ILLINOIS STATE BAR ASSOCIATION

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Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

Greetings From the Chair

BY LYNNE R. OSTFELD

As we start a new year, I want to welcome you to the Food Law Section. This has been a rough year for accomplishing much other than learning how to conduct meetings via Zoom. But, because people always need to eat and because the growing, preparation and sale of what they eat is increasingly newsworthy, this section will always have value and activities. We are needed to keep other lawyers informed in ways to help their clients and benefit their practices.

The Food Law Section had just been organized when the pandemic hit. We will continue the work started by immediate past chair, Molly Wiltshire, and member Jane McBride, and the way the section has been organized. That is to organize the many topics touching on food law

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2021 Update: Third-Party Food Delivery Service Lawsuits and Legislation

BY JESSICA GUARINO & PATRICK WARTAN

The landscape of food production and delivery has seen an expedited logistical shift thanks to the COVID-19 pandemic. In fact, one study suggests as much as $19 billion in growth of third-party delivery services resulted "purely due to the pandemic."[1] Over the past five years in the United States, the market revenue for platform-to-consumer services like DoorDash, Grubhub, and UberEats has increased by a dramatic 204 percent.[2] Most recently, third-party food delivery companies have been the source and target for nationwide litigation spanning an array of legal issues, from employment concerns to deceptive sales practices. Below is a description of the pending litigation and bills of concern current to the time this update was written.

New York

Lawsuits

Fee Caps

Doordash, Inc., Grubhub Inc., and

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Greetings From the Chair

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by subcommittees: Food Innovation, Technologies, Regulations and Litigation; Illinois Alcohol & Beverage; Illinois Farming & Craft Foods; Sustainability & Environmental; Restaurants (new).

The Food Law Section through each subcommittee will sponsor timely seminars and webcasts. We have already put on a seminar, via Zoom, Getting to Zero Food Waste, which went very well. Food Labeling & Cell Based Meat will be a webcast on October 19, 2021.

We will also continue a newsletter, which we hope to publish on a monthly basis. All members of the section are welcome to contribute to this.

Communication, questions, and comments can be dealt with through the ISBA Central Communities. To access this, sign into the ISBA website, go to "Groups & Participation" (fourth item from the left in the upper ribbon below the ISBA logo). In the third column "Get Involved" go to the first item under the heading "ISBA Central Committees." There, go to the first heading on the left "Getting Started." Entry numbered three is "… post a message…." Click on that. It will open a new page "Start New Thread." Fill in the community or section to be posted to. It is a drop-down menu. The rest is self-evident.

I look forward to your participation in this Section and our providing informative, timely help to our legal community.■

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Food Law

This is the newsletter of the ISBA's Section on Food Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.To subscribe, visit www.isba.org/sections or call 217-525-1760.

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2021 Update: Third-Party Food Delivery Service Lawsuits and Legislation

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Portier, LLC v. City of New York, No. 21-cv-7564 (S.D.N.Y. 2021)

In May 2020, the city of New York enacted price controls that set the amount of money that third-party delivery services could charge restaurants to 15 percent of the total order price, as well as 5 percent for marketing fees.[3] Plaintiffs assert that the city government repeatedly pushed back the expiration date for these price controls and eventually announced that the price controls would be permanent. The plaintiffs allege that the price controls are unconstitutional because they limit the freedom to pursue legitimate business enterprise, as well as violate the equal protection clause of the New York and U.S. Constitutions.

The plaintiffs state that the price controls unfairly target third-party delivery services, and that the city arbitrarily set the cap at 15 percent without an inquiry the economic impact of the price controls. Furthermore, the plaintiffs state that the irrational motivations" of the city government are made clearer by other measures that the government has undertaken against third-party delivery services, including policies that mandate licensing requirements.[4]

Customer Data

DoorDash, Inc. v. City of New York, No. 21-cv-7695 (S.D.N.Y. 2021)

In September 2020, DoorDash filed an additional lawsuit challenging a New York City ordinance requiring DoorDash's disclosure of customer data to restaurants, such as their names, addresses, emails and telephone numbers.[5] Notably, the ordinance prohibits "third-party platforms from limiting restaurants' ability 'to download and retain such data' or to 'use . . . such data for marketing or other purposes,'"[6] and restricts the applicability of the bill to third-party food delivery platforms. The ordinance also functionally requires customers to opt-out of the app's sharing of their data for each specific online order.[7] Plaintiffs allege that the ordinance violates the First Amendment, the Contract Clause, the Takings Clause, the Dormant Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution.

