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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

ASA Upholds Complaints Against Ads Targeting Children

The U.K. Advertising Standards Authority (ASA) has upheld the Obesity Health Alliance's complaints against advertisements for Kellogg Coco Pops Granola and a KFC milkshake. The organization asserted that both companies targeted ads for a product high in fat, salt or sugar (HFSS) to an audience under 16.

The ad for Kellogg's Coco Pops Granola ran during a children's television show. Kellogg asserted that its granola is not an HFSS product, which ASA confirmed. "However, Coco Pops was a well-established brand, and Coco the Monkey, who was used to advertise all the products in the range, was also well-established as an equity brand character," ASA held. "We considered that many adults and children were likely to very strongly associate the Coco Pops brand and Coco the Monkey primarily with Coco Pops original cereal. At the time the ad was seen by the complainant Coco Pops original cereal was an HFSS product and the Coco Pops range was a mainly HFSS product range. We considered it was therefore incumbent on Kellogg's to take careful steps to ensure that, if ads for non-HFSS products in the range were directed at children, they did not have the effect of promoting Coco Pops original cereal or other HFSS products in the range through the use of branding." Accordingly, ASA forbade Kellogg from scheduling the ad to run during programs "principally directed at or likely to appeal particularly to audiences below the age of 16."

KFC placed a poster ad for its milkshake near a primary school, ASA found, in violation of the Committees of Advertising Practice

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Code. KFC "confirmed the advertised product was an HFSS product and said that the ad was mistakenly placed within 100 metres of the school. They apologised for the error and explained that their media agency mistakenly, due to human error, selected the phone kiosk as a site for the ad." The poster was removed from its location.

Spain Seizes Illegally Colored Tuna

In collaboration with EUROPOL, Spain's environmental protection service has seized 45 tons of tuna illegally treated with color-enhancing substances. The tuna was frozen and acceptable for canned use, but four individuals were recoloring the fish and selling it as fresh, according to the investigators. The alleged perpetrators face up to four years in prison for "endangering public health."

Hydrox Maker Files FTC Complaint on Alleged Mondelez Tactics

Leaf Brands, which manufactures and sells Hydrox cookies, has reportedly filed a complaint with the Federal Trade Commission (FTC) alleging anti-competitive practices by Mondelez, which produces Oreos. In a social media post, Leaf Brands alleges that Mondelez has been "undertaking a national program to damage our brand and stop us from competing," including "trying to make it hard to find our cookies in stores nationally, in hopes of lowering sales volume and having us discontinued." Leaf Brands alleges that when Mondelez employees stock grocery stores shelves, they move Hydrox cookies to less noticeable areas on the shelf. "We hope the Federal Trade Commission will start the investigation very soon," the post states. "We understand there is already case law on this issue and we hope to utilize it in our case against Mondelez."

LITIGATION

Ninth Circuit Vacates EPA Order Allowing Use of Chlorpyrifos

The Ninth Circuit has vacated a 2017 Environmental Protection Agency (EPA) order allowing some uses of the pesticide chlorpyrifos, remanding the matter to the agency with directions to revoke all tolerances and cancel all registrations for the

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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

pesticide within 60 days. *League of United Latin Am. Citizens v. Wheeler*, No. 17-17636 (9th Cir., entered August 9, 2018.) Eleven plaintiffs and eight states acting as intervenors petitioned the court to review the order, arguing that the tolerances were inconsistent with the Food, Drug and Cosmetic Act (FDCA) in "the face of scientific evidence that [chlorpyrifos] residue on food causes neurodevelopmental damage to children … a need for additional scientific research is not a valid ground for maintaining a tolerance that, after nearly two decades of studies, has not been determined safe to a 'reasonable certainty.'"

EPA argued that FDCA's administrative process requirements deprive the court of jurisdiction until EPA issues a response to the petitioner's objections, which has not occurred. The court determined that the process does not "clearly state" that obtaining an order in response to administrative objections is a jurisdictional requirement. The section "'is written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of the federal courts to hear the suit' … It delineates the process for a party to obtain judicial review, by filing suit in one of two venues within a specified time, not the adjudicatory capacity of those courts."

In a 2-1 decision, the court found no justification for the 2017 order and that EPA could not refuse to act on the grounds that it might find additional scientific evidence in the future. The court held that "EPA's interpretation of the [FDCA's] administrative review provision as providing limitless time to respond to objections would give the agency 'virtually unlimited discretion to bury large claims like [petitioners'] in the administrative process, and to stay judicial proceedings for an unconscionably long period of time.'"

