Shook, Hardy & Bacon L.L.P.

ISSUE 367 | OCTOBER 8, 2010

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FTC Proposes Revisions to Environmental Marketing Guides

The Federal Trade Commission (FTC) has determined that its "Green Guides," which "help marketers avoid making deceptive claims by outlining general principles that apply to all environmental marketing claims," should be retained and updated. Initially developed in 1992 and last revised in 1998, the guides also provide information about how "reasonable consumers are likely to interpret particular claims, how marketers can substantiate them, and how they can qualify those claims to avoid consumer deception."

The proposed changes include new guidance on the "use of product certifications and seals of approval, 'renewable energy' claims, 'renewable materials' claims, and 'carbon offset' claims." They do not address use of the terms "sustainable," "natural" and "organic." Public comments are requested by December 10, 2010.

FTC Chair Jon Leibowitz was quoted as saying, "In recent years, businesses have increasingly used 'green' marketing to capture consumers' attention and move Americans toward a more environmentally friendly future. But what companies think green claims mean and what consumers really understand are sometimes two different things. The proposed updates to the Green Guides will help businesses better align their product claims with consumer expectations."

Among other proposed revisions are warnings that marketers not label their products with general claims, such as "environmentally friendly" or "eco-friendly," because consumers apparently give these statements a broad interpretation. According to FTC, "Very few products, if any, have all the attributes consumers seem to perceive from such claims, making these claims nearly impossible to substantiate." The proposed revisions also advise product manufacturers to "provide specific information about the materials and energy used," when making claims about the use of "renewable materials" and "renewable energy."

Among the questions about which FTC is seeking comment are (i) "How should marketers qualify 'made with renewable materials' claims, if at all, to avoid deception?"; (ii) "Should the FTC provide guidance concerning how long consumers think it will take a liquid substance to completely degrade?"; and (iii) "How do consumers understand 'carbon offset' and 'carbon neutral' claims? Is there any evidence of

consumer confusion concerning the use of these claims?" FTC also proposes reorganizing and simplifying the guides to make them easier to use. *See FTC Press Release*, October 6, 2010.

FDA Announces Plan to Launch "Regulatory Science" Initiative

The Food and Drug Administration (FDA) has issued a report titled "Advancing Regulatory Science for Public Health," that outlines the agency's plan to develop new scientific and technological tools, standards and approaches to improve its ability to assess the safety, efficacy, quality, and performance of FDA-regulated products, including foods and tobacco. FDA expects to use President Barack Obama's (D) $25-million increased budget request for fiscal year 2011 to expand the initiative and "build additional partnerships with academia, industry and government around the country." According to a news source, FDA's budget has been frozen under a continuing resolution Congress passed before taking its latest recess.

A new office dedicated to regulatory science will be created, and the initiative's goals include protecting the food supply by focusing on "the development of more rapid and practical methods for detecting microbial pathogens in food and equipping FDA's labs to test multiple food samples for contaminants at once. In addition, FDA must enhance the scientific understanding of the causes of food-borne illness so that feasible interventions can be designed and implemented to effectively reduce risk." The report refers to other opportunities "to advance regulatory science to improve food safety," such as (i) "Developing effective tools and strategies for sampling, testing and analysis," (ii) "Tracking *Salmonella* in the food supply," (iii) "Preventing microbiological hazards," (iv) "Responding to food-borne illness," (v) "Controlling toxins," and (vi) "Monitoring antibiotic resistance in food-borne pathogens." FDA also hopes to safely reduce, refine or replace animal testing. *See The Associated Press*, October 6, 2010.

