Shook, Hardy & Bacon L.L.P.

ISSUE 482 | MAY 3, 2013

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FTC Issues Guidance on Children's Online Privacy Law

The Federal Trade Commission (FTC) has issued guidance to answer stakeholder questions about changes to the Children's Online Privacy Protection Act (COPPA) slated to take effect on July 1, 2013. According to FTC, the new rules apply not only to the operators of Websites and mobile apps directed at children younger than age 13, but the operators of general audience sites and apps "with actual knowledge that they are collecting, using, or disclosing personal information from children under 13," as well as third-party operators "that have actual knowledge that they are collecting personal information directly from users of another Web site or online service directed to children."

In addition to describing the types of personal information covered by COPPA, which for the first time will class IP addresses as persistent identifiers, the guidance addresses, among other things, (i) new online privacy policy rules, including requirements for displaying the policy; (ii) disclosure requirements for the collection and use of geolocation data; (iii) when and how to acquire parental consent if necessary; (iv) the disclosure of collected information to third parties; and (v) limitations on data collection. It also discusses how industry groups and other parties adhering to self-regulatory guidelines can qualify as an FTC-approved "COPPA safe harbor program," which under the amended rules must offer protections that are equal to or greater than the agency's standards; a mandatory assessment mechanism; and "effective disciplinary actions for member operators who do not comply with the safe harbor program guidelines."

"A court can hold operators who violate the Rule liable for civil penalties of up to $16,000 per violation," states FTC, noting that foreign-operated sites directed at U.S. children must still comply with COPPA. "The amount of civil penalties a court assesses may turn on a number of factors, including the egregiousness of the violations, whether the operator has previously violated the Rule, the number of children involved, the amount and type of personal information collected, how the information was used, whether it was shared with third parties, and the size of the company."

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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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FDA to Take "Fresh Look" at Added Caffeine in Foods and Beverages

Food and Drug Administration (FDA) Deputy Commissioner for Foods and Veterinary Medicine Michael Taylor said this week that the agency "is taking a fresh look at the potential impact that the totality of new and easy sources of caffeine may have on the health of children and adolescents, and if necessary, will take appropriate action." According to Taylor, "[t]he only time that FDA explicitly approved the added use of caffeine in a food was for cola and that was in the 1950s." He acknowledged that in today's environment children and adolescents can be exposed to the substance "beyond anything FDA envisioned when it made the determination regarding caffeine in cola."

In 2010, FDA warned companies producing alcoholic malt beverages that the added caffeine was an unsafe additive and that seizure of their products was possible under federal law. The companies ceased producing the caffeinated products. Additional information about the 2010 initiative appears in Issue **373** of this *Update*. Congressional representatives have called on the agency to review the safety of energy drinks, which purportedly contain high levels of caffeine, and in late 2012, FDA indicated in response that it was then reviewing the potential risks of stimulant ingredients in such products. Details appear in Issue **463** of this *Update*.

News sources report that caffeine has found its way into foods and beverages ranging from jelly beans, trail mix and potato chips to popcorn, beef jerky, and energy drinks and shots. Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson, who has long urged FDA to take action on the proliferating use of caffeine, said, "Could caffeinated macaroni and cheese or breakfast cereal be next? One serving of any of these foods isn't likely to harm anyone. The concern is that it will be increasingly easy to consume caffeine throughout the day, sometimes unwittingly, as companies add caffeine to candies, nuts, snacks and other foods. And that's on top of the soda, coffee, tea, and energy drinks that are already widely consumed." The American Academy of Pediatrics has reportedly indicated that caffeine has been associated with adverse effects on children's developing neurological and cardiovascular systems. *See FDA.gov Statement* and *CSPI News Release*, April 29, 2013; *cnbc.com*, April 30, 2013.

