Shook, Hardy & Bacon L.L.P.

ISSUE 525 | JUNE 6, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Senators Seeks Flexibility on Food Labeling

In response to Affordable Care Act provisions, requiring restaurants and similar retail food establishments to provide calorie and other nutrition information for menu items, U.S. Sen. Claire McCaskill (D-Mo.) and a bipartisan group of senators have reportedly requested that the Office of Budget and Management (OMB) review nutrition labeling regulations to "ensure that any measures adopted will allow flexibility for restaurants and avoid unnecessarily burdening food retail establishments where nutrition information is already prevalent."

"Since FDA published its proposed rule to implement nutrition labeling of standard menu items at chain restaurants, many concerns have been raised about the regulations expanding to non-restaurants, such as grocery and convenience stores, where the vast majority of food products are already labeled with nutritional information," wrote the senators in a May 30, 2014, letter to OMB Administrator Howard Shelanski. "The proposed rule also could affect restaurants with highly variable items or different food service formats, such as pizza delivery operations [thereby harming] both those non-restaurants that were not intended to be captured by the menu labeling law, as well as those restaurants that have variability in the foods they offer."

The senators identified several alternatives that they contend "would allow the food service industry to maintain [its] commitment to customers while increasing [its] ability to comply with federal law," including (i) "limiting the scope of the menu labeling regulations to establishments where food service is the primary source of revenue"; (ii) "allowing delivery operations to provide nutritional information online"; (iii) "allowing multiple approaches for made-to-order or variably sized items"; (iv) "allowing restaurants with drive-throughs to display required nutritional information on a poster or pamphlet"; and (v) "not penalizing reasonable margins of inadvertent human error." *See Sen. McCaskill Press Release,* May 30, 2014.

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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 Discuss Nutrition and Supplement Facts Labels

The U.S. Food and Drug Administration has **announced** a June 26, 2014, public meeting in Washington, D.C., to discuss two proposed rules aimed at updating nutrition information and serving size requirements on Nutrition and Supplement Fact labels. Introduced 20 years ago, the Nutrition and Supplements Facts labels "help consumers make informed food choices and maintain healthy dietary practices."

Among others, the agency has proposed the following changes: (i) to require information about "added sugars"; (ii) to update daily values for nutrients such as sodium, dietary fiber and Vitamin D; (iii) to require manufacturers to declare potassium and Vitamin D amounts on the label, because they are new "nutrients of public health significance"; (iv) to change the serving size requirements to reflect how much people "actually" eat; (v) to require that packaged foods, including drinks, that are typically eaten in one sitting be labeled as a single serving and that calorie and nutrient information be declared for the entire package; and (vi) to make calories and serving sizes more prominent to "emphasize parts of the label that are important in addressing current public health concerns such as obesity, diabetes, and cardiovascular disease." FDA will accept comments on the rules until August 1, 2014. *See CFSAN Constituent Update*, May 28, 2014.

FDA to Update Guidance on Mercury Levels in Seafood

Responding to a lawsuit filed by the Center for Science in the Public Interest (CSPI) and the Mercury Policy Project (MPP), the U.S. Food and Drug Administration (FDA) will soon update guidance on the permissible levels of mercury in seafood and the associated potential risks for pregnant women and young children. While CSPI and MPP urged the agency to mandate mercury-level labeling on seafood and at fish counters in grocery stores, FDA Commissioner Margaret Hamburg said that labels would not be mandated under its forthcoming guidelines. Previous guidance issued in 2010 indicated that pregnant women should limit seafood intake to less than 12 ounces weekly and discouraged consumption of shark, swordfish, tilefish, and king mackerel. *See Associated Press*, May 30, 2014.

EFSA Releases Draft Opinion on Allergenic Food Ingredient Labeling

The European Food Safety Authority (EFSA) has **launched** a public consultation on a draft scientific opinion evaluating "allergenic foods and food ingredients for labeling purposes." Prepared by EFSA's Panel on Dietetic Products, Nutrition and Allergies (NDA), the new draft updates previous scientific opinions "relative to food ingredients or substances with known allergenic potential listed in Annex IIIa of 2003/89/EC," including cereals containing gluten, milk and dairy products, eggs, nuts, peanuts, soy, fish, crustaceans, mollusks, celery, lupin, sesame, mustard, and sulfites.

