Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

National Food Plan to Target "Food Deserts"

U.S. Representative Nydia Velázquez (D-N.Y.) is reportedly poised to introduce legislation authored by U.S. Senator Kirsten Gillibrand (D-N.Y.) that would provide $1 billion in loans and grants to help build nearly 2,100 grocery stores in areas around the nation that lack access to "fresh, nutritious" food. The Healthy Food Financing Initiative would reportedly create an estimated 200,000 new jobs nationally, including an estimated 26,000 in New York City.

"Low-income communities face higher incidences of obesity and diabetes, and a big part of the problem is the lack of access to healthy foods," Velázquez was quoted as saying. "This initiative is about empowering families to make healthier food choices so they live longer." *See Press Release of Senator Kirsten Gillibrand,* April 12, 2010.

USDA IG Concerned about Monitoring of Drugs, Pesticides and Heavy Metal Residues in Meat

The U.S. Department of Agriculture's (USDA's) Office of Inspector General (IG) has released a report, which finds that the federal government's "national residue program is not accomplishing its mission of monitoring the food supply for harmful residues" of veterinary drugs, pesticides and heavy metals. According to the report, federal agencies have failed to establish thresholds for "dangerous substances" such as copper or dioxin, an omission that "has resulted in meat with these substances being distributed in commerce." The IG also found that USDA's Food Safety and Inspection Service (FSIS), which is responsible for the national residue program, "does not attempt to recall meat, even when its tests have confirmed the presence of veterinary drugs."

Among other matters, the report calls for (i) better coordination among FSIS, the Environmental Protection Agency and the Food and Drug Administration; (ii) an expansion of the substances these agencies test for; (iii) improvements to the methodology for sampling hazardous residues; (iv) the development of more efficient ways to approve newer methods of testing for drug residues; (v) the establishment

of tolerances for additional potentially harmful substances; and (vi) the development of plans, policies and procedures to address the problem in slaughter facilities, ranging from the implementation of appropriate controls to preventing the release of potentially adulterated products before residue tests are confirmed.

FSIS Updates List of Suitable Ingredients for Meat, Poultry and Egg Products

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) has issued a **directive** that revises its list of suitable ingredients that can used in the production of meat, poultry and egg products. FSIS will update the directive quarterly by issuing revisions as opposed to amendments. FSIS has added hypobromous acid and oat filler as suitable ingredients for certain processes.

Hyporomous acid, which can kill the cells of many pathogens, may be used in water or ice under specific conditions to process meat and poultry products. Oat filler can be used in various meat products where binders are permitted and in whole muscle meat products "not to exceed 3.5 percent of the product formulation." Oat filler must be listed as an "isolated oat product" or "modified oat product" in the ingredients statement and whole muscle meat products must be descriptively labeled.

National Organic Standards Board Solicits Nominations to Fill Five Vacancies

The U.S. Department of Agriculture's (USDA's) National Organic Standards Board (NOSB) has **requested** nominations for five upcoming vacancies.

The 15-member board is charged with developing and recommending a proposed National List of Allowed and Prohibited Substances. NOSB is seeking two organic producers, two "consumer/public interest" individuals and a USDA-accredited certifying agent to serve five-year terms. Written nominations must be postmarked on or before July 17, 2010. *See Federal Register*, March 22, 2010.

EFSA Establishes Acceptable Daily Intake for Steviol Glycosides

The European Food Safety Authority's (EFSA's) Panel on Food Additives and Nutrient Sources has **assessed** "the safety of steviol glycosides, sweeteners extracted from plant leaves, and established an Acceptable Daily Intake [ADI] for their safe use." According to EFSA, toxicological testing showed that the substances, such as stevioside and rebaudioside, "are not genotoxic, nor carcinogenic, or linked to any adverse effects on the reproductive human system or for the developing child."

