

## FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### Report Urges FTC and AGs to Investigate Digital Marketing of Alcohol to Youth

The Center for Digital Democracy and the Berkeley Media Studies Group have released a [report](#), "Alcohol Marketing in the Digital Age," that discusses some of the specific ways that alcohol beverage companies are conducting contemporary advertising campaigns using digital media, data collection, behavioral targeting, social media, and online gaming and video that allegedly appeal to underage youth. The report, which was reportedly submitted to the Federal Trade Commission (FTC), calls on that agency, as well as the state attorneys general, to "investigate the data collection, online profiling, and targeting practices of alcohol beverage companies online, including social media data-mining technologies. The FTC and other regulators need to determine whether alcohol beverage ad targeting is reaching specific young people and their networks."

While the report notes that beer and alcohol companies have "a self-regulatory code of ethics that includes provisions for limiting exposure to marketing messages to underage youth," its authors contend that age restrictions and verifications are "not only inadequate but increasingly irrelevant." They suggest that a simple math calculation allows anyone under the legal drinking age to circumvent Internet mechanisms relying on birth dates alone to bar entrance.

Among other proposals in the report are for the FTC to (i) collect and publish information about what alcohol companies are spending on social media marketing, "a simple extension of what the commission is already doing regarding tobacco marketing expenditures"; (ii) investigate "neuromarketing-related techniques designed to influence or measure subconscious responses"; and (iii) investigate whether age-verification mechanisms are working. The report calls on the alcohol industry to strengthen its self-regulatory codes "to explicitly ban the collection of psychographic information on underage users of any Web site, whether controlled by alcohol marketers or not," and publish annual "transparency reports" about their digital marketing.

The Distilled Spirits Council reportedly issued a statement refusing to comment on a report that had not been read, but stating "the spirits industry's longstanding commitment to responsible advertising regardless of the medium has been commended by the FTC and industry watchdogs." The Beer Institute was quoted as

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saying that beer companies "are adamantly opposed to illegal underage drinking and alcohol abuse. Our members direct their advertising to adults of legal drinking age in accordance with the Beer Institute's Advertising and Marketing Code." See *MediaPostNews Online* and *Broadcasting & Cable*, May 17, 2010; *Congress Daily/National Journal*, May 18, 2010.

### Health Canada Seeks Feedback on Potential Changes to Gluten-Free Labeling

Health Canada has issued a [proposed policy intent](#) that would update current gluten-free labeling guidelines to reduce risks related to the accidental consumption of undeclared gluten and expand choices for consumers following a gluten-free diet.

Gluten, a protein found in cereal grains such as wheat, barley and rye, can trigger the autoimmune disorder celiac disease (CD). Although oats do not contain gluten, food products containing oats currently cannot use the term "gluten-free" on labeling in the event they have been inadvertently contaminated with gluten from other grains during harvesting, processing or transportation. Since that policy was enacted, however, Health Canada has concluded that individuals with CD who can tolerate oats may benefit from consumption of uncontaminated oats (those "specifically produced to be free of gluten from other cereals"). The agency is accepting public comments until July 11, 2010. See *Health Canada Website*, May 10, 2010.

### Wisconsin Governor Vetoes Raw Milk Legislation

Wisconsin Governor Jim Doyle (D) has reportedly vetoed a proposal ([S.B. 434](#)) that would have allowed farmers to sell unpasteurized milk and milk products directly to consumers. Doyle indicated in April 2010 that he would likely sign the bill, but ultimately decided that the potential health risks of consuming raw milk outweighed its alleged benefits. "I recognize that there are strong feelings on both sides of this matter, but on balance, I must side with the interests of public health and the safety of the dairy industry," he said in his May 19 veto message. He added that an expert task force will stay abreast of the issue to "make certain that the concerns and interests on all sides are fully analyzed."

Raw-milk opponents like plaintiffs' lawyer Bill Marler assert that sales of the unpasteurized products could lead to bacterial contamination outbreaks while advocates reportedly contend that unprocessed milk contains nutrients that can ameliorate certain cardiac conditions, including high blood pressure. The ongoing food safety debate over the production and sale of raw milk products was highlighted in [Issue 348](#) of this Update. See *Office of the Governor News Release* and *Journal Sentinel*, May 19, 2010.

