Shook, Hardy & Bacon L.L.P.

ISSUE 374 | DECEMBER 10, 2010

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Obama Expected to Sign Child Nutrition Bill into Law

The U.S. House of Representatives has approved the Healthy, Hunger-Free Kids Act of 2010 (S. 3307), which first lady Michelle Obama called "a ground-breaking piece of bipartisan legislation that will significantly improve the quality of meals that children receive at school and will play an integral role in our efforts to combat childhood obesity." President Barack Obama (D) is expected to sign the $4.5 billion bill, approved in a 264-157 vote on December 2, 2010. The measure was approved by the U.S. Senate in August.

The legislation allows the U.S. Department of Agriculture (USDA) to set new nutritional standards for all foods sold in schools, including lunch lines and vending machines, and will require schools to offer more fruits, vegetables, whole grains, and low-fat dairy products. Its provisions also make it easier for qualified children to receive free school meals and provide funding for 21 million after-school meals annually in all 50 states. "This legislation will allow USDA, for the first time in over 30 years, the chance to make real reforms to the school lunch and breakfast programs by improving the critical nutrition and hunger safety net for millions of children," USDA Secretary Tom Vilsack said in a statement.

Other provisions include (i) "increasing the federal reimbursement rate for school lunches by 6 cents for districts that comply with federal nutrition standards"; (ii) "requiring schools to make information more readily available to parents about the nutritional quality of school meals, as well as the results of any audits"; and (iii) "improving WIC by making it easier for children to get recertified as eligible for the program, requiring greater use of EBT technology (debit cards), and expanding support for breastfeeding." *See White House Press Release; USDA Press Release*; *The Associated Press*, December 2, 2010.

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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White House Seeks Comments on Nanotech-Related Research

The White House Office of Science and Technology Policy has published a notice requesting public comment on the National Nanotechnology Initiative's draft "Strategy for Nanotechnology-Related Environmental, Health, and Safety Research." Comments are requested by January 6, 2011.

The draft describes the research that 25 federal agencies believe is needed to adequately assess the environmental, human health and safety aspects of nanomaterials, and includes information about the state of the science and an analysis of the gaps and barriers to achieving the necessary research. The core research areas involved are nanomaterial measurement, human exposure assessment, human health, the environment, and risk assessment and risk management methods.

GAO Report Highlights Value of Agricultural Chemical Usage Data

The Government Accountability Office (GAO) has released a report titled "USDA Could Enhance Pesticide and Fertilizer Usage Data, Improve Outreach, and Better Leverage Resources." GAO was asked to investigate the effect of budgetary cutbacks on a program that gathers, analyzes and disseminates information about the use of agricultural chemicals. According to the report, the cutbacks forced data users to rely on older statistics, "which hindered their ability to make informed decisions because agricultural chemical use can change from year to year due to the emergence of new pests, weather variations, changing market conditions, and other factors."

GAO recommends various improvements to the system, including incorporating data from other publicly available sources, minimizing potential overlap with other data sources and identifying and consulting with data users on a regular basis.

FTC Proposes Privacy Browser Setting for Consumers' Online Use

The Federal Trade Commission (FTC) has issued a preliminary staff report that proposes a framework for businesses and policymakers to protect the privacy of consumers using the Internet. FTC staff seeks stakeholder comments on the proposed framework until January 31, 2011, and a final report will follow.

The report coincides with a recent congressional hearing during which FTC officials testified that a "persistent" browser setting could allow consumers to choose whether companies can collect data about their online searching and browsing. According to an agency press release, although online tracking can help targeted advertising efforts, FTC "supports giving consumers a 'Do Not Track' option because the practice is largely invisible to consumers, and they should have a simple, easy way to control it." The option could be

accomplished through legislation or "potentially through robust, enforceable self-regulation," FTC said. "The advantage of industry doing something themselves is that they can move much more quickly than lawmakers," FTC Chair Jon Leibowitz told news sources.

If Congress chooses to enact legislation, FTC urged it to consider such issues as (i) the benefits that online "behavioral" advertising provides consumers; (ii) "an option that lets consumers choose to opt out completely or choose certain types of advertising they wish to receive or data they are willing to have collected about them"; and (iii) new FTC authority to fine violators to "provide a strong incentive for companies to comply with any legal requirements, helping to deter future violations." *See Legal Times,* December 1, 2010; *FTC Press Release,* December 2, 2010.

