Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND GUIDANCE

U.S. and Mexico Resolve Cross-Border Trucking Dispute Under NAFTA

The United States and Mexico have signed a memorandum of understanding (MOU) that resolves a long-haul, cross-border trucking dispute involving "retaliatory tariffs" on more than $2 billion in U.S. exports, including food and agricultural products. According to the U.S. Department of Transportation (DOT), the July 6, 2011, agreement will "lift tariffs and put safety first."

Under the agreement, Mexico will immediately suspend half of the retaliatory tariffs imposed in March 2009, with the remaining 50 percent to be removed within five days of the first Mexican trucking company receiving U.S. operating authority. In return, Mexican long-haul truck drivers will be allowed to ship goods into the United States after complying with, among other things, the Federal Motor Vehicle Safety Standards and electronic vehicle monitoring designed to track "hours-of-service compliance" to ensure that drivers make cross-border shipments and not "domestic cargo between points within the United States."

According to U.S. Agriculture Secretary Tom Vilsack, the agreement puts the two countries on an "equal footing" under the North American Free Trade Agreement (NAFTA). "For U.S. farmers and ranchers, the lifting of these tariffs means jobs and fiscal relief—lifting constraints on American products, removing barriers to trade with a key trading partner, and putting Americans back to work at a time when U.S. agriculture is setting record export figures," Vilsack said. *See U.S. Department of Agriculture, DOT Press Releases,* July 6, 2011.

Federal Agencies Address *Salmonella* in Meat, Poultry, Shell Eggs

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) has announced an expansion of the *Salmonella* Initiative Program (SIP) to help industry reduce foodborne pathogens in raw meat and poultry products. The agency has extended the comment period to September 12, 2011.

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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According to FSIS, the voluntary, incentive-based program allows "participating establishments to operate under certain regulatory waivers to try new procedures, equipment or processing techniques to better control *Salmonella*." As a condition for participation, establishments selected for SIP must regularly collect product samples to test for *Salmonella,* campylobacter and generic *E. coli,* and then share the data with the agency.

FSIS has set new deadlines for establishments currently operating with regulatory waivers to apply for SIP and has allowed a "limited number of establishments to operate with modified line speed" which will be evaluated by a National Institute for Occupational Safety and Health study. *See USDA Press Release,* July, 8, 2011; and *Federal Register,* July 13, 2011.

Meanwhile, the Food and Drug Administration (FDA) has **announced** the availability of a draft document titled "Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, Storage, and Transportation." The **guidance** offers compliance aid to egg producers and others covered under a final rule published on July 9, 2009. FDA requests comments on the draft guidance by September 12, 2011. Details of the final rule were included in **Issue 310** of this *Update*. *See Federal Register,* July 13, 2011.

GAO Report Claims FCC Could Improve Children's Television Act Enforcement

The U.S. Government Accountability Office (GAO) has released a **report** recommending that the Federal Communications Commission (FCC) improve its enforcement of the Children's Television Act (CTA) of 1990, which restricts advertising during children's programs, requires a certain amount of informational/educational programming as a condition of broadcast license renewals and prohibits the use of program characters in advertising during any program for children younger than age 12. On the basis of its review of FCC data, interviews with FCC and broadcast station officials and focus groups with parents, GAO expressed concerns about the agency's lack of specific standards to assess informational (or "core children's") programming. The report also found that most self-reported violations involved broadcasters exceeding advertising time limits.

According to the report, core children's programming on commercial broadcast stations "increased significantly" from 1998 to 2010, along with cable and satellite providers—"to which core children's programming requirements do not apply—increasing the number of channels specifically targeted to children." Noting a lack of widely accepted standards to assess such programming, GAO recommends that FCC (i) "implement a strategy to oversee cable operators' and satellite providers' compliance," (ii) "work with industry to develop voluntary guidelines for assessing core children's programming," and (iii) "implement and assess the effectiveness of additional mechanisms to inform parents about core children's programming."

Advocacy Groups Seek FDA Rule on Mercury in Seafood

Several consumer protection organizations have filed a **citizen petition** with the Food and Drug Administration (FDA), seeking a rulemaking "for labeling and point of sale advisories concerning mercury in seafood to minimize methylmercury exposure to women of childbearing age and children."

