Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Abandons Animal ID System for New Framework

The U.S. Department of Agriculture (USDA) has announced its intention to abandon the National Animal Identification System (NAIS) and develop a "new, flexible framework for animal disease traceability," citing public feedback and input from states, tribal nations, industry groups, and small and organic farmers. Created in 2004, NAIS aimed to register all domestic livestock in a national database to facilitate the response of state and federal officials during a disease outbreak. The system apparently drew criticism from many quarters that objected to both the cost and intrusiveness of the measure, which some felt would eventually become mandatory.

Unveiled at the National Association of State Departments of Agriculture (NASDA) Mid-Year Meeting, the new initiative outlines "the basic tenets of an improved animal disease traceability capability in the United States." According to USDA, this framework will (i) "Only apply to animals moved in interstate commerce"; (ii) "Be administered by the States and Tribal Nations to provide more flexibility"; (iii) "Encourage the use of lower-cost technology"; and (iv) "Be implemented transparently through federal regulations and full rulemaking process." The department has also described additional steps "to further strengthen protections against the entry and spread of disease," including (i) "accelerating actions to lessen the risk from disease—such as tuberculosis—posed by imported animals"; (ii) "initiating and updating analyses on how animal diseases travel into the country"; (iii) "improving response capabilities"; and (iv) "focusing on greater collaboration and analyses with States and industry on potential disease risk overall."

To these ends, USDA plans to convene a forum with animal health leaders, as well as revamp the Secretary's Advisory Committee on Animal Health to address confidentiality and liability issues. "One of my main goals for this new approach is to build a collaborative process for shaping and implementing our framework for animal disease traceability," stated USDA Secretary Tom Vilsack in a February 5, 2010, news release. *See The New York Times,* February 5, 2010.

EPA Proposes Significant New Use Rule Under TSCA for Carbon Nanotubes

The Environmental Protection Agency (EPA) has issued a proposed rule that "would require persons who intend to manufacture, import, or process [multi-walled carbon nanotubes] for an activity that is designated as a significant new use by this

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proposed rule to notify EPA at least 90 days before commencing that activity." The activities identified in the proposed rule as "a significant new use" are (i) "protection in the workplace" ("full-face respirators with N100 cartridges"), and (ii) "industrial, commercial, and consumer activities" ("additive/filler for polymer composites and support media for industrial catalysts"). According to the notice, EPA has issued the proposal under the authority of the Toxic Substances Control Act (TSCA) and would adopt the 90-day notice requirement to give the agency the opportunity to evaluate the intended use and "prohibit or limit that activity before it occurs," if necessary. Comments must be submitted by March 5, 2010. *See Federal Register*, February 3, 2010.

Surgeon General Calls for National Grassroots Effort to Reverse Obesity Trend

Surgeon General Regina Benjamin has issued a **report** calling for Americans to join her in a "national grassroots effort" to reverse the "crisis" of overweight and obese adults and children. *The Surgeon General's Vision for a Healthy and Fit Nation 2010* warns that if the trend continues, many children "will be afflicted in early adulthood with medical conditions such as diabetes and heart disease."

The report's recommendations include (i) making healthy choices at home by consuming less sodas and juices with added sugars and eating more fruits, vegetables and whole grains; (ii) creating healthy schools by providing fresh fruit and vegetables, whole grains, water, and low-fat beverages; and (iii) creating healthy work sites that promote healthy eating in cafeterias.

First ANSI Sustainable Agriculture Standard E-Newsletter Published

The committee drafting an American National Standards Institute (ANSI) Sustainable Agriculture Standard (SCS-001) has published its first quarterly **e-newsletter** to report on standard development activities and solicit donations to support the work. The newsletter provides the names of those recently appointed to serve on the standards committee and includes subcommittee reports. The next meeting will apparently be scheduled sometime between March and June 2010 at the University of Arkansas. Shook, Hardy & Bacon attorneys **James Andreasen** and **Chris McDonald** have been monitoring the committee's work on behalf of a coalition of stakeholders concerned about early drafts developed without industry input.

Humane Society Continues to Seek Animal Protection Laws in State Legislatures

The Humane Society of the United States is apparently continuing to push for ballot initiatives and legislation that would impose new requirements on the livestock industry. In Vermont, legislators are considering a bill (**S. 230**) that would require that "a representative of the Vermont humane society be present when livestock are bled or slaughtered, and to report and increase penalties for violations of the humane slaughter rules." Proposed penalties for violation of the law could include fines no less than $5,000 and 90 days in prison.

Meanwhile, a petition has reportedly been filed with Ohio's attorney general seeking the certification of an initiative to place a proposed constitutional amend-

ment on the ballot in fall 2010 to require that the state's newly formed livestock board adopt humane slaughtering measures. The proposed amendment would also prohibit killing animals by strangulation and prevent the sale, transport or receipt "for use in the human food supply" of "downer cows." According to a news source, the amendment would also punish violations of humane animal treatment standards with a year in jail and/or a $1,000 fine.

