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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

White House Launches Campaign to Fight Childhood Obesity

Calling it one of the most urgent health issues facing the nation, the White House has initiated efforts to solve the problem of childhood obesity within a generation. President Barack Obama (D) has signed a **Presidential Memorandum** which creates a Task Force on Childhood Obesity that includes Cabinet members and is charged with developing within 90 days a "comprehensive interagency plan" that "builds on effective strategies, engages families and communities, and mobilizes both public and private sector resources."

The Obama administration will also reportedly ask Congress to improve childhood nutrition by banning sugary snacks and drinks from school vending machines and requiring schools to offer healthier alternatives. Agriculture Secretary Tom Vilsack told a news source that the administration will seek the changes when the Child-hood Nutrition Act is overhauled later this year. *See The Associated Press,* February 8, 2010.

First lady Michelle Obama will also take up the matter and has launched a "**Let's Move**" campaign to revamp the ways American children eat and play. The initia-tive will focus on providing support to parents, getting healthier foods into the nation's schools, increasing children's activity levels, and improving access across the country to healthy, affordable foods. While New York University Professor Marion Nestle applauded the new campaign, she questioned its failure to include efforts to address youth food marketing, when "food commercials are ubiquitous in kids' lives." She cited two recent studies that looked at the purported correlation between childhood obesity and watching TV food commercials and movies that prominently feature name-brand foods.

In one study, University of California-Los Angeles researchers analyzed the TV shows that children watched and their body mass indices. Frederick Zimmerman & Janice Bell, "Associations of Television Content Type and Obesity in Children," *American Journal of Public Health*, (February 2010). The researchers found that TV viewing per se does not contribute to obesity. Rather, the evidence suggests that advertising content "is associated with obesity."

In the other **study**, published online February 8 in *Pediatrics*, Dartmouth Medical School researchers analyzed the use of food, beverage and restaurant brands in the

top 20 movies from 1996 through 2005. "Food, beverage, and food retail establishment brands are frequently portrayed in movies, and most of the brand placements are for energy-dense, nutrient-poor foods or product lines," according to the study's abstract. "Movies are a potent source of advertising to children, which has been largely overlooked."

Nestle also noted that Kelly Brownell, director of Yale University's Rudd Center for Food Policy and Obesity, and his colleagues have written an **article** in the *American Journal of Public Health* detailing how the food industry's self-regulation is "not working and what would be needed to make it work." According to Nestle, "Michelle Obama may not be able to touch this one. But Congress can. And it should." *See Food Politics,* February 11, 2010.

Meanwhile, the American Beverage Association announced that some of its members will start this year to voluntarily add calorie counts to the front of soft drink cans, bottles, vending machines, and soda fountains so that consumers can make better- informed choices. "The companies will coordinate with the Food and Drug Administration to implement the calorie initiative, which will go above and beyond what is required by the federal agency's food labeling regulations," the association stated in a February 9 press release.

Codex Milk Committee Drops Standard for Processed Cheese Products

During a recent meeting of the Codex Alimentarius Commission's Committee on Milk and Milk Products, delegates reportedly agreed to recommend that the commission revoke the international standards on processed cheese when it meets in July 2010. A committee working group had been charged with redrafting a proposed standard for processed cheese and reported that it was unable to do so given the delegations that "continued to insist on textual solutions reflecting closely their own national situation, which did not attract consensus." According to the working group's co-chairs, "the fundamental difficulty with attempting to develop this standard arises from the requirement for the standard to address the very large variety of products marketed as processed cheese, while retaining scope for innovation."

A representative of the International Dairy Foods Association, speaking on behalf of the U.S. representatives to the committee reportedly said, "The U.S. government and dairy industry have long believed that revoking the standards would be better than accepting poorly written updates that might compromise the U.S. processed cheese domestic market." Among the issues of disagreement were cheese content and the acceptability of using gelatin, starches and stabilizers in processed cheese products.

In other action, the milk committee finalized a new standard on fermented milk products, such as smoothies, yogurts and kefir products; if approved by the commission, it would require these products to contain at least 40 percent dairy ingredients. The committee also agreed to endorse analytical testing methods supported by the International Dairy Federation and the International Organization for Standardization. Because this marks a departure from previous reliance on many American Association of Analytical Chemists testing methods, the U.S. dairy industry may need to test under both systems to meet U.S. and foreign market requirements. *See DairyReporter.com*, February 9, 2010.