### Local Governments Fail to Pass Soft Drink Taxes

According to news sources, both Philadelphia and the District of Columbia have failed to adopt taxes on sweetened beverages. Philadelphia's mayor apparently never had a council majority to support his proposed soda tax and has now indicated that he will be forced to make cuts to police and fire department budgets

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and limit branch libraries to four-day weeks. A council member known as a leading administration critic reportedly characterized the mayor's threat as "retribution."

In a related development, the D.C. Council has informally disapproved a proposal that would have taxed sweetened beverages sold in the district at one penny per ounce. The council member who proposed the tax wanted to use the revenue to fund a healthy school initiative that council has approved because the city's financial officer has apparently indicated that funds are not available to implement it. The initiative reportedly requires schools to serve healthier food to address the child obesity problem. See *Philly Online* and *The Examiner*, May 21, 2010.

### LITIGATION

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#### **Ninth Circuit Denies Request for *En Banc* Review of Ruling Upholding California Downer Livestock Law**

The Ninth Circuit Court of Appeals has apparently denied the National Meat Association's request that the entire court review a recent panel decision which lifted a preliminary injunction that prevented California from enforcing a law prohibiting slaughterhouses from taking, processing or selling nonambulatory animals. Additional details about *National Meat Association v. Brown*, No. 09-15483 (9th Cir. 3/31/10), appear in [Issue 344](#) of this *Update*. The National Meat Association indicated in a May 18 press release that it intends to ask the U.S. Supreme Court to review the matter.

#### **Cheese Maker Seeks to Recover Losses for Foul-Tasting Product**

A Minnesota company that produces cheese has filed a complaint in federal court against an ingredients and flavorings company, alleging that it supplied a flavoring ingredient with phenolic compounds that "caused the cheese in which it was used to have a taste repugnant to certain of the customers who consumed the cheese." *Bongards' Creameries v. Kerry Ingredients & Flavours*, No. 10-cv-02058 (U.S. Dist. Ct., D. Minn., filed May 14, 2010). According to the complaint, flavoring company representatives agreed that the cheese contained unacceptable levels of "off" flavors but refused to pay the cheese maker's losses in excess of \$1.3 million associated with the recall of 800,000 pounds of "contaminated cheese." Alleging breach of implied warranties of merchantability and fitness for a particular purpose and breach of contract, the plaintiff seeks compensatory damages, attorney's fees and costs.

#### **Hershey Co. Claims Brownie Baking Pan Infringes Its Product Configuration Trademark**

Pennsylvania-based chocolate maker Hershey Co. has filed a Lanham Act lawsuit against Williams-Sonoma Inc., alleging that the kitchen-product retailer is marketing and selling a baking pan that infringes Hershey's "Chocolate Bar Design Mark," a purportedly distinctive rectangle scored into 12 smaller rectangles. *The Hershey Co. v. Williams-Sonoma, Inc.*, No. 1:10-cv-1011 (U.S. Dist. Ct., M.D. Pa., filed May 12, 2010). According to the complaint, Hershey has been selling its chocolate bar

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for more than 100 years and registered its design in 1968. Hershey alleges that defendant's unauthorized use of the design mark will cause confusion and that potential purchasers and consumers are likely to believe the infringing brownie pan is licensed by or affiliated with Hershey or its products.

As an example of that confusion, the complaint quotes alleged online consumer comments about the baking pans: "you can make your own little hershey's miniatures"; "It's like a Hershey's bar with individual brownies"; and "Whether you're a fan of Hershey's chocolate bars or not, it's [sic] design is undeniably a classic confectionary icon: a flat, rectangular bar divided up into bite-sized pieces that are easy to snap off." The complaint also calls the infringement intentional, alleging that the defendant sells the pan in packaging that uses "a typeface that is extremely similar to the well-known 'Hershey's' font."

Hershey contends that that the defendant rejected its claims of infringement and refused to stop selling the baking pan. Alleging trademark infringement and related claims under federal law, common law trademark infringement and unfair competition, and trademark dilution under state law, the plaintiff seeks injunctive relief, an accounting of profits, compensatory and punitive damages, treble damages, costs, attorney's fees, and the destruction of infringing products.