The panel has set an ADI for steviol glycosides of 4mg per kg body weight per day, a level "consistent" with the joint recommendation of the U.N. Food and Agriculture Organization and World Health Organization. As the panel noted, however, "this ADI could be exceeded by both adults and children if these sweeteners are used at the maximum level proposed by the applicants" seeking authorization to market the sweetener. In light of this assessment, the European Commission must now consider whether to authorize these substances "for their purposed use… in sugar free or reduced energy foods such as certain flavored drinks, confectionery with no added sugar or energy reduced soups." *See EFSA News,* April 14, 2010.

SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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Romania Considers Tax on Fast Food

The Romanian government has reportedly proposed a tax on fast foods high in fat, sugar and salt. Backed by the European Public Health Alliance, the health ministry has sought to create the world's most comprehensive tax scheme that would include, not just sugary foods and beverages, but savory fare as well. Proponents have claimed that the measure would help combat rising obesity rates in the Balkan nation while simultaneously raising £860 million for government coffers.

But legislators have apparently struggled to define fast food as they consider more than 40,000 products eligible for the levy. They have already exempted popular street fare like pizza and kebabs on the ground that these items are often made from fresh ingredients, drawing further criticism from detractors who have questioned the proposal's uneven application. In addition, the World Health Organization has noted that the plan penalizes vulnerable populations in a country where the average worker spends approximately one-half of his total income on food.

"It must be a tax that really does tax [certain foods] so as to encourage people to eat more healthily, for instance, to consume more vegetables. People in Romania don't care very much about what is good for them and what is not and this tax could be a good way of educating them to do so – but only if it is done properly," one nutritionist told *The Lancet*. "But it will not be good if it is just a tax on certain types of fast foods or outlets and ends up being just a way to raise money for the state and not a method of making people's eating habits more healthy." *See The Lancet,* March 27, 2010; *The NZ Herald,* April 3, 2010.

New York Bills Address *Trans* Fats and HFCS in Foods Sold Statewide

Assembly members have introduced a bill (A10665) similar to legislation in effect in New York City, that would restrict the use of artificial *trans* fats in foods sold in restaurants and retail food stores. Sponsored by Assemblymen Felix Ortiz (D – Brooklyn) and Richard Gottfried (D – Manhattan), the *trans* fat bill would not allow the use or sale of foods containing trans fat unless sold in the manufacturer's original sealed and properly labeled package. The measure would take effect as to "oils, shortenings and margarines containing artificial *trans* fat that are used for frying or in spreads," 180 days after the bill is passed, and would be effective December 31, 2011, as to "oils or shortenings used for deep frying of yeast dough or cake batter and all other foods containing artificial *trans* fat." The law would not apply to products containing less than 0.5 grams of *trans* fats per serving.

Sponsored by Assemblywoman Barbara Clark (D-Queens), another recently introduced bill (A10574) would prohibit the use or sale of foods containing high fructose corn syrup (HFCS) in restaurants and retail food stores and forbid its use in the preparation of any food product sold or served in restaurants.

The Center for Consumer Freedom has criticized the bill, calling it "full of gooey thinking." According to an April 14, 2010, item on its Web site: "It's hard to tell which proposal is crazier—this, or a statewide salt ban proposed by another Assemblyman."

Liverpool Weighs Ban on Word "Obesity"

The Liverpool City Council is reportedly considering a ban on the word "obesity" after the Liverpool Schools Parliament, a student body organization, expressed concern that some could find the term offensive. Although some experts have apparently disputed this contention, suggesting that the word adequately reflects the severity of the health condition, students argue that the stigma "would turn people off, particularly young people," as one youth representative told the press. The proposal would require the council to use the description "unhealthy weight" in all literature geared toward children. "We can't change government terminology or clinician terminology, but we can look at changing how we communicate weight issues in council reports and in our communications with children," a council spokesperson was quoted as saying. *See BBC News,* April 12, 2010; *The Telegraph,* April 13, 2010.