Mark Anstoetter
816-474-6550
manstoetter@shb.com

or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com

EC Report Provides Overview of Projects Tracking Public Debate on Nanotechnology

The European Commission has released a report, "Understanding Public Debate on Nanotechnologies: Options for Framing Public Policy," that discusses several commission projects designed to assess "the nature of public debate on nanosciences and nanotechnologies, and the ways in which deliberative approaches could lead to better governance of these technologies." The overview includes summaries of the FramingNano, Nanocap, Deepen, and Nanoplat projects. The authors, who were involved as coordinators or participants in these projects, acknowledge that nanotechnology policy is still in its initial phases of development and could be overwhelmed by the sheer volume of products expected to enter the market in the near future. They note that international authorities have not yet agreed to definitions relating to the technology and that the European Union is regulating nanoparticles as "chemical substances" under REACH. Among other matters, they observe that nanotechnology in food is expected to be defined as a "novel food," much like genetically modified foods have been defined since the 1990s, and that a food-additive proposal before the European Parliament is the "first piece of legislation to include explicit reference to nanotechnology."

EFSA Rejects Infant Formula Ingredient's Immunity Claim

The European Food Safety Authority (EFSA) has issued its opinion that the Immunofortis® in Danone Baby Nutrition's infant formula does not, as the company claims, "naturally strengthen the baby's immune system." According to EFSA, the scientific evidence the company submitted (i) "had considerable limitations," (ii) "was inconsistent," and (iii) "was not convincing." It concluded that the evidence was "insufficient to establish a cause and effect relationship between the consumption of Immunofortis® and the initiation of appropriate immune responses including the defence against pathogens." The company apparently sought the opinion of the Panel on Dietetic Products, Nutrition and Allergies as to its claim and provided 25 human study references and five non-human studies. *See EFSA Journal 2010*.

India Blocks Commercial Release of GM Eggplant

The Indian Ministry of Environment and Forests has apparently imposed an indefinite moratorium on the commercial introduction of genetically modified (GM) eggplant, or brinjal, while the agency considers the recommendations of its Genetic Engineering Approval Committee (GEAC). In announcing the decision, Environment Minister Jairam Ramesh cited negative public reactions to *Bacillus thuringiensis* (Bt) brinjal, as well as the objections of state governments, unknown safety and environmental issues, and concerns about foreign influence in the domestic agricultural market. Ramesh has also called for the creation of an independent genetic engineering regulator and further research to examine "the chronic effects of Bt brinjal on human health." As he stated in his remarks, the ministry has adopted "a cautious, precautionary principle-based approach" to Bt brinjal that "does not, in any way, mean conditional acceptance."

Meanwhile, advocacy groups have reportedly welcomed the ban, which GM Watch has hailed as "a groundbreaking victory for citizens, farmers, NGOs, and indepen-

dent scientists." But Indian scientists have warned that the moratorium could set back indigenous efforts to develop other GM crops. "We have no less than 10 GM products to get into the regulatory system for trials—including brinjal, chickpea, sorghum, sugar cane, castor, rice and potato—that took 15 years to develop and a lot of money," a project director with the Indian Council of Agricultural Research was quoted as saying. "All scientists associated with these projects are disillusioned." *See BBC News, The Hindu Times* and *Nature,* February 9, 2010; *GM Weekly Watch Newsletter,* February 11, 2010.

OEHHA Seeks Comment on Whether to List Bisphenol A as Reproductive Toxicant

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has **issued** a request for public comment on its determination that bisphenol A (BPA) "appears to meet the criteria for listing as known to the State to cause reproductive toxicity under Proposition 65, based on findings of the National Toxicology Program's Center for the Evaluation of Risks to Human Reproduction (NTP-CERHR, 2008)." The notice states that BPA is a "[c]omponent in polycarbonate plastic used in water and baby bottles, present in epoxy resins used to line food cans and in dental sealants."

Comments must be submitted by April 13, 2010. If requested by March 12, a public forum will be scheduled for the public to "discuss the scientific data and other relevant information on whether the chemical meets the criteria for listing in the regulations." If OEHHA determines, after reviewing the comments, that BPA should be listed, the agency will publish a Notice of Intent to List and provide an opportunity for additional public comment. Those who manufacture and sell products containing substances listed under Proposition 65 must provide warnings to the public that the substances are known to the state to cause cancer or reproductive harm. Failure to do so generally allows private citizens and the attorney general to bring actions for violations of the law.