FDA Revises Qualified Health Claims for Selenium Dietary Supplements

According to counsel for a company that makes dietary supplements containing selenium, the Food and Drug Administration (FDA) has agreed to allow the company to make qualified health claims for the products that include brief disclaimers. The company will apparently be able to label its products with claims that selenium "may reduce the risk" of prostate, colon, bladder, and thyroid cancers as long as it includes the following: "Scientific evidence concerning this claim is inconclusive. Based on its review, FDA does not agree that selenium may reduce the risk of these cancers." The negotiations that led to the breakthrough reportedly followed a federal district court ruling in May that FDA violated First Amendment commercial speech standards by censoring specific qualified health claims for the company's products and requiring the use of a lengthy contradictory qualification. The parties are apparently continuing to discuss disagreements over the effect of selenium on other cancers. *See NutraIngredients-USA.com*, October 6, 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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Audit Standard for Biotech Compliance Program Available

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has published a notice announcing the availability of its biotechnology compliance assistance program **audit standard**. The document "will be used by participating regulated entities to develop and implement sound management practices, thus enhancing compliance with the regulatory requirements for field trials and movement of genetically engineered [GE] organisms in 7 CFR part 340." APHIS developed a voluntary quality management assistance program to help regulated entities improve their management of domestic GE organism research and development. The new audit standard "provides criteria for the development, implementation, and objective evaluation of the entity's [program]." *See Federal Register*, October 5, 2010.

U.S. Codex Delegates Prepare for Upcoming Meetings

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has **announced** an October 13, 2010, public meeting in College Park, Maryland, to provide information and receive public comments on draft U.S. positions to be discussed at the 32nd Session of the Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) on November 1-5 in Santiago, Chile. The meeting will address a discussion paper on the "Inclusion of New Part B for Underweight Children in the Standard for Processed Cereal-Based Foods for Infants and Young Children." Other agenda items will include (i) proposed revision of "Codex General Principles for the Addition of Essential Nutrients to Foods", (ii) proposed revision to the "Guidelines on Formulated Supplementary Foods for Older Infants and Young Children", and (iii) "Proposed Draft Nutrient Reference Values for Nutrients Associated with Risk of Diet-Related Noncommunicable Diseases for General Population." *See Federal Register,* October 1, 2010.

FSIS has also **announced** a November 2 public meeting in Washington, D.C., on draft U.S. positions to be discussed at the 42nd Session of the Codex Committee on Food Hygiene November 29 through December 3 in Kampala, Uganda. Agenda items will include a microbiological risk assessment progress report and information from the World Organization for Animal Health. Other agenda items will include (i) proposed draft guidelines for the control of *Campylobacter* and *Salmonella* in chicken meat; (ii) proposed draft guidelines on the "Application of General Principles of Food Hygiene to the Control of Viruses in Food"; (iii) proposed draft revision of the "Recommended International Code of Hygenic Practice for Collecting, Processing, and Marketing of Natural Mineral Waters"; and (iv) proposed draft revision of the "Principles for the Establishment and Application of Microbiological Criteria for Foods." *See Federal Register,* October 4, 2010.

New Partnership to Address Potential Nanotech-Related Safety Concerns

The National Institute for Occupational Safety and Health (NIOSH) and the National Science Foundation Center for High-rate Nanomanufacturing (CHN) have announced a partnership to help companies identify and address potential health and safety concerns related to nanotechnology. NIOSH and CHN—a collaboration of

the University of Massachusetts Lowell, Northeastern University and the University of New Hampshire—will provide onsite evaluations and recommend solutions to small- to medium-sized companies and research laboratories across the country.

"There is an intense demand from industry to evaluate nanomaterial exposures and develop appropriate control strategies, practices, guidelines and medical surveillance," stated CHN's manager of environmental health and safety in a September 22, 2010, NIOSH press release. "Our team has conducted innovative research on nanomaterial toxicology, exposure and control that will help companies develop strategies to protect workers from the potential health effects of nanomaterials, thus paving the way for the commercialization of nano products."

FAO/WHO to Hold Expert and Stakeholder Meetings on BPA

The Food and Agriculture Organization (FAO) and World Health Organization will **hold** expert and stakeholder meetings to discuss bisphenol A (BPA) on November 1-5, 2010, in Ottawa, Canada. Supported by the European Food Safety Authority, Health Canada, the National Institute of Environmental Health Sciences, and the U.S. Food and Drug Administration, the November 2-5 expert meeting will address the toxicological and health aspects of BPA, assess its safety, and consider alternatives to the ubiquitous plasticizer.

