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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Brazilian Meatpacker to Pay $3.2 Billion to Settle Bribery Charges

The holding company of Brazilian meatpacker JBS SA has reportedly agreed to pay a $3.2-billion fine for the company's involvement in a graft and bribery scandal involving more than 1,800 politicians, including President Michel Temer and former President Dilma Rousseff. J&F Investimentos, co-owned by brothers Joesley and Wesley Batista, will pay the fine to U.S. and Brazilian authorities over a period of 25 years. Joesley Batista stepped down as chairman and member of the JBS SA board of directors; Wesley Batista has resigned from the board but remains chief executive of the company. The Batistas purportedly told Brazilian federal prosecutors they had paid about $186 million in bribes to politicians, and JBS SA had already agreed to pay $183.8 million to settle its criminal liability for the bribes. *See NPR*, May 31, 2017.

AAP Recommends Limiting Fruit Juice For Kids

The American Academy of Pediatrics (AAP) has announced new recommendations limiting the amount of fruit juice that children consume to reduce the risk of obesity and dental caries. Whole fruit is preferable to fruit juice for nutrition and healthy weight gain, the group stated, because 100 percent juice is mostly water, with small amounts of vitamins and minerals and no fiber. The recommendations further specify that infants should not have

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fruit juice at all during their first year, and toddlers should be limited to 4 ounces a day. AAP also recommends that juices be pasteurized to reduce the risk of *E. coli*, *Salmonella* and *Cryptosporidium*.

LITIGATION

Advocacy Groups Seek to Vacate FDA GRAS Rule

Five public advocacy groups have filed suit against the U.S. Department of Health and Human Services and the U.S. Food and Drug Administration (FDA) seeking to vacate FDA's "Substances Generally Recognized as Safe" (GRAS) rule, which allegedly allows "potentially unsafe food additives to be used in the food supply (human and animal) without FDA review, approval, oversight, or knowledge, in violation of the Federal Food, Drug and Cosmetic Act (FDCA)." *Ctr. for Food Safety v. Price*, No. 17-3833 (S.D.N.Y., filed May 22, 2017).

The plaintiffs argue that the GRAS rule allows manufacturers to certify that a substance is GRAS without notice to FDA or the public, although the rule gives them the option to notify the agency about certification. However, they allege, the Food Additives Amendment to the FDCA requires food additives to go through an FDA approval process. FDA allowed manufacturers to begin using the proposed rule's optional notification process in 1997, although the rule was not finalized until 2016.

The plaintiffs also argue that the rule lacks a recordkeeping requirement, making enforcement and review impossible, and that the lack of FDA review means consumers are not warned of potential drug interactions with or allergic reactions to new additives. The complaint alleges that (i) the GRAS rule permits an unconstitutional sub-delegation of FDA authority to private parties; (ii) the FDA criteria for GRAS classification conflicts with the criteria in the FDCA; and (iii) FDA has foreclosed from judicial review the regulatory decisions it is statutorily required to carry out.

"Most Americans would be shocked to learn that FDA allows novel chemicals onto the market without a safety review," a representative of the Environmental Defense Fund said in a May 22, 2017, press release. "Yet, FDA's practice on GRAS additives flouts the law and leaves the agency unaware of what chemicals are being added to our food and with no way to ensure that these additives—and the food that contains them—are safe."

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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.

Little Caesars Faces Class Action Over "Halal" Pizza Containing Pork

A Muslim man who alleges he was served pork pepperoni on a pizza sold as halal has filed a $100-million putative class action against Little Caesar Enterprises. *Bazzi v. Little Caesar Pizza*, 17-7931 (Mich. Cir. Ct. Wayne Cty., filed May 25, 2017). According to the complaint, the plaintiff ordered the pizza at a franchise location in Dearborn, Michigan, that advertises halal pizza, but although the pizza box displayed a halal sticker, the pepperoni contained pork. Alleging breach of contract, unjust enrichment and fraud, the plaintiff seeks class certification, compensatory and punitive damages and attorney's fees.

Jury Finds For UC Davis in Strawberry IP Infringement

A California jury found that retired University of California, Davis, professors willfully infringed the university's patents on strawberries they developed in the school's program. *Regents of Univ. of Cal. v. Cal. Berry Cultivars*, No. 16-2477 (N.D. Cal., verdict filed May 24, 2017). The professors formed a private strawberry-breeding company, California Berry Cultivars, after retiring from UC Davis. The jury found they had engaged in conversion, willful infringement, breach of duty of loyalty and breach of fiduciary duty, but released them from allegations that they interfered with the university's business contracts or prospective economic relationships. Additional details appear in Issues 604 and 633 of this *Update*.

Cheese Not "Natural" if Cows Given GMO Feeds, Consumer Alleges

A consumer has filed a proposed class action alleging Sargento Foods misleadingly advertises its cheese products as "natural" despite containing genetically modified organisms (GMOs) or animal growth hormones. *Stanton v. Sargento Foods, Inc.*, No. 17-2881 (N.D. Cal., filed May 19, 2017). The plaintiff asserts that the cows providing milk for the production of Sargento cheeses are fed GMO corn and soybeans as well as a growth hormone. Alleging violations of state consumer-protection acts and breach of warranty laws, the plaintiff seeks class certification, damages, an injunction and attorney's fees.

Moose Munch Slack-Fill Putative Class Action Dismissed

A proposed slack-fill class action against Harry & David LLC was dismissed after the parties voluntarily dismissed the action. *Brown v. Harry & David LLC*, No. 17-0999 (S.D.N.Y., stipulation filed May 22, 2017). The stipulation did not explain the reason for dismissal but stipulated that it was dismissed "with prejudice against the Defendant." The plaintiff had alleged that 10-ounce containers of Moose Munch Milk Chocolate, Dark Chocolate, Classic Caramel and Cinnamon Maple Pecan popcorn mix were underfilled by as much as 43 percent.

Bob Marley's Family Awarded $2.4 Million for Trademark Infringement

The family of Bob Marley will receive more than $2.8 million in damages and unpaid royalties from Jammin Java Corp. in a trademark-infringement suit. *Fifty-Six Hope Rd. Music Ltd. v. Jammin Java*, No. 16-5810 (C.D. Cal., order entered May 30, 2017). The family's companies, 56 Hope Road Music Ltd. and Hope Road Merchandising LLC, own the late musician's intellectual property and publicity rights and sued Jammin Java after it failed to pay royalties on a license to produce Marley Coffee. Jammin Java was founded by Marley's son Rohan, who left the company in 2008.