LITIGATION

Court Refuses to Allow Vanilla Maker's Cross Claims in Mercury-Contamination Insurance Coverage Litigation

The Third Circuit Court of Appeals has upheld a district court's decision not to allow a flavoring company to file cross claims in litigation between an insurance carrier and the company that supplied vanilla beans tainted with mercury to the flavoring company. **The Travelers Ins. Co. v. Dammann & Co., Inc., No. 09-1225 (3d Cir., decided February 5, 2010)**. The flavoring company sought to hold the vanilla bean supplier liable under contract, tort and indemnification theories, and the district court held that the proposed cross claims were time-barred or failed to state a claim. The Third Circuit agreed.

The flavoring company's request to file cross claims occurred more than four years after it received the vanilla beans, and its breach of warranty claims were thus untimely under the Uniform Commercial Code. Because New Jersey law applied to the case, the appeals court then discussed at length why it believed New Jersey

courts would apply the economic loss doctrine to preclude liability for the products liability claims the flavoring company asserted to recover for scrapping contaminated finished flavoring products, claims from customers who bought the products, testing costs, plant cleaning costs, internal labor and administrative costs, and lost profits. According to the Third Circuit, these are the types of direct and consequential damages generally recoverable in contract. Thus, the court ruled that New Jersey's six-year statute of limitations for products liability claims would not apply to make the flavoring company's claims timely.

The court also determined that indemnification is available to obtain recovery from the indemnitor for liability incurred to a third party only. Because the flavoring company was seeking recovery for damages to itself, the court found that its express indemnification claim was also governed by contract principles and was thus time-barred. Because the flavoring company "failed to allege that it had incurred 'any "legal obligation" under which it was compelled to pay the claimed money to its customers and distributors' and failed to point to any 'settlement agreement, court order, etc. under which it was obligated to make these payments,'" the court further found that it had failed to state a claim for implied indemnification.

Jury Awards Arkansas and Mississippi Rice Farmers $1.5 Million for GM Contamination Losses

The second bellwether trial in some 6,000 cases filed by rice farmers alleging that contamination of their conventional crops with genetically modified (GM) rice led to a drop in the market price for rice has reportedly ended with a $1.5 million award to the plaintiffs. *In re: Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., verdict rendered February 5, 2010). While the jury did not award punitive damages, the company expressed its disappointment with the ruling and said in a statement, "Bayer CropScience maintains that it acted responsibly and appropriately at all times" in handling its GM rice. The company intends to "vigorously" defend itself in all future related trials.

The dispute followed the U.S. Department of Agriculture's announcement in late 2006 that the GM strain, which was not then approved for human consumption, had been detected in the U.S. rice harvest. Bayer had apparently been testing the GM crop at a Louisiana State University-run facility in Louisiana. European markets immediately imposed restrictions on U.S. long-grain rice imports, which led to a dramatic drop in the demand for and price of U.S. rice. According to news sources, the market has still not recovered, as European importers have turned to producers in Thailand and India to supply European markets. *See The Associated Press*, February 6, 2010; *Product Liability Law 360*, February 8, 2010.

Pet Food Ingredient Importers Sentenced in Kansas City Federal Court

A U.S. magistrate judge has sentenced to three years of probation the couple who owned the company that imported melamine-tainted pet food ingredients into the United States from China. Sally Qing Miller, a Chinese national, and her husband, Stephen Miller, were also barred from importing pet food ingredients and were each ordered to pay a $5,000 fine. According to a press release, no further restitution was required "in light of a $24 million settlement in a related civil suit reached in the

U.S. District court for the District of New Jersey." Their company, ChemNutra, Inc. was ordered to pay a $25,000 fine. The Food and Drug Administration has reportedly estimated that 1,950 cats and 2,200 dogs died after eating the contaminated food in 2007.

Sally Miller was quoted as saying, "I'm really, really sorry this happened. I hope through this tragic, unfortunate event, the whole industry can learn from us, from the mistake." While the evidence did not show that she and her husband knew the tainted ingredients would kill animals, they did not apparently exercise due diligence to ensure the product was safe. Counsel for the Millers reportedly indicated that ChemNutra's business activities have ceased, but that the couple have started a new import business. *See The Kansas City Star, Office of the U.S. Attorney, W.D. Mo., News Release*, February 5, 2010.

