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SPOTLIGHT

Introducing the Food & Beverage Litigation Update Website!

This week, Shook, Hardy & Bacon celebrates 15 years of the *Food & Beverage Litigation Update*. Our first issue, published October 9, 2002, explored a number of legislative and litigation trends—including a governmental initiative to ban soft drinks in schools, a lawsuit challenging allegedly toxic ingredients in a protein bar and a U.S. Food and Drug Administration meeting on acrylamide—that we continue to cover each week as they progress through the evolving regulatory landscape.

With our 650th issue, we are excited to announce the launch of the *Food & Beverage Litigation Update* website. On the website, you can find all 650 issues of the *Update* in the Archive as well as many issues divided into individual stories that are tagged and categorized with subjects and jurisdictions for your browsing convenience. We will continue to send you a weekly compilation of our coverage, and we welcome you to follow along with our stories as they appear on the website throughout the week.

Thank you to all of our readers, whether this is your first issue or your 650th. We look forward to hearing what you think about this new format of the *Food & Beverage Litigation Update*!

LEGISLATION, REGULATIONS & STANDARDS

Chicago Repeals SSB Tax After Two Months of Enforcement

Chicago officials have voted to repeal a sugar-sweetened beverage (SSB) tax approved in November 2016 by the Cook County Board of Commissioners but delayed by a lawsuit arguing that the tax was unconstitutional. The tax took effect in August 2017 after a

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court dismissed the Illinois Retail Merchants Association's lawsuit.

Retailers reportedly saw SSB sales decline 25 to 50 percent, while retailers with locations in surrounding counties not subject to the tax saw sales increase. In addition, the *Chicago Tribune* reported, "Internal polling for one Cook County commissioner showed more than 90 percent of constituents opposed the soda tax." The repeal will take effect December 1, 2017.

Other jurisdictions continue to experiment with SSB taxes. In April 2018, Ireland will begin taxing non-alcoholic, water- and juice-based drinks with an added sugar content of 5 grams or more per 100 milliliters. Pure fruit juices and dairy products will be exempt from the tax. "It is hoped that the introduction of a financial barrier on sugar sweetened drinks will result in reduced consumption by incentivising individuals to opt for healthier drinks in tandem with providing motivation for the soft drinks industry to reformulate by reducing added sugar content and delivering healthier products," the country's October 10, 2017, Sugar-Sweetened Drinks Tax Information Note stated. A similar tax will take effect in the United Kingdom concurrently.

LITIGATION

Burger King Settles Coupon Class Action

Burger King has agreed to settle a putative class action alleging some of the chain's locations overcharged consumers who presented buy-one-get-one-free coupons for breakfast sandwiches, charging them more than they would have paid without the coupons. *Anderson v. Burger King*, No. 17-1204 (D. Md., motion filed October 11, 2017). According to the plaintiff's unopposed motion for settlement, Burger King began an internal investigation of the complaint's allegations and promptly sent a software update to franchises and written instructions to restaurant cashiers to ensure the problem stopped. If the class is certified for the purposes of the settlement, class members who have receipts will receive $5 payments and those without will receive $2 gift cards.

Projected Class Action Alleges Restaurant Groups' Plan to End Tipping Is Conspiracy

Danny Meyer, David Chang, Jonah Miller, Tom Colicchio and other restaurateurs have been named as defendants in a putative class action that alleges a business strategy to eliminate tipping and replace it with a service charge of at least 20 percent is price-fixing and a conspiratorial restraint of trade that violates the federal Racketeer Influenced and Corrupt Organizations Act and Sherman Act. *Brown v. 140 NM LLC*, No. 17-5782 (N.D. Cal., filed

October 5, 2017). The complaint alleges that the restaurateurs' agreement constitutes price-fixing because the restaurants involved conspired to raise their prices simultaneously.

Meyer, CEO of Union Square Hospitality Group, is alleged to have spearheaded the "conspiracy." The complaint cites dozens of newspaper articles, television and radio interview transcripts, trade group meetings and tweets in which Meyer and other defendants discussed the reasons for implementing the change and explaining the competitive advantages of acting as a group. According to the complaint, Thaddeus Vogler, owner of Trou Normand and Bar Agricole in California, told *NPR* that he tried a no-tipping system but retracted it, noting, "We were losing staff. Servers mostly . . . We were continuing to hire young new people, train them, and then they would get the set of skills necessary, and they would generally give notice and move to other restaurants in our community who were still on a traditional tip economy."