Meanwhile, a South Yorkshire community has also attracted considerable media attention for its aborted plan to burn a "40 [foot] effigy of a fat boy in tight clothes sitting in an overflowing ashtray opposite a table full of cakes of burgers," according to an April 15, 2010, column in the *Guardian*. The town of Barnsley apparently wanted to conduct the ceremony, dubbed "Bye Bye Burger Boy," as the centerpiece of its upcoming wellness festival, but scrapped the idea after health workers feared the display might "humiliate" some attendees. "We recognize there is a real health issue regarding obesity in Barnsley and we need to continue to find ways to address it, but this is not the way to do it and, together with NHS Barnsley, we apologize for any offense that has been caused," stated the city council.

LITIGATION

DOJ Antitrust Complaint Against Dean Foods Survives Dismissal Motion

A federal court in Wisconsin has reportedly denied the motion to dismiss filed by Dean Foods Co. in antitrust litigation brought by the U.S. Department of Justice (DOJ) and the attorneys general of three states, challenging the company's acquisition of a milk producer in 2009. *U.S. v. Dean Foods Co.*, No. 2:10-cv-00059 (U.S. Dist. Ct., E.D. Wisc., Milwaukee Div., filed January 2010). More details about the case can be found in issue 335 of this Update. While the court's ruling rejects Dean Foods' claim that the complaint lacked sufficient details, the court expressed some concerns about the government's pleading, criticizing "structural issues" and "a lack of specificity in content."

A Dean Foods spokesperson was quoted as saying," We believe our acquisition of Foremost Farms is promoting competition in the region and has already produced benefits for consumers and farmers. We continue to believe that the government's complaint against us is unfounded." Noting the court's "recognition of the 'shortcomings' of the plaintiffs' pleadings, which the Court called 'not well structured,'" the company indicated that it was looking forward to the discovery process. *See FoodNavigator-USA.com*, April 9, 2010.

Sodium Content Claims Against Denny's Dismissed

A federal court in Illinois has dismissed putative class claims alleging that Denny's Corp. fails to inform consumers that some of its menu items contain excessive levels of salt. *Ciszewski v. Denny's Corp.*, No. 09 C 5355 (U.S. Dist. Ct., N.D. Ill., E. Div., decided April 7, 2010). Additional information about the case can be found in issue 318 of this Update.

The court determined that the named plaintiff failed to sufficiently plead a violation of the state's consumer fraud statute because he failed to identify any particular deceptive communication generated by Denny's. Indeed, plaintiff made clear that his claim was based on alleged deceptive omissions. Because Illinois law requires "some communication from the defendant, either a communication containing a deceptive misrepresentation or one with a deceptive omission," the court ruled that he had "failed to plead the circumstances constituting the fraud with sufficient particularity." With the fraud claim dismissed, the court also dismissed derivative unjust enrichment and accounting claims.

To support his implied contract claim, the plaintiff contended that the company's intent to serve meals safe to eat is implicit in its offer to sell meals, because "consumers reasonably expect restaurants to sell meals that are safe for human consumption. [Plaintiff] contends that by providing meals that contain unsafe amounts of sodium, Denny's breached their implied contract." According to the court, the plaintiff did not allege "that any given Denny's meal is unsafe in and of itself. To put it another way, he does not allege that exceeding the [Center for Disease Control]-recommended maximum for a day, or several days, in a single meal is by itself unsafe. Thus assuming for purposes of discussion that a restaurant impliedly contracts with its customers that the food it sells is safe for consumption, he has not adequately alleged a breach of that contract."

Had the plaintiff claimed that Denny's impliedly contracted to sell "only meals that contain less than a particular amount of sodium," the court may have found this claim sufficiently alleged. As he did not, the court dismissed the claim, thus disposing of the entire case, but gave the plaintiff until April 27, 2010, to file an amended complaint stating "one or more viable claims." Failing that, the court will enter a final judgment of dismissal with prejudice.