EC to Restrict Neonicotinoids in Bid to Protect Bees

Although a recent proposal to restrict the use of three neonicotinoids failed to gain support from the qualified majority of member states on an appeals committee, the European Commission (EC) has **announced** its intention to proceed with the plan as part of its bid to better protect honeybees. Basing its decision on a European Food Safety Authority's (EFSA) scientific report that "identified 'high acute risks' for bees as regards exposure to dust in several crops such as maize, cereals and sunflower, to residue in pollen and

nectar in crops like oilseed rape and sunflower and to guttation in maize," the Commission has agreed to limit the use of clothianidin, imidacloprid, and thiametoxam "for seed treatment, soil application (granules) and foliar treatment on bee- attractive plants and cereals" for a period of two years starting December 1, 2013. Under the plan, "the remaining authorized uses are available only to professionals," with possible exceptions for the treatment of "bee-attractive crops in greenhouses" or "open-air fields only after flowering." *See EC News Release,* April 29 and May 3, 2013.

Meanwhile, two new studies have attempted to identify additional causes behind colony collapse disorder (CCD), a phenomenon implicated in bee die-offs worldwide since 2006. The U.S. Department of Agriculture (USDA) and Environmental Protection Agency (EPA) recently **released** a joint "Report on the National Stakeholders Conference on Honey Bee Health" held October 15-17, 2012, in Alexandria, Virginia, where experts gathered to discuss "the current state of knowledge regarding the primary factors that scientists believe have the greatest impact on managed bee health."

According to a May 1 USDA press release, the conference concluded that multiple factors have played a role in honey bee colony declines, "including parasites and disease, genetics, poor nutrition and pesticide exposure." In particular, the report points to the parasitic Varroa mite "as the major factor underlying colony loss in the U.S. and other countries," a challenge compounded by "widespread resistance to the chemicals beekeepers use to control mites within the hive." USDA and EPA have also called for additional research into the effects of pesticide exposure while emphasizing that beekeepers should work with federal and state partners to improve the nutrition and genetic diversity of their hives.

"The decline in honey bee health is a complex problem caused by a combination of stressors, and at EPA we are committed to continuing our work with USDA, researchers, beekeepers, growers and the public to address this challenge," said Acting EPA Administrator Bob Perciasepe. "The report we've released today is the product of unprecedented collaboration, and our work in concert must continue. As the report makes clear, we've made significant progress, but there is still much work to be done to protect the honey bee population."

In addition, a second study published in the *Proceedings of the National Academies of Science* (*PNAS*) has suggested that "the widespread apicultural use of honey substitutes, including high-fructose corn syrup, may… compromise the ability of honey bees to cope with pesticides and pathogens and contribute to honey bee losses." Wenfu Mao, et al., "Honey constituents up-regulate detoxification and immunity genes in the western honey bee *Apis mellifera,*" *PNAS,* May 2013. After feeding bees "a mixture of sucrose and powdered sugar" with added chemical components found in honey, University of

Illinois researchers reported that some of these constituents—and especially *p*-coumaric acid—"increase the expression of detoxification genes that help keep honey bees healthy," according to a May 1 press release.

Present in the outer walls of all pollen grains, *p*-coumaric acid not only turned on detoxification genes, but also "immunity genes that code for antimicrobial proteins," raising questions among the researchers about the immune systems of bees raised on high-fructose corn syrup diets that lack this essential chemical. "If I were a beekeeper, I would at least try to give them some honey year-round," one of the authors said, "because if you look at the evolutionary history of *Apis mellifera*, this species did not evolve with high fructose corn syrup. It is clear that honey bees are highly adapted to consuming honey as part of their diet."

EFSA Solicits Acrylamide Data

The European Food Safety Authority (EFSA) has **issued** "a call for acrylamide occurrence data in food and beverages intended for human consumption collected outside official controls." Part of the agency's ongoing assessment of acrylamide levels in food and beverages, the latest request for data focuses on the following product categories: (i) french fries sold as ready to eat; (ii) potato crisps; (iii) pre-cooked french fries and potato products for home-cooking; (iv) soft bread; (v) breakfast cereals; (vi) biscuits, crackers, crisp bread, and similar products; (vii) coffee and coffee substitutes; (viii) baby foods, "other than processed cereal based foods"; (ix) "processed cereal-based foods for infants and young children"; and (x) other products, including muesli and porridge, pastry and cakes, and savory snacks.