Legislation

Additionally, the New York City Council passed a series of bills in September of 2021 to address many of the issues involved in the nationwide litigation, which are detailed below. The New York City Council is the first to take action of this kind, establishing a minimum set of protections for delivery workers.[8]

- Int. 2294-A Establishes minimum payments

Requires the Department of Consumer and Worker Protection (DCWP) to "conduct a study to determine how much delivery workers must be paid for their work," and to "promulgate rules establishing a method of determining minimum payments for delivery workers by January 1, 2021. "[9]

- Int. 2296-A Creates standards for payment

Prohibits "food delivery apps and couriers from charging delivery workers for the payments of their wages. It would also require the food apps and couriers pay their delivery workers for their work at least once per week."[10]

- Int. 2298-A Bathroom access for deliveristas

Requires that, during the creation of contracts between third party delivery services and restaurants, apps "include a provision in these contracts requiring restaurants and other food service establishments to make their toilet facilities available for delivery workers' use, as long as the delivery worker seeks to access the facilities while picking up a food or the beverage order for delivery."[11]

- Int. 1846-A Ensures gratuity policies

"Prohibits a food delivery app from soliciting a tip from a customer unless that app discloses conspicuously in plain language the amount or proportion of each gratuity that is provided to the delivery worker; and the manner in which gratuities are provided, whether immediately or not, and whether in cash or not . . . before or at the same time the gratuity is solicited from the customer."[12]

Requires "food delivery apps to credit gratuities to the delivery worker . . . [and] notify delivery workers whether a gratuity was added to the order, how much the gratuity was, whether the customer removed it from the bill and why, if a reason was provided."[13]

- Int. 2289-A Distance and route limits

Protects delivery workers by allowing them to set and change the following trip parameters: "maximum distance per trip, from a restaurant, that they will travel; and that such worker will not accept trips over any bridges or tunnels, or over particular bridges or tunnels."[14]

Requires apps to provide the following information to the delivery driver prior to their acceptance of the trip: "the address where the food, beverage or other goods must be picked up; the estimated time and distance for the trip; the amount of any gratuity, if specified by the consumer; and the amount of compensation to be paid to the food delivery worker, excluding gratuity."[15]

- Int. 22880-A Requires insulated food delivery bags

Requires provision of insulated bags to any delivery worker who has completed at least six deliveries for the company, free of charge.[16]

Grants DCWP power to suspend, revoke, and deny or refuse to renew a food delivery app license if any provision relating to this bill is violated twice in the previous two years.[17]

Chicago

Fee Caps/Deceptive Practices

City of Chicago v. DoorDash, Inc. and Caviar, LLC, (Cook County Cir. Ct. 2021)

In September 2021, Chicago "officials accused DoorDash and GrubHub of harming the City's restaurants and their customers by charging high fees and through other deceptive practices."[18] These deceptive practices include the misrepresentation of various fees, from describing the delivery fee as the full price of delivery service to hiding markups of menu prices. Other allegations include accusations that DoorDash and other

third-party delivery services deceptively inflated menu prices and promotional discounts, that they list unaffiliated restaurants without the restaurants' permission while falsely portraying them as business partners, and that they deceptively used consumer tips to subsidize the platform's payment to the driver.[19]

Legislation

Since the COVID-19 pandemic, the City of Chicago has passed various ordinances regulating third-party food and beverage delivery fees. The latest Ordinance (Ordinance 2021-2862) was passed on July 28, 2021 and took effect on September 24, 2021 but expired, along with all other third-party food delivery fee regulations, on October 31, 2021.