Court Dismisses Litigation Seeking Cancer Warning Label on Hot Dogs

According to news sources, a federal court in New Jersey has dismissed putative class claims filed by a vegan advocacy organization on behalf of state residents alleging consumer fraud against companies that sell hot dogs and processed meats. The Cancer Project, identified as an affiliate of the Physicians Committee for Responsible Medicine (PCRM), had asked the court to order companies such as Nathan's Famous, Kraft Foods/Oscar Mayer, Sara Lee, ConAgra Foods, and Marathon Enterprises, to warn consumers that "Consuming hot dogs and other processed meats increases the risk of cancer." The case was filed in a state court in July 2009; more information is available in issue 312 of this Update.

A spokesperson for the American Meat Institute praised the court's action and reportedly said, "Meat products are regulated and inspected by the U.S. Department of Agriculture and bear the federal government's seal of inspection, showing they are wholesome and nutritious. The lawsuit argued for warning labels on our products, but warning labels would be more appropriately placed on PCRM's Web sites and press releases to alert consumers to that organization's true anti-meat agenda." He also said that "credible health sources . . . will tell you that a healthy diet can include processed meats." *See American Meat Institute Press Release*, April 9, 2010; *FoodNavigator-USA.com*, April 13, 2010.

RICO Claims Against Applebee's and Weight Watchers Dismissed

A federal court in Kansas has dismissed a putative class action filed against Applebee's International, Inc. and Weight Watchers International, Inc., finding that the claims raised under the Racketeer Influenced and Corrupt Organizations Act (RICO) were not sufficiently alleged. *Shepard v. Applebee's Int'l, Inc.*, No. 08-2416 (U.S. Dist. Ct., D. Kan., decided April 7, 2010). Details about the litigation, filed by a different named plaintiff, appear in issue 274 of this Update. The complaint alleged that the companies misrepresent the fat and calorie information in the dishes on the restaurateur's "healthy" Weight Watchers® menu.

The court had previously dismissed the plaintiffs' state law claims as preempted by the Nutrition Labeling and Education Act, and sustained in part a motion to dismiss their RICO claims. Thereafter, defendants filed a motion for judgment on the pleadings as to the remaining RICO claim, arguing that the plaintiffs failed to allege "racketeering activity" because they did not sufficiently allege predicate acts of mail and wire fraud. The only fraud claims that were alleged had already been ruled preempted, thus, the court agreed with defendants that predicate acts under RICO had not been sufficiently alleged. The court overruled the plaintiffs' motion for class certification as moot.

Eleventh Circuit Reinstates RICO Claims Against Steak House; Putative Class Alleges Illegal Workers Were Hired

The Eleventh Circuit Court of Appeals has determined that Ruth's Chris Steakhouse employees in Alabama adequately alleged that their employers "encouraged or induced an alien to reside in the United States, and either knew or recklessly disregarded the fact that alien's residence here was illegal," thus stating the predicate act needed to bring a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). ***Edwards v. Prime, Inc.*, No. 09-11699 (11th Cir., decided April 9, 2010)**. So ruling, the court reinstated the plaintiffs' RICO claim against the parent company; its Birmingham, Alabama, franchisee; and the franchise owner and operator. The court did not reverse trial court rulings dismissing wage-related claims and claims of discrimination or retaliation.

The plaintiffs alleged that the defendants knowingly hired and employed illegal aliens, allowing them to work under the names of former Ruth's Chris employees who were U.S. citizens and providing them with the former employees' Social Secu-

rity numbers. The defendants also allegedly "asked the illegal aliens employed in the restaurant whether they knew of any other illegal aliens who were interested in working there" and paid them in cash, preferring them over U.S. citizens. According to the complaint, the company gave its employees who were in the country illegally name tags showing names other than their own. The defendants argued that these allegations, that is, the prospect of working in a particular restaurant, did not provide any realistic incentive for staying in this country. "They insist that aliens could reside outside the United States and simply enter periodically as work is needed." The court responded by stating, "That argument borders on the frivolous," and cited case law indicating that the act of knowingly providing illegal aliens with Social Security numbers can "encourage or induce" them to reside in this country.