EFSA has specified that "the analytical method used for the quantitative determination of acrylamide… should achieve a LOQ [level of quantification] of 30 µm/kg for bread and foods for infants and young children and 50 µm/kg for potato products, other cereal products, coffee and other products." The agency has asked food and beverage manufacturers to submit any relevant data collected since 2010 by June 30, 2013.

EFSA Opens Public Consultation on Fluoride Reference Values

The European Food Safety Authority's (EFSA's) Panel on Dietetic Products, Nutrition and Allergies (NDA Panel) has **initiated** a public consultation on the draft scientific opinion on dietary reference values for fluoride. Citing evidence that supports fluoride's role in the prevention of dental caries, the NDA Panel set the adequate intake (AI) for all sources, including non-dietary ones, based on "estimates of mean fluoride intakes of children via diet and drinking water with fluoride concentrations at which the caries preventative effect approached its maximum whilst the risk of dental fluorosis approached its minimum."

To this end, the panel set the AI of fluoride from all sources at 0.05 mg/kg body weight per day for both children and adults, including pregnant and lactating women. EFSA will accept comments on the proposed reference values until June 13, 2013.

UK Advertising Watchdog Upholds Complaints Against Social-Media Alcohol Ads, Organic Milk Claims

The U.K. Advertising Standards Authority (ASA) recently **upheld** three out of four complaints brought by the Youth Alcohol Advertising Council (YAAC) against Fireball Whiskey distributor Hi Spirits Ltd. over social media advertisements that allegedly promoted excessive drinking. In particular, the complaints focused on Fireball Whiskey's Facebook page, which, in addition to advertisements depicting young women pouring or consuming alcohol, a young man "lying face down on a bed" and teddy bears branded with the whiskey's logo, apparently featured (i) "a poster in style of 'Keep Calm and Carry On'" with the tagline "TAKE A SHOT AND IGNITE THE NITE" and a caption asking users to "Like if you think this is a good plan for the weekend!"; (ii) a status update asking users to submit their "Fireball stories from the weekend" to win "Fireball freebies!"; and (iii) a status update asking students undergoing final exams to "Like this status and tell us why we should send you some Fireball and freebies to keep you going!"

YAAC argued that these ads and status updates not only promoted excessive drinking and, in some cases, "were likely to appeal to people under age 18," but also appeared to show people younger than age 25 consuming alcohol while suggesting "that the product was capable of changing mood and enhancing mental capabilities." Although Fireball agreed to remove the advertisements in question until ASA had completed its adjudication, it confirmed that users must be 18 years old to follow Fireball Whiskey's Facebook page and expressed concern that removing posts and status updates uploaded by followers "would be tantamount to censorship and against the fundamental right to freedom of speech."

In upholding three complaints, ASA ruled that user responses to the advertisement asking, "What are your Fireball stories from the weekend (or any weekend)?," "had been adopted by Fireball" and ultimately "fell within the remit of the CAP Code," which requires "marketing communications to be socially responsible and contain nothing that was likely to lead people to adopt styles of drinking that were unwise or encourage excessive drinking." As a result of this interpretation, the agency held that this status update and the responses to its solicitation, as well as the advertisements showing a women pouring Fireball Whiskey into large glasses ("i.e. not shot glasses") and a man who seemed to be intoxicated, "glorified" the idea of excessive alcohol consumption. ASA also concurred with YAAC that one of the ads appeared to show people younger than age 25 consuming alcohol and that the status

updates directed at students "suggested Fireball would have a positive effect on the recipients' mental and/or physical capabilities." But because Fireball had "an age-gate mechanism in place" for its Facebook page, ASA dismissed the complaint against the teddy bear advertisement as "unlikely to have a particular appeal for people under 18."

