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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Advocacy Groups Urge Senate to Support NOSB

A group of advocacy organizations has sent a letter asking the leaders of the Senate Committee on Agriculture, Nutrition & Forestry to "fully support organic agriculture in the Farm Bill and to oppose any changes that would undermine the organic standards and the National Organic Standards Board (NOSB)." The organizations urge the committee to refrain from changing the board's authority or composition, which could "harm the integrity of the organic program, undermine consumer trust in the organic label, and severely damage the reputation of the industry as a whole." The letter also includes a number of requests to fund various organic-farming programs.

ASA Upholds Challenge to Ad Linking Milk Consumption to Cancer

The U.K. Advertising Standards Authority (ASA) has upheld a challenge to a bus poster sponsored by Viva, a vegan-advocacy group, that claimed the hormones in cow's milk have been "linked to cancer." Viva asserted that consumers interpret the words "linked to" as a phrase "commonly used to express an association

between two factors when there was a potential or likely relationship but not an absolute causative relationship." The group submitted several research papers in support of the ad claim, but ASA was unconvinced by each study, citing unrelated or overly broad subject matters as well as the inclusion of self-reported data. ASA concluded that "the claim 'milk contains 35 hormones, including oestrogen … some of these are linked to cancer', as it would be understood by consumers to mean that due to the presence of hormones, drinking cow's milk could increase a person's risk of developing cancer, had not been substantiated and was therefore misleading."

FDA Affirms Decision Banning PHOs in Foods

The U.S. Food and Drug Administration (FDA) has confirmed its 2015 decision removing partially hydrogenated oils (PHOs) from generally recognized as safe status by denying a food additive petition seeking approval for the use of PHOs in some foods. The agency also extended the June 2018 compliance date for removing PHOs from food, citing trade associations that "informed us that, due to shelf lives ranging from 3 to 24 months, a variety of products containing non-petitioned uses of PHOs will be in distribution on, and for some time after, the compliance date in the final order," according to the *Federal Register* announcement. For products manufactured before June 18, 2018, the enforcement date will be January 1, 2020.

FDA has also extended the compliance date for the uses of PHOs in the food additive petition, including (i) use as a solvent or carrier for flavoring or coloring agents; (ii) use as a processing aid; and (iii) use as a pan release agent for baked goods. For food manufactured with PHOs used for these purposes before June 18, 2019, the enforcement date will be January 1, 2021.

Missouri Legislature Passes Bill Banning "Clean Meat" Labels

The Missouri legislature has passed an agriculture bill that would prohibit companies from labeling lab-grown and plant-based products as "meat." The bill bans "misleading or deceptive

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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.

practices" in the sale of meat, including "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." Missouri Governor Eric Greitens must sign the bill by July 15, 2018. Similar measures have been debated at the federal level, and the U.S. Cattlemen's Association filed a petition in February 2018 urging the U.S. Department of Agriculture to establish beef labeling that would limit the use of "beef" and "meat" on products not derived from animals.

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.

OTA Launches Organic Fraud Prevention Program

The Organic Trade Association (OTA) has announced a program that "provides organic businesses with a risk-based approach for developing and implementing a written strategic plan to assure the authenticity of organic products." Each of the pilot program's participants "will concentrate on one product or ingredient" or "a specific location" then seek feedback from other stakeholders in the supply chain, according to OTA's press release. The plan will focus on (i) "identifying and assessing specific weaknesses or vulnerabilities in their business that pose the most risk of fraud"; (ii) "identifying and taking measures to reduce those vulnerabilities to deter fraud"; (iii) "establishing a monitoring program to ensure the fraud prevention measures are in place"; and (iv) "developing a complaint system to be used when fraud is suspected or detected."

U.S. House Rejects Farm Bill

The U.S. House of Representatives has voted against the 2018 Farm Bill in a 213-198 vote. Dissenting voters apparently cited a number of issues, with some rejecting the bill's changes to the Supplemental Nutrition Assistance Program and others protesting the legislature's failure to enact unrelated immigration measures. Majority Whip Steve Scalise (R- La.) reportedly indicated that the House will vote on the bill again in late June 2018.

Before the vote, Rep. Thomas Massie (R-Ky.) introduced an amendment to the bill that would have prevented federal agencies from regulating the interstate traffic of unpasteurized milk sold for human consumption. The bill was rejected 331-79.