In Kentucky, a Senate committee has apparently approved a bill (S.B. 105) intended to preempt animal-rights groups from imposing livestock standards in the state. It would create a Livestock Care Standards Board that would include food producers and be chaired by the state's agriculture commissioner. The bill's sponsor was quoted as saying, "The goal is that the conversation be driven by scientific standards and practical animal care standards and the conversation not be driven by emotion." *See The U.S. Agricultural & Food Law and Policy Blog*, February 2 and 5, 2010.

Massachusetts House Approves Vote to Prohibit Soft Drinks, Candy from Schools

The Massachusetts House of Representatives has reportedly approved a bill (H.B. 4459) that would allow the state to prohibit high-calorie sodas and fatty, salty and sugary snacks in elementary, middle and high schools.

The legislation, which supporters believe will help fight childhood obesity, also encourages schools to serve low-fat dairy products and whole-grain breads and pastas, non-fried fruit and vegetables, non-carbonated water, and juice with no additives. The bill applies only to "competitive" foods or beverages—those sold à la carte, in vending machines or as side dishes—which are not part of the larger federal lunch program.

"What this bill would do is get junk food out of the schools, but more importantly get healthy food into the schools," sponsor Representative Peter Koutoujian (D-Waltham) was quoted as saying. Kelly Brownell, director of Yale University's Rudd Center for Food Policy and Obesity, praised the legislation, saying, "This offers parents a greater sense of security that their children will be nutritionally safe in school. There is no credible argument I have ever heard for selling junk food in school." The bill now heads to the Massachusetts Senate. *See Boston Herald*, January 31, 2010.

Western Australia Approves GM Canola

The state government of Western Australia (WA) recently announced its decision to allow the cultivation of genetically modified (GM) canola within the region as of this year. State Agriculture and Food Minister Terry Redman reportedly signed the exemption order under the Genetically Modified Crops Free Areas Act of 2003, thus permitting WA farmers to grow GM canola varieties approved by the Office of the Gene Technology Regulator. Redman noted that, according to a government report, commercial trials have proven the feasibility of segregating GM canola "from paddock to port," a requirement of the Act meant to preserve the state's "markets and reputation by preventing the introduction of GM crops before adequate segregation and identity preservation systems are in place." As WA Premier Colin

Barnett stated, "This decision brings WA in line with other major grain growing states in New South Wales and Victoria, where growers have been able to grow GM canola commercially since 2008. WA farmers are some of the best in the world, but they need to have access to new technology like GM canola to remain competitive in the global marketplace." *See WA Press Release,* January 25, 2010.

Meanwhile, Greenpeace has publicly criticized the announcement, claiming that the "decision to ignore the recommendations of the Parliamentary Review Committee and allow GM crops to be grown commercially, risks Western Australia's major export market and ignores domestic consumer wishes, while delivering no real support for farmers." Greenpeace has alleged that the introduction of GM canola will run afoul of the European Union's strict GM labeling laws and jeopardize "Western Australia's major canola export markets, which in 2008-09 were the Netherlands, France, Pakistan, Japan and Belgium." *See Greenpeace Press Release,* January 27, 2010.

In a related development, the German food and agriculture industry has apparently called for "more comprehensive" GM labeling, characterizing the current system as "dishonest." The head of the National Federation of the German Food Industry (BVE) purportedly told a German newspaper that the group favors positive labeling on products to identify any production method using genetic engineering. In addition, the German Farmers' Association echoed these remarks at the International Green Week in Berlin, arguing that the current "GM-free" label is "misleading" because it does not contain any provisions for the use of vitamins, enzymes or vaccines made with genetic engineering. According to one media report, however, "No changes can be expected in the near future," as "the legislative process required would take several years." *See GMO-Compass.com,* January 23, 2010.

LITIGATION

Federal Court Allows False Advertising Claims to Proceed Against Tropicana

A federal court in California has denied the defendant's motion to dismiss in a putative class action alleging false and misleading advertising for defendant's "Tropicana Pure 100% Juice Pomegranate Blueberry Flavored Blend of 5 Juices from Concentrate with other Natural Flavors." *Zupnik v. Tropicana Prods., Inc.*, No. CV09-6130 (U.S. Dist. Ct., C.D. Cal., decided February 1, 2010). Plaintiffs allege that the product label, which emphasizes the pomegranate and blueberry components of the product by image and size of type constitutes false or misleading advertising in violation of several state statutes. According to the complaint, consumers are misled into believing the juice is primarily pomegranate and blueberry juice when it is, in fact, mostly pear juice.