Meanwhile, ASA has also **upheld** 10 complaints against a Kosher, organic milk supplier whose Internet page allegedly made unsubstantiated claims about the quality of its products and production methods. Dismissing HaLove's contention that "the differences between organic and non-organic dairy farming were generally known," the agency ruled that the following statements could not be substantiated and thus were misleading: (i) "None of [the cows] suffer from mastitis"; (ii) "the milk is healthier than standard milk"; and (iii) "Emma's Dairy has one of the lowest bacteria count [sic] in England according to the FSA monitor!." In addition, with the exception of two statements concerning the use of genetically modified feed and pesticides on non-organic farms, ASA agreed with the complainant's assertion that the remainder of the claims "misleadingly implied that antibiotics, milk producing hormones and the abortion of calves were routinely used and carried out in dairy production" and "that dairy cows generally experienced oversized udders and artificially increased body weight." ASA has thus directed HaLove to remove these statements from its Website in the absence of proper substantiation.

Sugar-Sweetened Beverage Tax Clears First Hurdle in California Legislature

The California State Senate Committee on Governance and Finance has reportedly passed legislation (**S.B. 622**) that would impose a 1-cent per fluid ounce tax on sugar-sweetened beverages such as soft drinks, energy drinks, sweet teas, and sports drinks. Sponsored by Sen. Bill Monning (D-Carmel) and passed in a 5-2 vote, the measure aims to generate funds to support the newly created Children's Health Promotion Fund and finance programs statewide to fight childhood obesity. The bill excludes milk products, and fruit and vegetable juices would be subject to the law only if the fruit or vegetable content in the beverages dropped below 50 percent.

"This is the first time this state committee has passed a bill that would place a tax on sugary drinks and the first step toward stemming the epidemic of childhood obesity," Monning said. "By taxing these products we will be able to implement programs that will assist in preventing diseases among children and begin to address a public health crisis, whose rising health care costs affect all Californians." The bill now goes to the Senate Health Committee for review. *See Monterey County Weekly,* April 24, 2013; *Sen. Monning News Release,* April 29, 2013.

LITIGATION

Court Orders Injunctive Relief for Olive Oil Association in False Ad Suit

A federal court in New York has agreed to impose some of the preliminary injunctive relief requested by the North American Olive Oil Association in litigation alleging that Kangadis Food Inc., doing business as The Gourmet Factory, falsely labeled its product as "100% Pure Olive Oil" when it actually contained Pomace or was 100-percent refined olive oil. *N. Am. Olive Oil Ass'n v. Kangadis Food Inc.*, No. 13-868 (U.S. Dist. Ct., N.D.N.Y., order entered April 25, 2013).

The court agreed that consumers would likely be confused about Pomace, "an industrially processed oil produced from olive pits, skins, and pulp," labeled as "100% Pure Olive Oil," and agreed that the defendant, which had changed its product as of March 1, 2013, to remove the Pomace and sell instead 100-percent refined olive oil as "100% Pure Olive Oil," likely had a significant amount of its old product on store shelves. Accordingly, the court continued an earlier preliminary injunction preventing Kangadis from selling as "100% Pure Olive Oil" any product containing Pomace and preliminarily ordered the company to take steps to inform potential consumers that tins of its product packed before March 1 contain Pomace.

The court declined, however, to extend its injunction to stop Kangadis from selling 100-percent refined olive oil as "100% Pure Olive Oil," finding that the trade association plaintiff failed to present extrinsic evidence that "the perceptions of ordinary consumers align with [state and federal] labeling standards such that they would understand a product labeled '100% Pure Olive Oil' to contain a blend of refined and virgin olive oil." While "olive oil industry insiders and certain regulators likely would understand Kangadis's label to describe a blend containing at least some virgin olive oil," the court stated, "in the absence of any evidence to the contrary, it is far from clear that an ordinary consumer, unfamiliar with industry lingo, would perceive those terms the same way." The court refused to impose a $10-million bond on the plaintiff, finding it "wildly unreasonable" and stating, "In the event the injunction has issued in error, a $10,000 bond likely will adequately compensate Kangadis for the costs of the ordered notice and any damages they may cause."