LITIGATION

California Supreme Court Dismisses Grape Growers' First Amendment Challenge

The California Supreme Court has affirmed an appeals court ruling holding that an assessment collected to subsidize a grapes promotional campaign is constitutional and not compelled speech. *Delano Farms Co. v. Cal. Table Grape Comm'n*, No. S226538 (Cal., entered May 24, 2018). The growers argued that the program required them to "sponsor a viewpoint (promoting all California table grapes equally) with which they disagree" because they "believe that the table grapes they grow and ship are exceptional." The California Table Grape Commission asserted that the program was government speech rather than private speech, resulting in no free speech violation.

The court concluded that the compelled grape subsidy constituted government speech, focusing on the "governmental direction and control" of the messaging. "In sum, the Commission was created by statute and given a specific mission to, among other things, promote in a generic fashion a particular agricultural product," the court held. "In order for the promotional material of a body like the Commission to be considered government speech under an 'effectively controlled' theory [], the government must have the authority to exercise continued control over the message sufficient to ensure that the message stays within the bounds of the relevant statutory mandate. The foregoing review of the totality of the relevant circumstances reveals such authority, and the resulting governmental accountability for the Commission's messaging. Moreover, nothing in the record suggests that the Commission has departed from its mission." Because the commission retained control of messaging, it constituted government speech, the court ruled, and the grape growers did not have the right to exclude themselves from the subsidy based on their disagreement with the message. "Although individuals have a right to speak freely, they do not have the right *not* to fund government speech. To recognize such a right would make effective governance impossible," the court held.

Court Denies Challenge to NOSB Substance Review Process

A federal court has dismissed a lawsuit alleging that the National List's sunset review process violates the Administrative Procedures Act. *Ctr. for Food Safety v. Perdue*, No. 15-1590 (N.D. Cal., entered May 24, 2018). The court found that the notice promulgating the alteration of the review process was not a final action because it did not "alter any criteria or standards for the evaluation of a particular substance." The challenge further presented ripeness issues because the harms, such as the inclusion of certain compounds in organic foods, may never materialize, the court noted. The notice does not predetermine the U.S. Department of Agriculture's (USDA's) decision to renew or remove a substance, the court held, and the plaintiffs are not precluded from later asserting harms from an "allegedly wrongful renewal. Plaintiffs must accordingly await that decision for the Court to properly review USDA's actions," the court concluded.

Court Declines to Reconsider Juice Certification Denial

A federal court has denied a motion to reconsider a denial of class certification in a lawsuit alleging that Tropicana Products Inc. mislabeled its orange juice as "natural." *In re Tropicana Orange Juice Mktg. & Sales Practices Litig.,* No. 11-7382 (D.N.J., entered May 24, 2018). The plaintiffs argued that the court misconstrued its theory of liability, gave more weight to the defendant's expert opinions, overlooked evidence of class-wide injury and erred in its ascertainability analysis.

The court ruled that because the plaintiffs "exhaustively alleged" that the juice contained added flavoring, whether the product conforms to the standard of identity for pasteurized orange juice "lies at the heart of Plaintiff's theory of liability *as articulated by Plaintiffs' own words*." Finding the claims unsupported by the pleadings, the court found no cause for reconsideration. The court also pointed to an expert opinion showing variation in the reasoning behind consumer decisions to buy the juice, creating "a predominance problem." Moreover, the court rejected assertions

of error in its ascertainability analysis, finding the plaintiffs' evidence was insufficient "for a multitude of reasons."

Fifth Circuit Affirms Viacom's Ownership of "Krusty Krab" Mark

The U.S. Court of Appeals for the Fifth Circuit has affirmed a ruling that a Texas restaurant, "The Krusty Krab," infringed Viacom International Inc.'s common law trademark. *Viacom Int'l, Inc. v. IJR Capital Invs.*, No. 17-20334 (5th Cir., entered May 22, 2018). The court held that Viacom had established both use and distinctiveness of the mark because "The Krusty Krab" had been extensively and consistently licensed, establishing Viacom's ownership of the mark as an identifier of goods and services. The court also found an impermissible likelihood of consumer confusion. Although the court noted that its ruling did not establish trademark protection "in every context" for Viacom's mark, it affirmed the finding of the district court that Viacom had established its ownership in common law.