According to the petition, some 200,000 children in the United States, between ages two and five, have blood mercury levels nearly 50 percent higher than base levels recommended by the Environmental Protection Agency. Noting that the percentages of women and children exceeding recommended mercury levels are higher in coastal regions and among African-Americans, Asians, the affluent, and those in the fishing industry, the petition claims that consumers "do not know the risks inherent in exposing themselves and their families to this potent neurotoxin."

Jane Hightower, a physician who authored *Diagnosis: Mercury—Money, Politics & Poison*, signed the petition, which was also brought on behalf of Earthjustice, the Zero Mercury Working Group, and Center for Science in the Public Interest. They seek seafood labeling and point-of-sale advisories that would inform women of childbearing age and parents of young children about (i) "the presence of mercury in certain seafood species," and (ii) "the recommended consumption limits associated with relative mercury content, including the importance of eating 12 oz. of lower-mercury seafood a week." The petition includes proposed warning label alternatives and a chart showing which fish species have the lowest and highest mercury contents.

Michigan Liquor Board Lifts Ban of "Raging Bitch" Beer

The Michigan Liquor Control Commission has reportedly reversed its decision to ban sales of a Maryland-based beer with a controversial name. Flying Dog Brewery has received approval to promote and sell its "Raging Bitch" Belgian-Style IPA in Michigan. According to Flying Dog, the commission has barred the beer's sale in Michigan since 2009, claiming its label was "detrimental to the public health, safety and welfare." The brewery subsequently filed a First Amendment lawsuit in a Grand Rapids federal court. More information about the lawsuit appears in **Issue 388** of this *Update*.

The commission switched its position after the U.S. Supreme Court recently determined that states cannot engage in "content-based discrimination," according to a news source. Although calling the move "a victory for craft beer," Flying Dog has announced that it has no plans to drop its pending lawsuit. "Most companies would take what Michigan did and say, 'Great, I can sell my beer and move down the road,'" Flying Dog Brewery's chief executive, Jim Caruso, reportedly said. "We're not doing that." *See Flying Dog Blog*, June 29, 2011; *Associated Press*, July 1, 2011.

EU Approves Food Labeling Rules

The European Parliament has reportedly approved new food labeling rules aimed at helping consumers make "better informed, healthier choices." As outlined in a July 6, 2011, press release, the new regulations will require labels "to spell out a food's energy content as well as fat, saturated fat, carbohydrate, sugar, protein and salt levels, in a way that makes them easy for consumers to read." To this end, such nutritional information must be presented "in a legible tabular form on the packaging, together and in the same field of vision," and "expressed per 100g or per 100ml," with the option of expressing values per portion.

Slated to take effect three to five years after publication in the *EU Official Journal,* the new rules also (i) tighten allergen labeling requirements for both pre-packaged products and non-packaged foods sold in restaurants or canteens; (ii) extend existing country-of-origin labeling laws to fresh meat from pigs, sheep, goats, and poultry; and (iii) dictate that consumers cannot be "misled by the appearance, description or pictorial presentation of food packaging." In addition, meat and fish consisting of combined meat parts or fish parts must now be labeled "formed meat" or "formed fish," accordingly.

"The new rules are supposed to provide more and better information to consumers so they can make informed choices when buying. But [it] is more than that: the food industry should benefit too. There should be more legal certainty, less bureaucracy and better legislation in general," Member of European Parliament Renate Sommer (EPP, DE) said.

Codex Alimentarius Commission Approves GM Food Labeling Guidance

According to news sources, the Codex Alimentarius Commission concluded its meeting in Geneva by reaching an agreement on labeling foods that contain genetically modified (GM) ingredients. While the guidance is not mandatory, it would allow countries to label GM foods without risking a legal challenge before the World Trade Organization. National laws based on Codex guidance or standards cannot apparently be challenged as trade barriers. The matter has been debated before the commission, which consists of food safety regulatory agencies and organizations from around the world, for some two decades.

