ISSUE 642 | JULY 28, 2017

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

EU to Issue Guidelines on Discriminatory Food Distribution

European Commission President Jean-Claude Juncker has reportedly indicated the EU will issue guidelines discouraging companies from selling apparently identical food products across Europe but using inferior ingredients in the foods sold in the eastern part of the continent. The Czech Republic's agriculture minister has asserted that his country is Europe's "garbage can" because companies produce their foods with cheaper ingredients but sell them with identical branding. Hungary, Poland, Bulgaria, Romania and Slovakia have also objected to the practice, which multiple studies have purportedly confirmed. Juncker reportedly said the EU would issue guidelines on how to interpret existing rules in September 2017 and did not rule out further legislation to combat the discrimination. *See Reuters,* July 27, 2017.

LITIGATION

Court Clears Way for Chicago SSB Tax, Dismissing Retailers' Lawsuit

A sugar-sweetened beverage (SSB) tax will go into effect in Chicago and surrounding suburbs following a Cook County court's dissolution of a temporary restraining order and dismissal of the Illinois Retail Merchants Association's lawsuit alleging the tax violated the state's constitution. *Illinois Retail Merchs. Ass'n v. Cook Cty. Dep't of Revenue*, No. 2017L050596 (Ill. Cir. Ct., Cook Cty., order entered June 28, 2017). The 1-cent-per-ounce tax was

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scheduled to take effect July 1, 2017, but its implementation was postponed by the restraining order, which was upheld by the state appeals court. More details about the tax appear in Issues 622 and 640 of this *Update*. *See Chicago Tribune*, July 28, 2017.

ADA May Cover Restaurant Websites, Court Holds

A New York federal court has denied Five Guys Enterprises' motion to dismiss a lawsuit alleging a blind woman's inability to access the restaurant chain's website violates the Americans with Disabilities Act (ADA), ruling "the text and purposes of the ADA, as well as the breadth of federal appellate decisions, suggest that defendant's website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants, which indisputably are public accommodations under the statute." *Marett v. Five Guys Enters.*, No. 17-0788 (S.D.N.Y., July 21, 2017).

The court rejected Five Guys' argument that the plaintiff failed to state a claim under the ADA, finding the law's purpose is to prevent discrimination against disabled individuals in major areas of public life. "The statute explicitly covers twelve categories of entities, which includes establishments that 'serv[e] food or drink (e.g., restaurants and bars)," and the statute defines "public accommodation" to include a "restaurant, bar or other establishment serving food or drink," the court noted. Additional details about the complaint and the issue of website access for the visually impaired appear in Issues 635 and 640 of this *Update*.

KFC Franchisee Claims Company Never Disclosed Policy Barring Halal-Chicken Marketing

A KFC Corp. franchisee that sells halal chicken has filed a lawsuit against the company, alleging the franchise agreements did not disclose a purported company policy preventing franchisees from making religious claims about their food. *Lokhandwala v. KFC Corp.*, No. 17-5394 (N.D. Ill., filed July 24, 2017). The plaintiff, who owns and operates eight franchises, began advertising and selling halal chicken in 2003, and KFC allegedly assisted with locating approved poultry suppliers and distributors of halal-certified chicken. In 2016, the plaintiff asserts, the company informed him that it had a policy dating back to 2009 prohibiting

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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.

religious claims about KFC products, "citing a risk of lawsuits and consumer confusion."

The plaintiff alleges the policy was not disclosed in any of his franchise agreements, violating the Illinois Franchise Disclosure Act; he further alleges that his "customer base and business revenue is heavily dependent on the sale of Halal chicken to the Muslim community" and that four of his locations would not generate enough revenue to sustain operations if he was forced to stop selling halal chicken. Claiming breach of contract, promissory estoppel, violations of the Illinois Franchise Disclosure Act and state consumer-protection laws, the plaintiff seeks injunctive relief and attorney's fees.

Another Outbreak Prompts Norovirus Lawsuits Against Chipotle

Two consumers have filed lawsuits alleging they contracted norovirus after eating at one of Chipotle Mexican Grill's locations. *Hogan v. Chipotle Mexican Grill*, No. 109599 (Va. Cir. Ct., Loudoun Cty., filed July 26, 2017); *Moore v. Chipotle Mexican Grill*, No. 109660 (Va. Cir. Ct., Loudoun Cty., filed July 26, 2017). Both complaints allege negligence and breach of implied warranties, and each plaintiff seeks $74,000 in damages and attorney's fees. The Loudoun County Health Department has identified more than 135 people who became ill after eating at Chipotle's Sterling, Virginia, restaurant between July 13-16, 2017, and confirmed that two people tested positive for the same strain of norovirus.

On July 19, federal prosecutors served Chipotle with a new subpoena seeking details about the outbreak. In 2015, the U.S. Attorney's Office for the Central District of California began a criminal investigation into a series of norovirus, *E. coli* and *Salmonella* outbreaks traced to Chipotle locations in several states. Additional details about the previous outbreaks appear in Issues 589, 593, 617 and 637 of this *Update*.

According to *Reuters*, Chipotle said it identified a sick employee as the cause of the Virginia outbreak. Chipotle representatives reportedly said they will now be enforcing a "zero tolerance" policy for employees who fail to follow food-safety protocols. *See Reuters*, July 27, 2017.

