

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

U.S. Agencies Announce Plans to Regulate Food Marketing to Kids

The Federal Trade Commission (FTC) recently hosted a forum titled "Sizing up Food Marketing and Obesity," which heard proposals from federal agencies, consumer watchdogs and industry representatives for regulating food advertising to children. In addition to addressing new research, First Amendment issues and self-regulatory initiatives, the forum unveiled a set of [proposed nutritional standards](#) (SNAC PAC) developed by an interagency working group at the request of Congress. Co-authored by FTC, the Centers for Disease Control and Prevention, the Food and Drug Administration (FDA), and the Department of Agriculture, SNAC PAC sets out three standards designed to limit the marketing of foods to children ages 2 through 17. Standard I describes foods that "are part of a healthful diet and may be marketed to children without meeting Standards II and III," including (i) "100 percent fruit and fruit juices in all forms"; (ii) "100 percent vegetables and vegetable juices in all forms," provided the product does not exceed "140 mg of sodium per RACC" [reference amount customarily consumed]; (iii) "100 percent non-fat and low-fat milk and yogurt"; (iv) "100 percent whole grains"; (v) "100 percent water." This standard defines "100 percent" as "no added nutritive or non-nutritive sweeteners and no other functional ingredients added to the product, except flavoring for water, milk and yogurt."

Standard II stipulates that "foods marketed to children must provided a meaningful contribution to a healthful diet" by either (i) containing at least 50 percent by weight of one or more of the following: "fruit; vegetable; whole grain; fat-free or low-fat milk or yogurt; fish; extra lean meat or poultry; eggs; nuts and seeds; or beans" or (ii) containing one or more of the following per RACC: "0.5 cups of fruit or fruit juice," "0.6 cups vegetables or vegetable juice," "0.75 oz. equivalent of 100 percent whole grain," "0.75 cups milk or yogurt; 1 oz. natural cheese; 1.5 oz. processed cheese," "1.4 oz. meat equivalent of fish or extra lean meat or poultry," "0.3 cups cooked dry beans," "0.7 oz. nuts or seeds," or "1 egg or egg equivalent."

The third standard provides a list of "nutrients to limit," such as saturated fat, *trans* fat, sugar, and sodium. In particular, Standard II provides that food products marketed to children (i) cannot contain more than 1 g of saturated fat per RACC; (ii) cannot derive more than 15 percent of their calories from saturated fat; (iii) cannot contain any *trans* fat (defined as less than 0.5 g); (iv) cannot contain more than 13 g of added sugars per RACC; and (v) cannot contain more than 200 mg sodium per portion.

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For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com



or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

The interagency working group reportedly plans to submit to Congress, no later than July 15, 2010, a report containing these recommendations and other findings on the "positive and negative contributions of nutrients, ingredients and food" to children's diets. The Center for Science in the Public Interest (CSPI) has since praised this initiative, stating in a December 15, 2009, press release that these standards would represent "one of the most significant developments in this area in 30 years." According to CSPI Nutrition Policy Director Margo Wootan, industry should take the interagency working group's recommendations "as a wake-up call, and soon [phase] out the discredited practice of marketing junk food to kids altogether."

Department of Health and Human Services (HHS) Secretary Kathleen Sebelius also outlined steps to improve front-of-package (FOP) labeling, warning that the agency will take "appropriate enforcement action" against labels "that appear to be misleading." As Sebelius noted in her [keynote address](#), HHS is working with FDA to develop "consistent criteria for food labels," as well as a "voluntary, government-approved symbol system" that would "give healthy producers an advantage" and incentivize product reformulations. "The companies that make these products are not stupid," stated Sebelius. "The reason they spend \$1.6 billion a year—more than the GDP of Belize—marketing food to children is because it works." See *Reuters*, December 15, 2009.