The court concluded, "The meat of the matter is that the amended complaint adequately pleads that the defendants encouraged or induced an alien to reside in the United States, and either knew or recklessly disregarded the fact that the alien's residence here was illegal, in violation of § 1324(a)(1)(A(iv). It thereby states a predicate act of racketeering. And because the amended complaint also alleges that the defendants did that 'far more times than two,' it adequately pleads the pattern of racketeering activity necessary to state a RICO claim." The court dismissed this interlocutory appeal for lack of jurisdiction as to issues other than those considered.

Insurance Companies Seek Contribution from Other Insurers in Defending Diacetyl Exposure Lawsuits

A group of insurance companies has sued another group of insurers, seeking a declaration that the defendants are also required to indemnify and defend flavoring companies that have been named as defendants in lawsuits by former microwave popcorn- and candy-plant employees alleging injuries from exposure to diacetyl. *Arrowood Indem. Co. v. Atl. Mut. Ins. Co.*, No. 10600881 (N.Y. Sup. Ct., N.Y. County, filed April 7, 2010). While the plaintiffs anticipate that additional diacetyl exposure lawsuits will be filed, they allege that they have been defending, subject to a reservation of rights, seven cases already filed in Illinois, Missouri, Montana, and Ohio. The plaintiffs contend that the defendants have either wrongfully denied any coverage obligations or refused to respond to requests for contribution to the litigation defense or indemnity costs. Seeking declaratory relief, the plaintiffs also ask for damages, attorney's fees, interest, and costs.

Poultry Plant Managers and HR Personnel Sued for Alleged Hiring of Illegal Immigrants

A putative class action has been filed against individual plant managers and human resources personnel responsible for hiring employees at 16 Perdue Farms, Inc. facilities in Alabama, Georgia and Tennessee, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) in the hiring of illegal immigrants. *Walters v. McMahen*, No. 1:10-cv-257 (U.S. Dist. Ct., M.D. Ala., S. Div., filed March 22, 2010). The named plaintiffs seek to represent a class of legally employed workers whose wages were allegedly depressed because of the illegal scheme to hire at

"extremely low wages" hundreds of employees who were in this country illegally. The plaintiffs also seek treble damages, preliminary and permanent injunctions, attorney's fees, and costs.

Among other matters, the plaintiffs allege that the illegal hiring scheme consisted of (i) "hiring workers who have previously been employed at Perdue under different identities"; (ii) hiring workers known to be using false identity documents; (iii) "hiring workers who cannot speak English while claiming to be U.S. citizens"; (iv) "falsely attesting under penalty of perjury on I-9 Forms issued by the U.S. Government that an employee's identification document(s) appears genuine and relates to the person tendering them"; and (v) coaching illegal immigrants when hired to claim a high number of dependents to reduce the tax withholding. The plaintiffs also allege that the defendants "tip off" the illegal employees before government raids to ensure they will not be arrested, stating "former Perdue employees have explained that on days when there are visits by the government or rumors of such visits/raids, the Perdue Facilities are noticeably emptier and many production lines are unable to run."

New Alien Tort Claims Act Complaint Filed Against Chiquita

More than 200 relatives of Colombians allegedly killed or "disappeared" by members of an organization designated by the United States as a "Global Terrorist" in 2001 have filed a lawsuit under the Alien Tort Claims Act (ATCA) against Chiquita Brands International, Inc., alleging that the company's illegal financial support of the organization was responsible for their injuries. *Montes v. Chiquita Brands Int'l, Inc.*, No. 0:10-cv-60573 (U.S. Dist. Ct., S.D. Fla., filed April 14, 2010). Represented by Boies, Schiller & Flexner LLP, the plaintiffs bring the same types of claims that have been raised in other ATCA lawsuits filed against the company, which pleaded guilty to making the illegal payments to purportedly protect its banana plantation operations. Additional information about these cases can be found in issue 342 of this Update. The plaintiffs here, identified by name, seek compensatory and punitive damages.