### Cupcake Battle Underway in Utah

Mini's Cupcakes, Inc. has sued LuAnn's Cupcakes, Inc. in a federal court in Utah, claiming the infringement of trade dress rights by LuAnn's sale of cupcakes substantially the same in appearance as Mini's gourmet "Breakfast at Tiffany's" cupcake. *Mini's Cupcakes, Inc. v. LuAnn's Cupcakes, Inc.*, No. 2:10-cv-457 (U.S. Dist. Ct., D. Utah, Cent. Div., filed May 14, 2010). The distinctive design allegedly features "vanilla cake, blue cream cheese frosting and silver and white gems.

According to Mini's, LuAnn's "Tiffany Jewel" cupcakes are so similar that the "ordinary observer" will be confused about the origin of LuAnn's product. The plaintiff alleges trade dress infringement, unfair competition, false designation of origin, passing off, and false advertising under federal law; common law unfair competition, misappropriation, and trade dress infringement under state law; and vicarious trade dress infringement against a supermarket that distributes the alleged infringing cupcakes. Mini's seeks injunctive relief, an accounting of profits, compensatory damages, attorney's fees, and costs.

## LEGAL LITERATURE

### Jennifer Pomeranz, "Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate," *Journal of Law, Medicine & Ethics*, Spring 2010

Authored by the director of legal initiatives at the Rudd Center for Food Policy and Obesity at Yale University, this [article](#) purports to demonstrate that food and beverage advertising to children is deceptive and misleading speech and therefore not protected under the First Amendment. According to the author, because this

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speech is not protected, the Federal Trade Commission (FTC) has the authority to restrict the industry's marketing to youth. The article discusses scientific studies about the effects of advertising on children and analyzes court opinions addressing First Amendment and commercial speech issues.

The author then contends, "If children under a certain age cannot understand that the communication is intended to persuade them, then this is a deceptive and misleading way to propose a commercial transaction to them. Because the marketing messages cannot be presented in a way in which they could understand the intent of advertising due to their limited cognitive abilities, such speech cannot be corrected as would be the case if it were only potentially misleading." Thus, the author concludes that the government should regulate food and beverage advertising to children as deceptive and not constitutionally protected; she states, "Childhood obesity is a public health catastrophe in need of such interventions."

### **Neil Buchanan, "Why New York's (and Other Jurisdictions') Food Regulations Do Not Violate Freedom of Choice: The False Notion That Our Tastes Are of Our Own Making," *FindLaw.com*, May 20, 2010**

Authored by a Cornell Law School visiting scholar with a Ph.D. in economics, this [legal commentary](#) suggests that government critics err when they call efforts to address obesity an infringement on their freedom of choice. According to the article, this objection has "no meaning in the context of a modern economy" where "we are being manipulated into eating unhealthfully." To illustrate, the author says that those opposing government regulation in this area are saying, in essence, "Don't let Big Brother tell me what to eat. I do what the Pillsbury Dough Boy tells me."

The author argues that governmental initiatives aimed at altering our eating habits do not violate our freedom, but rather constitute "an important way to push back against all of the ways in which people are manipulated and harmed by industrial food production." Because government is already "inextricably involved in deciding what is grown and sold, how it is labeled and marketed, and who can buy it," the author opines, "there is nothing even remotely disturbing or unusual about a government's enacting a law that will affect how and what people eat." He suggests that a particular enactment's legitimacy can be questioned only on the ground of what motivated the legislation and claims that a law changed to fight juvenile diabetes "is a legitimate use of government's powers."

The article concludes, "In sum, government efforts to improve public health do not undermine freedom of choice in food consumption, because such freedom is illusory. Our choices are, and have always been, shaped by the interactions of governments' laws and businesses' interests."