Tropicana argued that the plaintiff lacked standing, her claims were expressly preempted by federal law, and they were not pleaded with particularity. The court disagreed, finding that because the plaintiff claimed she did not get what she paid for, she had sufficiently alleged an injury-in-fact and thus had standing to bring her claims. The court also determined that federal law did not preempt the state law claims "[b]ecause Congress has also allowed states, at the very least, to pass statutes

identical to [federal law]." According to the court, if the Food and Drug Administration can sue for false or misleading labels, then a private party equipped with a private right of action under state law can sue to enforce an identical state statute. The court further concluded that the plaintiff's fraud claims were pleaded with sufficient particularity.

False Advertising Claims Filed in California Against Kellogg Co. over *Trans* Fats

Two California residents have filed putative class claims against the Kellogg Co. in a California federal court, alleging that the company misleads consumers by making health claims for its Nutri-Grain® bars and promoting some of its Keebler cookie products as containing 0 grams of *trans* fat. *Higginbotham v. Kellogg Co.*, No. 10 CV-255 (U.S. Dist. Ct., S.D. Cal., filed February 1, 2010). According to the complaint, which provides detailed information about the differences between natural saturated fats and artificial *trans* fat, including that the artificial fat "causes cardiovascular disease, type 2 diabetes, and cancer," the *trans* fat content of Kellogg's products renders them "dangerous and unfit for human consumption."

The plaintiffs seek to certify a class of "All persons who purchased, on or after January 1, 2000, one or more Kellogg products containing artificial trans fat for their own use rather than resale or distribution." They allege false advertising under the Lanham Act, violations of the California Unfair Competition Law and the common law of unfair competition, and violations of the California False Advertising Law and Consumer Legal Remedies Act. The plaintiffs seek an injunction to stop the company from marketing products that contain *trans* fat as "no trans fat" and/or "0g trans fat," a corrective advertising campaign, disgorgement of profits, the destruction of all misleading and deceptive advertising materials and products, restitution, costs, expenses, and attorney's fees.

A company spokesperson has reportedly stated that Kellogg believes the suit is meritless. *See FoodNavigator-USA.com*, February 4, 2010.

Quaker Oats Targeted by *Trans* Fat Class Action in California

Two California residents have filed a false advertising complaint on behalf of themselves and a nationwide class of consumers against The Quaker Oats Co., alleging that the company falsely labels Chewy Granola Bars® as "0g trans fat" when they actually contain "dangerous amounts of artificial trans fat, a toxic product that causes cancer, diabetes, and heart disease, and is banned in an increasing number of United States and foreign jurisdictions." *Chacanaca v. The Quaker Oats Co.*, No. 5:10-cv-00502 (U.S. Dist. Ct., N.D. Cal., San Jose Div., filed February 3, 2010). Represented by the same counsel and using the same graphics and allegations about natural and *trans* fats as a complaint filed a few days earlier against Kellogg involving its Nutri-Grain® bars, the plaintiffs allege violations of the Lanham Act, California's statutory and common laws of unfair competition, and the California False Advertising Law and Consumer Legal Remedies Act. They seek to enjoin the alleged false marketing and to compel a corrective advertising campaign, the disgorgement of profits, the destruction of "all misleading and deceptive advertising materials and products," restitution, costs, expenses, and attorney's fees.

Another Lawsuit Claims Yogurt Maker Violates False Advertising Law

A New Jersey resident has reportedly filed a putative class action against General Mills, Inc., alleging that the company's claims about the beneficial digestive health benefits of its Yo-Plus® yogurt products are false and misleading. *Amin v. General Mills, Inc.*, No. 2:10-cv-305 (U.S. Dist. Ct., D.N.J., filed January 19, 2010). According to a news source, the plaintiff alleges that the company's own studies refute many of its health claims; he also cites insufficient-evidence findings by the National Advertising Division of the Council of Better Business Bureaus. The plaintiff seeks certification of a class of New Jersey residents who purchased the product since they were first sold in the state and alleges violations of the New Jersey Consumer Fraud Act and breach of express warranty. *See Mealey's Food Liability*, February 2, 2010.

In issue 333 of this Update, we discussed the decision of a federal court in Florida to certify a class action raising the same types of claims against General Mills.

Popcorn Plant Workers Seek Damages for Diacetyl Exposure

A number of microwave popcorn workers and their spouses have reportedly filed a complaint against a flavoring company in a federal court in Illinois, alleging personal injuries, loss of consortium and wrongful death from exposure to the butter flavoring diacetyl. *Barker v. Int'l Flavors & Fragrances, Inc.*, No. 3:10-cv-48 (U.S. Dist. Ct., S.D. Ill., filed January 21, 2010). The workers were apparently employed by AgriLink, a microwave popcorn manufacturer; they claim that diacetyl exposure can cause the lung disease bronchiolitis obliterans. According to the complaint, the defendant misrepresented the chemical's safety and hid research on its risks from users. The plaintiffs apparently allege negligence and products liability and are seeking compensatory damages, attorney's fees and costs. *See Mealey's Food Liability*, February 2, 2010.