FDA Hearings to Target Alleged Effect of Food Dyes on Children's Behavior

The Food and Drug Administration (FDA) has **announced** an advisory committee meeting to "discuss whether available relevant data demonstrate a link between children's consumption of synthetic color additives in food and adverse effects on behavior." FDA plans to provide background material no later than two business days before the March 30-31, 2011, public meeting in Silver Spring, Maryland.

Calling the news "welcome and overdue," Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson said that the meeting was in response to CSPI's 2008 petition calling for FDA to ban Yellow 5, Red 50 and six other food dyes. The dyes "have long been shown in numerous clinical studies to impair children's behavior," Jacobson said. "But for years—FDA—which actually commissioned one of the first controlled studies—dismissed the mounting evidence against the dyes." *See Federal Register* and *CSPI News Release,* December 1, 2010.

Canadian Firm Seeks Approval for Biotech Apple That Resists Browning

The U.S. Department of Agriculture has reportedly been asked by a Canadian biotechnology company to approve its genetically modified (GM) apple, which resists browning after it is sliced. The British Columbia-based company apparently licensed the non-browning technology from an Australian company that developed it for potatoes. Approval of the GM technology could take several years, and U.S. apple growers have reportedly expressed concerns about cross-pollination with conventional apple trees as well as the cost of replanting apple groves with the "Arctic" apples, a figure estimated at $10,000 to $20,000 per acre.

Andrew Kimbrell, executive director of the Center for Food Safety, criticized

the proposal, apparently claiming, "A botox apple is not what people are looking for. I'm predicting failure." Yet, the sliced apple market has increased in recent years, with suppliers relying on calcium and ascorbic acid to maintain product freshness. The company seeking the GM apple's approval claims that the technology will reduce the cost of producing fresh slices. While reluctant to adopt any new technology that could turn off consumers on the basis of taste or preference, the U.S. apple industry is apparently interested in learning more about the product. *See Associated Press*, November 30, 2010.

IOM Revises Vitamin D, Calcium DRIs

The Institute of Medicine (IOM) has issued a **report** revising the dietary reference intakes (DRIs) for vitamin D and calcium, while warning that "too much of these nutrients may be harmful." At the request of the U.S. and Canadian governments, the IOM Food and Nutrition Board assessed more than 1,000 vitamin D and calcium studies related to a range of health outcomes, "including but not limited to cancer, cardiovascular disease and hypertension, diabetes and metabolic syndrome, falls, immune response, neuropsychological functioning, physical performance, preeclampsia, and reproductive outcomes." Although evidence apparently substantiated "the importance of vitamin D and calcium in promoting bone growth and maintenance," it did not confirm any "benefits beyond bone health—benefits often reported in the media."

The new **DRIs** provide nutrient guidelines based on estimated average requirements, recommended dietary allowances and upper level intakes for different age groups. According to IOM, "Most Americans and Canadians up to age 70 need no more than 600 international units (IUs) of vitamin D per day to maintain health, and those 71 and older may need as much as 800 IUs." In addition, "The amount of calcium needed ranges, based on age, from 700 to 1,300 milligrams per day."

The IOM findings note that most people receive enough vitamin D and calcium from dietary or environmental sources to maintain good bone health. It also cautions against consuming high amounts of these nutrients, which are often included in popular supplements and fortified foods. "Kidney stones have been associated with taking too much calcium from dietary supplements," states the IOM report. "Very high levels of vitamin D (above 10,000 IUs per day) are known to cause kidney and tissue damage. Strong evidence about possible risks for daily vitamin D at lower levels of intake is limited, but some preliminary studies offer tentative signals about adverse health effects." *See IOM Press Release,* November 30, 2010.

Meanwhile, the Vitamin D Council has lambasted the IOM's conclusions,

questioning how the board could recommend the same vitamin dose for infants, adults and pregnant women. "While that 400 IU/day dose is close to adequate for infants, 600 IU/day in pregnant women will do nothing to help the three childhood epidemics most closely associated with gestational and early childhood vitamin D deficiencies: asthma, auto-immune disorders, and, as recently reported in the largest pediatric journal in the world, autism," opines a December 1, 2010, press release.