Political Contributions at Issue in Diamond Foods Securities Litigation

A federal court in California has reportedly ordered two plaintiffs' law firms to disclose under seal any contributions made "either directly or indirectly by the firm or by any member of the firm to the Democratic Attorneys General Association from January 1, 2012, to present, and any communications between either law firm and the Mississippi Attorney General's office concerning any such contribution." *In re Diamond Foods, Inc., Securities Litig.*, No. 11-5386 (U.S. Dist. Ct., N.D. Cal., order entered April 23, 2013).

The order follows Diamond Food's opposition to the appointment of the Mississippi Public Employee Retirement System (MPERS) as class representative in a securities class action alleging that the food company improperly accounted for some $50 million in payments to walnut growers. When the payments, allegedly intended to artificially lower the company's fiscal 2011 costs, were revealed, a $2.3-billion deal to acquire the Pringles brand was purportedly delayed and later fell apart, according to the putative class complaint. Additional details about the litigation appear is Issue 464 of this *Update*.

Diamond evidently claims that the law firms participated with Mississippi Attorney General Jim Hood in "an apparent 'pay to play' arrangement" under which Hood received political contributions from the firms in exchange for retaining the firms and others to provide securities class action "monitoring" services and representation when Hood sues on MPERS's behalf. In an April 18 filing, Chitwood Harley Harnes LLP and Lieff Cabraser Heimann & Bernstein LLP argued that the campaign contributions have no bearing on MPERS's ability to represent the class and that the donations had no effect on Hood's choice of counsel. *See Law360*, April 26, 2013.

Monster Beverage Seeks to Halt City Attorney's Investigation and Demands

Monster Beverage Corp. has filed a complaint for declaratory and injunctive relief against San Francisco's city attorney, who launched an investigation into the company's alleged marketing of energy drinks to children in October 2012. ***Monster Beverage Corp. v. Herrera*, No. 13-786 (U.S. Dist. Ct., C.D. Cal., E. Div., filed April 29, 2013)**. According to the complaint, City Attorney Dennis Herrera has threatened to sue the company under the Sherman Law and California's consumer protection laws if Monster does not agree to reformulate its product to lower the caffeine content, provide adequate warning labels, cease promoting over-consumption in marketing, cease using alcohol and drug references in marketing, and cease marketing to minors.

The energy beverage maker contends that Herrera's investigation and demands are preempted by federal law and represent an attempt to "usurp FDA's [the Food and Drug Administration's] regulatory authority" contrary to the primary-jurisdiction principle. Monster also claims that Herrera's conduct violates the First and Fourteenth Amendments under the doctrines of "compelled speech" and "void for vagueness," and as impermissible restrictions on "content-based speech" and "commercial speech." The company further alleges violation of the Commerce Clause. The company seeks preliminary and permanent injunctions to stop Herrera from enforcing the state's consumer protection laws "as regards Plaintiffs' energy drinks," attorney's fees and costs.

Among other matters, Monster claims that (i) its products contain less caffeine than other comparable beverages, including coffee, sodas and energy shots; (ii) Herrera "appears to be motivated by publicity rather than science"; (iii) the company is now exceeding FDA requirements by labeling its Monster Energy® drinks with the total amount of caffeine per 8-ounce serving and per can; and (iv) product labels have long cautioned: "Not recommended for children, pregnant women or people sensitive to caffeine" and "Consume Responsibly."