To this end, NAD addresses the following topics: (i) "the prevalence of food allergies in unselected populations"; (ii) "proteins identified as food allergens"; (iii) "cross-reactivities"; (iv) "the effects of food processing on allergenicity of foods and ingredients"; (v) "methods for the detection of allergens and allergenic foods"; (vi) "doses observed to trigger adverse reactions in sensitive individuals"; and (vii) "approaches used to derive individual and population thresholds for selected allergenic foods." EFSA has requested written comments by August 8, 2014. *See EFSA News Release,* May 23, 2014.

Ad Watchdog Reverses Decision on "French Beer" Brewed in UK

The U.K. Advertising Standards Authority has **reversed** an earlier decision upholding two complaints alleging that Heineken UK Ltd.'s print and TV advertisements gave the impression that its Kronenbourg 1664 beer was brewed in France and made primarily from French hops, despite text disclaimers stating that the product was "Brewed in the UK." According to ASA, Heineken argued that Kronenbourg 1664 "could correctly and reasonably be described as a 'French beer' because of its heritage, the origin of its recipe and the use of the Strisselspalt hop, as well as its ownership and the yeast type used." In particular, the company noted that the aromatic Strisselspalt hop—though not the sole hop used in the beer—was the key ingredient in creating the beer's final character and taste, attributes that could not be captured "from a simple calculation of the proportion in which [the Strisselspalt hop] featured in the recipe."

In its revised assessment, ASA acknowledged these arguments and dismissed the complaints against the print and TV advertisements. In both cases, the authority found that the ads in question focused more on the unique character of the Strisselspalt hop than the brewing process itself. "Because we were satisfied that consumers would understand the association with France in the context of one of the ingredients used rather than the location of production, and because the [TV] ad contained clarification that the beer was brewed in the UK, we concluded that the [TV] ad was not misleading," states ASA. "[B]ecause we were satisfied that the Strisselpalt hops used in Kronenbourg 1664 were sourced from Alsace, France, we concluded that the [print] ad was not misleading."

California Senate Passes Warning Label Legislation for Sugary Drinks

The California Senate has passed a bill (**S.B. 1000**) that would require all sugar-sweetened beverages (SSBs) containing more than 75 calories per 12-ounce serving to carry labels warning of obesity, diabetes and tooth decay. Milk-based beverages and 100%-fruit and -vegetable juices would be exempt. Introduced in February 2014 by state Sen. Bill Monning (D-Carmel) and co-sponsored by the California Center for Public Health Advocacy, the

"Sugar-Sweetened Beverages Safety Warning Act," is backed by the California Medical Association, Latino Coalition for a Healthy California and California Black Health Network.

Noting "overwhelming evidence" linking obesity and the consumption of sweetened beverages," and claiming that SSBs are the "single largest source of added sugars in the American diet," the bill specifically seeks to "protect consumers and promote informed purchasing decisions . . . about the harmful health effects that result from the consumption of drinks with added sugars."

If passed by the Assembly and signed by the governor, the measure would take effect July 1, 2015. Further details about S.B. 1000 appear in Issue 514 of this *Update*.

California Senate Rejects GM Food Labeling Legislation

A California bill requiring labels to disclose genetically modified (GM) ingredients in food recently failed to pass after a close vote in the state senate. Opponents argued that it would cost the average consumer as much as $400 per year for labeling a category of food that presents no risk to the public.

Vermont became the first state to enact a GM ingredient-labeling law in May 2014. Additional information about that statute appears in Issue **521** of this *Update*. *See Reuters*, May 29, 2014.