The group has since filed a Freedom of Information (FOI) request asking IOM to release 14 consultation reports allegedly suppressed during the review process. It also accuses the Food and Nutrition Board (FNB) of ignoring "thousands of studies from the last ten years that showed higher doses of vitamin D helps: heart health, brain health, breast health, prostate health, pancreatic health, muscle health, nerve health, eye health, immune health, colon health, liver health, mood health, skin health, and especially fetal health."

"Today, the FNB has failed millions of pregnant women whose as yet unborn babies will pay the price," concludes the council's statement, which advises pregnant women to "continue taking 5,000 IU/day until their [5-hydroxy vitamin D blood test] is between 50–80 ng/mL (the vitamin D blood levels obtained by humans who live and work in the sun and the mid-point of the current reference ranges at all American laboratories)." *See The New York Times,* November 19, 2010.

EC Bans BPA in Baby Bottles

The European Commission (EC) has announced a ban on bisphenol A (BPA) in plastic baby bottles. According to a November 26, 2010, press release, the decision was reached at a meeting of European Union member states that followed "months of discussion and exchange of views between the Commission's services, the European Food Safety Agency, member states and the industry."

The measure prohibits member states from manufacturing the bottles with BPA starting on March 1, 2011, and selling and importing them as of June 1. John Dalli, commissioner in charge of health and consumer policy, reportedly raised concerns after recent studies claimed to show BPA could be harmful to infants. "The decision is good news for European parents who can be sure that as of mid-2011 plastic infant feeding bottles will not include BPA," he was quoted as saying.

Meanwhile, a UK expert has criticized the move, telling a news source that it was "an overreaction." Richard Sharpe, of the University of Edinburgh Medical Research Council's Human Reproductive Sciences Unit, said that he viewed the decision as political rather than scientific. "I do not know of any convincing evidence that bisphenol A exposure, in the amounts used in polycarbonate bottles, can cause any harm to babies as not only are the amounts so minus-

cule but they are rapidly broken down in the gut and liver," he said. "Babies have the necessary enzymes and are able to metabolize bisphenol A just as effectively as adults." *See BBC News,* November 25, 2010; *EC Press Release*, November 26, 2010.

EC Rejects Citizen Initiative on GM Crops as Invalid

Saying the European Union's (EU's) citizen initiative procedure, created under the Lisbon Treaty, is "not yet valid," EU Health Commissioner John Dalli has reportedly dismissed on procedural grounds the submission of 1.03 million citizens taking part in a campaign to compel the European Commission (EC) to prohibit genetically modified (GM) crops until an "independent ethical, scientific body" assesses their impact. This first effort to activate the Lisbon pact's rules allowing one million citizens to propose legislation was apparently initiated in May 2010 after the EC decided to grant the first EU GM cultivation approval.

According to one of the organizations responsible for the anti-GM campaign, "European citizens have given the Commission more than a million reasons to listen to the public and act with precaution rather than cave to the private interests of a handful of GM companies who are influencing Europe's agricultural future." Dalli indicated that he would take the request into consideration as a petition rather than a citizens' initiative, noting the EC could not "accept any initiative at this stage," since the European Parliament has not agreed yet on how the procedure would operate, said a news source. The groups supporting the campaign reportedly argued that the citizens' initiative procedure is "directly applicable" and can be exercised in the absence of any other regulation. *See Irish Times*, December 10, 2010.

EC Committee Defines "Nanomaterial"

The European Commission's (EC's) Scientific Committee on Emerging and Newly Identified Health Risks has approved a **definition** for "nanomaterial" as a basis for future regulatory safety evaluations and risk assessments. The committee concluded that size is the most relevant consideration in defining the term, and that no scientific justification exists to prefer any specific size limit other than the range from 1 to 100 nanometers. According to the committee, "size influences bio-distribution (and distribution kinetics) in an organism or in an ecosystem which should be taken into consideration in the risk assessment of nanomaterials." The committee decided not to distinguish between natural and manufactured nanomaterials in its definition.

