Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

USDA Denies New York City's Plan to Ban Food-Stamp Use for Soda

The U.S. Department of Agriculture (USDA) has rejected New York City Mayor Michael Bloomberg's (I) plan to prohibit residents from using food stamps to buy sugar-sweetened beverages and soda. In October 2010, Bloomberg and state officials had proposed a two-year experiment that would exclude the drinks from USDA's Supplemental Nutrition Assistance Program (SNAP) in an effort to reduce obesity.

In an August 19, 2011, **letter** to a state official, SNAP's associate administrator Jessica Shahin wrote that the waiver was denied because of concerns that the "scale and scope" of the plan were "too large and complex" to implement and evaluate. Asserting that it would be too difficult to assess the ban's effectiveness, Shahin instead suggested that USDA collaborate with the city on "anti-obesity intervention targeting consumption and associated behaviors while encouraging healthy choices."

Expressing disappointment with the decision, Bloomberg said, "We think our innovative pilot would have done more to protect people from the crippling effects of preventable illnesses like diabetes and obesity than anything being proposed anywhere else in the country—and at little or no costs to taxpayers. New York City will continue to pursue new and unconventional ways to combat the health problems that affect New Yorkers and all Americans." *See New York City Mayor Bloomberg Press Release,* August 19, 2011.

FDA Issues Plan to Improve Food Science

The Food and Drug Administration (FDA) has issued its "**Strategic Plan for Regulatory Science**," a document deemed to be the agency's "blueprint for overhauling the science it uses to develop and evaluate food, medicines, and medical devices." In a **section** underscoring the agency's emphasis on food safety, the document focuses on prevention and risk-based priorities required by the Food Safety Modernization Act.

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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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"To effectively implement this new food safety mandate, it is imperative that FDA ensures a strong science infrastructure, clearly identifies its research needs, and collaborates with other public health and research agencies in the [f]ederal government, state government agencies, academia, and private industry," states the document, which details FDA's Regulatory Science Initiative outlined in October 2010.

Regarding food science, FDA plans to (i) "[e]stablish and implement centralized planning and performance measurement processes," (ii) "[i]mprove information sharing internally and externally," (iii) "[m]aintain mission critical science capabilities," and (iv) "[c]ultivate expert institutional knowledge." The agency intends to involve stakeholders from the private sector in accomplishing its plan.

LITIGATION

Court Allows Intervention in Industry Suit Against NMFS Challenging Pesticide Opinion

A federal court in Maryland has permitted groups representing environmental and fishing interests to intervene in litigation filed by Dow AgroSciences LLC and two other pesticide manufacturers against the U.S. National Marine Fisheries Service (NMFS), seeking to overturn the agency's opinion that three insecticides threaten the Pacific salmon. *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, No. 09-00824 (U.S. Dist. Ct., D. Md., S. Div., order entered August 23, 2011).

In March 2011, the Fourth Circuit Court of Appeals determined that NMFS's biological opinion on the effects of chlorpyrifos, diazinon and malathion was judicially reviewable action under the Administrative Procedure Act, thus allowing the companies, which hold registrations for the insecticides from the Environmental Protection Agency (EPA), to challenge the action before the district court. NMFS apparently provided the biological opinion to EPA in 2008 as part of EPA's process of reregistering the insecticides for sale and use; they were first registered in the 1950s and 1960s.

In response to a lawsuit filed by environmental groups in 2001, a federal court ordered EPA to consult with NMFS in connection with the pesticide ingredients. According to the Fourth Circuit, EPA initiated formal consultation with NMFS on 37 active pesticide ingredients, including those at issue in this litigation, "having concluded that they 'may affect' listed Pacific salmonid species and their habitats." NMFS apparently failed to issue the biological opinion for several years, prompting additional litigation that resulted in its 2008 agreement to issue the opinion within 90 days. NMFS then concluded that "these insecticides would jeopardize critical habitat and prey for 'evolutionary significant units' of 28 Pacific salmonid species that are listed as endangered or threatened."