LITIGATION

Watered-Down Beer MDL Dismissed with Prejudice

A multidistrict litigation (MDL) court in Ohio has dismissed with prejudice six putative class actions involving plaintiffs from California, Colorado, Florida, New Jersey, Ohio, Pennsylvania, and Texas, alleging that Anheuser-Busch "routinely and intentionally adds extra water to its finished product to produce malt beverages that 'consistently have significantly lower alcohol content than the percentages displayed on its labels.'" *In re Anheuser-Busch Beer Labeling, Mktg. & Sales Practices Litig.*, MDL No. 13-2448 (U.S. Dist. Ct., N.D. Ohio, E. Div., order entered June 2, 2014). Additional details about the litigation and the order consolidating the cases appear in issues **473** and **487** of this *Update*.

Federal regulations allow malt beverages containing 0.5 percent or more alcohol by volume a tolerance of 0.3 percent in the alcohol content, "either above or below the stated percentage of alcohol," and the affected jurisdictions have adopted or refer to these regulations in their statutes and regulations. The defendant argued in its motion to dismiss that the plaintiffs failed to "allege any deviation in labeling of the alcohol content of the products at issue that exceeded the regulatory tolerance of 0.3 percent."

The plaintiffs did not dispute this, but argued that (i) the court should exercise its equitable powers to "create an exception to the tolerance when a misstatement of alcohol content, no matter the degree, is knowing or intentional"; (ii) the tolerance regulation "must be considered in the context of the statutory and regulatory scheme as a whole," and allowing the tolerance "even in the case of deliberate misstatements would 'subvert the entire combined statutory and regulatory scheme, which was specifically designed to prevent consumer deception"; and (iii) "tolerance" should be considered a term of art that permits only "unintentional deviations" from the goal of absolute accuracy. The court disagreed, declining to rewrite the law to distinguish between intentional and unintentional deviations and refusing to give the word "tolerance" anything other than its ordinary meaning.

Proposed "All Natural" Mislabeling Class Action Against Diamond Foods Dismissed

A California federal court has dismissed a putative class action against Diamond Foods Inc. alleging that its Kettle tortilla chips are mislabeled as "All Natural" despite containing synthetic ingredients. *Surzyn v. Diamond Foods Inc.*, No. 4:14-cv-136 (U.S. Dist. Ct., N.D. Cal., order entered May 28, 2014). Citing a lack of basic factual assertions such as which product was the subject of the lawsuit, the court granted plaintiff Dominika Surzyn leave to amend within 21 days. Diamond Foods argued that its "All Natural" label is not misleading within the context of the rest of the packaging, which lists some of the ingredients—maltodextrin and dextrose—at issue in the case, and cited a Federal Trade Commission (FTC) determination that consumers' understanding of "natural" is context-specific. The court rejected Diamond Foods' assertions, finding that FTC had reached its conclusion not to dismiss any meaning and implication of the world "natural" but to decline to offer guidance on the use of the word without more particular facts about its context.

Court Limits Class Certification Grant in "All Natural" Litigation

A federal court in California has certified a nationwide class of consumers as to the injunctive relief requested in litigation against Dole Packaged Foods regarding its labeling claims that certain fruit products are "All Natural" despite the presence of ascorbic acid and citric acid, but limited the damages class to California consumers and the number of products at issue. *Brazil v. Dole Packaged Foods, LLC*, No. 12-1831 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered may 30, 2014). Dismissed with prejudice were Dole products and label statements in the second amended complaint for which the named plaintiff did not move for class certification. An earlier ruling narrowing the claims is discussed in Issue 498 of this *Update*.

Among other matters, the court disagreed with Dole's argument that the class could not be ascertained because company records identifying purchasers or the products they purchased do not exist and further disagreed that the "All Natural" labels are not susceptible to common proof. The court found supporting cases distinguishable because the plaintiff challenges just "10 products labeled 'All Natural Fruit' based only on their inclusion of ascorbic acid and citric acid." Accordingly, whether the statement is material, in the court's view, "is a question common to the class."