Meanwhile, Herrara has fired back at "an apparently pre-emptive lawsuit," **stating** "Monster Energy is claiming an unfettered right to continue marketing its products to children and youth, even in the face of overwhelming evidence that its products pose serious risks to young people's health and safety. I strongly disagree with Monster's legal contention, and I intend to litigate this case aggressively to reform their irresponsible marketing and business practices, which I believe clearly violate California's consumer protection laws." He contends that his office has been negotiating in good faith with the company and also claims to have uncovered evidence of "a 'Monster Army' social networking community with children as young as 11 and even 6 years of age, and a 'Monster Energy Drink Player of the Game' series, which photographs high school athletes with two four-packs—fully 128 ounces—of highly caffeinated Monster products."

Peanut Company Owner Fails in Bid to Reclaim Passport

A federal court in Georgia considering the criminal charges filed against former Peanut Corp. of America owner Stewart Parnell has denied his request for the return of his passport "for purposes of employment-related international travel." *United States v. Parnell*, No. 13-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered April 26, 2013). Parnell apparently surrendered his passport as a condition of his pretrial release. Parnell and company managers were charged in a 76-count indictment over a nationwide *Salmonella* outbreak in 2009. Additional information about the charges appears in Issue **472** of this *Update*.

According to the court, Parnell was allowed to be released "on an unsecured $100,000 bond with no pretrial supervision by the U.S. Probation Office," and, because he did not show that he cannot find employment within the United States and no other changes have taken place since the conditions were set, the court had no basis for returning the passport.

California AG Brings Prop. 65 Suit over Candy Containing Lead

California's attorney general (AG) has filed a suit against a number of candy manufacturers and grocery retailers, alleging that they have violated Proposition 65 (Prop. 65) by failing to label "ginger candies and other food products containing ginger" and/or "plum candies and other products containing plums," which the AG claims contain lead, a substance known to the state "to

cause cancer, birth defects, and other reproductive harm." *People v. Dakota Bros.*, No. n/a (Cal. Super. Ct., San Francisco Cnty., filed April 30, 2013). Under Prop. 65, "businesses must provide a 'clear and reasonable warning' before exposing individuals to lead," according to the complaint, and the defendants have allegedly not provided such warnings. The AG seeks civil penalties, not to exceed $2,500 per day for each violation, injunctive relief, attorney's fees, and costs.

Dissident Raisin Growers Prevail in Challenge to California Marketing Board

According to a news source, a California judge recently determined that the California Department of Food and Agriculture did not comply with statutory requirements when it created the state's Raisin Marketing Board 15 years ago, agreeing with a challenge filed by dissident raisin growers and packers who have long complained about paying for marketing with which they did not agree. Superior Court Judge Raymond Cadei reportedly determined that the raisin industry did not prove that the industry was in crisis when the board was formed, stating, "[t]he record shows that there was no evidence of the kind of severe adverse economic conditions the Marketing Act was intended to address." The court also ordered the board to repay the plaintiffs' assessments, which could reach millions of dollars. Board officials have indicated they will explore all legal options to keep the board operating. *See The Fresno Bee*, April 27, 2013.

OTHER DEVELOPMENTS

Ag Law Professor Refutes *NYT* Article Claims About Fraud in *Pigford* Settlement

University of Arkansas School of Law Professor Susan Schneider has authored a post on the **Agricultural Law Blog** agreeing with a Federation of Southern Cooperatives post refuting claims by a *New York Times* reporter of fraud linked to the recovery of settlement proceeds (the *Pigford* settlement) in litigation alleging U.S. Department of Agriculture (USDA) loan program discrimination against African-American, Hispanic, Native American, and women farmers.

Schneider states that on reading the April 25, 2013, *New York Times* article, titled "U.S. Opens Spigot After Farmers Claim Discrimination," "I was alarmed to see errors, omissions, and misleading references . . . [and] I am very disappointed that the author appeared more interested in producing a salacious story than in treating the issue with the respect and depth that it deserved." She includes a number of details overlooked in the newspaper article and concludes, "casting the story in the cynical tone of political agendas is profoundly insensitive to the many, many deserving claimants who just wanted their government to treat them the same way that it treated a white male farmer. The *Times* article missed the opportunity to accurately acknowl-

edge the difficulties in righting past wrongs, the complexities of different cases, and the inability of some in agriculture to move forward."