Consumer interest organizations were apparently pleased with the agreement, but had urged the commission to adopt mandatory labeling. Still, a Consumers Union scientist reportedly said, "We are particularly pleased that the new guidance recognizes that GM labeling is justified as a tool for post-market monitoring. This is one of the key reasons we want all GM foods to be required to be labeled—so that if consumers eat modified foods, they will be able to know and report to regulators if they have an allergic or other adverse reaction." Meanwhile, the Biotechnology Industry Organization, which

endorsed the agreement as "totally consistent with the U.S. position," emphasized that the agreement "says no new guidelines are needed," and it is "just a compilation of existing texts with a consideration statement that says foods derived from biotech are no different from other foods based on method of product[ion]. It also encourages companies to be consistent with Codex guidelines."

In a related matter, U.S. trade and agriculture officials, citing scientific evidence on the additive's safety, reportedly criticized the commission for failing to move forward with standards on ractopamine, a feed additive. Commission members were apparently unable to reach a consensus about the drug, which is used to enhance leanness in pork and beef. Without a Codex standard, some governments, including Taiwan's, have restricted U.S. beef imports because the meat has trace amounts of ractopamine. Trade talks with Taiwan's government broke down over the issue in October 2009. *See The Hill*, July 5, 2011; *Law360*, July 6, 2011; *Agweek*, July 11, 2011.

Bahamas Bans Shark Fishing

The Bahamas Ministry of Agriculture and Marine Resources has reportedly announced its decision to prohibit all commercial shark fishing in its waters, citing a shark tourism industry that generates $80 million in revenue each year. According to media reports, the ban would encompass 240,000 square miles and protect approximately 40 shark species present in the area. The new protections were purportedly needed after a seafood export firm last year proposed fishing the Bahamas for shark fins, a plan that quickly met resistance from the Bahamas National Trust and the Pew Environment Group.

"The Bahamas government is determined to enhance the protection extended to sharks," stated Agriculture and Marine Resources Minister Lawrence Cartwright. "As we are all aware, sharks are heavily fished in many corners of the world's oceans." *See The Washington Post*, July 5, 2011.

LITIGATION

Recent Court Developments: BPA, Nutella® and Alaskan Fishing Regulations Litigation

A multidistrict litigation court in Missouri has denied motions for class certification in 24 transferred cases against companies that make baby bottles and sippy cups allegedly containing bisphenol A (BPA). *In re: Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967 (U.S. Dist. Ct., W.D. Mo., W. Div., decided July 5, 2011). The plaintiffs sought to certify various classes, including individual state classes and multi-state classes as to certain claims and defendants. The court focused on the commonality, predominance and superiority prongs of class certification to conclude that differences in state

laws and facts unique to each putative class member rendered the claims unsuitable for class treatment.

Still, the court dismissed the requests to certify individual statewide classes without prejudice, finding it appropriate to allow the transferor courts to determine whether these classes met the certification requirements when the cases are returned to their jurisdictions. The court also indicated that it would delay remand "until after one or more cases have been litigated through final judgment." The court invited the plaintiffs to seek the certification of one or more Missouri classes by August 8, 2011.

A federal court in California has narrowed the issues for trial in a consumer class action "brought on behalf of people who have purchased Ferrero's Nutella® spread after relying on allegedly deceptive and misleading labeling and advertisements." *In re Ferrero Litig.*, No. 11-205 (U.S. Dist. Ct., S.D. Cal., decided June 30, 2011). Granting in part and denying in part the defendant's motion to dismiss, the court determined that (i) the plaintiffs lack standing to challenge the company's Website statements about its product because they did not actually rely on those statements, and (ii) the plaintiffs' challenge to the adequacy of the company's disclosure of an artificial ingredient is preempted by federal law.

The court declined to rule on whether the plaintiffs' claims about the company's TV statements, "Hazelnut Spread with Skim Milk & Cocoa" and "Made with over 50 Hazelnuts per Jar," were preempted by federal law. The court did not agree with the defendant that its statements were not likely to deceive an ordinary consumer and that some of the statements were non-actionable puffery. The plaintiffs will also be allowed to pursue their claims for violations of the Consumers Legal Remedies Act, unfair and unlawful conduct under the Unfair Competition Law, breach of express warranty, and breach of implied warranty of merchantability.