Meanwhile, industry and consumer representatives offered their perspectives in a forum panel dedicated to the progress of self-regulatory initiatives. One participant from the University of Arizona presented a report titled "[The Impact of Self-Regulation on the Nutritional Quality of Foods Advertising on Television to Children](#)," which used the "Go-Slow-Whoa" food rating system developed by HHS to determine that "the majority of advertisements from companies participating in the Children's Food and Beverage Advertising Initiative are for nutritionally poor Whoa products, which should only be consumed on special occasions." Commissioned by Children Now, the study also alleged that "more than one-quarter of all food and beverage advertising to children originates from companies that do not participate in the initiative." Thus, the report concluded, "the Children's Food and Beverage Advertising Initiative has not improved the overall nutritional quality of ads targeting children," while this "advertising environment... continues to expose them to nutritionally poor food products, contributing to the current obesity epidemic." See *Children Now Press Release*, December 14, 2009.

The vice president and director of the Better Business Bureau's Children's Food and Beverage Advertising Initiative, Elaine Kolish, however, has reportedly disputed these findings. "[Dozens] and dozens of products have been meaningfully reformulated or newly introduced to meet nutrition standards," Kolish was quoted as saying. "Because of these reformulations, involving reductions in calories, fats, sodium or sugars, the nutritional profile of foods in child-directed advertising has improved significantly... While we understand and appreciate exhortations for companies to keep improving the products they advertise to kids, that's exactly what they've been doing." See *FoodNavigator-USA.com*, December 15, 2009.

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House Proposal Would Deny Tax Deduction for Fast Food Ads Targeting Children

Representative Dennis Kucinich (D-Ohio) has introduced a bill (H.R. 4310) that would amend the tax code to deny “any deduction for advertising and marketing directed at children to promote the consumption of food at fast food restaurants or of food of poor nutritional quality.” The proposal defines “food of poor nutritional quality” as food “determined by the Secretary (in consultation with the Secretary of Health and Human Services and the Federal Trade Commission) to provide calories primarily through fats or added sugars and to have minimal amounts of vitamins and minerals.”

Among those advertising-related expenses that could not be deducted would be travel (including meals and lodging), “goods or services of a type generally considered to constitute entertainment, amusement, or recreation or the use of a facility in connection with providing such goods and services,” gifts, and other promotion expenses. The bill, which has four co-sponsors, was referred to the Committee on Ways and Means.

OIG Report Criticizes FDA’s Food Facility Registry, Tracking Capabilities

The U.S. Department of Health and Human Services’ Office of Inspector General (OIG) has issued a [report](#) criticizing the U.S. Food and Drug Administration’s (FDA’s) food facility registry and traceability standards. According to the report, “FDA requires each domestic food facility to provide information for the registry,” including contact information for the facility, the owner or operator, and the parent company, and an emergency contact. After sampling 130 selected domestic food facilities, OIG concluded that (i) “Seven percent... either failed to register or failed to cancel their registration with FDA, as required”; (ii) “Almost half... failed to provide accurate information for the registry”; (iii) “FDA regulations do not ensure that the registry contains certain information that may be needed to locate a facility in an emergency”; and (iv) “Over half of the managers... were unaware of FDA’s registry requirement.”

OIG has recommended that FDA improve the registry’s accuracy by developing “strategies to systematically verify” the information, in part by seeking “statutory authority to require food facilities to reregister on a routine basis.” The government watchdog has also urged FDA to “consider seeking statutory authority to impose civil penalties through administrative proceedings against facilities that do not comply with registry requirements.” In addition, FDA has been asked to make mandatory some optional parts of the registry and to “work with the food industry to increase facilities’ awareness” of these requirements.

Although FDA apparently agreed with OIG about problems with the registration process, the agency has indicated that “proposed legislation would create a strong incentive to ensure timely and proper registration.” As OIG remarked in its executive summary, however, “we still recommend that FDA consider seeking statutory authority to impose civil penalties, such as a daily fine, as an intermediate step before taking more severe actions.” See *Law360.com*, December 11, 2009.