CVS Targeted in Nationwide Class Action Alleging Sale of OTC Drugs and Foods Past Expiration Dates

A putative class action has been filed in a federal court in Louisiana against CVS Caremark Corp., alleging that the company "has a long history of selling out-of-date medications, baby formula, and food." *Cooper v. CVS Caremark Corp.*, No. 2:10-cv-00331 (U.S. Dist. Ct., E.D. La., filed February 5, 2010). The named plaintiff, who claims she purchased an expired over-the-counter (OTC) medication from a CVS store, seeks to certify a nationwide class of persons who likewise purchased expired products and asks the court for injunctive relief and compensatory damages. The complaint alleges that the expired OTC medications are "adulterated" under Food and Drug Administration guidelines and that their sale violates the Food, Drug, and Cosmetic Act. The plaintiff also claims that expired OTC drugs, food and baby formula "are unmerchantable and unfit for ordinary use."

OTHER DEVELOPMENTS

Food Safety Advocates Call for Follow Up in *E. Coli* Testing of Ground Beef Constituents

According to a news source, U.S. Department of Agriculture (USDA) inspectors, who test the meat and trimmings used in ground beef, deal with about 60 positive *E. coli* tests annually by taking steps to ensure that the tested meat does not reach consumers, but they apparently fail to conduct a full inspection to try to pinpoint the source of contamination or locate additional meat that may be contaminated. Food safety and consumer advocates, such as Food & Water Watch, have reportedly called on the USDA to adopt a policy change that would require deeper investigations when positive results turn up in routine investigations. They contend that this could indicate a breakdown in the food safety system and consumers are at risk because other tainted meat could remain in the food chain.

A spokesperson for the USDA's Food Safety and Inspection Service (FSIS) was quoted as saying, "The risk profile of these positives is far lower than a known outbreak," which requires a more intense investigation to deal with a potentially spreading illness. FSIS is reportedly reviewing all aspects of food safety regulations

and noted in a statement, "Increased testing of ground beef is one such option, but testing alone will not ensure the safety of products in the marketplace. Both FSIS and industry testing programs are designed to detect contamination as effectively as possible, but the nature of pathogens makes it impossible to detect with complete certainty." Canada apparently takes a similar approach to routine inspections, but it is also reviewing how it handles ground beef production.

U.S. Representative Rosa DeLauro (D-Conn.) agreed that more investigation is warranted after a routine positive test, calling it an "important preventive measure" that should be immediately implemented. "Any testing and trace-back regimen that has the potential of reducing food-borne illnesses should not be dismissed by USDA," she said. An American Meat Institute spokesperson reportedly disagreed, contending that good reasons support treating a positive routine test differently than an outbreak, but that processors should retain control of meat until test results are known. Apparently, processors often release meat for distribution before learning the results of testing. The institute commented to USDA that recalls could be reduced if distribution awaits test results. *See Chicago Tribune*, February 9, 2010.

MEDIA COVERAGE

Tom Hamburger & Kim Geiger, "Beverage industry douses tax on soft drinks," *Houston Chronicle,* February 8, 2010

According to this article, pressure from the beverage industry has made policymakers think twice about imposing a tax on sugary beverages, which some have viewed as a way to address both revenue deficits and obesity. The reporters discuss how Congress has handled the issue since the Obama administration indicated an interest in the tax in 2009 and public health advocates testified before a Senate committee urging support for the proposal. They note how a coalition of business interests "operating under the name Americans Against Food Taxes," quickly mobilized an array of organizations, including the National Hispanic Medical Association, to lobby against the tax.

Kelly Brownell, director of Yale University's Rudd Center on Food Policy and Obesity, apparently responded to the involvement of health groups in the industry initiative by saying, "It's all about payback. Public health advocates ran into the same phenomena when seeking to increase taxes on tobacco." The article reports that while the Hispanic association received beverage industry money, its director contends that it had nothing to do with the decision to join opposition groups that were concerned about the proposal's effect on minority communities.

The article also notes that the industry has funded peer-reviewed research that disputes a link between soft drinks and obesity and has aggressively criticized findings by other scientists making that link. The American Beverage Association has reportedly targeted Brownell for criticism, claiming that he and others are acting as advocates; an association spokesperson said, "They pick and choose the facts that support their view and they attack anyone who disagrees. It's scientific McCarthyism." The authors suggest that the idea of a tax on soft drinks is no longer viable in Congress.