Court Holds NLEA Preempts Maple Syrup Claims Against Quaker Oats

A California federal court has dismissed a consolidated putative class action alleging that Quaker Oats falsely advertised breakfast cereals as containing maple syrup or sugar, holding that the claims were preempted by the Food, Drug and Cosmetic Act (FDCA) and the Nutritional Labeling and Education Act amendment (NLEA), despite a "maple syrup" exception that allows states to regulate maple syrup. *In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litig.*, No. 16-1442 (C.D. Cal., entered October 10, 2017).

The plaintiffs asserted that the NLEA's preemption provision contains an exception for state laws applicable to maple syrup. The court disagreed, holding that each of the subsections of the exception permit states to regulate what kinds of products may be sold as maple syrup and that the plain language of the subsections did not permit a broader reading to cover "any claim relating to maple syrup." If Quaker uses the word maple or shows the image of a pitcher of syrup in advertising and labeling, the court said, "it is permitted to do this so long as the primary recognizable flavor is appropriately labeled as 'naturally' or 'artificially' flavored—which, based on the Label . . . [it] has done."

The court also rejected the plaintiffs' argument that Quaker failed to address the question of whether preemption applied to the use of maple as a sweetener, finding that the complaint did not clearly allege that the plaintiffs bought the products because of the promise of maple used as a sweetener as opposed to a flavor.

The court dismissed all ten counts of the complaint but granted the plaintiffs leave to amend, holding that it is "possible for plaintiffs in consumer misrepresentation cases to seek injunctive relief if they allege that they intend to purchase the products in the future."

Online and Mail-Order Sellers Must Obtain Organic Permits, ECJ Rules

The European Court of Justice (ECJ) has ruled that all online and mail-order sellers of organic products—including small producers and sellers that would otherwise be exempt from the requirements—must obtain sales permits to avoid fraud and mislabeling and maintain "consumer confidence" in products labeled as organic. *Kamin und Grill Shop GmbH v. Zentrale zur Bekampfung unlauteren Wettbewerbs eV*, No. C-289/16 (ECJ, entered October 12, 2017). Kamin, a mail-order and internet business, began marketing spice mixes in 2012 that it labeled as organic. A German consumer advocacy group challenged the sales, and the German Bundesgerichtshof (Federal Court of Justice) referred the case to ECJ. The court found that in the case of online or mail-order retail sales, product storage and delivery by intermediaries created a risk of re-labeling, exchange or contamination so the "direct" sales exemption for small, face-to-face sellers should not be construed broadly.

SCOTUS Declines Consideration of Circuit Split on Class Action Administrative Feasibility Requirement

The U.S. Supreme Court has denied a petition for a writ of certiorari asking the court to resolve a split among circuit courts on the question of whether putative class action plaintiffs must propose an administratively feasible method to identify potential class members. *Conagra Brands, Inc. v. Briseno*, No. 16-1221 (U.S., denial entered October 10, 2017). The case centers on a consumer's allegation that Conagra Brands, Inc.'s Wesson cooking oil is mislabeled as "100% Natural" because it contains genetically modified ingredients. Conagra appealed a Ninth Circuit decision that joined the Sixth and Seventh Circuits in holding that independent administrative feasibility is not needed for a class action to succeed. The Second, Third, Fourth and Eleventh Circuits have allowed the additional requirement, which companies have used to argue that their putative class actions should be dismissed.

SCIENTIFIC/TECHNICAL ITEMS

Energy Drinks Consumers Suggest Strategies to Reduce Youth Consumption

The *Journal of Nutrition Education and Behavior* has published a study in which youth aged 12-25 suggested strategies to reduce youth energy-drink consumption. Jacinta Francis, et al., "Informing Intervention Strategies to Reduce Energy Drink Consumption in Young People: Findings From Qualitative

Research," *Journal of Nutrition Education and Behavior*, October 2017. Researchers reportedly found that while the subjects were familiar with energy drinks, they did not agree as to whether the term included coffee, sports drinks, nutritional supplements and soft drinks. Some were apparently aware that the drinks contained caffeine and sugar, the study noted, but few were aware they contained other ingredients or could explain how the drinks allegedly work. The participants also said advertising, promotions and peer pressure influenced consumption. They suggested five strategies to reduce consumption: (i) restrictions on sales and availability; (ii) changes in packaging; (iii) price increases; (iv) reducing visibility in retail outlets; and (v) research and education.