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FDA Bars Seafood Dealer from Importing Food for 20 Years

According to the Food and Drug Administration (FDA), a food importer from Virginia, who was sentenced to five years in prison for conspiring to import falsely labeled catfish from Vietnam to avoid paying import tariffs, has been barred from importing food into the United States for the next 20 years. This action apparently marks the first time the agency used its debarment authority under a law allowing the FDA to “debar a person from importing an article of food or offering such an article for import into the United States if that person has been convicted of a felony for conduct relating to the importation into the United States of any food.” The law also allows debarment in instances of the importation of adulterated food posing “a threat of serious adverse health consequences or death to humans or animals.”

FDA reported that Peter Xuong Lam, president of Virginia Star Seafood Corp., was found guilty before a federal court in California on four felony counts relating to a conspiracy to sell frozen catfish filets falsely labeled as sole, grouper, flounder, snakehead, channa, and other fish species to avoid paying federal import tariffs. While catfish is subject to the tariffs, the other fish are not. The alleged conspiracy reportedly involved more than 10 million pounds of frozen catfish filets. Twelve other individuals and companies have been convicted of charges arising from the conspiracy, although the organizer remains a fugitive, possibly living in Vietnam. In addition to a prison sentence, the court apparently ordered Lam to forfeit more than \$12 million to reimburse the government for anti-dumping duties. *See FDA Press Release*, December 11, 2009.

APHIS Prepares Draft EIS on GE Alfalfa, Public Comments Solicited

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), responding to a directive issued by the Ninth Circuit Court of Appeals, has [prepared](#) a draft environmental impact statement (EIS) on genetically engineered (GE) alfalfa. The agency has preliminarily determined that granting GE alfalfa nonregulated status will have “no significant impact on the human environment.” The draft, which runs more than 1,400 pages, will be available for a 60-day public comment period once it is published in the *Federal Register*.

The agency will conduct four public meetings on the proposed EIS; they will take place in January and February 2010 in Las Vegas, Nevada; Kearney, Nebraska; Lincoln, Nebraska; and Washington, D.C. The GE crop at issue is referred to as Roundup Ready® alfalfa, engineered to be resistant to the herbicide glyphosate. The Ninth Circuit enjoined Monsanto from selling the GE seed and farmers from planting it until APHIS finalizes an EIS, having found that the agency did not adequately document “potential, or lack of potential, environmental impacts.” The successful litigants convinced the court that potential harm to conventional and organic crops from seed drift were concerns that had to be accounted for under the National Environmental Protection Act. *See USDA News Release*, December 14, 2009.

USDA Closes Complaint in Wrongful Organic Advertisement Charge Against Target Corp.

The U.S. Department of Agriculture’s (USDA’s) National Organic Program has reportedly closed its investigation of Target Corp. for erroneously including in newspaper adver-

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tisements organic labeling on Silk® soy milk products. The Cornucopia Institute, which charged the retailer with violating federal organic regulations, apparently made public a letter obtained from the USDA indicating that Target admitted the error and is reviewing its processes to ensure the mistake is not repeated. Further details about the institute's complaint appear in issue 324 of this Update. The organic industry watchdog has been taking a number of initiatives to bring to the public's attention that the company making Silk® soy milk switched this year from organic to conventional soy beans. See *Star Tribune*, December 14, 2009; *Cornucopia News*, December 2009.

FSIS Proposes Labeling Rule for Single-Ingredient Meat and Poultry Products

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has published a supplemental [proposed rule](#) that would "require nutrition labeling of the major cuts of single-ingredient, raw meat and poultry products, unless an exemption applies." FSIS proposed a similar rule in January 2001, and this notice responds to public comments already submitted and "explains how the Agency intends to proceed with a final rule." Under the proposal, the nutrition facts label would contain information about serving size, calorie content, fat, saturated fat, cholesterol, sodium, carbohydrates, fiber, protein, and vitamins. Additional public comments are solicited and must be submitted by February 16, 2010.