The Ordinance (2021-2862) replaced the prior temporary fee relief that the City had passed (Ordinance 2021-2592) which, in addition to other restrictions, had provided that it was unlawful for third-party delivery services to charge fees in excess of 10 percent of the total order price. Under the new regulations, it was unlawful for a third-party delivery service to charge a restaurant:

1. a fee greater than 15 percent of the total order price;
2. any amount designated as a 'delivery fee' for an online order than does not involve the delivery food or beverages;
3. any fee, commission, or cost other than as specifically stated above.

Notwithstanding this language, third-party delivery services could give restaurants an option to obtain delivery services for a total fee not to exceed 15 percent of the total order price. If the delivery services provided this option to restaurants, then such delivery services could also offer services wherein the above restrictions would not apply to such delivery services. Further, the regulations in this Ordinance do not apply to chain restaurants (i.e. restaurants with ten or more locations operating under a common business name).

Again, Chicago's food delivery fee cap regulations all expired on October 31, 2021. At this time, it is not anticipated that new fee cap regulations will be enacted in the City of Chicago.

Massachusetts

Fee Caps

Commonwealth of Massachusetts v. Grubhub Holdings Inc. (Suffolk County Superior Ct. 2021)

On January 14, 2021, the Commonwealth of Massachusetts enacted an ordinance that capped fees that third-party delivery services could charge restaurants to 15 percent of the order price. The purpose of the ordinance was to protect restaurants that had been adversely affected by the pandemic and lasted the duration of the state of emergency declared by the Governor. The Massachusetts Attorney General brought a lawsuit against Grubhub in July of 2021.[20] While the plaintiff alleges that delivery services like DoorDash and Uber Eats seamlessly adjusted their policies to comply with the statute, they allege that GrubHub knowingly continued to charge restaurants in excess of the 15 percent cap, thus violating the General Legislature's ban on deceptive and unfair trade practices.[21] GrubHub allegedly did this by tacking on unnecessary fees such as those related to customer care and fraud monitoring, increasing the total fee amount to above 15 percent, and continued to engage in this unfair practice even after restaurants complained that the company was violating the delivery fee cap.[22]

San Francisco

Fee Caps

DoorDash, Inc. and Grubhub Inc. v. City and County of San Francisco, Case No. 3:21-CV-05502 (N.D. Cal. 2021)

San Francisco recently enacted an ordinance that established price controls on what delivery services can charge restaurants for their services (15 percent cap), limiting the ability of delivery services and restaurants to freely negotiate prices. Doordash and other third-party food delivery services filed suit against the City and County of San Francisco in response in July 2021.[23] The plaintiffs assert that the ordinance at question is economically detrimental to restaurants, consumers, and delivery drivers since it limits the service options available to restaurants, could lead to higher prices for consumers, and decreases employment opportunities for delivery drivers.[24]

Furthermore, the plaintiffs assert that the ordinance is unconstitutional since it violates the constitutional right to freely negotiate contracts and borders on violating the equal protection clause; the plaintiffs claim that the ordinance is targeting them because of the companies' support of Proposition 22, which was recently struck down.[25] ■

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2. David Curry, *Food Delivery App Revenue and Usage Statistics*, BusinessofApps (Sept. 2, 2021), https://www.businessofapps.com/data/food-delivery-app-market/.
3. The Associated Press, *Doorash, Grubhub and Uber Eats Sue New York City Over Price Caps*, NPR (Sept. 10, 2021, 12:19 p.m.), https://www.npr.org/2021/09/10/1035905604/doordash-grubhub-uber-eats-lawsuit-sue-new-york-city.
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5. Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, NYTimes (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html.
6. *DoorDash, Inc. v. City of New York*, No. 21-cv-7695 (S.D.N.Y. 2021); NYC Int. 2311-2021-A.
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19. *City of Chicago v. DoorDash, Inc. and Caviar, LLC*, (Cook County Cir. Ct. 2021).
20. *Commonwealth of Massachusetts v. Grubhub Holdings Inc.* (Suffolk County Superior Ct. 2021).
21. *Id.*
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24. *Id.*
25. *Id.*