Arkansas Jury Awards Rice Farmers $48 Million in GM Contamination Litigation

After less than two hours of deliberation, an Arkansas jury has reportedly awarded 12 rice farmers nearly $48 million in compensatory and punitive damages for the 2006 contamination of conventional rice stocks with a genetically modified (GM) strain. The farmers alleged that Europe and Japan stopped importing U.S. rice after the contamination became known, causing a precipitous drop in the price for their crops. Most of the award against Bayer CropScience was punitive; litigation against the company is pending in a number of other states. This jury verdict, reached on April 15, 2010, tops a $1 million award rendered against the company by another Alabama jury in March. Information about that verdict can be found in issue 341 of this Update. *See Associated Press*, April 15, 2010.

OTHER DEVELOPMENTS

IOM Announces Briefing to Unveil Report on Salt Reduction Strategies

The Institute of Medicine (IOM) has **announced** an April 21, 2010, briefing to release the findings of its Strategies to Reduce Sodium Intake Committee, which investigated various means "that could be employed to reduce dietary sodium intake to levels recommended by the Dietary Guidelines for Americans." To be held at the National Press Club in Washington, D.C., the 10 a.m. briefing will also include a live audio Webcast.

The IOM committee includes experts associated with the Culinary Institute of America at Greystone; Dana-Farber Cancer Institute; Georgetown University School of Medicine; Kraft Foods; Johns Hopkins Bloomberg School of Public Health; Mathematic Policy Research, Inc.; Monell Chemical Senses Center; National Institutes of Health; New York City Department of Health and Mental Hygiene; Oklahoma State University; University of California, Hastings College of Law; University of Cincinnati; and RTI International. Its forthcoming report "may address a range of focal points including but not limited to (i) actions by food manufacturers such as new product development and food reformulation, (ii) actions at the government level such as special initiatives and regulatory or legislative options, and (iii) actions by public health professionals and consumer educators." In addition, "Attention will be given to fostering innovation and, as appropriate, exploring public-private partnerships and other creative solutions."

Meanwhile, New York University Professor Marion Nestle has drawn attention to the "long-awaited" report in an April 14 *Food Politics* blog post, noting that "[t]he great majority, perhaps 80%, of the salt in the U.S. diets comes from processed and pre-prepared foods." As Nestle opines, "If salt is to be lowered, the processed food and restaurant industries must do it. Just about everyone agrees that salt reduction has to occur gradually and across the board."

RWJ Foundation Provides Grant to Public Health Law Center; Former Tobacco Focus Expanded to Include Obesity-Related Issues

The Robert Wood Johnson Foundation has awarded a grant to the Public Health Law Center, located on the campus of William Mitchell College of Law in St. Paul, Minnesota, "to develop a network of experts and to provide legal technical assistance, analysis, coordination, and training to public health professionals, lawyers, and health advocacy organizations across the country." The center, which has expanded its tobacco-control focus to include "other health priorities, including healthy eating, obesity prevention, worker wellness, and legal training for non-attorney health professionals," has launched a new **Web site**. The site includes links to scholarly articles, information about current events and upcoming symposiums, and a public health blog.

Among the publications recently released are "**Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption**," and "**Stumped at the Supermarket: Making Sense of Nutrition Rating Systems**." The first article,

which acknowledges the guidance and assistance of anti-tobacco attorney Richard Daynard, concludes that "a significant tax on sugar-sweetened beverages could have the desired public health effect of reducing consumption of high-calorie and low-nutrition beverages. The food and beverage industry is prepared to challenge tax initiatives and many of the same legal policy issues seen in the tobacco control movement, including discounting, are likely to arise." This article was co-authored by Patricia Davidson, a senior staff attorney for the Public Health Advocacy Institute, which conducted a number of conferences throughout the 2000s to bring public health officials, consumer advocates and litigators together to address obesity issues.