The court agreed with Dole, however, that California law could not be applied on a class-wide basis as to the damages claims; thus the nationwide class failed the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). In this regard, the court found that the "place of the wrong" is the geographic location where the misrepresentations were communicated to the consumer—"in other words, in each of the 50 states." The court also addressed whether the plaintiff had presented a sufficient damages model consistent with its liability case. While the court found the full-refund and price-premium models inconsistent with the liability case, it ruled that the "economic or regression analysis" proffered by the plaintiff's expert would trace damages to "Dole's alleged liability by accounting for several factors other than the alleged misbranding that might influence changes in price or sales."

Dole had also argued that the court should deny class certification because the expert had not yet run his regressions, but the court noted that the company had not produced the discovery necessary for the analysis before class certification was briefed. In this regard, the court stated, "Dole cannot use damages discovery as both a sword and a shield. In its [Discovery Dispute Joint Report] #1, Dole claims that it need not produce discovery relevant to damages before class certification because the discovery is not relevant to class certification. Yet, Dole opposed class certification on the basis that Dr. Capps has not performed his regression analysis. According to [the named plaintiff], Dr. Capps cannot perform his regression analysis without the discovery Dole refused to produce."

"All Natural" Claims Trimmed in Whole Foods Litigation

A federal court in California has granted in part and denied in part the motion to dismiss in a putative class action alleging that Whole Foods Market Group misleads consumers by labeling certain food products containing sodium acid pyrophosphate (SAPP) as "All Natural." *Garrison v. Whole Foods Mkt. Group, Inc.*, No. 13-5222 (U.S. Dist. Ct., N.D. Cal., order entered June 2, 2014). Additional information about the complaint appears in Issue **504** of this *Update*.

The court ruled that (i) the claims were not preempted under federal law; (ii) the primary jurisdiction doctrine did not apply (given the lack of a clear

indication that the U.S. Food and Drug Administration intended to revisit its decision not to adopt formal regulations as to the meaning of "natural"); (iii) the plaintiffs sufficiently pleaded a cause of action (with the exception of allegations pertaining to marketing in various media and advertising—these claims were dismissed with leave to amend); (iv) the fraud allegations were pleaded with sufficient particularity; and (v) the named plaintiffs had standing to bring claims for products they had not purchased in light of the similarities among the product labels. According to the court, "By establishing that any of the labels were misleading, the Plaintiffs would necessarily establish that they all were. The named plaintiffs therefore have the 'necessary stake in litigating' the class's claims required to confer standing."

The court ruled that the plaintiffs could not seek injunctive relief because they know now that the products contain SAPP, a purportedly synthetic ingredient, and thus they will not be misled in the future. "It may very well be that the legislative intent behind California's consumer protection statutes would be best served by enjoining deceptive labeling. But the power of federal courts is limited, and that power does not expand to accommodate the policy objectives underlying state law." The court also dismissed the plaintiffs' claims for unjust enrichment as duplicative of their other statutory and common law claims.

Statewide Class Certification Granted in Almond Milk "All Natural" and ECJ Labeling Suit

A California federal court has certified a class of California consumers who allege that Blue Diamond Growers' almond milk is mislabeled as "All Natural" and hides its added sugar content by listing "evaporated cane juice" (ECJ) on its label instead. *Werdebaugh v. Blue Diamond Growers*, No. 5:12-cv-2724 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered May 23, 2014). The court granted plaintiff Chris Werdebaugh's motion for certification of the California class but rejected his request for nationwide certification because he had not shown that California had any interest that outweighed the interests of other states in determining their own policies.

Werdebaugh argued that the "All Natural" label on Blue Diamond's almond milk is misleading because the product contains chemical preservatives, synthetic chemicals and added artificial color, and the label also lists ECJ as an ingredient when sugar is the common name as required by the U.S. Food and Drug Administration (FDA). The court ruled that Werdebaugh had standing to pursue his claims because he relied on the "All Natural" and ECJ listing on the almond milk label, despite that he did not know what ECJ was and he "testified that his purchasing decision would not have been affected by the presence of dried cane syrup." More information on the class action against Blue Diamond Growers appears in Issue 499 of this *Update*.