Grocery Bag Fee is Not a Tax, Colorado Supreme Court Holds

The Colorado Supreme Court has upheld a municipal ordinance charging a $0.20 "waste reduction fee" for paper grocery bags and prohibiting disposable plastic bags, ruling the charge is part of a regulatory program of waste management and not a tax. *Colo. Union of Taxpayers Found. v. City of Aspen,* No. 16SC377 (Colo., entered May 21, 2018). After two members of the plaintiff advocacy group paid the bag charge in Aspen, the group sued the city and members of the city council alleging the charge was a tax subject to voter approval under the state's Taxpayer Bill of Rights. The trial court and the Colorado Court of Appeals ruled in the city's favor.

The court noted that grocers are permitted to retain a portion of the $0.20 charge to provide information to customers, train staff and improve collection and administration, while the remainder is submitted to the city on a form separate from the sales tax form. The funds are deposited into a "Waste Reduction and Recycling Account" and cannot supplant funds from the annual budget or

revert to the city's general fund. The court held that because the charge's primary purpose is "not to raise revenue for general governmental use," it is "not a tax of any kind. Instead of raising revenue with this ordinance, Aspen sought to regulate the use of plastic and paper bags as part of its waste management efforts . . . the amount of the charge imposed for the right to use a paper bag bears a reasonable relationship to Aspen's cost of permitting that use."

NLRB Allows Firing of Pizzeria Employee Following Criticism of Manager

The National Labor Relations Board (NLRB) has ruled that a pizzeria that fired an employee who criticized a manager did not violate the National Labor Relations Act. *Bud's Woodfire Oven LLC,* No. 05-194577 (N.L.R.B., issued May 18, 2018). The determination focused on whether the employee acted on his own behalf or engaged in protected concerted activity by criticizing his manager using profanity during a staff meeting. The board found no corroboration for the employee's testimony that other coworkers had complained about the manager's conduct; further, the employee's criticism did not "lay the foundation for meaningful dialogue about employees' terms and conditions of employment." Instead, the employee's remark was intended as an insult and "calculated to undermine [the manager's] authority," the board held.

Spangler Challenges Tootsie Roll Packaging in Trade Dress Lawsuit

Spangler Candy Co. has filed a lawsuit alleging that the packaging for Tootsie Roll Industries LLC's Charms Mini Pops infringes its Dum Dums trade dress. *Spangler Candy Co. v. Tootsie Roll Indus., LLC*, No. 18-1146 (N.D. Ohio, filed May 18, 2018). Spangler asserts that for decades it has sold its lollipops in red bags with the brand name in white letters above a display window, a red border at the bottom and a yellow circle or oval with blue numerals in the center. The complaint alleges that Tootsie Roll has changed its Charms Mini Pops packaging from a yellow bag to a bag that resembles the Dum Dums bag. Further,

pallet displays of the products at some retailers show bags inside similar yellow boxes, the complaint asserts, making the "overall visual impression" of the two products "deceptively and confusingly similar." Claiming trade dress infringement and unfair competition, Spangler seeks damages, injunctive relief, accounting of profits and attorney's fees.

Rose Acre Farms Sold Contaminated Eggs, Lawsuit Alleges

A woman has filed a lawsuit alleging she was hospitalized after eating *Salmonella*-contaminated eggs from Rose Acre Farms Inc. *Roberts v. Rose Acre Farms, Inc.,* No. 18-61082 (S.D. Fla., filed May 14, 2018). The plaintiff alleges that she purchased eggs packaged by Coburn Farms, a Sav-A-Lot Food Stores brand, and became ill enough to require two hospitalizations. The Centers for Disease Control and Prevention has linked Rose Acre Farms eggs to a nine-state outbreak of *Salmonella* infections. Claiming strict product liability, breach of warranty, negligence and negligence per se, the plaintiff seeks damages and attorney's fees.

MEDIA COVERAGE

Op-Ed Profiles Farmer Targeting Antibiotics in Cattle

A *New York Times* opinion piece has detailed the efforts of Sandy Lewis, an organic cattle farmer, to persuade fellow ranchers and others in the agriculture industry not to administer antibiotics for growth in cattle. Lewis, a former arbitrageur, has called on the U.S. Food and Drug Administration to ban and criminalize the use of antibiotics before cattle are sick, a prophylactic use acceptable under the agency's regulation banning antibiotics for growth promotion. The piece echoes a March 2018 report from the *New York Times* on the effects of antibiotic use in cattle feed on antibiotic resistance and gut microbes.


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