The November 1 stakeholder meeting will provide an opportunity for interested parties to present their views on specific questions, which will also be considered during the expert session. The main topics slated for discussion include (i) "General chemistry of BPA and analytical methods for detection in food"; (ii) "Occurrence of BPA in the diet, including studies on migration of BPA from food contact material"; (iii) "Metabolism and toxicokinetic studies of BPA"; (iv) "Toxicity of BPA based on animal studies, including studies performed according to OECD guidelines as well as research studies with other study designs"; (v) "Mechanisms of toxic action of BPA"; (vi) "Epidemiological studies"; (vii) "Exposure assessments of BPA from dietary sources"; and (viii) "Alternatives/replacements currently used, or proposed for use, and their potential risks to human health." FAO and WHO have also made available an International Food Safety Authorities Network **information note** that summarizes the current state of knowledge on BPA.

New York City Considers Excluding Sugar-Sweetened Beverages from SNAP

The New York State Office of Temporary and Disability Assistance has approved and submitted to the U.S. Department of Agriculture (USDA) a New York City proposal "to exclude sugar-sweetened beverages, the largest single contributor to the obesity epidemic, from the list of allowable purchases through the nation's food stamp program (also known as Supplemental Nutrition Assistance Program, or SNAP)," according to an October 7, 2010, press release.

Unveiled by Governor David Paterson (D) and New York City Mayor Michael Bloomberg (I), the initiative would prohibit the city's food stamp users from buying soft drinks and other sugar-sweetened beverages for up to two years while researchers study the ban's impact.

If accepted by USDA, the plan would define sugar-sweetened beverages "as those

containing more than 10 calories per 8 ounces (except fruit juices without added sugar, milk products and milk substitutes)." It would also provide for "a rigorous evaluation…to determine if the initiative results in fewer purchases of sugar-sweetened drinks, and assists in combating the associated health effects."

Noting that "close to 40 percent of public school students in kindergarten through 8th grade are overweight or obese," the press release adds that USDA's National School Lunch/School Breakfast Program and Women, Infants and Children Program already bar the sale or purchase of sugar-sweetened beverages, while SNAP itself rules out some items like alcohol and cigarettes. "The use of Food Stamp benefits to support the purchases of sugar sweetened beverages not only contradicts the intent of this vital program, but it also subsidizes a serious public health epidemic," opines Paterson. "We are helping record numbers of low-income families put food on the table, and we are very proud of that accomplishment. But there is clear evidence that low-income individuals have higher rates of obesity and are more at risk of becoming obese than other groups."

Meanwhile, New York State Health Commissioner Richard Daines and New York City Health Commissioner Thomas Farley have penned an October 7, 2010, *New York Times* op-ed in support of the proposal. The article claims that this policy "would be entirely in keeping with existing standards for defining what is and isn't nutritious," pointing to USDA's assessment of sugar-sweetened beverages as "foods of minimal nutritional value." The authors also view the city's SNAP proposal as part of its many obesity-reduction initiatives, including "programs to increase the availability of fresh produce in poor neighborhoods; … nutrition requirements for meals served in schools, after-school and day care programs and centers for the elderly; and… advertising campaigns to educate the public about obesity and nutrition."

But other consumer and nutrition advocates have been more circumspect about the plan. In 2004, USDA reportedly denied Minnesota's attempt to institute similar restrictions on the ground that they would "'perpetuate the myth' that food-stamp users made poor shopping decisions." As George Hacker, senior policy adviser for the Center for Science in the Public Interest's health promotion project, apparently told *The New York Times,* "a more equitable approach" might focus on educational campaigns. "The world would be better, I think, if people limited their purchases of sugared beverages," he was quoted as saying. "However, there are a great many ethical reasons to consider why one would not want to stigmatize people on food stamps." *See The New York Times,* October 6, 2010.

LITIGATION

Application of FOIA's Personal Privacy Exemption Before U.S. Supreme Court

The U.S. Supreme Court has decided to hear the appeal of case that involves the application of a personal privacy exemption under the Freedom of Information Act (FOIA) to federal agency law enforcement records involving corporations. *FCC v. AT&T Inc.*, No. 09-1279 (U.S., certiorari granted September 28, 2010). The Third Circuit Court of Appeals barred the Federal Communications Commission (FCC) from

releasing information about an investigation of AT&T, finding that the company has a right to personal privacy under FOIA's exemption 7(c). This exemption allows agencies to withhold law enforcement records where their disclosure would result in an invasion of personal privacy.