Center for Food Safety Alleges Children's Foods Violate Prop. 65

The Center for Food Safety has filed a lawsuit alleging Dr. Praeger's Sensible Foods Inc. violates California's Safe Drinking Water and Toxic Enforcement Act (Prop. 65) by failing to warn consumers that its children's food products contain levels of acrylamide in excess of 0.2 micrograms per day. *Ctr. for Food Safety v. Dr. Praeger's Sensible Foods, Inc.,* No. RG18915114 (Cal. Super. Ct., Alameda Cty., filed August 1, 2018). The advocacy group alleges that four of the company's frozen vegetable products contain levels of acrylamide outside of safe-harbor limits and that none of the products carry the "clear and reasonable warning" required by Prop. 65. The complaint seeks injunctive relief, civil penalties and attorney's fees.

inspections, subject to FDA, USDA and FTC regulation.

Federal Court Dismisses Slack-Fill Action Against Candymaker

A federal court in Missouri has denied class certification in a slack-fill action against Just Born Inc., ruling that the plaintiff was unable to represent one proposed class and that individual issues would predominate for the other two. *White v. Just Born, Inc.*, 14-4025 (W.D. Mo., entered August 7, 2018). Alleging that boxes of Mike and Ikes and Hot Tamales were underfilled, the plaintiff sought certification of three classes: a Missouri Merchandising Practices Act (MMPA) class, an unjust enrichment (Restatement) class and an unjust enrichment (Appreciation) class.

First, the court found that the Restatement class did not include Missouri residents, so the Missouri plaintiff could not serve as a representative of the potential class members. "In an attempt to account for variations in states' unjust enrichment laws, [the plaintiff] seeks certification of two separate unjust enrichment classes," the court held. "In doing so, however, [the plaintiff] defined himself out of one."

As to the MMPA and Appreciation proposed classes, the court found that the "litigation would be dominated by individual inquiries into whether each class member was deceived by any slack-fill in a box before purchasing it. In other words, it would be dominated by causation and knowledge." Because of the lack of commonality, neither class could be certified.

Lawsuit Alleges Contaminated Goldfish Caused Gastroenteritis

Pepperidge Farms Inc. faces a lawsuit alleging that a woman became ill with *Salmonella* gastroenteritis after eating the company's Goldfish crackers, which purportedly contained contaminated dry whey powder. *Finch v. Pepperidge Farms, Inc.*, No. 18-152 (N.D. Miss., filed August 8, 2018). The plaintiff alleges that she bought and ate the Goldfish on July 19, 2018, became ill that evening, and tested positive for *Salmonella* one week later. Pepperidge Farm issued a recall of four varieties of Goldfish after its supplier notified it of potential contamination. Claiming manufacturing-defect strict liability, failure-to-warn strict liability, negligence per se, negligence and breach of warranties, the plaintiff seeks damages and attorney's fees.

Court Denies Motion to Dismiss

Kombucha Putative Class Action

A California federal court has denied a motion to dismiss a putative class action alleging deceptive labeling and advertising of Yogi Green Tea Kombucha, ruling that whether a reasonable consumer believes that kombucha should contain live organisms is a question of fact. *Cohen v. East West Tea Co. LLC*, No. 17-2339 (S.D. Cal., entered August 2, 2018). The plaintiff alleged that East West Tea falsely labels and advertises its product as kombucha because it purportedly contains no "live organisms." The court found that the parties' definitions of "kombucha" differ and that a reasonable consumer may or may not expect to find live organisms in kombucha. Whether a practice is deceptive is not a matter to be resolved by a motion to dismiss, the court held, noting "mixed case law on whether ambiguity regarding the definition of a word merits a motion to dismiss."

SCIENTIFIC / TECHNICAL ITEMS

U.K. SSB Tax Produces "Minimal Impact" on Consumer Behavior, Survey Finds

Nielsen has announced the results of a survey of U.K. consumers comparing opinions about sugar-sweetened beverages (SSBs) before and after the country's SSB tax took effect in April 2018, finding "minimal impact on consumer behaviour." The survey reportedly found that 62 percent of consumers "claim to have not changed their consumption behaviour in any way post-sugar tax, and only one fifth are checking sugar content on packages more frequently since the tax has come into effect." Further, 11 percent of consumers indicated that they would stop drinking SSBs before the tax took effect, but that number has dropped to one percent. "The number of people who said they would continue to buy sugary soft drinks also, surprisingly, grew post-tax, increasing from 31% in February to 44% in June," Nielsen's press release states.

MEDIA COVERAGE

Most "Organic" Restaurants Lack Certification, NYT Reports

The New York Times has published an article exploring the use of the term "organic" to describe food sold in restaurants, which are not required to undergo the same certification process as farms and food companies. The U.S. Department of Agriculture does not certify restaurants and does not plan to change that policy, an agency spokesperson reportedly told the *Times*. Restaurants that claim to be organic can be certified by third-party organizations, but certification can require "meticulous record keeping, extensive staff training on organic rules, fees in the thousands of dollars and lengthy inspections that involve scrutiny of everything from produce invoices to cleaning materials."