USDA, Dairy Producers Pledge to Reduce Greenhouse Gas Emissions

U.S. Department of Agriculture (USDA) Secretary Tom Vilsack recently announced an agreement with dairy producers "to accelerate adoption of innovative manure-to-energy projects," with the goal of reducing greenhouse gas (GHG) emissions by 25 percent by 2020. USDA has vowed to work with farmers and the Innovation Center for U.S. Dairy to develop and implement anaerobic digester technology, "a proven method of converting waste products, such as manure, into electricity." According to USDA, only 2 percent of U.S. dairies that are candidates for a profitable digester are currently utilizing the technology, which can generate enough electricity to power 200 homes. The agency's memorandum of understanding reportedly pledges to "increase the number of anaerobic digesters supported by USDA programs," as well as develop "new technologies to help dairies reduce greenhouse gas emissions."

"Use of manure to electricity technology is a win for everyone because it provides an untapped source of income for farmers, provides a source of renewable electricity, reduces our dependence on foreign fossil fuels, and provides a wealth of additional environmental benefits," stated Vilsack in a December 15, 2009, news release.

In a related development, the Sustainable Development Commission (SDC) has published a report, titled [Setting the Table: Advice to Government on Priority Elements of Sustainable Diets](#), that purportedly assesses "the environmental and health impacts of changing patterns of food consumption." Commissioned by the UK Department for Environment and Rural Affairs (Defra), the study apparently claims that "[a]round 18% of UK greenhouse gas emissions are related to food consumption and production," and that "an estimated 70,000 premature deaths in the UK could be avoided if our diets matched nutritional guidelines." The report includes several policy recommendations for creating guidance on sustainable diets, advising Defra "to develop, through the Food

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2030 project, a shared vision among business, Government and civil society on advise to consumers and the food chain for a sustainable diet.” According to *Setting the Table*, Defra should partner with other UK and European agencies to “better align nutrition advice with environmental evidence” and promote sustainable diets at the international level.

Meanwhile, states SDC in a December 11, 2009, press release, consumers should work to reduce meat and dairy in their diets, eliminate food waste and cut out “food and drink of low nutritional value—including fatty and sugary foods.” The group has called for “all food advice generated across Government to incorporate environmental considerations as well as health guidance, and for sustainability criteria to be incorporated into public sector catering standards.” It has also asked Defra to coordinate research on “sustainability ‘hotspots’—including meat and dairy, fish, soy, and palm oil—and how different methods of production can affect sustainability.” See *SDC Press Release*, December 11, 2009.

Dairy UK, however, has since criticized the SDC report as too “narrow,” urging government to seek “a better balance between environmental, political and economic sustainability in consideration of the diet of the future.” The industry group’s December 11, 2009, [statement](#) argues that dairy production not only adds £8 billion to the UK economy each year, but that dairy farmers “also manage grazing land that is a major store of carbon.” In addition to cutting cattle methane emissions by 17 percent since 1990, dairy processors have apparently “saved more than 130,000 tonnes of carbon from entering the atmosphere in the last 10 years.”

EU Signs Deal on Banana Imports, Ending Long-Running Trade Dispute

EU ambassadors this week signed an agreement with Latin American and U.S. officials to end “a 15-year dispute over EU banana imports,” according to a December 15, 2009, press release, which described the impasse as “the longest trade dispute in history.” The European Union has apparently agreed to “gradually cut its import tariff on bananas from Latin America from €176 per tonne to €114,” in addition to providing €200 million to African and Caribbean banana-exporting countries “to help them adjust to stiffer competition from Latin America.” In return, Latin American countries will “not demand further cuts” and the United States has consented to drop its World Trade Organization (WTO) complaint against Europe’s banana importation practices. “This dispute on bananas has soured global trade relations for too long,” stated EU Agriculture and Rural Development Commissioner Mariann Fischer Boel, who noted that the accord was “well-balanced” and likely to further European objectives pertaining to “so-called ‘tropical’ and ‘preference erosion’ products and thus on the Doha Round,” a WTO trade negotiation round that aims to increase world trade. See *The New York Times*, *The Telegraph* and *The Wall Street Journal*, December 16, 2009.