William Neuman, "One Bowl = 2 Servings. F.D.A. May Fix That.," *The New York Times,* February 6, 2010

This article discusses the Food and Drug Administration's (FDA's) renewed interest in revising its approach to food serving sizes as front-of-package labeling gains traction in the marketplace. According to *Times* writer William Neuman, "The push to re-evaluate serving size comes as the F.D.A. is considering ways to better convey nutrition facts to hurried consumers, in particular by posting key information on the front of packages. Officials say such labeling will be voluntary, but the agency must set rules to prevent companies from highlighting the good things about their products, like a lack of *trans* fats, while ignoring the bad, like a surfeit of unhealthy saturated fats."

Created in the 1990s to help shoppers "compare the nutritional values of different products," serving sizes are based on eating habit surveys taken during the 1970s and 1980s. Neuman claims, however, that while many people "might eat two or three times" the serving size listed on the Nutrition Facts panel, they tend to focus solely on the calorie number when making food purchases. "On today's food packages, many of the serving sizes puzzle even the experts," writes Neuman, predicting that the Obama administration will encourage FDA to bring serving sizes "for foods like chips, cookies, breakfast cereals and ice cream into line with how Americans actually eat."

"Still," Neuman concedes, "the solution is not as simple as merely bumping up the standard portions for some foods. Officials worry that could send the wrong message. If the serving size for cookies rose to two ounces, from one ounce, for instance, some consumers might think the government was telling them it was fine to eat more."

SCIENTIFIC/TECHNICAL ITEMS

Study Alleges Link Between Soft Drink Consumption and Pancreatic Cancer

A recent study has allegedly linked soft drink consumption to an increased risk of developing pancreatic cancer. Mark Pereira, et al., "Soft Drink and Juice Consumption and Risk of Pancreatic Cancer: The Singapore Chinese Health Study," *Cancer Epidemiology, Biomarkers & Prevention,* February 2010. Using data from 60,524 participants enrolled in the Singapore Chinese Health Study, researchers determined that individuals who consumed more than two carbonated, sugar-sweetened beverages per week "experienced a statistically significant increased risk of pancreatic cancer… compared with individuals who did not consume soft drinks after adjustment for potential confounders." In addition, the study did not find a similar association for juice consumption. "The high levels of sugar in soft drinks may be increasing the level of insulin in the body, which we think contributes to pancreatic cancer cell growth," one author was quoted as saying.

Other scientists, however, have noted some limitations of the study, which was the first to examine the potential relationship between sugar-sweetened beverages and pancreatic cancer in Chinese men and women. "Although this study found a risk,

the finding was based on a relatively small number of cases and it remains unclear whether it is a causal association or not. Soft drink consumption in Singapore was associated with several other adverse health behaviors such as smoking and red meat intake, which we can't accurately control for," stated one researcher with the Yale School of Public Health.

The American Beverage Association (ABA) has also contested the findings, pointing to the many other factors, such as age, smoking and race, known by the National Cancer Institute to increase pancreatic cancer risk. "The authors are skipping several steps in trying to connect soft drinks with pancreatic cancer, including an allegation regarding an increase in insulin production," concluded ABA in a February 9, 2010, press statement. "This was reaffirmed by a 2008 study published in the *American Journal of Clinical Nutrition,* which found that consumption of added sugar or of sugar-sweetened foods and beverages is not associated with overall risk of pancreatic cancer." *See BusinessWeek, FoodNavigator-USA.com* and *Yahoo! News,* February 8, 2010.

Beer Is Good Source of Silicon for Bones, Says New Study

A recent study has reportedly "confirmed that beer is a very rich source of silicon," a dietary nutrient that increases bone mineral density. Troy Casey and Charles Bamforth, "Silicon in Beer and Brewing," *Journal of the Science of Food and Agriculture,* February 2010. According to researchers with the University of California's Department of Food Science and Technology, pale ales made from barley grist contained more silicon than non-alcoholic beers, light lagers and wheat beers, "likely because of the high levels of silica in the retained husk of barley." Of the commercial beers sampled, silicon content apparently ranged from 6.4 to 56.5 milligrams per liter. "During brewing the vast majority of the silicon remains with the spent grains; however, aggressive treatment during wort production in the brewhouse leads to increased extraction of silicon into wort and much of this survives into the beer," the study concludes. *See Reuters,* February 9, 2010.

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
San Francisco, California
+1-415-544-1900
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400