Food Based Country and Region of Origin Litigation

BY MICHAEL R. REESE

"There are three things that matter… Location, Location, Location." – Lord Harold Samuel (founder of one of Britain's largest real estate companies)

Country and region of origin litigation (also known as "COOL", but perhaps better termed as "ROOL" or "CROOL", depending on one's perspective) is a growing area of concern for food companies. Globalization has resulted in a dramatic increase in the number of companies and supply chains that transcend national or regional boundaries. For many food products, however, the country (or region) of origin is of significant importance to the consumer. One need think no further than the concept of *terroir* when it comes to French wines or Columbian coffee[1], or perhaps Wisconsin cheese curds or authentic Chicago hot dogs, to appreciate that the location from which a food product originates is prized by the consumer and commands a premium price.

Indeed certain states have specific laws that prohibit marketing and labeling that could cause consumer deception regarding the origin of a product. For example, the California Consumer Legal Remedies Act states that: "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful…***Using deceptive representations or designations of geographic origin in connection with goods or services.***"). *See e.g.* California Civil Code §1770(a).

This article explores several recent cases involving the origin of food products. These cases underscore the risks faced by companies when supply chains cross international or regional borders and conflict with the commonly assumed loci for food production.

Risks Associated With Changing Location of Manufacture

"Cause, remember: no matter where you go... there you are." - Buckaroo Banzai (physicist, neurosurgeon, test pilot, and rock star)

In the past decade, there have been a spate of mergers among food companies, which have resulted in the creation of international food conglomerates.[2] With these mergers, the site of food manufacturing has often moved, as consolidation occurs and companies try to gain efficiencies by relocating production closer to the point of sale. Consequently, manufacturing can become divorced from the commonly believed origin of a product. As seen below, this can spell trouble for food companies since consumer confusion can lead to lawsuits.

Case Study One – Beck's Beer

"On victory, you deserve beer, in defeat, you need it." – Napoleon

Bremen – a town in northern Germany – is renowned for three things: the Bremen Town musicians from the Brothers Grimm fairy tale; Werder Bremen, a soccer team in the Bundesliga league; and Beck's beer. Only the last is broadly known.

Beck's beer originated and was brewed in Bremen, Germany in 1873, and continued to be for the next one hundred years. But, in 2012, after consolidation among beer companies, the production of Beck's beer sold in North America was moved to Anheuser-Busch's facilities in St. Louis, Missouri.[3]

Despite the fact that Beck's beer sold in the United States was now brewed more than 5,000 miles from Germany, the labels of Beck's beer still claimed the beer "Originated in Germany," was made with "German Quality," and "Brewed Under the German Purity Law of 1516."

In 2013, several plaintiffs filed a lawsuit against Anheuser-Busch for allegedly misleading consumers as to the origin of Beck's beer in the case titled, *Marty v. Anheuser-Busch Companies, LLC*. The consumers claimed they had overpaid for Beck's beer by paying a premium price for what they believed was an imported beer when, in fact, Beck's is a domestic beer. The consumers brought claims for violation of the laws of Florida, New York and California, where the three plaintiffs resided. The case was brought as a class action; a procedural device that allows the claims of many individuals to be represented by a single plaintiff or a small group of plaintiffs. In other words, the three plaintiffs sought to represent not only their own claims, but also the claims of all other persons who purchased Becks' beer within the past several years. This is significant, as the damages of individual purchasers of a food products are often small, particularly when compared to the expense of litigation. However, when those damages are multiplied by the millions of persons who purchased the product, the results are often in the hundreds of millions of dollars, making the costs and risk of litigation worthwhile. As the esteemed former Seventh Circuit Judge and University of Chicago lecturer Richard Posner so articulately stated, "[t]he *realistic* alterative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[4] This is what the class action device achieves, relief for millions of consumers for their everyday transactions.