Those opposing the Third Circuit's interpretation have suggested that if it is upheld, records such as meat inspection reports could be withheld "on the theory that the meat processor's privacy rights would be invaded because of the public 'embarrassment' the corporation might feel if its filthy processing plant conditions were known." They also suggest that Food and Drug Administration food safety inspection reports could be exempt from disclosure as well as the quarterly enforcement reports of the U.S. Department of Agriculture's Food Safety and Inspection Service. AT&T has reportedly argued that the Third Circuit was correct because FOIA defines the term "person" to include corporations. *See Public Citizen Amicus Brief*, May 2010; *InsideEPA.com*, October 1, 2010.

Ice Cream Consumers Agree to Settle Fraudulent Labeling Claims

A federal court in New Jersey has issued a preliminary order granting certification of a nationwide class for settlement purposes in litigation against Unilever U.S., Inc., alleging that reduced-calorie labels for its Breyers Smooth & Dreamy Ice Cream® violated consumer fraud law. *Ercoline v. Unilever U.S., Inc.*, No. 10-01747 (U.S. Dist. Ct., D.N.J., order filed October 4, 2010). The class consists of all U.S. purchasers of Breyers and Unilever branded ice cream products represented as reduced-calorie since April 2004. The court also approved the form and content of the class notice and will allow settlement class members to opt out if they make the request at least 20 days before the final approval hearing, scheduled for March 21, 2011. Objections to the proposed settlement must be filed within 45 days of the class notice publication.

According to a news source, Unilever continues to deny that it misrepresented the calorie content of its ice cream products by labeling Smooth & Dreamy® flavors as containing one-third the number of calories as regular ice cream. The product allegedly contains, on average, only about 15 percent fewer calories than the company's original line of ice cream products. Under the terms of the agreement, Unilever will apparently change its low-calorie ice cream labels, pay class counsel $200,000 for attorney's fees, pay the named class representative $5,000, and provide $25,000 for costs, fees and the expenses of giving the class notice of the settlement. *See Product Liability Law 360*, October 6, 2010.

MDL Court Dismisses Plaintiffs in Contaminated Peanut Butter Litigation

A multidistrict litigation (MDL) court has dismissed the claims of 16 plaintiffs who alleged that they or their minor children became ill as a result of eating peanut butter contaminated with *Salmonella*. *In re ConAgra Peanut Butter Prods. Liab. Litig.*, MDL No. 1845 (U.S. Dist. Ct., N.D. Ga., Atlanta Div., decided September 29, 2010). According to the court, "The best way to show that peanut butter is contaminated with Salmonella is to test the peanut butter itself. The fact that the peanut butter was recalled does not mean that it was contaminated. In fact, most of the recalled peanut butter was free of Salmonella contamination."

Noting that the plaintiffs could also use circumstantial evidence to show that they ate contaminated peanut butter, the court determined that these plaintiffs could not show that the peanut butter they ate was made at the affected plant during the outbreak period (by means of a product code stamped on the jar lid—apparently none of them saved the jar lid). They also could not show that they contracted Salmonellosis shortly after eating the peanut butter (by means of a positive blood, urine or stool sample or a differential diagnosis by a physician).

As to plaintiff Patricia Ladd, the court refused to grant ConAgra's motion for summary judgment. This plaintiff identified a product that was produced at the affected plant and tested positive for roundworm, which can cause similar symptoms, but her symptoms persisted long after treatment for that problem. Her doctor completed a differential diagnosis "and believes 'with reasonable medical probability' that contaminated peanut butter caused Ladd's illness." According to the court, this testimony was sufficient to create a genuine issue of fact as to causation.