Kerrygold Butter and Wisconsin Dairy Settle Trademark Dispute

A Wisconsin creamery selling "Irishgold" butter and the distributor of Kerrygold butter have agreed to a consent decree that will end a trademark dispute. *Ornua Foods N. Am. v. Eurogold USA*, No. 17-0510 (E.D. Wis., motion filed July 25, 2017). After Wisconsin began enforcing a 1950s law requiring all butter sold in the state to bear a state or federal grade mark, effectively banning all imports and out-of-state artisanal products, Wisconsin dairy Old World Creamery began selling its own butter in packaging similar to Kerrygold. Additional details about the ban and trademark suit appear in Issue 631 of this *Update*.

Under the consent decree, the dairy will (i) continue to sell its Irish-style butter but will amend the mark to "Euro Gold" or "Euro-Gold"; (ii) withdraw its trademark application for "Irishgold" butter; (iii) refrain from using "substantially similar" packaging; (iv) not sell any Irish-themed dairy products under a mark that includes the word "gold"; and (v) not use Celtic fonts in its marketing.

Court Allows Mike and Ike® Slack-Fill Suit to Proceed

A federal court has denied a motion to dismiss a slack-fill complaint against Just Born, maker of Mike and Ike® and Hot Tamales® candies. *White v. Just Born*, No. 17-4025 (W.D. Mo., order entered July 21, 2017). The complaint alleged that consumers are likely to choose opaque, "theater-sized" boxes of the candies believing they are a good value despite allegedly containing up to 35 percent empty space.

The court found that the plaintiff had pleaded sufficient facts to establish a claim under the Missouri Merchandising Practices Act, finding "a reasonable consumer could conclude that the size of a box suggests the amount of candy in it. . . . [t]he Court cannot conclude as a matter of law and at this stage of the litigation that the packaging is not misleading." Moreover, Just Born's argument that the packages' labeling and disclosures of net weight, number of pieces of candy per serving and servings per box are fatal to the plaintiff's claim "overlooks that the Court must consider the plausibility of the complaint as a whole, not the plausibility of each individual allegation."

Another Mike and Ike® slack-fill lawsuit is pending in California federal court. Additional details about that case appear in Issue 628 of this *Update*.

Plaintiff Files Class Action Claiming Organic Candy Contains No Real Fruit

A California plaintiff has filed a lawsuit alleging the Organic Candy Factory's peach, boysenberry, blackberry and raspberry gummy candies contain "substitute flavors" rather than real fruit. *Arabian v. Organic Candy Factory*, No. 17-5410 (C.D. Cal., filed July 21, 2017). The plaintiff asserts that the company markets its gummy bears and gummy-filled chocolate as containing "nothing artificial ever," leading consumers to believe the candy is made with real fruit and allowing the company to charge a premium. Claiming breach of warranties, breach of contract, fraud, misrepresentation, quasi contract and violations of California consumer-protection law, the plaintiff seeks class certification, damages, restitution, declaratory and injunctive relief, and attorney's fees.

Lawsuit Filed in Papaya *Salmonella* Outbreak

A New Jersey man has filed a lawsuit against a produce supplier for its role in a *Salmonella* Kiambu outbreak in 12 states linked to Mexican papayas that has sickened 47 people and reportedly caused one death. *Colon v. Grande Produce*, No. 17-5458 (D.N.J., filed July 26, 2017). The plaintiff alleges that he fell ill in June 2017 after consuming a papaya imported by Grande Produce and was later diagnosed with *Salmonella*-induced illness. Claiming strict product liability, negligence and breach of warranties, the plaintiff seeks damages and attorney's fees.

On July 26, Grande Produce announced it had issued a limited recall of Caribeña Maradol papayas distributed between July 10-19, but the U.S. Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention are warning consumers to avoid all Mexican Maradol papayas regardless of the source. An FDA recall notice stated, "The FDA notes that there are illnesses in states where Grande Produce did not distribute papayas and is continuing its investigation."

Frito-Lay Fights Chip Maker's Application for Similar Design Mark

A Bengali potato-chip maker's application to register a design mark has drawn opposition from Frito-Lay, which argues the mark is too similar to the one it has used since 1995. *Frito-Lay N.*

Am. v. Putul Distribs., No. 91235606 (T.T.A.B., notice of opposition filed July 17, 2017). The notice asserts that Putul's proposed design mark for its fish, pickles and potato chips—a green and red circle bisected by a wide red and black ribbon—is likely to be confused with Frito-Lay's, which is a "round sun or globe bisected by a banner or ribbon." In addition to the alleged potential confusion between the marks on potato-chip products, Frito-Lay also asserts that fish and pickles are "food products that may be complementary or consumed with Frito-Lay's goods." Claiming priority, likelihood of confusion and dilution by blurring, Frito-Lay seeks a denial of Putul's registration application.

Federal Court Holds Noodles & Co. Has No Independent Duty of Care to Card Issuers For Data Breach

A federal court has dismissed with prejudice a data-breach suit filed by a group of credit unions against Noodles & Co., holding that the restaurant had no independent duty of care to the unions distinct from its contractual agreements with MasterCard and Visa. *SELCO Cmty. Credit Union v. Noodles & Co.*, No. 16-2247 (D. Colo., order entered July 21, 2017). The plaintiffs, four credit unions whose cardholders' information was compromised by the data breach, sued for negligence, negligence per se and declaratory relief, claiming they lost revenue due to decrease in card usage after the breach was publicized and incurred costs related to canceling and reissuing cards, responding to cardholder inquiries and monitoring accounts. The court held that economic loss rules in both Colorado and the unions' home states barred recovery in tort for purely financial losses caused by negligence. Further, the court found, no independent duty exceptions to those rules existed and any duty of care Noodles & Co. allegedly breached arose from interrelated contracts coordinated by the payment networks.