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## OTHER DEVELOPMENTS

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### **Rick Berman Exposé Tries to One Up Rachel Maddow Interview**

In an article reprinted by *AlterNet* with the permission of The Humane Society of the United States (HSUS), journalist and freelance writer Ian Shearn provides an in-depth look at public relations guru/lobbyist Rick Berman. Shearn contends that Berman is making a fortune taking money from large corporations to attack the charities that criticize big business and to otherwise lobby against laws that regulate business, such as those preventing animal cruelty in animal husbandry. Because Berman operates as a public charity, he is not required to disclose who funds his multi-million dollar campaigns, as MSNBC's Rachel Maddow learned when she interviewed him earlier this year and he refused to reveal his funding sources.

Shearn discusses the various entities Berman has established, including the Center for Consumer Freedom (CCF) "to educate the public on food and beverage issues," and the American Beverage Institute "to fight government regulation of alcohol consumption," as well as the new CCF-funded Website *Humane Watch* that "consists essentially of daily blog entries taking aim at various HSUS official and functions." Shearn notes that some of Berman's *Humane Watch* efforts have borne fruit as several corporate funders recently withdrew their HSUS contributions over concerns that little of the organization's budget goes to support animal shelters.

According to Shearn, HSUS and Mothers Against Drunk Driving have filed a joint complaint against Berman, alleging to the New York State Commission on Public Integrity that his American Beverage Institute failed to register and report 2008-2009 lobbying activity undertaken "to influence pending legislation related to ignition interlock devices." The institute purportedly spent \$70,000 on ads in New York newspapers opposing the measure, which was ultimately enacted. Shearn concludes by quoting several Berman critics who "tip their hat to his business and political acumen." Among the critics is Center for Science in the Public Interest Director Michael Jacobson, who was quoted as saying, "I don't think Berman is very effective. He temporarily muddies the water a little, but basically he's just someone on the sidelines throwing raspberries."

## MEDIA COVERAGE

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### **Alice Lichtenstein, David Ludwig, "Bring Back Home Economics Education," *Journal of the American Medical Association*, May 11, 2010**

Tufts University Professor Alice Lichtenstein and Harvard Medical School Professor David Ludwig team up in this commentary to advocate bringing back home economics to school classrooms as a way to combat the country's childhood obesity epidemic. "Instruction in basic food preparation and meal planning skills needs to be part of any long-term solution," they write.

The authors welcome better food and beverage choices in schools and communities, but assert that those choices will have limited effect "if children do not have the ability to make better choices in the outside-school world," which they will inhabit

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for the majority of their lives. "If children are raised to feel uncomfortable in the kitchen, they will be at a disadvantage for life."

They opine that unlike home economics classes of the 1960s, new food education classes should be open to both genders. "Girls and boys should be taught the basic principles they will need to feed themselves and their families within the current food environment: a version of hunting and gathering for the 21<sup>st</sup> century. Through a combination of pragmatic instruction, field trips, and demonstrations, this curriculum would aim to transform meal preparation from an intimidating chore into a manageable and rewarding pursuit."

### **Anneli Rufus, "Why Caffeine Is the Perfect Addiction for a Worker Bee Society," *AlterNet*, May 19, 2010**

This article by book author Anneli Rufus discusses a recently issued scientific study that purports to show that caffeine can "significantly reduce[] the number of errors" made by shift workers and can, in fact, be more effective at preventing errors than a nap. Rufus further explores how widespread U.S. consumers' alleged addiction to coffee, caffeine and energy drinks has become, noting that nearly one-third of American teenagers "regularly consume caffeinated energy drinks." The article discusses the purported physical effects of ingesting too much caffeine, reporting that the National Institutes of Health this year classified caffeine as a "poisonous ingredient" and recommends calling the National Poison Control Center if caffeine overdose is suspected. The author provides anecdotal evidence about the difficulty some encounter when they consume ever higher amounts of caffeine to maintain the same effects and then attempt to quit cold turkey.

### **Daniela Perdomo, "Big Soda Wants to Keep America Fat: Here's How to Fight Back," *AlterNet*, May 21, 2010**

*AlterNet* staff writer and editor Daniela Perdomo takes a look in this article at the money that the beverage industry is purportedly spending to oppose federal and state efforts to impose a tax on soft drinks. According to the article, the American Beverage Association increased its lobbying nearly 4,000 percent over the last quarter of 2009, from \$140,000 to \$5.4 million. The article cites statistics indicating that children and teens today consume 10 to 15 percent of their daily caloric intake in the form of soft drinks, and weigh more, at a shorter average height, than their counterparts when soft drinks were first introduced in the late 1880s. While some public health advocates argue that people should not consume more than one sweetened beverage each week, those blaming American obesity on lack of exercise counter that "soft drinks are an enjoyable, safe product that people have been enjoying for generations."