FSA Says Offspring of Clones Do Not Require Authorization as "Novel Foods"

The United Kingdom's Food Standards Agency (FSA) board has reportedly changed its position to agree with the European Commission (EC) that food from the offspring of cloned cattle and pigs does not require authorization as "novel foods." Meeting December 7, 2010, to discuss animal cloning for food production, the FSA board also agreed that "for food safety purposes, mandatory labeling of meat and milk obtained from the descendants of cloned cattle and pigs would be unnecessary and disproportionate, providing no significant food safety benefit to consumers."

According to an FSA press release, the food safety watchdog agreed to advise European Union ministers that "the marketing of products obtained from cloned animals should be subject to authorization as novel foods," but that it was prepared to adopt EC's position that offspring of cloned cattle and pigs does not require such authorization. FSA announced that it will seek views from interested parties relating to its change of position. The board also agreed to ask the Department for Environment Food and Rural Affairs to "consider what information about the ethics and welfare of animal cloning should be provided to the public." *See FSA Press Release,* December 7, 2010.

The news follows an FSA advisory committee's recent determination that meat and milk from cloned animals is "hypothetically" safe. The Advisory Committee on Novel Foods and Processes considered a "hypothetical application under the Novel Foods Regulations on whether available evidence on clones and their offspring provides a sufficient basis for the evaluation of meat and milk from such animals." According to a November 25, 2010, FSA press release, the committee concluded that (i) "the evidence showed that no differences in composition between the meat and milk of conventional animals, clones or their progeny and is therefore unlikely to present any food safety risk"; (ii) "the current evidence on the composition of meat and milk is relatively limited, and further evidence is required on how the rearing of animals in different environments may affect the meat and milk"; (iii) "any potential differences between conventional cattle and the progeny of a clone were unlikely to exist from the second generation onwards"; and (iv) "consumers may want to see effective labeling of products from clones and their offspring." *See FSA Press Release*, November 25, 2010.

San Francisco Board of Supervisors Overrides Mayoral Veto of Toy Ban

The San Francisco Board of Supervisors has overruled Mayor Gavin Newsom's (D) veto of a bill prohibiting restaurants from offering toy giveaways in children's meals deemed too high in calories, salt or fat. Under the law, which takes effect in December 2011, restaurants can only provide toys with meals containing fewer than 600 calories and 640 milligrams of sodium, and if fat

makes up less than 35 percent of the total calories.

In vetoing the measure, Newsom called the legislation an "intrusive and ineffective approach" to combat the problem and "unprecedented governmental intrusion into parental responsibilities and private choices." But Supervisor Eric Mar (D) told a news source after the November 23, 2010, veto override that parents and health advocates support the measure to help curb childhood obesity. "From the Institutes of Medicine to the World Health Organization, we know that reducing the consumption of junk food by kids could spare the health of millions and save billions of dollars to our overstrapped public health system," Mar said. *See CNN.com*, November 23, 2010.

LITIGATION

Court-Ordered GE Sugar Beet Seedling Destruction on Hold

The Ninth Circuit Court of Appeals has reportedly issued a temporary stay of a district court order mandating the destruction of 256 acres of genetically engineered (GE) sugar beet seedlings that were, according to the lower court, planted illegally in September 2010. ***Ctr. for Food Safety v. Vilsack*, No. 10-04038 (U.S. Dist. Ct., N.D. Cal., decided November 30, 2010)**.

Press sources indicate that the Ninth Circuit's postponement is scheduled to expire December 23, when the court will either allow the crop destruction to proceed or extend the stay until it can thoroughly review an appeal from the lower court order granting the plaintiffs' motion to remedy violations of the National Environmental Policy Act (NEPA) by pulling the seedlings out of the ground. The seedlings were being grown to produce seed for future Roundup Ready® sugar beet crops, which are resistant to glyphosate, an ingredient in a popular herbicide. GE sugar beet critics contend that it contaminates conventional crops even in the presence of protocols to prevent cross-pollination.