Settlement Reached with Insurance Carrier in Peanut Corp. *Salmonella* Outbreak

According to a news source, some 120 of those purportedly sickened by *Salmonella*-contaminated peanut butter and their attorneys should soon begin receiving a share of a $12 million Harford Insurance Co. policy held by the Peanut Corp. of America. Those sharing the settlement filed claims by October 31, 2009, as part of the company's bankruptcy proceeding. The outbreak reportedly took the lives of nine people and sickened 700 who apparently ate peanuts and peanut paste traced to a company plant in Blakely, Georgia. *See The Columbus Dispatch*, February 2, 2010.

OTHER DEVELOPMENTS

IOM Holds Meeting on Front-of-Package Nutrition Rating Systems and Symbols

The Committee on Examination of Front-of-Package Nutrition Rating Systems and Symbols of the Institute of Medicine held a **meeting** on February 2, 2010. The committee was established at the request of the Food & Drug Administration (FDA)

and Centers for Disease Control and Prevention (CDC) to undertake a review of front-of-package (FoP) nutrition rating systems and symbols. The purpose of the meeting was to gather information that might help the committee conduct its study. Among those appearing during the meeting were representatives of the FDA, CDC and U.S. Department of Agriculture.

FDA staff indicated that in March 2010 the agency plans to issue a proposed rule that will define the scope of what constitutes a "dietary guidance statement" and provide criteria for the use of these statements. A 90-day comment period will follow its publication in the *Federal Register*. FDA will also be issuing two guidance documents, one of which will recommend upper limits for certain nutrients that a food should not exceed if it bears a dietary guidance statement and one that will provide draft recommendations on displaying nutrient information on FoP statements.

During the meeting, FDA acknowledged that, in addition to providing consumers with easily accessible nutrition information, the agency views the development of an FoP scheme as a means to encourage product reformulation. This second objective appears to reflect the more proactive approach the Obama administration has taken on food policy, that is, establishing policy to pressure food processors rather than letting market forces and consumer preferences dictate production.

MEDIA COVERAGE

Marni Jameson, "Fed up with fat and saying something about it," *Los Angeles Times*, February 1, 2010

This article chronicles a growing movement among "normal weight folks" who have become "vocal, sometimes vehemently so, in their support for 'sin taxes' on junk foods and soda," and who have "increasingly attacked, with words or actions, the overweight or obese." Jameson quotes Douglas Metz, chief of health services for a San Diego-based company that offers wellness programs to employers, as saying: "Americans as a society are getting fed up with the matter of obesity. No doubt about it. Some pockets of society are taking positive action, and unfortunately others are taking negative action. That's what happens when a society hasn't figured out what the fix is."

Jameson cites several examples, including the recent unsuccessful plan of Lincoln University in Pennsylvania that sought the body mass index of every enrolling student and required the obese to lose weight or take a fitness class before they could graduate and the attempt by Mississippi legislators to pass a bill allowing restaurants to prohibit obese people from dining. "Most efforts have ultimately met a quick demise or retraction, but not before leaving an impact," she writes.

Jameson also notes that, according to health experts, if "still-slim" Americans, public health officials and employers channel their concerns properly, a positive outcome can result. "Not long ago, the thought of not allowing people in a building to smoke wasn't realistic; now it's common," Mertz said. "Similarly, in some schools the thought

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of banning sugary drinks and junk food seems completely unrealistic, but that will change too. The changes will meet resistance, but over time, healthy ideas will gain acceptance."

SCIENTIFIC/TECHNICAL ITEMS

Literature Review Examines Alleged Link Between Artificial Sweeteners and Childhood Obesity

A recent literature review has examined research that links children's artificial sweetener consumption to weight gain, purportedly finding "no strong clinical evidence for causality." Rebecca J. Brown, et al., "Artificial Sweeteners: A systematic review of metabolic effects in youth, "*International Journal of Pediatric Obesity,* January 2010. Sponsored by the National Institute of Diabetes, Digestive and Kidney Disease, the meta-analysis looked at 18 studies that included both randomized controlled trials, which did not demonstrate any adverse or beneficial metabolic effects for artificial sweeteners, and "data from large, epidemiologic studies," which tended to "support the existence of an association between artificially-sweetened beverage consumption and weight gain in children."

The review also pointed to questions raised by recent animal studies while admitting the difficulty of establishing "causality between artificial sweetener consumption, weight gain, and metabolic abnormalities, as artificial sweetener is like to be an indicator for other variables." According to the authors, "At the current time, the jury remains out regarding a possible role of increased sweetener use in the obesity and diabetes epidemic, whether adverse, beneficial or neutral."

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