

## FOOD & BEVERAGE LITIGATION UPDATE

### CONTENTS

#### Legislation, Regulations and Standards

Independent Investigator Disparages Canada's Response to 2008 <i>Listeria</i> Outbreak .....	1
Fraser Institute Report Urges Reform of Canadian Food Labeling Policy .....	1
California Advisory Committee Requests More Information About Bisphenol A ...	2

#### Litigation

Trade Group Files False Advertising Suit over Plastic Water Bottle Claims .....	2
CSPI-Backed Action Against Denny's Seeks Disclosure of Sodium Levels, Warning Notice .....	3
Vegan Group Seeks Cancer Warning on Hot Dogs .....	3

#### Media Coverage

Elizabeth Kolbert, "XXXL: Why Are We So Fat?" <i>The New Yorker</i> , July 20, 2009 .....	4
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## LEGISLATION, REGULATIONS AND STANDARDS

### Independent Investigator Disparages Canada's Response to 2008 *Listeria* Outbreak

A new [report](#) by an independent investigator is harshly critical of Canada's food safety system with respect to the 2008 *Listeria* outbreak linked to the deaths of 22 people.

Sheila Weatherill, a nurse and health executive who led the federally appointed investigation, said the system was caught unprepared and acted without urgency, citing a void in leadership, a raft of systematic flaws, a shortage of inspectors, and evidence of contamination on meat-production lines months before last summer's outbreak that was not effectively monitored.

While *Listeria* is difficult to detect, "more could have been done to prevent it happening in the first place ... and more must be done to make sure it doesn't happen again," Weatherill asserts. Her 57 recommendations include (i) providing better training for food inspectors, (ii) assigning Canada's public health agency the lead role in responding to national food-borne emergencies and (iii) performing an external audit to determine whether more inspectors are needed. *See Reuters*, July 21, 2009; *FoodProductionDaily.com*, July 22, 2009.

### Fraser Institute Report Urges Reform of Canadian Food Labeling Policy

A new [report](#) from the independent research organization Fraser Institute claims that Canada's rigid advertising standards leave consumers in the dark about the potential health benefits of certain food products.

"Canadian consumers are being denied," Brett Skinner, the Fraser Institute's director of bio-pharma and health policy, was quoted as saying. "They don't know about the potential health benefits of many food products because information can't be printed on labels."

The Consumers' Association of Canada responded to the report by asserting that Canadians are well-served by the current system. "There's no reason we should follow American standards," an association representative said. "Some American consumer groups aren't even happy with the amount of claims made on labels for foods." *See Fraser Institute Press Release; Canwest News Service*, July 20, 2009.

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 312 | JULY 24, 2009

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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### California Advisory Committee Requests More Information About Bisphenol A

The Developmental and Reproductive Toxicant Identification Committee of the California Environmental Protection Agency's Office of Environmental and Health Hazard Assessment (OEHHA) has reportedly asked OEHHA to further investigate the potential developmental and reproductive health effects of the chemical bisphenol A (BPA). The committee voted against placing BPA on the state's Proposition 65 list of chemicals known to the state to cause reproductive toxicity in a meeting held July 15, 2009.

According to a July 23 notice, the committee now seeks information regarding (i) "possible increased susceptibility for developmental toxicity from bisphenol A in subpopulations, for example in those with poor nutritional status for certain nutrients such as folic acid"; (ii) "evidence that bisphenol A exposures in utero or pre-conception may lead to precancerous lesions and eventually cancers (e.g., breast and prostate)"; (iii) "evidence for bisphenol A-induced developmental- or reproductive-related neurobehavioral effects, as these endpoints are further studied"; (iv) "evidence for effects on the immune system resulting from bisphenol A exposures during early development, as new information becomes available"; and (v) "evidence of bisphenol A-induced developmental and reproductive effects from epidemiologic studies, as new information becomes available."

Materials related to the committee's consideration of BPA are available [here](#).

## LITIGATION

### Trade Group Files False Advertising Suit over Plastic Water Bottle Claims

A trade group representing bottled water producers, distributors and suppliers has filed a lawsuit in federal court against Eco Canteen Inc., a stainless steel bottle manufacturer, "for engaging in a deliberate scare campaign to mislead and deceive the public" about the purported health and environmental risks associated with plastic bottle use. *International Bottled Water Association v. Eco Canteen Inc.*, 09-cv-00299 (U.S. Dist. Ct., W.D. N.C., filed July 22, 2009). According to the International Bottled Water Association (IBWA), Eco Canteen has made several false and misleading claims about both single-serve and reusable plastic bottles that included likening these products to poison and linking them to breast and prostate cancer. This "viral" marketing campaign was allegedly designed "to be picked up and disseminated by third parties" despite IBWA's repeated requests for corrective action.

The complaint also notes that the defendant "purposefully matches images of single-serve recyclable plastic bottles with its claims relating to an organic compound called Bisphenol A ('BPA');" even though single-serve recyclable bottles do not generally contain BPA. "In any event," states the complaint, "Eco Canteen's claims pertaining to the alleged health risks of BPA are false and misleading as well. The FDA [Food and Drug Administration] has determined that exposure levels to BPA from food contact materials are below those that may cause health effects and that such use therefore is safe."