OEHHA Proposes Pilot Program for Food Retailers to Provide Prop. 65 Warnings to Consumers

The Office of Environmental Health Hazard Assessment (OEHHA) of California’s Environmental Protection Agency has proposed implementing Proposition 65 (Prop. 65) food warnings as a [pilot program](#) that will expire in 4-5 years. The proposal was presented

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during the agency's last informal stakeholder meeting before final regulatory language is drafted. Under Prop. 65, warnings must be provided on products containing chemicals known to the state to cause cancer or reproductive harm. OEHHA has been considering for some time how manufacturers and retailers can provide warnings to consumers about the chemicals in foods that are on the Prop. 65 list. Comments may be submitted until January 29, 2010.

The pilot program will allow the agency "to make some basic assumptions about the level of participation and coverage of the program, and then test them out over the 'pilot' period." Under the proposal, manufacturers would make product-specific information available to retailers through a central Internet-based system. Retailers would be able to convey warning information by means of a "binder" option that consumers could consult in each store. The retailers would have to use an on-product or shelf-tag identifier in addition to the binder to alert consumers as to its existence.

Small retailers would have alternative warning requirements that could consist of "just posting the informational sign with the web address" where consumers could go to get more information. The public would also have access to a Web-based database to search for product-specific warnings by product name, manufacturer, retailer, or chemical name. It is apparently unknown what consumer advocates and environmentalists will have to say about the proposal. It conforms in some respects to suggestions put forward by industry stakeholders and would include "a full 'safe harbor' for all participating manufacturers and retailers to encourage full participation in the program." *See Inside Cal/EPA*, December 18, 2009.

LITIGATION

Fifth Circuit Limits Application of Packers and Stockyards Act

A fractured Fifth Circuit Court of Appeals has determined that claims alleging violation of the Packers and Stockyards Act of 1921 must be supported by proof of injury, or likelihood of injury, to competition. [*Wheeler v. Pilgrim's Pride Corp., No. 07-40651 \(5th Cir., decided December 15, 2009\)*](#). The issue arose from a complaint filed by certain poultry "growers," alleging under the Act that another grower "was given a contract [with defendant] on preferable terms." The district court and a Fifth Circuit panel concluded that the Act did not require a showing of adverse effect on competition and allowed the claims to proceed. The appeals court, in a 9-7 decision, reversed, finding the district court erred in denying defendant's motion for summary judgment.

Four judges joined the majority opinion but authored a concurrence to more clearly discuss the statutory interpretation principles at issue in the case. The dissenting judges, relying on the "unambiguous language" of the law, would have found that sections 192 (a) and (b) "do not require a showing of competitive injury."

Settlement Reached in Diacetyl Case Arising from Popcorn Consumption

According to a news source, a Denver man who alleged that his habit of consuming two bags of microwave popcorn every day caused his *bronchiolitis obliterans*, a debilitating lung condition purportedly associated with exposure to the butter flavoring diacetyl,

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has settled his claims against a flavoring manufacturer. One of three diacetyl lawsuits brought by consumers in 2008, the claims of Wayne Watson were filed on his behalf by an Independence, Missouri, law firm that has obtained a number of settlements for workers with “popcorn lung” purportedly caused by occupational exposures to diacetyl. Details about Watson’s case appear in issue 244 of this Update. No additional information about the settlement has apparently been made available. See *Findlaw.com*, December 15, 2009.

Three Arrested in China for Selling Melamine-Contaminated Milk Powder

According to a press report, three people from the Shaanxi Jinqiao Dairy Co. have been arrested and charged with producing and selling toxic food. They are apparently accused of selling more than five tons of milk powder laced with melamine to a food additive firm, which discovered the contamination. The tainted product was apparently recovered before reaching the marketplace. The detentions come a little more than a year after a nationwide scandal involving contaminated milk powder killed six children and sickened more than 300,000. The first civil trial to consider claims by parents of an injured child began in November 2009, but a second hearing in the matter has reportedly been delayed after the defendants demanded additional investigation into the cause of the child’s illness. See *FoodNavigatorUSA.com*, December 11, 2009.