Anheuser-Busch moved to dismiss the case, arguing that no reasonable consumer could be deceived by the labeling and marketing of the product given that the labels on the beer stated that it was a ""Product of USA, Brauerei Beck & Co., St. Louis, MO" and also contained the words "BRAUEREI BECK & CO., BECK'S © BEER, ST. LOUIS, MO."[5] The court rejected this argument, holding that the "Product of USA"

disclaimer on the labels was blocked from plain view by the carton packaging. The court reasoned: "[A] consumer would have to either open the cartons of twelve-pack bottles and twelve-pack cans or lift the bottle from the six-pack carton in order to see the 'Product of USA' disclaimer … A reasonable consumer is not required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading." [6]

Furthermore, the court held that "the statement "BRAUEREI BECK & CO., BECK'S © BEER, ST. LOUIS, MO" was not sufficiently descriptive to alert a reasonable consumer as to the location where Beck's is brewed.[7] Although this statement contains the words "St. Louis, Mo," the court found that "there is nothing in the statement which discloses where Beck's is brewed."[8] As a result, it denied the motion to dismiss and allowed the case to proceed.

Shortly after issuance of the court's order denying the motion to dismiss, the parties entered into a settlement. The terms of the settlement provided for partial refunds to consumers valued at $20 million.[9]

Case Study Two – Kona Brewing Company

"Hawaii is a state as well as a state of mind." – The Honorable Beth L. Freeman

It is important to note that litigation based on place of origin is not just limited to countries, but also includes identifiable geographic areas within countries. This concept is most evident with respect to wines, where different regions within the same country – Bordeaux versus Beaujolais in France or Napa versus Russian River in California – can make a great difference in taste and price. As the case of *Broomfield v. Craft Brew Alliance, Inc.*, case no. 17-cv-1027-BLF, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) demonstrates, this concept is not limited to fine wines but can apply to a wide array of food products, where a food is associated with a particular region.

At issue in *Broomfield* was beer sold under the Kona Brewing Company brand name, including flavors styled as "Longboard Island Lager," Wailua Wheat Ale," Lemongrass Luau," and "Hanalei Island IPA," among others. The packaging for each variety of beer was adorned with Hawaiian-related images such as orchid flowers, volcanoes, palm trees, surfers, and hula dancers.

Historically, the beers were brewed in Kona, Hawaii. In 2010, however, the company was acquired by a publicly traded conglomerate, and the manufacture of Kona beers sold on the U.S. mainland was transferred to Oregon, New Hampshire, and Tennessee.

In 2017, three consumers filed a class action in federal court, alleging that the Kona branded beer sold on the mainland was misleadingly labeled because it led consumers to believe that the beer was brewed in Hawaii when it was not. The consumers asserted claims under state consumer protection laws, including California's Consumer Legal Remedies Act (cited above in the introduction), which expressly prohibits misrepresentations as to the origin of a product.

The defendant – Craft Brew Alliance, Inc. ("CBA") – moved to dismiss the complaint, arguing that no reasonable consumer would either believe or care that the beer was brewed in Hawaii.[10] The court disagreed, holding:

> Hawaii is a state as well as a state of mind. When adults want to escape the mainland, they can go to their local grocery store, purchase a package of Kona Brewing Company beer, and feel as though they are transported to the beaches of Hawaii. This case is about the importance of where that beer actually is brewed.[11]

CBA also argued that it disclaimed that the product was brewed in Hawaii by listing on the bottles themselves all of the places the beers are made including on the mainland.[12] The court rejected this argument and held that the disclaimer on the labels of Kona beer is not enough to contradict the representations on the outer packaging and that, under well-established legal precedent, reasonable consumers are not required to investigate to ascertain whether representations made on the face of the packaging are misleading.[13]

The court further explained:

> The disclaimer on the Kona beer label lists five locations, including "Kona, HI, Portland, OR, Woodinville, WA, Portsmouth, NH, and Memphis, TN" which encompass "all locations where the beers are brewed." A list of multiple locations on a product label does not amount to an explicit statement that the beer is brewed and packaged at a particular location. … Particularly the inclusion of Kona, Hawaii on the list mitigates the disclaimer's effectiveness, since Plaintiffs allege that no bottled or canned beer bearing the Kona label is actually brewed in Kona, Hawaii. Therefore, even if the Court was to consider the label in the context of the packaging, a reasonable consumer could still be deceived because the list of brewery locations does not "alert a reasonable consumer as to the location where [Kona beer] is brewed."[14]

The court then denied the majority of CBA's remaining arguments and allowed the case to proceed. The case ultimately resulted in a class action settlement.[15]

Risks Associated With International Supply Chains

"The Supply Chain stuff is really tricky." – Elon Musk (CEO of Tesla)

Country of origin litigation also is a risk where food production involves an international or multi-regional supply chain. This is especially the case where a food or ingredient commands a premium when it comes from a particular country or region.

Case Study – Filippo Berio Olive Oil

Filippo Berio is a popular brand of olive oil that originated in Lucca, Italy in 1867. The Salov North America Corporation imports and markets the Filippo Berio brand olive oil in the United States.

The words "Imported from Italy" appeared prominently on the front label of each bottle of Felippo Berio olive oil sold in the United States. However, the olives from which the oil is made are grown and pressed in other countries such as Spain, Greece and Tunisia, after which the oils are shipped to Italy where they are blended and bottled for export.

In 2014, a consumer filed a lawsuit in

federal court in the Northern District of California, titled *Kumar v. Salov North America Corp.*, case no. 14–CV–2411–YGR, 2015 WL 457692 (N.D. Cal. Feb. 3, 2015). He alleged that the "Imported from Italy" statement on the product labels was false and misleading, and violated federal regulations and state law concerning country of origin and misbranding of food products. [16]

The company defendant moved to dismiss, arguing that "no reasonable consumer would understand 'Imported from Italy' to mean that the product was made entirely from Italian-grown olives."[17] The defendant also argued that the back label of the bottle disclosed that the olives did not come solely from Italy but rather also originated from Spain, Greece and Tunisia.[18]

The court rejected these arguments by the company, noting that reasonable consumers should not be expected to look beyond misleading representations on the front of the bottle to discover the truth from smaller text displayed elsewhere.[19] The court refused to dismiss the complaint, concluding that the plaintiff should be given an opportunity to show at trial that reasonable consumers perceive "Imported from Italy" to mean that the product was made exclusively from olives grown in Italy.[20]

After several more rounds of litigation, including a successful motion to certify the case as a class action, the matter settled with the company changing the labelling and paying partial refunds to consumers.[21]

Conclusion

Jake: How are you gonna get the band back together? Those cops have your name, your address

Elwood: They don't have my address. I falsified my renewal. I put down 1060 West Addison.

Jake: 1060 West Addison? That's Wrigley Field.

Jake and Elwood Blues (a.k.a. The Blues Brothers)

As the above cases reveal, telling the truth about the origin of a food product is important. While this may seem obvious, it becomes trickier when the "origin" of a product has changed, or is murky because of what can be implied through the use of words or images that could convey the product is from a place that it in fact, is not.

When food companies change the site of manufacturing either through mergers or changes in supply chain, they need to be aware that consumers' expectations regarding product origin might no longer be met. This could result in significant exposure to COOL, ROOL, or CROOL liability.

Furthermore, even disclosures as to the new origin of a product may be deemed legally inadequate, particularly if the disclosures are provided in a manner that are not readily evident to the consumer, such as on the back of a product or in small print.