According to a news source, the intervenors have filed a motion to dismiss the companies' suit on the ground that the NMFS opinion is scientifically sound. They reportedly state, "At the end of the day, the [plaintiffs'] arguments amount to little more than a thinly veiled disagreement with NMFS' ultimate conclusion that their products are severely harming threatened and endangered salmon and steelhead. Mere disagreement with the agency's conclusions does not suffice to demonstrate that NMFS' [biological opinion] is arbitrary, capricious or otherwise not in accordance with the Endangered Species Act." *See Law360*, August 23, 2011.

Federal Court Rejects Claims That McDonald's Food Packaging Harms the Environment

A federal court in Illinois has reportedly dismissed on standing grounds the *pro se* claims of an individual plaintiff who alleged that the food packaging materials used by McDonald's Corp., when discarded by consumers, pose a threat to the environment. *Gencarelli v. McDonald's Corp.*, No. 11-5573 (U.S. Dist. Ct., N.D. Ill., decided August 19, 2011). The plaintiff filed his complaint under the Safe Drinking Water Act, Toxic Substances Control Act and National Environmental Policy Act. According to the court, he lacked standing to sue because he alleged "a generalized grievance" only. To establish standing, the plaintiff was required to show a "concrete injury in fact, causation, and redressability," which the court apparently found he failed to do. *See BNA Daily Environment Report*, August 24, 2011.

DOJ Plans to Oppose Counsel Fee Request in African-American Discrimination Suit

According to a press report, the U.S. Department of Justice (DOJ) plans to oppose the request for $90.8 million in attorney's fees filed by counsel for African-American farmers who sued the U.S. Department of Agriculture for discrimination in the administration of farm loan programs. Additional information about the fee petition appears in **Issue 405** of this *Update*. While DOJ lawyers have not yet filed a formal opposition to the fee petition, in other court papers they have apparently indicated that "the government does not agree with every point made by plaintiffs in support of final approval of this settlement agreement." The fee request represents 7.4 percent of the proposed $1.25 billion settlement. Ten individuals reportedly filed an objection to the settlement earlier in August, contending that settling the matter before discovery would be detrimental to plaintiffs who would lose their bargaining leverage with the federal government. *See The BLT: The Blog of LegalTimes*, August 24, 2011.

YoPlus® Plaintiffs File Opposition to Decertification Motion

Plaintiffs in a class action certified by a California federal court in April 2011, have filed an opposition to the defendants' motion to decertify the class in light of a case the U.S. Supreme Court decided in June. *Johnson v. General Mills, Inc.*, No. 10-00061 (U.S. Dist. Ct., C.D. Cal., S. Div., pleading filed August 22, 2011). The plaintiffs allege that class members were misled by the defendants' representations that YoPlus® products had digestive health benefits. Details about the court's certification ruling appear in **Issue 385** of this *Update*.

According to the plaintiffs, the defendants did not seek review of the court's certification ruling and, in fact, agreed to the plaintiffs' class notification program, which the court approved. The defendants purportedly assert that a U.S. Supreme Court ruling rendered 10 days later compels the court to decertify the class. Claiming that the defendants' argument is untenable as an unwarranted expansion of the U.S. Supreme Court's holding, the plaintiffs request that the court deny the motion for decertification. Essentially, the defendants claim that (i) because a few of the class members may have purchased the product for reasons apart from its digestive health promise, certification is prohibited under *Dukes*, and (ii) *Dukes* requires that all class members have Article III standing, that is, they are all required to have been affected by the digestive health message.

According to the plaintiffs, "General Mills is simply attempting to reframe, through an unwarranted expansion of *Dukes*, the same arguments about classwide reliance and causation under the California Consumers Legal Remedies Act and the California Unfair Competition Law that General Mills previously made to this Court and that this Court has already rejected."