OTHER DEVELOPMENTS

Advocacy Organization Urges Obama Administration to Take Agricultural Antitrust Action

Food & Water Watch has issued an alert seeking support for its call on the Obama administration to enforce antitrust laws against the agribusiness industry. According to the alert, “[m]ore than 85 percent of U.S. beef cattle are slaughtered by just four companies,” “[t]wo companies sell half of U.S. corn seed,” “[o]ne company controls 40 percent of the U.S. fluid milk supply,” and “[f]ive firms dominate the grocery sector, ensuring that low prices paid to farmers aren’t passed along to consumers at the store.”

Referring to hearings planned by the U.S. Department of Agriculture and the Department of Justice in 2010 to consider the “state of competition in agriculture markets,” the consumer organization has urged supporters to let these agencies “know that they must do a thorough investigation of the lack of competition in agriculture, as well as take immediate action to deal with unfair practices and lack of competition that are wreaking havoc on farmers and consumers across the country.” See *Food & Water Watch Alert*, December 15, 2009.

MEDIA COVERAGE

Paul Greenberg, “A Fish Oil Story,” *The New York Times*, December 16, 2009

This op-ed article examines the environmental sustainability of fish oil as more and more consumers are reportedly choosing supplements “as a guilt-free way of getting

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their omega-3 fatty acids." According to author Paul Greenberg, most fish oil "comes from a creature upon which the entire Atlantic coastal ecosystem relies, a big-headed, smelly, foot-long member of the herring family called menhaden," which one historian has apparently likened to the passenger pigeon in terms of rapid population decline. Once harvested for fertilizer and lamp oil, "trillions of menhaden were ground into feed for hogs, chicken and pets" after the advent of petroleum-based lamps. "Today," writes Greenberg, "hundreds of billions of pounds of them are converted into lipstick, salmon feed, paint, buttery spread, salad dressing and, yes, some of those omega-3 supplements you have been forcing on your children."

He argues that menhaden "keep the water clean," claiming that the "muddy brown color of the Long Island Sound and the growing dead zones in the Chesapeake Bay are the direct result of inadequate water filtration—a job that was once carried out by menhaden." Greenberg not only urges his readers to avoid fish oil supplements made from menhaden, but also calls on President Barack Obama (D) and congressional leaders "to ban the fishing of menhaden in federal waters." In addition, he asks the Virginia Legislature to enact "a similar moratorium in the Chesapeake Bay (the largest menhaden nursery in the world)." As Greenberg concludes, "If our government is serious about standing up for the little guy, it should start by giving a little, but crucial, fish a fair deal."

SCIENTIFIC/TECHNICAL ITEMS

Researchers Say Calorie Labels on Restaurant Menus Affect Food Choices

Yale University researchers, including Kelly Brownell, have published a study that concludes "Calorie labels on restaurant menus impacted food choices and intake; adding a recommended daily caloric requirement label increased this effect, suggesting menu label legislation should require such a label." Christina Roberto, et al., "Evaluating the Impact of Menu Labeling on Food Choices and Intake," *American Journal of Public Health*, December 17, 2009. The study evaluated the dinner selections made by some 300 participants randomly assigned to a menu (i) without calorie labels, (ii) with calorie labels, or (iii) with calorie labels and a label including the recommended daily caloric intake for an average adult.

According to the researchers, those participants in the latter two categories "ordered fewer calories than those in the no calorie labels condition." The participants in the second group did, however, consume more calories after the study dinner than either of the other groups. Combining calories consumed during and after the study dinner, the researchers found that participants in the third group, given the most information, "consumed an average of 250 fewer calories than those in the other groups."

New Fears Surround Alleged Health Effects of Bisphenol A

A French study on bisphenol A (BPA) has suggested a link between exposure to the chemical used in plastic containers and drink cans to reduced intestinal functioning. Viorica Braniste, et al., "Impact of oral bisphenol A at reference doses on intestinal

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barrier function and sex differences after perinatal exposure in rats," *Proceedings of the National Academy Sciences* (December 2009). Researchers at the National Institute of Agronomic Research (INRA) in Toulouse apparently found that the digestive tract of rats reacted negatively to low doses of BPA and that rats exposed to the chemical *in utero* and during breastfeeding had an increased risk of developing severe intestinal inflammation in adulthood. Additional research on human intestine cells evidently revealed that BPA lowered the permeability of the intestines and the immune system's response to digestive inflammation.

