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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Medical Groups Call for SSB Taxes

The American Academy of Pediatrics and the American Heart Association have issued a policy statement calling for taxes on sugar-sweetened beverages (SSBs) and a decrease in SSB marketing to children. The report states that U.S. children consume 17 percent of their calories "from added sugars, nearly half of which are from sugary drinks," which are apparently "the leading source of added sugars in the US diet, provide little to no nutritional value, are high in energy density, and do little to increase feelings of satiety."

The statement calls for six actions: (i) "policies that raise the price of sugary drinks, such as an excise tax"; (ii) "efforts to decrease sugary drink marketing to children and adolescents"; (iii) access to healthful foods through nutrition assistance programs; (iv) the provision of "ready access to credible nutrition information" to children and their families; (v) "[p]olicies that make healthful beverages the default choice"; and (vi) limits or disincentives on serving SSBs in hospitals.

Beer Institute Alleges Aluminum Sellers Overcharge Beverage Canners

The Beer Institute has alleged that aluminum companies have been charging tariff prices to beverage companies that can their products despite the tariff only applying to a portion of the aluminum in their cans. The tariff is imposed on imported aluminum scrap, which accounts for about 30 percent of the aluminum used to create beverage cans—the other 70 percent is composed of aluminum scrap collected domestically—but aluminum companies have been charging as if all of their aluminum is subject to the tariffs, Beer Institute argues.

The organization worked with Harbor Aluminum, "an independent authority on the aluminum industry and its markets," which purportedly found that "while the U.S. beverage industry paid an equivalent to $250 million in Section 232 tariffs for aluminum cansheet during March to December 2018, the U.S. government collected only around $50 million of that amount," according to a Beer Institute press release. "Harbor Aluminum estimates U.S. smelters got roughly $27 million and U.S. rolling mills around $173 million, by charging end-users a tariff-paid price as if the entire product of aluminum cansheet consisted of imported primary aluminum."

Codex Meeting on Food Labeling Scheduled

The U.S. Department of Agriculture has announced an April 9, 2019, public meeting to receive comments on the United States' positions for the Codex Committee on Food Labelling meeting to be held in Canada in May 2019. Among the announced topics are (i) "Proposed draft Guidance for the Labelling of Non-Retail Containers"; (ii) "Proposed draft Guidelines of Front-of-Pack Nutrition Labelling"; (iii) "Innovation—use of technology in food labelling"; (iv) "Labelling of alcoholic beverages"; and (v) "Criteria for the definition of 'high in' nutritional descriptors for fats, sugars, and sodium."

French Authorities Challenge Source of Kiwis in "Kiwigate"

French fraud investigators have reportedly accused seven kiwi suppliers of stamping kiwis imported from Italy as "French

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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.

origin." French authorities apparently noticed an influx of French kiwis on the market during the off-season for the fruit, leading them to investigate where the kiwis were sourced. According to *The Guardian*, investigators found that 12 percent of kiwis labeled as French were imported from Italy, where they can be grown with lower production costs and treated with products banned in France that can result in a higher yield. If convicted, the suppliers may receive prison sentences and €300,000 fines.

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.

LITIGATION

"Organic Restaurant" Only Uses Some Organic Ingredients, Plaintiff Alleges

A consumer has filed a putative class action alleging that Bareburger Group misrepresents its restaurants as selling only organic food despite using some non-organic ingredients in its products. *Rosenberg v. Bareburger Grp.*, No. 19-1634 (E.D.N.Y., filed March 22, 2019). The plaintiff and Bareburger were the subjects of a *New York Times* article in August 2018 that explored the use of the term "organic" in restaurant advertising.

The complaint asserts that Bareburger features the term "organic" throughout its signage, menu descriptions and marketing but does not ensure that the products are fully organic. "Defendant's executives confirmed that approximately 75 to 80 percent of the burgers were organic, not 100 percent, contrary to the labels," the plaintiff alleges, citing the *New York Times* article. "Defendant's 'Organic' restaurants have countless non-organic ingredients including lamb and bison and mayonnaise and tomatoes—crucial condiments when it comes to dressing up a purportedly organic burger." For allegations of negligent misrepresentation, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

"Heart-Check Mark" StarKist Lawsuit to Continue

A lawsuit alleging that StarKist misleads consumers by paying to feature the American Heart Association's (AHA's) Heart-Check

Mark will continue after a New York federal court refused to dismiss the complaint. *Warner v. StarKist Co.*, No. 18-0406 (N.D.N.Y., entered March 25, 2019). The court refused to dismiss the plaintiff's allegation that the Heart-Check Mark materially misleads consumers—finding "StarKist's failure to argue that the omission of language indicating it paid to place the Heart Check-Mark on its products would not mislead a reasonable consumer"—but noted that "this is a close call, which could be revisited at the summary judgment stage." The court dismissed the plaintiff's request for an injunction because it found "no 'real and immediate' threat of future injury" because the plaintiff's "own allegations indicate that he will not purchase or pay as much for the product going forward."

California Courts Grant Certification to Mike & Ike Buyers, Deny Veggie Burger Purchasers

A California federal court has granted certification to a class of Mike & Ike purchasers in a lawsuit alleging that the candy boxes contain too much non-functional slack-fill. *Escobar v. Just Born Inc.*, No. 17-1826 (C.D. Cal., W. Div., entered March 25, 2019). The plaintiff had alleged that the box of Mike & Ike candies she purchased at a movie theater contained 46 percent slack fill.

Meanwhile, another California federal court denied certification to a class of consumers who purchased Gardenburger vegetarian hamburgers, finding that the damages theory proposed by the plaintiff was insufficient to calculate the amount of damages. *Mohamed v. Kellogg Co.*, No. 14-2449 (S.D. Cal., entered March 23, 2019). The approach suggested by the plaintiff would have calculated "*the percentage of* the price premium" but did not include a calculation to arrive at the total amount of damages. "Plaintiff has not proposed to conduct a hedonic regression or any other type of analysis to calculate the price premium, which would account for the supply and market factors that influence price," the court held, denying the motion for class certification without prejudice.

Lawsuit Alleges TGI Friday's "Potato Skins" Lack Potato Skins, a "Healthier

Snack”

A consumer has alleged that TGI Friday’s Inc. misleads consumers with the name of its “Potato Skins,” including the “Cheddar & Bacon,” “Bacon Ranch” and “Sour Cream & Onion” varieties, because the products contain only “potato flakes” and “potato starch.” *Troncoso v. TGI Friday’s Inc.*, No. 19-2735 (S.D.N.Y., filed March 27, 2019). The plaintiff alleges that the “labeling deceives consumers into believing that they are receiving a healthier snack, but Defendant’s products do not live up to these claims.”

“The online version of the San Francisco Chronicle, sfgate.com, published an article titled, ‘The Benefits of Eating Potato Skins,’ touting many nutritional benefits in consuming potato skins, noting their high content of vitamin B-6, vitamin C, thiamin, niacin, iron, potassium, magnesium, and fiber,” the plaintiff asserts. “Similar articles and blog posts can be found on the Internet, where many reasonable consumers believe it to be the case.” The complaint explains that during potato-flakes production, potatoes are peeled and the potato skins are “treated as a zero-value waste product”; thus, the plaintiff argues, TGI Friday’s “potato skins” product containing only “potato flakes” cannot contain its namesake ingredient. The plaintiff seeks class certification, restitution, damages, a corrective advertising campaign, an injunction and attorney’s fees for alleged violations of New York consumer-protection statutes and fraud.