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 312 | JULY 24, 2009

IBWA seeks preliminary and permanent injunctive relief to bar Eco Canteen from making these statements, as well as unspecified damages for unfair and deceptive trade practices. "Eco Canteen's false and deceptive advertising campaign represents a systematic effort to undermine ... the confidence of consumers in the safety of the bottled water products of IBWA and its member companies," concludes the complaint.

### CSPI-Backed Action Against Denny's Seeks Disclosure of Sodium Levels, Warning Notice

A consumer supported by the Center for Science in the Public Interest (CSPI) has reportedly filed a putative class action in New Jersey Superior Court, alleging that meals he purchased at Denny's® restaurants contained "alarmingly large and undisclosed amounts of sodium." *DeBenedetto v. Denny's Corp.*, Docket No. \_\_\_\_\_ (N.J. Super. Ct. Law Div., filed July 23, 2009). At issue are menu items such as Moons Over My Hammy, Spicy Buffalo Chicken Melt and Meat Lover's Scramble, which purportedly contain sodium levels that exceed the daily recommended limit of 1,500 mg.

According to the complaint, "Denny's menu deceptively presents various items as single meals to be consumed by one individual without disclosing that they contain substantially more sodium (in some case *two or three times* more) than the *maximum* recommended amount for *all* meals consumed by an individual during the day."

The class action "seeks to compel Denny's restaurants to disclose on menus the amount of salt and to place a notice on its menus warning about high sodium levels," according to a July 23, 2009, CSPI press release. "By concealing an important material fact about its products – namely, that these foods have disease-promoting levels of sodium – Denny's is failing its responsibility to its customers and is in violation of the laws of New Jersey and several other states," CSPI Litigation Director Steve Gardner was quoted as saying.

Denny's Corp. has since issued a statement noting that nutritional information and alternative menu selections are already available to consumers. "With hundreds of items on the menu, Denny's offers a wide variety of choices for consumers with different lifestyles, understanding that many have special dietary needs," stated the July 23 press release.

**FOOD & BEVERAGE  
LITIGATION UPDATE**

ISSUE 312 | JULY 24, 2009

**Vegan Group Seeks Cancer Warning on Hot Dogs**

The Cancer Project, a vegan advocacy group affiliated with the Physicians Committee for Responsible Medicine (PCRM), has reportedly filed a putative consumer fraud class action on behalf of three New Jersey residents that seeks to require cancer-risk labels on hot dogs and other processed meats. Filed July 22, 2009, in New Jersey Superior Court, the complaint names as defendants the parent companies of several hot dog manufacturers, including Kraft Foods Inc., Sara Lee Corp. and Nathan's Famous Inc. The suit seeks damages for the named plaintiffs and declaratory relief under the Consumer Fraud Act for the proposed class.

The Cancer Project has contended that processed meats contain human carcinogens like nitrites and N-nitrosodimethylamine (NDMA), basing its claim on a recent meta-analysis by the American Institute for Cancer Research that purportedly associates the daily consumption of processed meat with an increased risk of colorectal cancer. "Just as tobacco causes lung cancer, processed meats are linked to colon cancer," stated Cancer Project President Neal Barnard in a July 22 press release. "Companies that sell hot dogs are well aware of the danger, and their customers deserve the same information."

Meanwhile, the American Meat Institute (AMI) and several nutrition experts have questioned the scientific claims behind the complaint. "We hope the court will move quickly to review the science affirming the safety of hot dogs and processed meats and dismiss this lawsuit, recognizing it for the nuisance that it is," said AMI President J. Patrick Boyle. "Meat products are regulated and inspected by USDA and bear the federal government's seal of inspection, showing they are wholesome and nutritious. While PCRM argues for warning labels on our safe products, the labels would be more appropriately placed on PCRM's web sites and press releases to alert consumers to their true agenda." See *Law360, Los Angeles Times* and *AMI Press Release*, July 22, 2009.

**MEDIA COVERAGE****Elizabeth Kolbert, "XXXL: Why Are We So Fat?," *The New Yorker*, July 20, 2009**

"Whether anything will be done – or even can be done – to stem the global tide of obesity is, at this point, an open question," writes *New Yorker* columnist Elizabeth Kolbert in her review of several "weight-gain books" that examine the causes and course of this recent phenomenon. The theories under consideration include those put forth in the following publications: (i) *The Evolution of Obesity* (Michael Power and Jay Schulkin), (ii) *The Fattening of America* (Eric Finkelstein and Laurie Zuckerman); (iii) *The End of Overeating* (David Kessler); (iv) *Fat Land* (Greg Critser); (v) *Mindless Eating* (Brian Wansink); (vi) *The Fat Studies Reader* (New York University); and (vii) *Globesity* (Francis Delpuech, Benard Maire, Emmanuel Monnier, and Michelle Holdsworth). According to the article, these books each offer a unique perspective on the obesity "epidemic," chalking up the increasing waistline to a variety of factors as divergent as evolution, corporate manipulation, cheaper calories, and human psychology.

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 312 | JULY 24, 2009

"The problem goes even beyond the corporate interests that have brought us 'eatertaining' foods, Value Meals, and oceans of high-fructose corn syrup," concludes Kolbert, who notes that even politicians acting on World Health Organization recommendations "tend to be in thrall" to special interests. "Collecting the maximum number of calories with the least amount of effort is, after all, the dream of every creature, including those too primitive to dream."

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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.