The district court determined that the likelihood of harm to the environment posed by planting a crop that the U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) deregulated without conducting a NEPA-required environmental impact statement (EIS), outweighed any economic harm to the intervenor-defendants—the companies that own the intellectual property rights to and supply the seed. According to the court, the evidence of economic harm introduced during a three-day hearing on the plaintiffs' motion for preliminary injunction was not limited to the September planting under permits APHIS hastily issued, but rather addressed "potential economic effects due to a complete vacature and injunction regarding the entire planting and production cycle of genetically engineered sugar beets."

USDA Secretary Tom Vilsack reportedly criticized the lower court's ruling as "a circumstance where a single judge can essentially decide whether someone gets to farm or doesn't get to farm." While USDA has appealed the ruling, Vilsack also apparently noted, "We need to figure out ways in which those who wish to do biotech and those who wish to do organic can live together in the same universe and be able to do what they think is best for their operation."

GE sugar beets comprise 95 percent of the U.S. sugar beet crop, and farmers are apparently "nervous" about the latest courthouse developments. While the public comment period on APHIS's draft EIS, which supports deregulating the crop, closed December 6, the agency is not expected to complete the EIS until March 2012. If farmers are ultimately forced to plant conventional seed in the interim, government experts reportedly predict that seed shortages could reduce total domestic refined sugar production by 20 percent. The full effect on prices will not occur until 2012, because each spring's planting produces sugar that will not be consumed until the following year. GE sugar beets planted before August 2010 were not affected by the federal district court's orders.

Counsel for Monsanto, which created the GE sugar beet and also appealed the district court injunction, was quoted as saying, "With due respect, we believe the court's action overlooked the factual evidence presented that no harm would be caused by these plantings and is plainly inconsistent with the established law as recently announced by the U.S. Supreme Court. The issues that will be appealed are important to all U.S. farmers who choose to plant biotech crops. We will spare no effort in challenging this ruling on the basis of flawed legal procedure and lack of consideration of important evidence."

The Center for Food Safety filed the action challenging APHIS's decision to permit the September plantings in Idaho and Oregon on behalf of a coalition of farmers, consumers and conservation organizations. Senior Staff Attorney George Kimbrell responded to the lower court's order to destroy the crop by saying, "Today's decision is a seminal victory for farmers and the environment and a vindication of the rule of law. The public interest has prevailed over USDA's repeated efforts to implement the unlawful demands of the biotech industry." *See Center for Food Safety Press Release*, November 30, 2010; *The Wall Street Journal*, December 1, 2010; *The New York Times*, December 2, 2010; *FoodNavigator-USA.com*, December 3, 2010; *Greenwire*, December 7, 2010.

Court Considers Insurance Coverage for *Listeria* Contamination

A federal court in Ohio has determined that, for the most part, an "all-risk" insurance policy excludes from coverage the losses sustained by a meat processor whose products were contaminated with *Listeria* during processing. *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.*, No. 08-01686 (U.S. Dist. Ct., N.D. Ohio, W. Div., decided December 2, 2010). Still, the court ordered the parties to prepare a question for certification to the Ohio Supreme Court as to whether,

"notwithstanding the failure of the policy to cover the plaintiff's loss, such loss might be covered" under a reasonable-expectations theory.

According to the court, the meat processor was required to destroy about 1 million pounds of fully cooked ham and turkey products after it was discovered that the *Listeria* found in product samples matched sludge in a hollow roller that was part of the processing plant's conveyor system. The company sought coverage for the disposed food products and additional losses resulting from business interruptions for a total of about $8 million under its all-risk insurance policy. The court rejected most of the meat processor's claims that the policy was ambiguous, except for an exclusion relating to manufacturing and processing operations. Given its ambiguity, the court determined that it must be resolved in favor of the insured. Accordingly, the court granted, in part, the defendant's motion for summary judgment on the declaratory judgment and breach of contract claims.

Federal Court Urges Parties to Negotiate in USDA Gender Discrimination Case

According to a news source, a district court in the District of Columbia has denied a request seeking an order that the Justice Department submit a proposal for settling claims of loan program discrimination filed by female farmers against the U.S. Department of Agriculture. Instead, the court apparently urged the lawyers representing the litigants to work together to reach an agreement and to report back during a January 14, 2011, status hearing.