Issues Narrowed in Texas Bellwether GM Rice Contamination Cases

A multidistrict litigation (MDL) court in Missouri has issued a number of rulings on motions for summary judgment and to exclude or limit expert testimony in the bellwether cases involving Texas rice farmers who allege that contamination of the U.S. rice supply with genetically modified (GM) rice caused a precipitous decline in prices for their crops on world markets. *In re Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., E. Div., decided October 4, 2010).

The court's pre-trial rulings are similar to its rulings in previous bellwether trials involving farmers in Arkansas, Louisiana, Mississippi, and Missouri. The court determined, among other matters, that (i) the Texas farmers could not sue for violation of a North Carolina statute; (ii) the economic loss doctrine did not bar the plaintiffs' claims; (iii) the plaintiffs could pursue claims for private nuisance but not for public nuisance; (iv) the defendants cannot assert as a defense that they complied with all GM statutes and regulations or that they complied with state-of-the-art industry standards; (v) the defendants cannot assert the affirmative defense of intervening cause; and (vi) the plaintiffs may seek punitive damages.

Burger King Franchisees Seek Declaration of Non-Liability

A number of Burger King Corp. franchisees in California have filed a complaint for declaratory relief in federal court, claiming that the company has no basis for demanding that they pay the cost of settlement or its attorney's fees and costs in a recently settled disability discrimination lawsuit. *Newport v. Burger King Corp.*, No. 10-4511 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed October 5, 2010). They seek an order declaring that Burger King is not entitled to indemnification as well as attorney's fees and costs.

According to the complaint, Burger King has demanded indemnification for a settlement it reached over complaints that its restaurants were not accessible to the disabled. "If the Plaintiff franchisees do not pay BKC's unfounded demand, BKC threatens to 'terminate' their franchise agreements, engage in self-help by

withholding money owed to the franchisees, and/or otherwise retaliate against franchisees by preventing them from obtaining new restaurant opportunities or limiting to whom they may sell their existing franchises (whether or not in California)," according to the franchisees. They contend that Burger King "exerts extensive control over its franchisees," and "requires franchisee adherence to its 'comprehensive restaurant format and operating system, including a standardized design, décor, equipment system, color scheme and style of building and signage." The disability discrimination lawsuit apparently focused on the restaurant chain's "design barriers.'"

Burger King settled that lawsuit by agreeing to pay $5 million to the class and did not oppose a request by class counsel for $2.5 million in attorney's fees. The plaintiffs were not part of the litigation and did not participate in efforts to settle it. Thereafter, Burger King purportedly demanded that its franchisees pay for the settlement and all attendant costs. They argue that under their franchise agreements, which have an indemnification clause, they are not required to indemnify Burger King for losses "resulting from the negligence of BKC" The franchisees allege that Burger King's negligence "was the essence of the claims" in the disability discrimination lawsuit.

Class Action Filed Against POM Wonderful for Consumer Fraud

A Kansas resident has filed a putative class action in state court against POM Wonderful, LLC, alleging that the company's claims that its pomegranate products have special health benefits are false, deceptive and misleading. *Haynes v. POM Wonderful, LLC*, No. CV08720 (Johnson County Dist. Ct., Kan., filed September 29, 2010). Seeking to certify a statewide class of consumers, the plaintiff refers to actions that advertising watchdogs and government agencies have taken against the company, including the recent Federal Trade Commission administrative complaint, after purportedly determining that the company does not have a sufficient scientific basis to make health-related representations about its products. The plaintiff alleges violations of the Kansas Consumer Protection Act and unjust enrichment and seeks damages in excess of $25,000, attorney's fees and costs.

Olive Garden Owner Sues TGI Friday's Franchisee for Trademark Infringement

Darden Concepts, Inc. has filed a trademark infringement action against a TGI Friday's franchisee located in San Diego, California, alleging that its use of "Never Ending Shrimp" to promote one of its menu offerings infringes the "Never Ending Pasta Bowl" mark that Darden has registered and used in its Olive Garden restaurants for 15 years. *Darden Concepts, Inc. v. Briad Restaurant Group, L.L.C.*, No. 10-2077 (U.S. Dist. Ct., S.D. Cal., filed October 6, 2010). Darden alleges that use of the "Never Ending Shrimp" mark has the potential to confuse the public and will mislead consumers to believe that TGI Friday's restaurants are affiliated with Darden's Olive Garden and Red Lobster restaurants. Darden alleges violations of federal and state law and seeks injunctive relief, all profits and damages resulting from defendant's infringing activities, treble damages, attorney's fees, and costs.