The Ninth Circuit Court of Appeals has dismissed the claims of commercial fishers who challenged state regulations that shortened the salmon fishing year and limited the number of fish that could be harvested. ***Vandevere v. Lloyd*, No. 09-35957 (9th Cir., decided July 11, 2011)**. The plaintiffs claimed that the regulations were unconstitutional as a taking of property without just compensation and as a violation of their due process rights. A district court granted the state's motion for summary judgment, and the Ninth Circuit affirmed.

The court provided an overview of Alaskan fishing laws to determine that under state law, the plaintiffs do not have a protected property interest in their entry permits, and, although their leases confer a "limited property interest," they waived their right to challenge the regulations when they signed the lease agreements. Apparently, the lease provisions "plainly exempt[] regulatory takings of the kind challenged here from the require-

ment that Plaintiffs receive just compensation." The court also determined that the state's "decision to enact a system of licenses or use privileges was not unreasonable, arbitrary, or capricious, and the statute bears a substantial and reasonable relationship to Alaska's goals of salmon conservation and maintenance of a stable fishery."

Recently Filed Lawsuits: Death in a Chocolate Factory, Demand for Documents in NYC "Man Drinking Fat" Ads, New Claims That Wesson Oil Is Not "100% Natural"

The parents of a 29-year-old who died after he fell into a vat of chocolate have filed a wrongful death action in a Pennsylvania state court against the company that owned the plant where he worked and a number of other defendants involved in manufacturing the allegedly faulty equipment that purportedly led to the accident. *Smith v. Lyons & Sons, Inc.*, No. n/a (Pa. Ct. of Common Pleas, Philadelphia County, filed July 1, 2011). The decedent allegedly slipped on a cardboard-covered platform made slippery with chocolate and other materials and fell into the vat through unguarded holes. The vat was "processing, mixing and melting chocolate at extremely high temperatures at the time." Co-workers were allegedly unable to stop the vat from operating because the switch was not located on the platform. Alleging negligence, strict liability and breach of express and implied warranties, the plaintiffs seek damages in excess of $50,000.

The American Beverage Association has filed a petition in a New York state court under the Freedom of Information Law (FOIL) against the New York City Department of Health and Mental Hygiene, seeking an order requiring the department to produce documents relating to its "anti-soft drink campaign entitled [sic] 'Pouring on the Pounds.'" *Am. Beverage Ass'n v. NYC Dept. of Health and Mental Hygiene*, No. 11107721 (N.Y. Sup. Ct., N.Y. County, filed July 1, 2011). Details about the advertising campaign, which depicted globs of human fat gushing from a soda bottle and ran in 1,500 subway cars for three months, appear in **Issue 318** of this *Update*.

According to the petition, the association sought "a broad array of records, including documents referenced in a recent article in *The New York Times*, which described a fundamental disagreement within the [department] concerning the scientific validity of the claims asserted in the Campaign." The department allegedly delayed its production of documents and denied part of the request, "resulting in an inadequate release of approximately 2,700 pages of documents." The association contends that the department "dramatically exceeded the scope" of two narrow FOIL exemptions "to withhold the release of critical records to which the [association] is most assuredly entitled." The exemptions at issue protect pre-decisional opinions and recommendations circulated intra- or inter-agency, and records constituting trade secrets or that could cause competitive injury.

Residents of California, Florida and New Jersey have filed a putative class action against ConAgra Foods, Inc. alleging that the company misrepresents its Wesson Oil Brands as "100% Natural" when they actually contain genetically modified ingredients. *Scarpelli v. ConAgra Foods, Inc.*, No. 11-04038 (U.S. Dist. Ct., D.N.J., filed July 14, 2011). Filed in a New Jersey federal court, the complaint is similar to a putative class action filed in California in June 2011. Additional details about that lawsuit appear in **Issue 400** of this *Update*.

Seeking to certify a nationwide class of Wesson Oil consumers as well as California, Florida and New Jersey subclasses, the plaintiffs allege violation of the Magnuson-Moss Act, unjust enrichment, breach of express warranty, violation of state consumer fraud laws, false advertising, and unfair and deceptive trade practices; they request compensatory, treble and punitive damages; prejudgment interest; restitution; injunctive relief; and attorney's fees and costs.