While the court did not rule that listing ECJ constitutes mislabeling, the decision stands in contrast to a recent wave of dismissals in putative class actions as other courts wait for FDA's determination on whether ECJ is simply sugar. For example, in *Gitson v. Clover Stornetta Farms Inc.*, a California federal court has dismissed claims of ECJ mislabeling without prejudice while it waits for FDA guidance. *Gitson v. Clover Stornetta Farms Inc.*, No. 3:13-cv-1517 (U.S. Dist., N.D. Cal., order entered May 30, 2014). More information on recent ECJ cases appears in Issue **524** of this *Update*.

CSPI Seeks Action on Pathogen Petition

The Center for Science in the Public Interest (CSPI) has filed a complaint against the U.S. Department of Agriculture and Food Safety and Inspection Service, seeking a declaration that the agencies have unreasonably delayed taking action on its May 2011 petition requesting that certain strains of antibiotic-resistant (ABR) *Salmonella* in ground meat and poultry be declared adulterants. *CSPI v. Vilsack*, No. 14-895 (U.S. Dist. Ct., D.D.C., filed May 28, 2014). Details about CSPI's petition appear in Issue **396** of this *Update*.

According to the nutrition and health advocacy organization, if these pathogens are declared adulterants, affected meat and poultry products would be barred from entering commerce, and the action "would also confirm the agency's authority to request without evidence of illness that a company recall products containing ABR *Salmonella*, or—in the absence of a company's voluntary compliance—to detain and seize those products." The complaint refers to a number of *Salmonella* outbreaks, some involving ABR pathogens, that sickened a number of people throughout the United States and have occurred since CSPI filed its petition.

Quality Egg to Pay $6.8-Million Fine in *Salmonella* Outbreak

As anticipated, Quality Egg LLC and its former owners, Austin "Jack" DeCoster and his son Peter, have entered guilty pleas to charges of introducing adulterated food into interstate commerce. Additional information about the plea agreement appears in Issue **524** of this *Update*. They admitted that the company's shell eggs, shipped to buyers in states throughout the country, contained *Salmonella* in 2010. As part of the plea agreement, the company reportedly agreed to pay a $6.8-million fine. The DeCosters, who will remain free on bail pending sentencing, face a maximum sentence of up to one year in prison or five years' probation. Sentencing has not yet been scheduled. *See USA Today*, June 3, 2014.

Class Action Challenging Source of Restaurants' "Kobe" Beef Settled

A California state trial court has approved the settlement agreement in a class action against Innovative Dining Group LLC (IDG), owner of the Boa Steakhouse and Sushi Roku chains, alleging that the restaurants falsely advertised their menu as containing Kobe beef. *Hall v. Innovative Dining Grp. LLC*, No. BC493144 (Cal. Super. Ct., Los Angeles Cnty., motion granted May 30, 2014). Plaintiffs claimed that using the term "Kobe beef" implies that the beef came from Wagyu cattle raised and slaughtered in the Kobe region of Japan, but IDG's restaurants advertised Kobe beef on their menus even while the U.S. Department of Agriculture banned beef imports from that region from May 2010 to August 2012. While admitting no wrongdoing, IDG has agreed to issue $20 gift certificates to customers who can prove that they purchased a Kobe beef menu item, $10 gift certificates to any class member who submits a claim, and a $12,500 *cy pres* award to the Los Angeles Regional Food Bank. The settlement follows similar lawsuits against Marriott International Inc., Barney's Beanery Worldwide Inc. and McCormick & Schmick's Seafood Restaurants Inc. *See Law360*, May 30, 2014.

Alcohol Beverage Companies Resolve Prop. 65 Warnings Claims

A California court has approved the settlement of claims that alcohol beverage makers allegedly sold their products without providing warnings required under the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Bonilla v. Anheuser-Busch, LLC*, No. BC537188 (Cal. Super. Ct., Los Angeles Cnty., judgment entered May 30, 2014). Additional details about the claims appear in issue **515** of this *Update*.