Unlike recent cases addressing charges that USDA discriminated against African-American (*Pigford I* and *Pigford II*) and Native American (*Keepseagle v. Vilsack*) farmers, *Love v. Vilsack* reportedly involves putative class claims that have not been certified. Counsel for the women farmers and those representing Hispanic farmers with similar claims (*Garcia v. Vilsack*) contend that the government's settlement proposals thus far pale in comparison to the sums agreed to in *Pigford* ($2.25 billion) and *Keepseagle* ($680 million). *See National Journal Daily*, December 3, 2010.

Court Orders Dole to Pay Documentary Filmmakers' Legal Fees

A California court has reportedly ordered Dole Food Co. to pay about $200,000 in legal fees and costs to Swedish filmmakers whom the company sued for defamation, alleging that their documentary about the lawyer who sued Dole on behalf of Nicaraguan banana plantation workers exposed to the pesticide DBCP implied that the company caused their deaths. *Dole Food Co. v. Gertten*, No. n/a (Los Angeles County Super. Ct., Cal., decided November 17, 2010).

The filmmakers filed a motion to strike the lawsuit after it was filed in July 2009 on the ground that it constituted a "strategic lawsuit against public participation," or SLAPP, which is prohibited by state law. Although Dole apparently dismissed its lawsuit voluntarily thereafter, "[t]he potential distributors were concerned because Dole had only dismissed without prejudice. They had the right to re-file the action," according to the filmmakers' counsel. While the film has been distributed in 15 countries, it has not evidently been shown in the United States since it premiered during the June 2009 Los Angeles Film Festival. So the filmmakers sought attorney's fees and a ruling on the SLAPP motion to ensure the case would not be resurrected.

The court ruled that the company "did not establish a probability that it would have prevailed upon the claim," and, if Dole had not voluntarily dismissed its action "the court would be granting defendants' motion to strike." Apparently the court determined that the film's message was unclear, and thus, not defamatory. The judge reportedly wrote, "As with Robin Hood, whether Juan Dominguez is a noble David taking on the evil Goliath Dole, or an ambulance-chasing fraud betraying his clients or trying to hold up a deep-pocket corporation, is a matter of opinion. It cannot be the basis for a claim of defamation."

The film's screening followed the dismissal of DBCP cases against Dole on the ground that Dominguez colluded with his clients to falsify work documents and lab reports. Additional information about the dismissed cases appears in **Issue 297** of this *Update*. *See National Law Journal* and *The Reporters Committee for Freedom of the Press*, November 30, 2010.

Humane Society Member Files Class Action Against Poultry Producer

Alleging that Perdue Farms Inc. misleads consumers by labeling its chicken products as "Humanely Raised," a member of the Humane Society of the United States (HSUS) has reportedly filed a putative class action against the company in a New Jersey court. The suit apparently claims that the company's chickens are processed under National Chicken Council guidelines that allow "numerous inhumane practices, including painful handling and shackling of live birds . . . and egregiously inhumane slaughter practices." The plaintiff seeks to represent all consumers who buy the company's chicken products relying on the "alleged deceptive and misleading humane claim." Compensatory damages and injunction relief are also sought.

According to an HSUS spokesperson, "Rather than implementing humane reforms, Perdue has simply slapped 'humanely raised' stickers on its factory farmed products, hoping consumers won't know the difference." Perdue reportedly responded to the complaint by stating, "The Humane Society of the United States is trying to define humane treatment of poultry by their own narrow, arbitrary standards. Our chickens are raised cage-free on family

farms in temperature-controlled housing with a continuous flow of fresh air, and they remain free to move about with constant access to food and water." *See HSUS Press Release* and *Meatingplace.com*, November 29, 2010; *Product Liability Law 360*, December 1, 2010.

Class Action Challenges Health Claims for Elderberry Juice

Two Missouri residents with arthritis and allergies have filed a putative class action on behalf of Missouri, Illinois and Kansas consumers who were allegedly deceived by false health-related claims made by a company that sells elderberry juice. *Delling v. Wyldewood Cellars, Inc.*, No. 10-02287 (U.S. Dist. Ct., E.D. Mo., E. Div., filed December 6, 2010). The complaint also names a retailer as a defendant.