Recent Agreements to Settle Disputes: Contaminated GE Rice Lawsuits, Dairy Pricing and False Pet Food Ads

Bayer CropScience has agreed to pay up to $750 million to settle the claims of rice farmers who allege that the company's genetically engineered (GE) rice contaminated their conventional crops and led to market losses when some countries closed their borders to U.S. rice imports. *In re: Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., agreement announced July 1, 2011). The agreement, which would resolve disputes filed in state and federal courts, gives the company the right to "walk away" if the acreage submitted to the settlement claims process is less than 85 percent of "average long-grain rice acres planted in 2006, 2007, 2008 and 2009 according to the USDA." Farmers could receive damages ranging from nearly $120 per acre planted in 2006 to about $10 per acre planted in 2010; supplemental loss funds would provide additional payments to farmers who can document other financial losses.

Dean Foods has reportedly agreed to settle class action claims filed by Southeast Dairy Farmers and Dairy Farmers of America alleging that the company violated antitrust law to artificially suppress milk prices. According to a news source, the proposed settlement, if approved, would require Dean Foods to make an initial $60 million payment for distribution to dairy farmer class members and then to make payments of $20 million annually for the next four years. Dean Foods CEO Gregg Engles said of the settlement, "We continue to be confident that we have operated lawfully and fairly at all times in the Southeast. . . . Settling this case allows us to focus on the business challenges that we face, and to continue to take costs out of our operations while avoiding the expense, uncertainty and distraction of a protracted litigation and the likelihood of a lengthy appeals process." *See Yahoo! Finance, FoodNavigator-USA.com*, July 13, 2011.

A federal court in California has preliminarily approved the settlement of a class action alleging that Natura Pet Products, Inc. made false and misleading state-

ments about its pet food by claiming that the ingredients were of "human-grade quality." *Ko v. Natura Pet Prods., Inc.*, No. 09-02619 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered July 13, 2011). The court approved a nationwide settlement class and established a timetable for class notification. The final fairness hearing will take place February 17, 2012. Under the proposed agreement, individual payments cannot exceed $120; the named plaintiff would receive a $20,000 enhancement fee.

Antitrust Laws Implicated When Competing Supermarkets Agree to Share Revenues During Labor Dispute

The Ninth Circuit Court of Appeals, in a divided *en banc* ruling, has determined that while an agreement between competitors to share revenues during a labor dispute is not immune from antitrust laws, the district court properly denied a challenge to an agreement between California supermarkets as a per se violation of the Sherman Act or on the basis of a "quick look" antitrust analysis; the Ninth Circuit found that a truncated or abbreviated review process is insufficient to determine whether this type of agreement has affected competition in the relevant market. ***California v. Safeway, Inc.*, No. 08-55671 (9th Cir., decided July 12, 2011) (*en banc*)**. Details about the court's previous ruling that the agreement was anticompetitive appear in **Issue 361** of this *Update*.

The court's majority "expressed no opinion on the legality of the arrangement under the rule of reason" (the traditional test for violations of federal antitrust laws) because California, which brought the challenge, stipulated that it would forego a challenge to the revenue sharing agreement under the "traditional rule of reason, contending instead that the [agreement] is invalid per se or on a 'quick look.'" According to the court, the "particular features and context" of this agreement "are more than mere idiosyncracies: they warrant further development of evidence and more rigorous review."

Three dissenting judges, in an opinion authored by Chief Judge Alex Kozinski, characterized the majority's opinion as advisory because it decided "an important legal question that will have absolutely no effect on anyone involved in this case." They would have ruled that the agreement in this case was protected by a Sherman Act labor exemption. Three dissenting judges, in an opinion authored by Circuit Judge Stephen Reinhardt, would have found that the agreement inherently violated antitrust law.

MEDIA COVERAGE

AP Highlights Legislator Resistance to Food Ad Limits

"House Republicans are siding with food companies resisting the Obama administration's efforts to pressure them to stop advertising junk food for children," writes *Associated Press* reporter Mary Clare Jalonick in a July 6, 2011, article examining the

efforts of individual legislators to stymie proposed Federal Trade Commission (FTC) food marketing guidelines. According to Jalonick, while food companies have lobbied "aggressively" against the proposal, Republican representatives have sought to include a provision in next year's FTC budget "that would require the government to study the potential costs and impacts of the guidelines before implementing them." As Representative Jo Ann Emerson (R-Mo.) explained, the guidelines might otherwise "lead to extraordinary pressure from the federal government" on those who do not conform to the voluntary measure.