Under the agreement, the companies, denying that the signage they already provided to retailers failed to comply with Prop. 65, will (i) obtain a list of all current licensees from the state Department of Alcoholic Beverage Control; (ii) mail or email to every licensee "Proposition 65 Signage"; (iii) mail or email a letter providing contact information for ordering additional signage free of charge, informing licensees of their posting obligations and describing regulatory requirements pertaining to placement; and (iv) repeat these actions every five years. They also agreed to periodically obtain updated licensee lists and send the same information to those retailers. The companies will pay the plaintiffs $92,000, including $16,000 in penalties—to be shared with the state—and $76,000 in attorney's fees.

ADA Discrimination Putative Class Action Filed Against TGI Friday's Franchisee

A wheelchair-bound plaintiff has reportedly filed a putative class action in California state court against the largest franchisee of TGI Friday's, Briad Restaurant Group LLC, for alleged violations of the Americans with Disabilities Act (ADA). *Hicks v. Briad Restaurants Grp. LLC*, No. BC546927 (Cal. Super. Ct.,

Los Angeles Cnty., filed May 28, 2014). Plaintiff, Chris Hicks, alleges that Briad Restaurant violated the ADA by having deficient bathroom facilities and insufficient signage for disabled parking spaces in at least 20 of its locations, and he further asserts that the company had received notice of the issues, was given an opportunity to fix them and failed to do so. As a result, Hicks argues that Briad Restaurant has violated the Unruh Civil Rights Act and the California Disabled Persons Act and seeks statutory relief and injunctive damages. *See Law360*, May 29, 2014.

Hot Sauce Nuisance Suit Dropped in California

According to a news source, the Irwindale City Council has decided to drop its public-nuisance declaration and lawsuit against Huy Fong Foods, the California-based company that makes the popular Sriracha hot sauce. Information about the dispute appears in Issue 520 of this *Update*. The company had asked for more time to address the odors emitted from its facility; residents had complained about burning throats and eyes since the hot sauce maker moved its main operation to Irwindale in 2013. Council's vote was reportedly taken behind closed doors after a meeting with company CEO David Tran and representatives from the governor's Business and Economic Development Office. Tran has indicated that better filters have been installed and should block fumes during the chili-grinding season that begins in August. *See AP*, May 29, 2014.

OTHER DEVELOPMENTS

Friends of the Earth Report Targets Nanoparticles in Food

Friends of the Earth has released a May 2014 report titled "Tiny Ingredients Big Risks," claiming that some popular food products contain unlabeled manufactured nanomaterials. Based on information obtained from the Woodrow Wilson International Center for Scholars Project on Emerging Nanotechnologies (PEN), the report identifies 94 food and beverage products—including almond milk, cereal, soy and dairy products, oils, and sports beverages—that purportedly contain nano-ingredients such as titanium dioxide, silver and "nano-sized self-assembled structured liquids" known as micelles. According to the report, the number of products on this list has allegedly increased tenfold since the consumer group published its last report in 2008.

"Friends of the Earth calls upon food companies and government regulators to stop this influx of nanofoods into the market, given the absence of regulations to ensure these novel products are safe for human health and the environment and labels to ensure consumer right to know," opines the

report's lead author in a May 21, 2014, press release. "We know too little about the safety of these small-but-powerful ingredients to be conducting this widespread experiment on our bodies and the environment." Additional details about an Arizona State University study that added many products to PEN's Nanoproducts Inventory appear in Issue 426 of this *Update*. *See Mother Jones,* May 28, 2014.

Rudd Center Releases Guidelines for Portraying Obesity in the Media

The Yale Rudd Center for Food Policy and Obesity has issued new guidelines that aim to "educate media representatives on how to appropriately discuss the disease of obesity in the media." Titled "Guidelines for Media Portrayals of Individuals Affected by Obesity," the report notes that the media is an "important and influential source of information about obesity," and the manner in which obesity, weight-loss and weight maintenance are portrayed, described and framed by the media "profoundly shapes the public's understanding and attitudes toward these important health issues and the individuals affected by them."