Accordingly, with any changes to production or supply chains, it is important for a manufacturer to review the marketing and labeling of any food products that may have strong association to a place of origin. Consumer surveys (either in-house or through outside third-parties) are recommended to determine whether changes in sourcing or location of manufacturing potentially could mislead consumers. If so, it is important to update the marketing and labeling to clearly inform consumers of the new origin of the product. Otherwise, it could result in class action litigation due to consumer confusion. In cases of changes to the source of supply or site of manufacturing, it is *caveat venditor* or seller beware.■

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1. See, *e.g.*, Françoise Alavoine-Mornas, "Fruit and vegetables of typical local areas: consumers' perception and valorization strategies through distributors and producers," presented at 52nd EAAE Seminar - Parma, June 19-21 1997 *available at* http://www.origin-food.org/pdf/eaae97/22_mornas.pdf.
2. Christopher Doering, "Who Will Food Industry Consolidation Squeeze?", USA Today, June 5, 2014.
3. Carla Bleiker, "Beck's Remains Home-Brewed Despite Global Label", Deutsche Welle, Dec. 12, 2012.
4. *Carnegie v. Household Intern, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)
5. *Marty v. Anheuser-Busch Companies, LLC*, 43 F.Supp.3d 1333, 1340 (S.D. Fla. 2014).
6. *Id.* at 1341 (*citing Williams v. Gerber Prods Co.*, 552 F.3d 934 (9th Cir. 2008)). *Williams* is the leading case on consumer deception and has been relied upon by state and federal courts across the United States, but particularly by federal courts in the Ninth Circuit, which covers California, Oregon, Washington, Hawaii, Arizona, Nevada, Idaho, Montana, and Alaska.
7. *Marty*, 43 F.Supp.3d at 1341.
8. *Id.*
9. *See Marty*, Plaintiff's Motion for Final Approval of Class Action Settlement, Case No. 1:13-cv-23656-JJO, ECF No. 157, at 19.
10. *Broomfield*, 2017 WL 3838453, at *5.
11. *Id.* at *1.
12. *Id.* at *6.
13. *Id.* at *7 (*citing Williams v. Gerber Prods Co.*, 552 F.3d 934 (9th Cir. 2008)).
14. *Id.* at *8.
15. *See Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027-BLF, 2020 WL 1972505 (N.D. Cal. Feb. 5, 2020).
16. *See Kumar*, 2015 WL 457692, at *1.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. See *Kumar v. Salov N. Am. Corp.*, No. 14-cv-2411-YGR, 2017 WL 2902898 (N.D. Cal. July 7, 2017)

The Only Bad Burger Is the One the Government Bans: ISBA Food Law Section Council CLE Presents Latest Developments in Regulating Plant-Based Food Labels and Cell-Based Meats

BY MOLLY L. WILTSHIRE

The Food Law Section Council welcomed Laura Braden, Esq., the lead regulatory counsel for international non-profit The Good Food Institute, to discuss the latest legal developments in food labeling. Plant-based products and alternatives to "traditional" dairy and meat-based proteins have become ubiquitous in our supermarkets and restaurants. In response to these developments, the legal landscape at the state and federal level has reacted. In multiple forums, interest groups have petitioned legislators and regulators to proscribe or require specific wording on the product labels, with varying results and court proceedings. More recently, as cell-based or cultivated meat, poultry, and seafood products get closer to launching in the United States, the federal regulators have been called to determine a regulatory scheme to ensure consumer safety. Ms. Braden provided an overview and looked ahead at what industry and consumers can expect in the coming year.

Plant-based Product Labels: Just like most of us are familiar with "gluten-free bread," a label like "veggie burger" tells consumers the product is made from, e.g., pea or soy protein instead of an animal-sourced protein. Lawsuits have been filed around the country that address whether labels on products like veggie burgers, alternative milks, and plant-based dairy products are misleading to consumers. One recent case involved Miyoko's "cultured vegan butter" "made from plants": *Miyoko's Kitchen Inc. v. Ross* (N.D. Cal. 3:20-cv-00893). The manufacturer, Miyoko's, challenged a California law that directed California's Department of Food and Agriculture to enforce against products sold in California the labeling requirements for "butter" according to the U.S. Food Drug and Cosmetic Act and the U.S. Food and Drug Administration's ("FDA") regulations for "cultured dairy products" "resembling milk products." The federal district court in California ruled that while the butter-related federal regulations had been in effect since the 1920s, "language evolves," and the use of the term butter in Miyoko's cultured vegan butter label did per se mislead consumers. The State had no evidence of consumers' confusion around the product, and so the law was unenforceable against that product.