LEGAL LITERATURE

Products Liability Reference Updated to Consider GM Foods

A looseleaf reference book titled *Products Liability: Design and Manufacturing Defects, 2d* has been updated with sections considering legal issues relating to genetically modified (GM) foods. The section on "design defects in GM organisms used in food production" discusses the extensive regulatory review to which these substances are subject and notes that no known injury has yet been linked to the use of GM organisms. The section on "failure to warn of idiosyncratic reaction to GM foods" cites cases involving plaintiffs with allergies or unusual susceptibilities involving other types of products. The author adds the following observation: "The same technology that is used to create novel food will provide the tools for preventing risk. Properly managed, novel food can reduce the net incidence of food allergies, through creation of hypoallergenic varieties of common crops. This standard for 'design' of food may one day give rise to 'design defect' liability for failure to implement a recombinant DNA design for a food product carrying known allergens."

OTHER DEVELOPMENTS

Symposium to Address Effects of Environmental Toxins on Children

The Children's Environmental Health Institute will conduct its "Sixth Biennial Scientific Symposium" on October 21-22, 2010, in Houston, Texas; the focus this year is "Prenatal & Early Life Exposures: How Environmental Toxins Affect the Course of Childhood."

The symposium will include sessions on "Improving Access to and Consumption of Healthy, Safe, and Affordable Food for Children and Families" and "Becoming Change Agents for Access to and Consumption of Healthy, Safe, Affordable and Accessible Food." Among other matters, conference participants will "discover strategies for childhood obesity prevention efforts that have been implemented by local governments." The symposium will also include a session on corporate best practices and responsible investing to prevent purported environmental health risks.

Marion Nestle Criticizes Alcohol Companies for Supporting Cancer Research

New York University Professor Marion Nestle has commented on an October 5, 2010, *USA Today* article that highlights the efforts of alcoholic beverage manufacturers to make financial contributions to breast cancer research efforts. According to *USA Today,* "Both the American Cancer Society and the National Cancer Institute say even moderate drinking increases breast cancer risk," but some companies have reportedly started "pink" product campaigns to raise money for research.

The purported conflict of interest has led the Breast Cancer Network for Strength and other advocacy groups to consider refusing donations tied to alcohol sales. *USA Today* cites Dwight Burlingame, associate executive director of the Center on

Philanthropy at Indiana University, as saying that "cause-related marketing is not about charity," but rather serves as a product promotion. At least one beverage manufacturer, however, has disputed that interpretation, noting that its campaign honors an employee who lost her life to breast cancer and that its efforts have raised $500,000 over the past two years for research.

Meanwhile, Nestle has lambasted the practice as little more than a marketing ploy. "Could we expect breast cancer research sponsored by alcohol companies to focus on the relationship of alcohol to breast cancer? Is this any different than cigarette companies paying for lung cancer research?," opines Nestle in an October 6, 2010, *Food Politics* blog post, which was reprinted on *The Atlantic's* Website.

SCIENTIFIC/TECHNICAL ITEMS

Fungal-Viral Combination Eyed in Colony Collapse Disorder

A recent **study** has homed in on a possible explanation for colony collapse disorder (CCD), a mysterious ailment behind the destruction of honeybee hives worldwide. Jerry J. Bromenshenk, et al., "Iridovirus and Microsporidian Linked to Honey Bee Colony Decline," *PLoS One,* October 2010. Researchers apparently found that a combined fungal and viral infection led to 100 percent fatality among bees exhibiting CCD, which disorients and disperses hive members. Although previous studies had evidently suspected small RNA bee viruses or other pathogens, no single factor has been "firmly linked to honey bee losses," according to the study abstract.