Del Monte Asks Court to Lift FDA Import Alert on Cantaloupes from Guatemala

Del Monte Fresh Produce N.A., Inc. has filed a complaint for declaratory and injunctive relief against the Food and Drug Administration (FDA) in a federal court in Maryland alleging that the agency lacked an adequate factual basis after a *Salmonella* outbreak in early 2011 to conclude that the company's Guatemalan cantaloupe supplier was the source of the contamination. *Del Monte Fresh Produce N.A., Inc. v. United States*, No. n/a (U.S. Dist. Ct., D. Md., filed August 23, 2011).

On the basis of that conclusion, FDA allegedly demanded that the company issue a recall or "suffer the consequences of an FDA consumer advisory questioning the wholesomeness of Del Monte cantaloupes." The agency also imposed an import alert under which Del Monte is prohibited from importing cantaloupes from its Guatemalan source without proving the fruit is "negative" for *Salmonella* and other pathogens. According to Del Monte, "this prohibition will continue indefinitely into the future unless enjoined by this Court." The company alleges that the Guatemalan farms supplying its cantaloupes follow

all applicable food safety procedures and that FDA had no evidence, even after testing, that the farms were the source of the *Salmonella* outbreak. Del Monte also questions whether the outbreak was linked to cantaloupes, because one person who fell ill had evidently not eaten any.

Alleging arbitrary and capricious action, agency action in excess of statutory jurisdiction and agency action without following proper procedures, Del Monte asks the court to set aside the import alert, permanently enjoin FDA from implementing or enforcing it and declare that the alert is unlawful.

NRDC Seeks FDA Action on Its BPA Petition

The Natural Resources Defense Council, Inc. (NRDC), a non-profit advocacy organization, has filed a complaint for declaratory and injunctive relief against the U.S. Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA), seeking an order compelling FDA to issue a final response to NRDC's October 2008 petition calling on the agency to prohibit the use of bisphenol A (BPA) in food packaging and other food-contact materials. *NRDC, Inc. v. HHS*, No. 11-5801 (U.S. Dist. Ct., S.D.N.Y., filed August 19, 2011). In June 2011, the D.C. Circuit Court of Appeals apparently dismissed a similar complaint, agreeing with FDA that it had been filed in the wrong court. Additional information about that complaint appears in **Issue 356** of this *Update*.

According to the new complaint, the Food, Drug, and Cosmetic Act requires FDA to respond to petitions like the one NRDC filed "within 90 days." Yet, "[m]ore than one thousand days have now passed without an agency response. In light of the harms associated with widespread exposure to BPA in food, FDA's delay in responding to the petition is unreasonable and violates the Administrative Procedure Act (APA), and the Food Act." According to NRDC, BPA is "a high production volume chemical, with over six billion pounds produced globally and over two billion pounds produced in the United States each year." Claiming that the chemical is a food additive which leaches from food containers into food and that a 2007 National Institutes of Health report concluded, "BPA exposure at current levels presents a significant risk to human health," NRDC alleges that FDA underestimates the levels of BPA to which adults are exposed. The complaint also outlines the chemical's purported endocrine-disrupting and reproductive effects.

Contending that FDA's failure to respond to its petition constitutes an unreasonable delay under the APA, NRDC asks the court to make a declaration to that effect, compel the agency to respond and award NRDC is costs and attorney's fees. *See The New York Times*, June 17, 2011.

POMWonderful Claims Pompis Infringes and Dilutes Its Trademark

POMWonderful LLC, which has created a market for pomegranate juice beverages and other products, has sued Backside Beverages, LLC, alleging that the company has infringed POM's trademark with its Pompis energy drink. *POMWonderful LLC v. Backside Beverages, LLC*, No. 11-00760 (U.S. Dist. Ct., D. Utah, Cent. Div., filed August 22, 2011). POM's complaint includes a comprehensive description of the actions it has taken and the $300 million it has spent to promote and protect its brand and trademarks since first introducing fruit-based beverages in 2002.