Similar labels in other states remain susceptible to consumer protection claims, however. In 2018-2019, for instance, several states passed laws restricting plant-based protein products from using terms on their labels if the products were not derived from harvested livestock. At the same time, regulatory petitions have sought clarification around such labeling expectations. In 2017, The Good Food Institute filed a Citizen Petition requesting guidance on how foods may be named by reference to the names of other standard foods, like almond milk or soy sausage. The FDA did not respond to the full petition but subsequently asked for public comment on the use of dairy terms in the labels of non-dairy alternatives. The agency has indicated that it intends to publish Draft Guidance on the Labeling of Plant-based Milk Alternatives in June 2022. In September 2021, the U.S. Department of Agriculture ("USDA") denied a petition filed by the U.S. Cattlemen's Association to ban plant-based products' use of the terms "meat" and "beef."

Federal Oversight of Cultivated Meat: Cultivated meat, poultry, and seafood products are not yet on the market in the United States, but federal agencies are developing regulatory guidance for producers. In March 2019, the FDA and USDA entered a formal agreement to establish a "Joint Regulatory Framework" for cell-based meats. Under that framework, FDA will oversee cell collection, cell banks, cell growth, and differentiation for all products. USDA will take over responsibility at "point of harvest" – overseeing further processing, pre-approving labels, and conducting inspections. These agencies also have committed to developing "joint principles" for cultured meat product labeling. In September 2021, USDA-FSIS published its Advance Notice of Public Rulemaking on cultivated meat and poultry labeling. The Advance Notice requests economic and consumer data in support of potential labeling rules. USDA is expected to consider First Amendment boundaries, existing and potentially changing Standards of Identity (21 C.F.R. § 101.3), and the use of common or usual meat and poultry products on these new products' labels.

Looking Ahead: The legal landscape on this topic is evolving. As Ms. Braden noted, we expect in the coming months to receive FDA's guidance on labeling plant-based

milks, a rulemaking from USDA on cell-based/cultivated meat, and as always, the potential for state laws and litigation over labeling.■

Molly L. Wiltshire is a partner in Schiff Hardin LLP's Litigation and Dispute Resolution group. Based in Chicago, IL, she litigates and counsels clients regarding complex commercial and civil disputes and administrative and regulatory issues. Molly has trial and appellate court experience in federal and state courts and has won a number of pre- and post-trial motions for her clients.

Molly founded the ISBA Food Law Section Council in 2019 and served as its inaugural chair. Her passion for food law started from her background in animal and environmental litigation. Molly has counseled a range of food clients on contract and warranty disputes and federal food inspection and production standards.

In addition to commercial litigation and food law, Molly is committed to diversity and inclusion in the legal profession, and is a member of the Institute for Inclusion in the Legal Profession (IILP) and the Leadership Council on Legal Diversity (LCLD). She has presented to various groups on topics including diversity and inclusion, the attorney-client privilege, and ethical rules regarding confidentiality. Molly received her J.D. from the University of Chicago Law School and her B.A., magna cum laude, from Columbia University.

Member Spotlight: Angela Peters

My interest in the ISBA Food Law Section stems from many years being a vegan, getting involved in issues related to animal cruelty, food waste, plant based foods (faux meats and milk), backyard raising of crops for sale, water health, soil health, pesticides and herbicides, fertilizers, and impact of runoff from hog farming onto organic farms. This just names a few issues that I have much interest in and energy to be involved in. Inspiration for this Food Law section was created on the ISBA Environmental Law Section. So many of the topics touch profoundly on environmental concerns also.

Admitted to bar, 1985.

Education: University of Illinois, Chicago (B.A. Philosophy, 1973); IIT-Chicago Kent College of Law (J.D. 1985).

Publications: Co-Author: "Foundational Requirements for Admissibility of Breach Machine Results," John Marshall Law Review, February, 1989.■