Describing the media as "an especially pervasive source of stigmatization against people with obesity," Rudd Center researchers note that photographs and videos tend to portray people with obesity as headless (i.e., only from the shoulders down), from unflattering angles (e.g., with only their abdomens or lower bodies shown), and engaging in stereotypical behaviors (e.g., eating unhealthy foods or engaging in sedentary behavior), which "degrade[s] and dehumanize[s] people with obesity, while spreading false assumptions and oversimplifying the complex issue of obesity."

"Considerable evidence shows that the media often reinforces negative weight-based stereotypes, perpetuating societal bias towards children and adults affected by obesity," said Rudd Center Deputy Director Rebecca Puhl. "These new media guidelines offer multiple strategies to promote appropriate, non-stigmatizing reporting of obesity, and call upon media representatives to give careful consideration to language and images used in their reporting of obesity."

Yelp Helps Health Officials Track Food Poisoning

The New York City Department of Health and Mental Hygiene (DOHMH) has reportedly partnered with the restaurant review Website Yelp to help health officials discover foodborne illness outbreaks and the restaurants allegedly responsible for them.

While investigating an outbreak of gastrointestinal disease associated with a particular restaurant, DOHMH officials had apparently noted that patrons had reported illnesses on Yelp that had not been reported to DOHMH. To explore

the potential of using Yelp to identify unreported outbreaks, DOHMH then collaborated with Columbia University and Yelp on a pilot project to identify restaurant reviews on Yelp that referred to foodborne illness. Researchers analyzed approximately 294,000 Yelp restaurant reviews from July 2012 to March 2013, using a software program developed specifically for the project.

According to the Centers for Disease Control and Prevention, which published a **report** detailing the project, the program identified 893 reviews that required further evaluation by a foodborne disease epidemiologist. Of the 893 reviews, 499 (56 percent) described an event consistent with foodborne illness (e.g., patrons reported diarrhea or vomiting after their meal), and 468 described an illness within four weeks of the review or did not provide a timeframe. Apparently only 3 percent of the illnesses referred to in the 468 reviews had also been reported to DOHMH during the same period. Closer examination revealed that 129 of the 468 reviews required further investigation, resulting in telephone interviews with 27 reviewers. From the 27 interviews, three previously unreported restaurant-related outbreaks linked to 16 illnesses met DOHMH outbreak investigation criteria, and the three restaurants were charged with multiple food-handling violations.

DOHMH reportedly plans to continue the project and refine it by (i) shortening the time from review to investigation, (ii) expanding it to include additional review Websites and (iii) linking to an electronic survey.

SCIENTIFIC/TECHNICAL ITEMS

RAND Study Examines Economic Measures to Curb Obesity

A recent review of literature on the impact of the economic environment on obesity has purportedly concluded that "effective economic measures policies to curb obesity remain elusive." Roland Sturm and Ruopeng An, "Obesity and Economic Environments," *CA: A Cancer Journal for Clinicians,* May 2014. Funded by the National Institutes of Health and RAND Corp., the study finds that U.S. obesity rates have continued to rise across all sociodemographic groups and geographic areas despite "increases in leisure time (rather than increased work hours), increased fruit and vegetable availability (rather than a decline in healthier foods), and increased exercise uptake."

Calling into question "some widely held, but incorrect, beliefs," the study's authors suggest that decreasing prices have played a primary role in food consumption patterns. Noting that consumers today spend only one-tenth of their disposable income on food, the researchers report that taxes on low-nutritional foods and other large price interventions "could close only part of the gap between dietary guidelines and actual food consumption."

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"The high cost of healthy food may not be the problem as far as obesity is concerned, rather it is excess availability and affordability of all types of food," lead author Roland Sturm explained in a May 22, 2014, press release. "We need to consider strategies that replace calorie-dense foods with fruits and vegetables, rather than just add fruits and vegetables to the diet." Additional details about Sturm's work on restaurant menu labeling regulations appear in Issue 499 of this *Update*.

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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.