According to the complaint, the defendant has tarnished POM's registered trademarks "because 'pompis' is a slang Spanish term for 'backside,' that is, 'backside' of a person. In English, 'pompis' is equally derogatory,— combining the term POM and the term 'pis' which phonetically sounds like 'piss.'" POM contends that such derogatory use of its marks intentionally trades on its goodwill "while at the same time tarnishing the POM brand."

POM also alleges that the defendant has placed a design in the middle of "Pom" to replace the "o" just as POM does, thus creating "a likelihood of confusion, mistake, and deception as to Defendant's affiliation, connection, and/or association with POM among consumers and the trade." POM further asserts that the defendant has connected "the health-focused POM® brand to a brand that conveys the opposite message. To the contrary, studies have shown that energy drinks are not healthful because of their high sugar and caffeine content."

POM alleges trademark infringement under 15 U.S.C. § 1114, trademark infringement and false designation of origin under 15 U.S.C. § 1125(a), trademark dilution under 15 U.S.C. § 1125(c), and violation of Utah's Unfair Competition Act. The company seeks a declaration of infringement, dilution and unfair competition as well as an injunction to stop the defendant from engaging in infringing activity; the recall, seizure, impoundment, and destruction of all infringing products; compensatory and punitive damages; lost profits; disgorgement; restitution; an accounting; an award to reimburse POM for corrective advertising; and attorney's fees, costs and interest.

Putative Class Claims Chipotle Misleads Consumers about Pinto Beans

A Jewish California resident who claims to be a vegetarian has filed a putative class action against Chipotle Mexican Grill, Inc., alleging that the company failed to adequately warn consumers that its pinto beans are prepared with or contain bacon or pork. *Shenkman v. Chipotle Mex. Grill, Inc.*, No. BC467980 (Cal. Super. Ct., Los Angeles County, Cent. Dist., filed August 19, 2011). According to the complaint, the company does not disclose in its in-store menus that pinto beans contain pork, and, when specifically asked, employees informed the plaintiff that the pinto beans did not contain bacon or pork. Relying on these

representations, the plaintiff purportedly purchased and ate the beans to his detriment, financial and otherwise.

The plaintiff seeks to certify a class of California residents who "abstain from consuming bacon or pork" for "ethical, religious, moral, cultural philosophical, or health-related reasons" and purchased the pinto beans from any Chipotle restaurant in California in the preceding four years. He alleges intentional and negligent misrepresentation, fraud and violations of California's False Advertising and Unfair Business Practices acts. The plaintiff requests compensatory and punitive damages, disgorgement and restitution, injunctive relief, payment to a *cy pres* fund, a corrective advertising campaign, an apology, attorney's fees, and costs.

OTHER DEVELOPMENTS

Anti-Nanotech Group Targets Researchers

A group known as "Individualities Tending Toward Savagery" (ITS) has reportedly claimed responsibility for injuring two Mexican nanotechnology researchers with a parcel bomb, putting scientists around the world on alert. According to an August 21, 2011, *Chronicle of Higher Education* article, the group has a manifesto that cites Ted Kaczynski, the Unabomber, as an inspiration and "has been linked to attacks in France, Spain, and Chile, and to a bomb sent earlier this year to a scientist at another Mexican university who specializes in nanotech." An analyst quoted by the *Chronicle* also warned that the threats "show signs of someone well-educated who could be affiliated with a college."

The latest attempt apparently targeted the director of a technology-transfer center at the Monterrey Institute of Technology and Higher Education, while an April 2011 bomb was intended for the nanotechnology department at the Polytechnic University of the Valley of Mexico. In addition, State of Mexico Attorney General Alfredo Castillo told media sources that the group may have terrorist ties in other countries, with the *Chronicle* adding that last month members of the ELF Switzerland Earth Liberation Front were sentenced for similar plots against a nanotechnology laboratory in Switzerland. "The ITS is a movement that, in accordance with its ideals, opposes any development of neo- or nanotechnology anywhere in the world," said Castillo, who has since urged Mexican universities to tighten security. *See The Associated Press,* August 9, 2011; *Times Union,* August 24, 2011.