But consumer advocates like the Center for Science in the Public Interest (CSPI) have disputed this reasoning. "The industry is exaggerating the influence of these voluntary regulations to gin up opposition," said CSPI Director of Nutrition Policy Margo Wootan. "These standards are supposed to provide a model of how self-regulation can work."

FTC Bureau of Consumer Protection Director David Vladeck has also reiterated the limits of the proposed guidelines. "Nobody's saying Toucan Sam has to fly the coop," he wrote on the FTC Website. "Ideally, during the next five years it would be great to see the cereal companies voluntarily tweak their formulations to raise the whole grain content and lower the added sugars for cereals marketed to children."

New York Times Covers GE Bluegrass Controversy

The U.S. Department of Agriculture's (USDA's) recent **decision** to exempt genetically engineered (GE) Kentucky bluegrass from federal approval has reportedly stirred debate over how the agency regulates biotech crops, with some critics calling the outcome "a blatant end-run around regulatory oversight." According to a July 1, 2011, press release, USDA's Animal and Plant Health Inspection Service (APHIS) dismissed a petition from the Center for Food Safety and International Center for Technology Assessment claiming that GE bluegrass developed by Scotts Miracle-Gro for golf courses should be regulated as a "noxious weed" under the Plant Protection Act. After conducting its assessment, APHIS apparently declined to regulate "Kentucky bluegrass, GE or traditional," as a federal noxious weed because it does not contain plant pest components.

As a July 7 *New York Times* article further explained, GE crops "are regulated under rules pertaining to plant pests" that "are really meant for pathogens and parasites, not corn stalks." But because most GE crops use plant virus DNA and bacterium to switch on pest-resistance genes, the new strain of plant usually falls under USDA's jurisdiction. Scotts Miracle-Gro, however, "deliberately avoided" viral DNA and bacteria, and instead used a gene gun to insert genetic material from other plants. The company then reasoned that its product could not be regulated as a noxious weed, an argument which USDA evidently found persuasive over the petitioners' objections.

Meanwhile, in a July 1 letter to Scotts Miracle-Gro, USDA Secretary Tom Vilsack reiterated that the company should be prepared to "work closely with a broad range of stakeholders in developing stewardship plans for testing and commercialization of the product." In particular, Vilsack noted, "producers wishing to grow non-GE Kentucky bluegrass will likely have concerns related to the gene flow between the GE variety and non-GE Kentucky bluegrass …, and those involved in the use of non-GE Kentucky bluegrass in pastures will likely have concerns about the loss of their ability to meet contractual obligations."

OTHER DEVELOPMENTS

Radioactive Beef Confirmed in Japan

Japanese officials have reportedly confirmed that beef registering up to seven times more radioactive cesium than permitted has entered the food supply, raising concerns among consumers about the country's safety precautions. The first batch of tainted beef apparently came from six cattle farmed within 18 miles of the Fukushima Daiichi nuclear power plant, which was compromised by an earthquake and tsunami earlier this year. After passing external radiation tests, the cattle were sold to butchers in Tokyo—where government workers first detected the contamination—and then to wholesalers and retailers in eight prefectures. A second batch of compromised cattle originated in Asakawa, approximately 37 miles from the power plant, and was shipped to slaughterhouses in Tokyo, Kanagawa, Chiba and Miyagi prefectures three months ago.

In both cases, the cattle allegedly ate rice straw containing 97,000 becquerels of cesium per kilogram instead of the 300 becquerels permitted by law, thus causing internal contamination that went undetected by standard tests. "It would be better not to rush them to the butcher," said Shizuko Kakinuma, a National Institute of Radiological Sciences researcher, who recommended that government increase its radiation testing to one animal per herd. Nevertheless, she noted, it remains "unlikely" that anyone in Japan could consume enough beef each day to create a health concern. *See The Wall Street Journal,* July 13, 2011; *Bloomberg,* July 15, 2011.

