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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

SPOTLIGHT

Shook Attorneys Discuss Legal Challenges of Emerging Technologies

Emerging technologies are changing the way we live, travel and buy goods and services. While new technology may improve our lives, it also brings new risks. Shook, Hardy & Bacon Partners Cary Silverman and Phil Goldberg, with Of Counsel Jonathan Wilson, have authored a report, *Torts of the Future: Addressing the Liability and Regulatory Implications of Emerging Technologies*, addressing the challenges of promoting innovation and economic growth while protecting consumer safety and privacy.

The report, published for the U.S. Chamber Institute for Legal Reform, focuses on five main areas of new technology:

- autonomous vehicles;
- the commercial use of drones;
- private space exploration;
- the "sharing economy," which allows people to generate income from underused assets such as cars and housing; and
- "The Internet of Things," involving products connected to collect and share data.

The authors examine current technological developments, provide an overview of existing regulatory and liability frameworks, consider current and anticipated litigation, and conclude with proposals for guiding principles to address liability and regulatory implications of emerging technologies. The U.S. Chamber Technology Engagement Center and the Institute for Legal Reform featured the report at its "Emerging Technologies and Torts of the Future" event in Silicon Valley.

Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

For additional information about Shook's capabilities, please contact

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LEGISLATION, REGULATIONS & STANDARDS

USDA, FDA Nominations Near Senate Votes

The Senate Agriculture Committee has approved Sonny Perdue's nomination to lead the U.S. Department of Agriculture (USDA), with Perdue receiving support from all members of the committee except Sen. Kirsten Gillibrand (D-N.Y.), along with an abstention from Sonny Perdue's cousin, David Perdue (R-Ga.). The full Senate vote has not yet been scheduled. *See Politico*, March 30, 2017.

After criticism over potential conflicts of interest, nominee for commissioner of the U.S. Food and Drug Administration (FDA) Scott Gottlieb has promised to recuse himself for one year from agency decisions involving more than a dozen companies. Gottlieb faces a Senate confirmation hearing on April 5, 2017. *See New York Times*, March 29, 2017.

SEC, DOJ End Hampton Creek Investigations

The Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have reportedly ended their investigations into Hampton Creek's alleged sales-inflation buyback operation, in which employees purchased jars of the company's Just Mayo product then sold the jars back to the company. *Bloomberg* initially reported that the company had expensed $1.4 million for "Inventory Consumed for Samples and Internal Testing" while reporting $1.9 million in sales during the same period, but a forensic consulting team with an accounting firm commissioned by Hampton Creek apparently found that the company spent less than half of one percent of sales on the buyback program. Additional information on the *Bloomberg* report appears in Issue 613 of this *Update*. *See Fortune*, March 24, 2017.

LITIGATION

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

High-Tech Eatery Faces Projected Class Action Over Disability Access

Eatsa, a fast-food chain featuring high-tech ordering and automated service, faces a putative class action alleging its restaurants are inaccessible to the blind. *Am. Council for the Blind, v. Keenwawa, Inc.*, No. 17-2096 (S.D.N.Y., filed March 23, 2017). Eatsa customers place orders through mobile apps or kiosks in the restaurants, then swipe a credit card to pay; the customer name then appears on a screen next to a wall of food-delivery "cubbies." When an order is ready, an LCD screen lights up and displays the customer's name, and the customer must tap a particular corner of the cubby to open it and retrieve the order. The complaint alleges that Eatsa failed to configure either its mobile app or kiosks to use audio technology, rendering the restaurant inaccessible to the blind or those with low vision.

Although Eatsa staffs each restaurant with one or two human "hosts" to help customers, the plaintiffs claim that a request for customer assistance can only be placed through the kiosk. The complaint alleges that blind or low-vision customers are unable to rely on otherwise attracting the notice of the hosts, especially during busy restaurant times, and are unable to independently use the kiosk, browse the menu, check ingredients and prices, review the order and pay, or pick up food orders from the cubbies. The plaintiffs claim that Eatsa's tablet-based kiosks may already be outfitted with technology capable of providing audio for blind customers; further, they argue that Eatsa's mobile app does not use text-to-speech features, even though such features are generally available on mobile devices.