ACLU Raises Privacy Concerns over ID Scanning

An August 23, 2011, *USA Today* article has highlighted privacy concerns over how bars, restaurants and night clubs use ID scanners to track and

share consumer data with other venues, including whether an individual patron "caused a problem" or "started a fight." As the purveyor of one system explained to journalist Trevor Hughes, the new networked scanners collect information about patrons and "allow multiple bars in a geographic area to alert each other about known troublemakers," a feature already employed by New York City, Miami, Los Angeles, and Las Vegas establishments.

This development, however, has since spurred criticism from groups like the American Civil Liberties Union (ACLU), which noted that the systems "come with very few promises of security or confidentiality." For example, as ACLU legislative counselor Chris Calabrese observed, while Canada has placed legal limits on the use of data gathered by ID scanners, consumer data could be sold to marketers or insurance companies in the United States. "You no longer control that information, and you no longer get to make decisions about how that information gets used," Calabrese was quoted as saying.

MEDIA COVERAGE

Zoe Tillman, "Grocery bagged," *The National Law Journal*, August 22, 2011

According to District of Columbia court reporter Zoe Tillman, U.S. District Judge James Boasberg is currently considering a motion to certify a class in litigation filed by a California consumer in 2008 to challenge the merger of Whole Foods Market Inc. and Wild Oats. As Tillman notes, in March 2009 the Federal Trade Commission settled the anti-competition charges it filed against Whole Foods, which the company's counsel argues could make it difficult for the plaintiffs to proceed on the merits.

Named plaintiff Ekaterini Kottaras reportedly contends that the merger violated antitrust laws by forcing shoppers to pay higher prices in the "premium, natural, and organic" products market. This article discusses the FTC proceedings in some detail to provide a context for the putative class litigation. Whole Foods apparently contends that Kottaras's expert testimony is insufficient to prove her case and that she may not be an appropriate class member due to her shopping habits and failure to retain receipts until two years after the merger. The parties are reportedly hoping the court will allow oral argument on the certification motion.

Wired Blogger Questions Safety of Food Imported from China

Wired magazine's "Superbug" blogger Maryn McKenna recently published an article questioning China's food safety record after reports surfaced that 11 people from one Xinjiang province village died "and anywhere from 120 to 140 were sickened" by vinegar contaminated with ethylene glycol. According to McKenna, "The vinegar had been stored in barrels that previ-

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ously contained antifreeze," although investigators have not yet determined "whether the vinegar was put in the barrels out of ignorance, making it a problem of accidental contamination, or deliberately by an unscrupulous producer seeking to cut corners."

In either case, McKenna warns, the scandal closely follows allegations that "aged" vinegar from Shanxi province is "dosed with industrial acid in order to cut fermentation time and turn out batches faster." It also adds to a growing roster of China's food safety problems that purportedly include "the meat that glowed in the dark; the tainted buns; the exploding watermelons; the 40 tons of bean sprouts containing antibiotics and carcinogens; the rice contaminated with heavy metals; the mushrooms imbued with bleach; and the pork so dosed with banned stimulants that athletes attending an international meet in Shanghai had to be told which restaurants were safe to eat at."

McKenna also cites Food and Drug Administration data estimating that Chinese food exports will increase 9 percent annually between 2010 and 2020. In particular, she notes the 2007 "melamine-in-milk" incident that reportedly sickened 300,000 Chinese children and spread to the United States via pet food, allegedly resulting in the deaths of 4,000 pets. "It's tempting to view these Chinese food scandals as interesting but remote, the learning curve of a society that pushes unfettered capitalism but never experienced the kind of progressive movement that led to food-safety reform in the United States," she concludes. "Except for one small detail: Chinese products don't stay in China. They are traded around the world, and increasingly they are sold here."

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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.