The Federation of Southern Cooperatives provides a claim-by-claim refutation, noting among other matters that the claims process did not encourage people to lie, the settlement program was not a giveaway—some 30 percent of all claims were denied—and of the more than 250 meetings conducted by class counsel, lawyers' aides did not, as claimed in the article, "fill out forms for [claimants] on the spot, supplying answers." The federation concludes by noting that the *New York Times* story is "largely anecodotal," including commentary from unnamed and embittered USDA officials "who refuse to admit the undeniable legacy of discrimination at the department," includes a misleading presentation of data, and that, of 503 cases referred, the FBI chose to investigate 60, or 3/10 of 1 percent of the 22,000 claims. *See Agricultural Law Blog*, April 29 and May 1, 2013.

Report Finds Contaminated Turkey Contains Antibiotic-Resistant Bacteria

According to a new *Consumer Reports* **study** that analyzed ground turkey purchased at retail store nationwide, more than one-half of the 257 samples tested were contaminated with fecal bacteria and "almost all" of the disease-causing organisms "proved resistant to one or more of the antibiotics commonly used to fight them."

The magazine tested both conventional meat and meat from birds that were not fed antibiotics, and, although all were reportedly found to be equally likely to contain the bacteria the magazine considered in its study, bacteria on the antibiotic-free ground turkey "were much less likely to be antibiotic-resistant."

"Turkeys are given antibiotics to treat acute illness," the report stated, "but healthy animals may also get drugs daily in their food and water to boost their rate of weight gain and to prevent disease." This practice "is speeding the growth of drug-resistant superbugs, a serious health concern. People sickened by those bacteria might need to try several antibiotics before one succeeds." *Consumer Reports* is urging the U.S. Food and Drug Administration to prohibit "all antibiotics in animal production except to treat illness."

Meanwhile, the Center for Science in the Public Interest (CSPI) has issued a report titled "Risky Meat: A Field Guide to Meat & Poultry Safety" that **examines** 12 years of foodborne-illness outbreak data—over 1,700 outbreaks—and "ranks meat and poultry foods based on outbreak reports and the likelihood of hospitalizations associated with the pathogens most commonly reported in those foods." According to the nonprofit group's analysis, "chicken nuggets, ham, and sausage pose the lowest risk of foodborne illness."

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 482 | MAY 3, 2013

SCIENTIFIC/TECHNICAL ITEMS

Added Sugar Constitutes 13 Percent of Daily Caloric Intake for Americans, Says CDC Report

A recent report issued by the Centers for Disease Control and Prevention (CDC) has allegedly found that "approximately 13% of adults' total caloric intakes came from added sugars between 2005 and 2010" despite government recommendations that "no more than 5% to 15% of calories should come from solid fats and added sugars." R. Bethene Ervin, et al., "Consumption of Added Sugars Among U.S. Adults, 2005-2010," *NCHS Data Brief,* May 2013. Based on data from the Natonal Health and Nutrition Examination Survey 2005-2010, the report also suggested that (i) "men consumed a larger amount of calories from added sugars than women, but not when their added sugar intakes were expressed as a percentage of total calories," and (ii) "the percentage of calories from added sugars increased with increasing age for children and adolescents, but there was no difference in added sugars consumption between income groups."

In addition, CDC researchers noted that "more of the calories from added sugars came from foods rather than beverages." For adults, beverages contributed 33 percent of calories from added sugars, while for children and adolescents, beverages contributed 40 percent of calories from added sugars. "However, previous research has shown that when foods and beverages are separated into specific food or beverage items, regular sodas are the leading food sources of added sugars, at least for adults aged 18-54," concluded the report's authors. "Regardless of whether the added sugars are from food or beverages, the majority of the calories from added sugars as well as total calories are consumed at home by both adults and youth."

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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.