"The findings illustrate the intestine's great sensitivity to bisphenol A and open new research paths for characterizing and evaluating the effects on endocrine disruptors from food," according to a December 15, 2009, INRA press release. "They may also contribute to risk assessment and the determination of new acceptable exposure thresholds for these molecules."

In a related development, Linda Birnbaum, director of the National Institute of Environmental Health Sciences (NIEHS) and the National Toxicology Program, told *The (Milwaukee) Journal Sentinel* that she had seen enough BPA studies to be concerned about its health effects. According to the December 11, 2009, article, Birnbaum's recent testimony before a Senate panel compared BPA to lead, mercury and polychlorinated biphenyls, all of which have been linked to various health effects even at low doses. She was quoted as saying that people should avoid exposure to BPA, especially pregnant women, infants and children. "There are plenty of reasonable alternatives," she said.

Mixing Caffeine and Alcohol May Pose Serious Risks, Pennsylvania Research Team Says

A Temple University [study](#) challenges the sobering effects of caffeine by asserting that mixing caffeine and alcohol could "lead to poor decisions with disastrous outcomes." Danielle Gulick and Thomas J. Gould, "Effects of Ethanol and Caffeine on Behavior in C57BL/6 in the Plus-Maze Discriminative Avoidance Task," *Behavioral Neuroscience* (2009). The authors observed mice in a maze that had been given ethanol (pure alcohol) at levels known to induce intoxication, doses of caffeine the equivalent of one up to six or eight cups of coffee for humans, a combination of the two, or neither. They tested the animals' (i) "ability to learn which part of the maze to avoid after exposure to a bright light or sound"; (ii) "anxiety, reflected by time spent exploring the maze's open areas"; and (iii) "general locomotion."

According to a December 7, 2009, press release from the American Psychological Association, which publishes *Behavioral Neuroscience*, the study revealed that "alcohol calmed the caffeine jitters, leaving an animal more relaxed but less able to avoid threats—a combination that the authors speculated could make people more likely to believe they are not drunk or not impaired enough to have problems functioning."

Co-author Thomas Gould also warned that caffeinated "alcohol-energy" drinks do not neutralize alcohol intoxication and raise the odds of drunken-driving citations, sexual misconduct and the need for medical assistance. "The bottom line is that, despite the appeal of being able to stay up all night and drink, all evidence points to serious risks associated with caffeine-alcohol combinations," Gould was quoted as saying.

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Phthalates Purportedly Linked to Breast Enlargement in Boys

A Turkish study has reportedly found that adolescent boys with abnormal breast enlargement, a common condition known as pubertal gynecomastia, had significantly higher phthalate blood levels than boys in a control group. Erdem Durmaz, et al., "Plasma Phthalate Levels in Pubertal Gynecomastia," *Pediatrics* (December 2009). The study specifically focused on the most commonly used phthalate, di-(2-ethylhexyl)-phthalate (DEHP), and its metabolite, Mono-(2-ethylhexyl)-phthalate (MEHP). Researchers tested 40 boys recently diagnosed with pubertal gynecomastia and 21 boys who did not have the condition. According to the results, "Plasma DEHP and MEHP were found to be statistically significantly higher in the pubertal gynecomastia group compared with the control group."

Co-author Elif Ozmert has apparently suggested that until further studies are conducted, people should limit their exposure to phthalates. "Although we can't achieve zero exposure, we can decrease it," he said. Ozmert recommended that consumers (i) avoid using plastic cups and food coverings, particularly for hot foods; (ii) stop microwaving plastic cups and baby bottles; (iii) steer clear of plastic toys; and (iv) reduce cosmetic use. *See Reuters*, December 14, 2009.

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

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.