The plaintiffs contend that they read an advertisement stating that elderberry juice "prevents colds, flu, viruses, asthma, allergies, diabetes, arthritis & more!" When they went to the store to further evaluate the product, they allegedly read customer and "physician" testimonials about the curative properties of elderberry juice and decided to purchase the product. According to the plaintiffs, they used the product "but failed to realize any health benefits and certainly did not see any abatement in their allergy or arthritis problems."

The plaintiffs allege one count of consumer fraud and seek an order certifying the case as a class action, compensatory damages, attorney's fees, costs, disbursement, and prejudgment interest, as well as punitive damages "in the amount of $5,000,000 or the largest amount allowable by law." They also seek "[a] injunction preventing Defendants from making claims to Missouri, Illinois, and Kansas consumers about the ability of the elderberry juice to treat, prevent, diagnose, or cure any illness or health condition."

Candy Makers Spar over Packaging

Hershey Company has reportedly sued Mars for trademark infringement in a Pennsylvania federal court, alleging that colors used in the packaging for Mars's Dove peanut-butter milk-chocolate Promises® candy is too similar to what Hershey uses for its Reese's Peanut Butter Cups®. Mars apparently filed a preemptive suit just days earlier in a Virginia federal court, asking to dismiss the Hershey complaint.

Mars reportedly contends that Hershey admits it does not have exclusive rights to package peanut-butter candies in orange wrappers and that orange is commonly used in the industry as an indicator of peanut-butter flavor. According to a news source, Hershey sent a cease-and-desist letter to Mars in November 2010, stating, "It can come as no surprise to Mars that Hershey, having objected to the color of the individual Dove peanut butter chocolate wrappers and filed a counterclaim to obtain a change of that color, would

have a serious problem with Mars' revising the outer package to add orange as a substantial background color." *See FoodNavigator-USA.com*, November 30, 2010.

OTHER DEVELOPMENTS

Campuses Shaken by "Whipahol®" Craze

Since the Food and Drug Administration (FDA) acted last month to nix alcoholic energy drinks, media focus has apparently shifted to the new campus craze, alcohol-infused whipped creams sold under the monikers CREAM and Whipped Lightning. The growing popularity of "whipahol®" has drawn scrutiny from both public health officials and campus administrators, who in some cases have warned parents about "creative combinations of alcohol" and raised questions about the sufficiency of package labeling. As one Boston Public Health Commission spokesperson told reporters, "If a product looks like something else, it's easy not to be aware that it might contain a lot of alcohol." *See The Boston Herald,* November 28, 2010; *Boston NECN,* November 29, 2010; *University of Kansas Parent Association ENews,* December 2010.

According to various news sources, the 30-proof canisters are sold in liquor stores where they do not need to be refrigerated and have a shelf life approaching nine months. Moreover, because they are considered distilled spirits, the alcoholic concoctions are not subject to FDA labeling laws but rather the Federal Alcohol Administration Act (FAA Act) administered by the Alcohol and Tobacco Tax and Trade Bureau (TTB), which issued a December 7, 2010, statement in response to consumer concerns.

"With respect to distilled spirits specialty products such as those currently being marketed as alcohol infused whipped cream, TTB requires a statement of composition on the label that identifies for consumers the type of distilled spirit in the product, and as a result, the fact that the product is an alcohol beverage," notes TTB. It has also urged consumers to contact their state alcohol boards with questions about local regulations. *See Time's Healthland* and *The Washington Post's Campus Overload,* November 29, 2010; *Delish.com,* November 30, 2010; *The Lantern,* December 5, 2010.

Rudd Center Launches Food Marketing Pledge Database

Yale University's Rudd Center for Food Policy and Obesity has released a new international **database** designed to track company pledges to limit food marketing to children. The database currently features 16 pledges: (i) three specific to the soft-drink industry; (ii) one specific to the food industry; and (iii) 12 applicable to the entire food industry. The pledges covered to date include the Council for Better Business Bureaus' Children's Food and Beverage Adver-

tising Initiative (CFBAI), as well as agreements that are either international in scope or based in Australia, Brazil, Canada, European Union, India, Mexico, Russia, South Africa, or Thailand.