Projected Class Action Claims Jelly Belly Mislabels "Sport Beans"

A California plaintiff has filed suit against the makers of Jelly Belly Sport Beans claiming the candy maker's labeling leads consumers to believe the product does not contain sugar. *Gomez v. Jelly Belly Candy Co.*, No. 17-0575 (C.D. Cal., filed March 24, 2017). The complaint alleges the product label says Sport Beans contain "evaporated cane juice," but not sugar or any other "commonly known sweetener." The plaintiff claims such labeling violates a Food and Drug Administration guidance document advising manufacturers that the term "evaporated cane juice" is not the common or usual name of any type of sweetener and that the ingredient should be listed on product labels as sugar. The plaintiff also claims Sport Beans are marketed as "energizing," containing "quick energy for sports performance," as well as

carbohydrates, electrolytes and vitamins. For allegations of negligent misrepresentation and California consumer-protection statute violations, the plaintiff seeks class certification, restitution, damages, injunctive relief and attorney's fees.

Rockstar Underfilled Coffee Drink Cans, Plaintiff Alleges

Energy-drink company Rockstar faces a putative class action alleging the company underfilled cans of its coffee drinks, giving the company an unfair competitive advantage and shortchanging consumers. *Podawiltz v. Rockstar, Inc.*, No. 17-0477 (D. Ore., filed March 26, 2017). The plaintiff claims he bought several cans of Rockstar's coffee drinks labeled "15 fl oz [473 ml]," but that independent lab testing showed the cans contained an average of 443 milliliters, about six percent less. For an alleged violation of the Oregon Unlawful Trade Practices Act, the plaintiff seeks class certification, injunctive relief, an accounting, restitution, damages and attorney's fees.

Court Grants Chipotle's Motion to Decertify FLSA Class Action

Chipotle Mexican Grill Inc. won decertification of a class action comprising more than 500 management trainees in 37 states when a federal court ruled that there were too many differences in the trainees' ability to perform managerial duties, causing the action to fail the predominance test. *Scott v. Chipotle Mexican Grill Inc.*, No. 12-8333, (S.D.N.Y., order entered March 29, 2017).

Seven named plaintiffs won conditional class certification in June 2013, after which 516 additional plaintiffs opted in. The plaintiffs, who worked as "apprentices," were temporary workers training for positions as restaurant general managers. The complaint alleged apprentices were classified as exempt and illegally denied overtime even if they spent most of their time on non-managerial tasks such as preparing food or serving customers, violating the Fair Labor Standards Act (FLSA) and state labor laws. However, the court found that the plaintiffs' testimony contained too much conflicting information about the apprentices' responsibilities. "[T]he apprentices had vastly different levels and amounts of authority in exercising managerial tasks," the court said. "If a jury were to determine that one apprentice is properly classified as exempt in Washington [under Chipotle's anticipated defenses], it

does not follow that all apprentices would be exempt across the country."

Jury Finds Competitor Liable for Infringement of Dan Aykroyd's Crystal Head Vodka

A jury has unanimously found Elements Spirits Inc. and its founder liable for trade dress infringement of Globefill Inc.'s Crystal Head, a vodka created by actor Dan Aykroyd and sold in a skull-shaped container. *Globefill Inc. v. Elements Spirits Inc.*, No. 10-2034 (C.D. Cal., verdict entered March 29, 2017). Just before the case went to jury deliberation, Globefill called a final rebuttal witness, a sculptor who testified that the founder of Elements Spirits asked him in 2009 to create a mold of the Crystal Head skull bottle that served as the base for Elements Spirits' Kah tequila bottles. After four hours of deliberation, the jury concluded the three-week trial with a verdict for Globefill. *See Law360*, March 29, 2017.

Heart Attack Grill Files Trademark Suit Against Heart Attack Shack

A Las Vegas restaurant called the Heart Attack Grill has filed suit against a Tennessee restaurant calling itself the Heart Attack Shack, claiming trademark infringement. *HAG IP, LLC v. Tipps Enterprises Inc.*, No. 17-0652, (M.D. Ky., filed March 29, 2017). The Las Vegas restaurant, which claims trademarks on its Single, Double, Triple and Quadruple Bypass burgers and Flatliner Fries, alleges that the Tennessee restaurant, which features burgers, wings and "Flatliner XL" fries, has infringed its trademarks. In a February 2017 article in the *Chattanooga Times Free Press*, the defendant owner claimed he named his restaurant after a "heart attack" burger on the menu of a restaurant that previously occupied his location. For trademark infringement of registered marks, the plaintiff seeks injunctive relief, accounting, damages, attorney's fees and destruction of all promotional materials bearing the trademarks.

In 2012, after the plaintiff sent a cease and desist letter to New York's Second Avenue Deli, which features "Instant Heart Attack" and "Triple Bypass" sandwiches on its menu, the deli filed suit. A New York federal court ruled the deli could use its sandwich names, finding it "safe to say that even an unsophisticated customer could readily differentiate between a Manhattan kosher

deli and its latke-based sandwich and a Las Vegas 'medically-themed' restaurant that features gluttonous cheeseburgers."

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