Among those consulting with the center is attorney Mark Pertschuk, who is identified as "the past President and Executive Director of Americans for Nonsmokers' Rights and the American Nonsmokers' Rights Foundation in Berkeley, California (1986 – 2007). From 1987 to 1990, [he] planned and managed the grassroots campaign to ban smoking on commercial airline flights in the United States." *See William Mitchell College of Law, Law School News*, April 8, 2010.

NRC Finds Farmers Reap Economic and Environmental Benefits from GE Crops

The National Research Council (NRC) has published a **report** finding that U.S. farmers who grow genetically engineered (GE) crops "are realizing substantial economic and environmental benefits – such as lower production costs, fewer pest problems, reduced use of pesticides, and better yields – compared with conventional crops." The report cautions, however, that farmers "need to adopt better management practices to ensure that beneficial environmental effects of GE crops continue," according to an April 13, 2010, NRC press release.

Billed as the "first comprehensive assessment of the effects of the GE crop-revolution on farm-level sustainability in terms of environmental, economic and social impacts," the report notes that GE crops constitute more than 80 percent of soybeans, corn and cotton grown in the United States. It ranks "improvements in water quality" as the top environmental benefit of GE crops, claiming that a reduction in insecticide and pesticide use has led to an uptick in conservation tillage, "which improves soil quality and water filtration and reduces erosion." In addition, "farmers who have adopted the use of GE crops have either lower production costs or higher yields, or sometimes both, due to more cost-effect weed and insect control and fewer losses from insect damage."

Despite these advantages, NRC advises farmers "not to rely exclusively on glyphosate," a common herbicide, and "to incorporate a range of weed management practices." As the council observes, "at least nine species of weeds in the United States have evolved resistance to glyphosate..., largely because of repeated exposure." The report urges federal and state agencies, industry and other stakeholders to collaborate in documenting "weed-resistance problems" and developing "cost-effective resistance-management programs."

It also backs further research to track and analyze the effects of GE crops on water quality and to determine the economic impact of cross-contamination on organic or convention crops marketed as free of GE traits. Maintaining that farmers "have

not been adversely affected by the proprietary terms involved in patent-protected GE seeds," NRC registers the concern of some farmers that "consolidation of the U.S. seed market will make it harder to purchase conventional seeds or those that have only specific GE traits." As a result, the report recommends that public and private institutions be made eligible "for government support to develop GE crops that can deliver valuable public goods but have insufficient market potential to justify private investment."

Meanwhile, an April 14 *Reuters* special report questions the ability of the U.S. regulatory regime to effectively monitor biotech agriculture. Titled "Are regulators dropping the ball on biocrops?," the article cites independent and U.S. Department of Agriculture (USDA) researchers who have raised flags about the lack of a review process. "A common complaint is that the U.S. government conducts no independent testing of these biotech crops before they are approved, and does little to track their consequences after," states the article, which faults U.S. regulators for attempting to retrofit the existing apparatus rather than create new rules for the unique challenges of biotechnology. The purported result is a system "that treats a genetically modified fish like a drug subject to Federal Drug Administration [sic] oversight, and a herbicide-tolerant corn seed as a potential 'pest'" that falls under USDA purview.

Highlighting a string of recent court cases, the article concedes that this current approval process is "costly and time-consuming for biotech crop developers." Nevertheless, USDA's attempts to overhaul the system have reportedly stalled for more than six years "amid heavy lobbying from corporate interests and consumer and environmental groups." In addition, the Environmental Protection Agency (EPA) and Food and Drug Administration (FDA) are seeking to make oversight activities more transparent but have drawn criticism for putting the burden of proof on developers of technology. "There is no question that our rules and regulations have to be modernized," USDA Secretary Tom Vilsack told *Reuters*. "The more information you find out, the more you have to look at your regulations to make sure they are doing what they have to do. There are some issues we are still grappling with."