The site breaks down each pledge according to "key criteria that define specific restrictions on marketing communications to children, including the definition of 'children' (age), the marketing directed at them (audience definition), the communications channels (ex. television, internet, etc.), marketing methods (ex. advertising using licensed characters, advertising using promotional materials, etc.) covered, and the foods affected." It also lists the signatories of each pledge, along with the commitments made by individual companies.

Billed as a collaborative effort with the Centre for Food Policy of City University London, the database is part of a youth marketing study funded by the Robert Wood Johnson Foundation. The Rudd Center has also **solicited** updates to keep the database as current as possible.

MEDIA COVERAGE

Lisa Miller, "Divided We Eat," *Newsweek,* November 22, 2010

"Essentially, we have a system where wealthy farmers feed the poor crap and poor farmers feed the wealthy high-quality food," food activist Michael Pollan told *Newsweek* society editor Lisa Miller in this article examining the gap in the availability of nutritious, fresh and organic foods between rich and lower-income Americans. Noting that "in hard times, food has always marked a bright border between the haves and the have-nots," Miller opines that healthier foods "have become luxury goods that only some can afford" while "highly caloric, mass-produced foods like pizza and packaged cakes" are staples for the poorest Americans, many of whom are obese and live in "food deserts" that lack supermarkets stocked with nutritious fare. "Corpulence used to signify the prosperity of a few but has now become a marker of poverty," Miller writes.

She quotes recent statistics from the U.S. Department of Agriculture that show 17 percent of Americans (about 50 million people,) live in "food insecure" households without enough money to buy food or that run out of food before more money comes in. "Reflected against the obsessive concerns of the foodies in my circle, and the glare of attention given the plight of the poor and hungry abroad, even a fraction of starving children in America seems too high," Miller writes.

Pollan and Joel Berg, executive director of the New York City Coalition Against Hunger, told Miller that an answer to the availability gap might rest with big retailers providing access to fresh, local and affordable produce. Pollan also envisions a future when health insurance companies advocate for small and mid-size farmers to fight diabetes and obesity and "dreams of a broad food-policy conversation in Washington." Berg, however, doesn't believe the food industry has been "entirely bad: it developed the technology to bring apples to Wisconsin in the middle of winter, after all. It could surely make sustainably produced fruits and vegetables affordable and available." As he explained to Miller, "We need to bring social justice to bigger agriculture as well."

SCIENTIFIC/TECHNICAL ITEMS

Researchers Suggest Limited Parental Influence on Eating Habits

A literature review and meta-analysis of global studies published since 1980 has reportedly found a "weak association" between parents' dietary intake and that of their children, suggesting to lead author Youfa Wang that "family environment plays only a partial role" in people's eating patterns. Youfa Wang, et al., "Do children and their parents eat a similar diet? Resemblance in child and parental dietary intake: systematic review and meta-analysis," *Journal of Epidemiology and Community Health,* November 2010. According to a December 8, 2010, press release, researchers with the Johns Hopkins Bloomberg School of Public Health, National Institute of Aging and University of Zaragoza compared "parent-child pairs' dietary intakes, by type of parent-child pairs (for example, mother-daughter vs. father-son), world regions and dietary assessment methods, and over time." Their findings apparently indicated "differences in parent-child dietary intake resemblance, across nutrients and dietary assessment approaches," with parent-child correlations for energy and total fat intakes weaker in the United States than Europe.

"Contrary to popular belief, many studies from different countries, including the United States, have found a weak association between parent-child dietary intake," stated Wang, who noted "the influence of other players on children's eating patterns such as that of schools, the local food environment and peer influence, government guidelines and policies that regulate school meals, and the broader food environment that is influenced by food production, distribution and advertising."

In a related development, the Bloomberg School recently joined the New York Academy of Sciences and The Sackler Institute for Nutrition Science in presenting *Super-Sized World: The Global Obesity Epidemic,* a conference featuring obesity experts on the latest science and policy initiatives. Speakers

FOOD & BEVERAGE LITIGATION UPDATE

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included Kelly Brownell, the director of Yale University's Rudd Center for Food Policy and Obesity, who addressed "default food conditions" such as "large portion sizes; too little access to healthy foods and too much access to calorie-dense, nutrient poor options; relentless marketing of junk food, particularly to children; and distorted food economics, driven in part by government policies, that make better foods more expensive."

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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.