Ongoing *E. Coli* Investigation Implicates Egyptian Fenugreek

The European Union (EU) has temporarily prohibited the importation of some seeds and bean sprouts from Egypt after a European Food Safety Authority (EFSA) report linked the products to an *E. coli* O104:H4 outbreak that reportedly killed 51 people, including as many as six U.S. citizens. According to a July 5, 2011, EU press release, all imported seeds and beans "for sprouting" will be frozen until October 31, 2011, and all fenugreek seeds imported from one

Egyptian company since 2009 will be destroyed. The ban apparently covers "seeds, fruit and spores used for sowing; leguminous vegetables, shelled or unshelled, fresh or chilled; fenugreek; dried leguminous vegetables, shelled, whether or not skinned or split; soya beans, whether or not broken; other oil seeds and oleaginous fruit, whether or not broken."

Officials apparently traced the *E. coli* outbreaks in France and Germany to a single importer that shipped Egyptian fenugreek seeds to both the Lower Saxony farm and U.K. seed supplier implicated in the event. "The contamination of seeds with the STEC O104:H4 strain reflects a production or distribution process which allowed contamination with fecal material of human and/or animal origin," concluded EFSA. "Where exactly this took place is still an open question. Typically such contamination could occur during production at the farm level. While contamination at subsequent steps in, up to, and including at the Importer cannot be excluded, it is highly unlikely that contamination could have taken place during transport of the sealed container." *See MSNBC.com,* July 8, 2011; *The Associated Press,* July 14, 2011.

Obesity Experts Propose Foster Care for Severely Overweight Kids

Harvard University obesity experts have reportedly proposed that some parents should lose custody of their extremely overweight children to foster care. In a July 13, 2011, *Journal of the American Medical Association* opinion piece titled "State Intervention in Life-Threatening Childhood Obesity," David Ludwig and Lindsey Murtagh suggest that the same legal precedents that protect undernourished children should apply to severely obese kids.

According to news sources, Ludwig, an obesity specialist at Harvard-affiliated Children's Hospital Boston, and Murtagh, a lawyer and Harvard School of Public Health researcher, claim that removing a severely obese child from the home may be legally justifiable because of imminent heath risks such as Type 2 diabetes, liver problems and breathing issues. State intervention "ideally will support not just the child but the whole family, with the goal of reuniting child and family as soon as possible," after possible parenting instruction, Ludwig reportedly said.

The commentary has apparently sparked outcry among some families and professionals dealing with childhood obesity. Citing a lack of evidence supporting the contention that states would do a better job than parents, they argue that parents cannot control associated issues such as advertising, marketing, peer pressure, and bullying. "If you're going to change a child's weight, you're going to have to change all of them," a University of Pennsylvania bioethicist was quoted as saying. *See Associated Press* and *The Wall Street Journal,* July 13, 2011; *ABC News,* July 14, 2011.

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SCIENTIFIC/TECHNICAL ITEMS

Phthalates, BPA Allegedly Influence Thyroid Hormones

A recent University of Michigan study has reportedly suggested that phthalates and bisphenol A (BPA) could affect thyroid functioning in humans. John Meeker and Kelly Ferguson, "Relationship Between Urinary Phthalate and Bisphenol A Concentrations and Serum Thyroid Measures in U.S. Adults and Adolescents from NHANES 2007-08," *Environmental Health Perspectives,* July 11, 2011. Researchers apparently used thyroid serum measures from 1346 adults and 329 adolescents enrolled in the U.S. National Health and Nutrition Examination Survey to determine that "[g]enerally speaking, greater concentrations of urinary phthalate metabolites and BPA were associated with greater impacts on serum thyroid measures." In particular, the study found that as urinary metabolite concentrations for di(2-ethylhexyl) phthalate (DEHP) and BPA increased, certain thyroid hormones decreased.

"The current study showed the strongest relationship between thyroid disruption and DEHP," explained a July 12, 2011, University of Michigan press release, which noted that "urine samples in the highest 20 percent of exposure to DEHP were associated with as much as a 10 percent decrease in certain thyroid hormones compared to urine samples at the lowest 20 percent of exposure."

"This seems like a subtle difference," study author Meeker was quoted as saying. "But if you think about the entire population being exposed at this level you'd see many more thyroid related effects in people."

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