Using mass spectrometry-based proteomics (MSP) "to identify and quantify thousands of proteins from healthy and collapsing bee colonies," the authors concluded that "co-infection" by invertebrate iridescent virus (IIV) and the microsporidia *Nosema ceranae* is "a probable cause of bee losses in the USA, Europe, and Asia." Nevertheless, they also stressed the need for further efforts to determine, in part, whether the IIV/*Nosema* association "is the cause or marker of CCD." They have suggested that beekeepers facing CCD might be able to disrupt the co-infection by "using treatments that are available to control *Nosema* species."

Meanwhile, an October 6, 2010, *New York Times* article has attributed the breakthrough to a unique collaboration between academic and military scientists. Led by University of Montana Professor Jerry Bromenshenk and his "Bee Alert" team, experts reportedly worked with the U.S. Army's Chemical Biological Center, using sensitive equipment designed to analyze and identify unknown protein combinations. As one microbiologist told the *Times,* "Our mission is to have detection capability to protect people in the field from anything biological. We brought it to bear on this bee question, which is how we field-tested it."

Prenatal DDE Exposure Allegedly Linked to Accelerated Growth

A recent study reportedly claims that prenatal exposure to the pesticide dichlorodiphenyltrichloroethane (DDT) and its breakdown product dichlorodiphenyldichloroethylene (DDE) is associated with accelerated growth and elevated BMI in infants born to normal-weight mothers. Michelle Mendez, et al., "Prenatal Organochlorine Compound Exposure, Rapid Weight Gain and Overweight in Infancy," *Environmental Health Perspectives,* October 2010.

Researchers apparently used data from Spain's ongoing INMA [Infancia y Medio-Ambiente] study, which assayed blood from approximately 500 expectant mothers for persistent chlorinated pollutants such as DDT and DDE, hexachlorobenzene, beta-hexachlorohexane, and dioxin-like polychlorinated biphenyls.

The authors concluded that, when compared to infants born to women in the lowest quartile for DDE exposure, those born to normal-weight mothers in the first quartile were at "a two times increased risk of rapid growth." In addition, "DDE was also associated with elevated BMI at 14 months." The study suggested, however, that the association only appeared true for normal-weight, as opposed to overweight, mothers, and that other organochlorine compounds "were not associated with rapid growth or elevated BMI."

Noting that most organochlorine exposure "is thought to come from the diet," Mendez told media sources that her team "didn't actually expect this interaction between maternal weight and DDE's impact," but stressed that the study's analyses left "less than a 5 percent chance that such a finding was due to chance." As Bruce Blumberg of the University of California, Irvine, was quoted as saying, the paper "is very interesting because the authors have linked the extensive literature on rapid early infancy weight gain [and] later increased BMI with endocrine disruptor exposure in a population of significant size… DDE levels are consistently associated with increased BMI in adults. Therefore, the current study provides another link between DDE and the risk of obesity." *See AOL Health* and *Science News,* October 6, 2010.

High *Trans* Fat Diet Associated with Overweight Infants

A recent study has suggested that mothers who consume diets high in *trans* fats could double the risk that their babies will have high levels of body fat. Alex Anderson, et al., "Dietary *trans* fatty acid intake and maternal and infant adiposity," *European Journal of Clinical Nutrition,* September 2010. University of Georgia (UGA) researchers studied 95 mothers in three groups—those who fed their babies only breast milk, those who used only formula and those who used a combination—to determine the effect of *trans* fat intake through breast milk. They concluded that the mothers who consumed more than 4.5 grams of *trans* fats daily while breastfeeding were more than twice as likely to have babies with high percentages of body fat, or adiposity, than those who consumed less than 4.5 grams per day.

"*Trans* fats stuck out as a predictor to increased adiposity in both mothers and their babies," study co-author Alex Anderson said in a press statement. He asserted that mothers who consumed more than 4.5 grams of *trans* fats per day increased their own risk of fat accumulation by almost six times, and that more follow up was

warranted. "It would help to be able to follow the child from when the mother was pregnant, through birth, and then adolescence, so that we can confirm what the type of infant feeding and maternal diet during breastfeeding have to do with the recent epidemic of childhood obesity," he said. *See UGA Press Release*, September 29, 2010.

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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.