Possible *Salmonella* Contamination of HVP Leads to Canine Joint Supplement Recall

A Nebraska-based manufacturer has voluntarily **recalled** a canine joint formula due to possible *Salmonella* contamination linked to hydrolyzed vegetable protein (HVP). According to the April 13, 2010, notice, Response Products has recalled a meat-flavored supplement for dogs because it contained components supplied by Basic Food Flavors, Inc., the company at the center of a nationwide HVP recall. Cetyl M™ for Dogs was "distributed in either a 120-count bottle (shipped between January 8, 2010 and April 2, 2010) or a 360-count bottle (shipped between February 11, 2010 and April 2, 2010)." While no lots have tested positive for *Salmonella* and no human or animal illnesses associated with use of the supplement, Response Products has warned that "People who handle dry pet food and/or treats can become infected with *Salmonella,* especially if they have not thoroughly washed their hands after having contact with the chews or any surfaces exposed to these products."

MEDIA COVERAGE

Scientific Battle Brewing over BPA Safety

The Independent has reported on an escalating dispute in the scientific community over the safety of bisphenol A (BPA), tracing the brouhaha to a three-year study commissioned by the Environmental Protection Agency (EPA) that found no evidence of BPA adversely affecting laboratory rats exposed to high doses of the ubiquitous plasticizer. In an April 13, 2010, article, science editor Steve Connor observes that *Toxicological Sciences,* which published the original work online in 2009, has become the battleground of choice for scientists arguing the merits of the research. Additional details about the EPA study appear in issue 327 of this Update.

According to *The Independent,* University of Missouri-Columbia Professor Frederick vom Saal first attacked the results in a letter to the journal, claiming that EPA researchers "violated U.S. National Toxicology Program recommendations" by failing to establish "the sensitivity of the animal model to the class of chemical being tested." This allegation, however, immediately drew fire from Professor Richard Sharpe of the U.K. Medical Research Council's Center for Reproductive Biology. In the March edition of *Toxicological Sciences,* Sharpe defended the EPA findings as "unequivocal and robust." He also lambasted the scientific community at large for wasting "tens, probably hundreds of millions of dollars" by refusing to revise its initial opinion on BPA even after secondary studies have consistently found in favor of its safety. As Sharpe concluded, "They tell us that, *in vivo* in female rats, bisphenol A is an extremely weak estrogen—so weak that even at levels of exposure 4000-fold higher than the maximum exposure of humans in the general population there are no discernible adverse effects."

Meanwhile, lead study author Earl Gray has publicly described his methodology as the one recommended by regulatory agencies for testing potentially toxic substances. His team has drafted a rebuttal that was recently accepted by *Toxicological Sciences* for future publication and highlighted in the April 7 edition of *STATS,* a George Mason University blog, which has questioned whether BPA is destined to become the "new MMR" (the controversial measles, mumps and rubella vaccine). Both *STATS* and *The Independent* quote Gray as maintaining that the "'insensitive rat' argument has been used for almost a decade in some quarters to try to dismiss every well-conducted rat study that obtained negative results with BPA."

Tom Bartlett, "Step Away From the Coke Machine," *The Chronicle of Higher Education,* April 4, 2010

The Chronicle of Higher Education recently profiled Kelly Brownell, director of Yale University's Rudd Center for Food Policy and Obesity, and his decades-long advocacy of soft drink taxes, an idea that once attracted derision but today "doesn't seem so radical." *The Chronicle* notes "growing evidence of a link between price and consumption," citing recent reports that appear to lend credence to Brownell's crusade. Despite opposition from free market economists, the beverage industry and groups like the Center for Consumer Freedom, the proposal has purportedly gained traction in legislative circles, rippling outwards from cities and states to

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the upper echelons of federal government. Counted among these supporters is Thomas Frieden, who once co-authored a paper with Brownell and now directs the Centers for Disease Control and Prevention. Moreover, according to *The Chronicle,* "[t]he professor is aware that the renewed interest in his idea is, at least in part, prompted by the budget shortfalls in states and cities across the government. For cash-strapped governments, a new source of revenue that also appears to promote an altruistic goal may be nearly irresistible."

OFFICE LOCATIONS

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FOOD & BEVERAGE LITIGATION UPDATE

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.

SHB 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.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.