The article compares the purported health issues associated with the consumption of sweetened beverages to cigarettes, stating "given how much we drink these beverages, and how much of the nutritionally void sugar we ingest is derived from them, soda has become a problem we're only now in hindsight realizing has damaged the health of entire generation. Kind of like cigarettes." Citing research on the effects of cigarette taxes on use, the author implies that soda taxes would not

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only raise significant revenues, but would help people consume fewer calories per day and lose up to five pounds each year. The author concludes by urging readers to “get off the Internet, reach for a glass of water and go for a run.”

### SCIENTIFIC/TECHNICAL ITEMS

#### NGO Coalition Tests Canned Foods, Allegedly Finds BPA at Levels Linked to Health Effects in Lab Animals

A coalition of public interest organizations has issued a [report](#), “No Silver Lining, An Investigation into Bisphenol A in Canned Foods,” that purportedly detected levels of the chemical in more than 90 percent of the cans from consumers’ shelves that were tested. While the highest levels of BPA, at 1,140 parts per billion (ppb), were apparently found in a can of green beans from a residential pantry in Wisconsin, average levels were 77.36 ppb. According to the report, a pregnant woman of average build consuming several canned food and beverage products in a single day could ingest as much as 138.19 µg of BPA, or 1.94 µg/kg body weight.

Outlining the scientific research purportedly linking BPA exposure to a number of negative health impacts, including obesity, low sperm count, miscarriage, placental cell death, infertility, heart disease, and changes in brain development, the report contends that levels of just 1 or 2 µg/kg body weight exposure have resulted in observed health effects in laboratory studies.

The report, published by the National Workgroup for Safe Markets, calls on manufacturers to identify and begin using replacements for BPA in their canned products, noting that some companies have already done so. It also calls for Congress to ban the chemical in food and drink containers and to “strengthen and pass the Safe Chemicals Act.” The coalition urges consumers to “opt for fresh foods whenever possible followed by frozen or dried foods, and when packaged foods are needed, choose glass, aseptic packages, or less toxic plastic containers when possible.”

The Grocery Manufacturers Association (GMA) reportedly responded to the report by stating that it ignores evidence showing that BPA is safe and that regulatory agencies around the world have affirmed the chemical’s safety. A spokesperson was quoted as saying that “no replacement for BPA . . . will work across the board for all foods. The performance of any technology that could impact the safety of food or beverages must be proven over the entire shelf life of the product before it can be used.” GMA noted that the Food and Drug Administration is currently updating its BPA safety assessment welcomed its review, saying that it “will add to the already robust catalog of scientific evidence on BPA.” See *USA Today* and *Supermarket News*, May 18, 2010.

#### Harvard Researchers Suggest Preservatives in Processed Meats Increase Risk of Adverse Health Effects

A study recently published in the American Heart Association’s *Circulation* journal purportedly shows that consumption of processed meats “is associated with higher incidence of [coronary heart disease] and diabetes mellitus.” Renata Micha,



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et al., "Red and Processed Meat Consumption and Risk of Incident Coronary Heart Disease, Stroke, and Diabetes Mellitus. A Systematic Review and Meta-Analysis," *Circulation*, May 17, 2010. The Harvard researchers apparently reviewed some 1,600 studies involving about 1.2 million subjects and found that the consumption of just 50 g per day of processed meat, such as one hot dog, was associated with a 42 percent higher risk of developing heart disease.

They found no increased risk associated with the consumption of unprocessed red meats and reportedly suggested that the difference may be explained by the levels of salt and nitrate preservatives found in cold cuts, bacon and sausage. The president of the American Meat Institute, which objected to the findings, was quoted as saying, "At best, this hypothesis merits further study. It is certainly no reason for dietary changes." See *Yahoo! News*, May 17, 2010; *FoodNavigator-USA.com*, May 18, 2010.

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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.

