Shook, Hardy & Bacon L.L.P.

ISSUE 411 | SEPTEMBER 30, 2011

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Obama Urged to Finalize Proposed Regulations on Food Marketing to Kids

Public health advocates from around the country have sent a **letter** to President Barack Obama (D) urging his administration to finalize the April 2011 proposed voluntary standards for food marketing to children. The guidelines would set limits on the amount of unhealthy fats, added sugars and sodium in foods advertised to children ages 2-17. Additional information on the proposed guidelines, which were designed by a Federal Trade Commission-led working group, can be found in **Issue 392** of this *Update*.

The September 27 letter was signed by 75 individuals claiming expertise in nutrition, marketing, medicine, and public health, including Kelly Brownell, Director of Yale University's Rudd Center for Food Policy & Obesity; anti-tobacco attorney Richard Daynard, Director of the Public Health Advocacy Institute; Frank Hu, Professor of Nutrition and Epidemiology at the Harvard School of Public Health; Marion Nestle, New York University Professor of Nutrition and Food Studies; and Juliet Schor, Boston College Professor of Sociology. Contending that "food marketing plays a key role" in contributing to the country's high obesity rate, they suggest that the food industry's $2 billion youth marketing budget "is testament to the fact that food marketing works." According to the letter, the industry's self-regulatory guidelines are not decreasing unhealthy food marketing to children quickly enough, noting that at the current rate "children will not be fully protected from unhealthy food ads until 2033."

Margo Wootan, nutrition policy director for the Center for Science in the Public Interest (CSPI), which helped craft the rules and organized the letter campaign, was quoted as saying that it "would be a real setback for children's health if the administration backed down on strong guidelines for food marketing to children." *See CSPI News Release,* September 27, 2011.

Congressmen Ask FTC to Investigate "Supercookie Monsters"

U.S. Representatives Joe Barton (R-Texas) and Edward Markey (D-Mass.) have written a September 26, 2011, **letter** to Federal Trade Commission (FTC)

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Chair Jon Leibowitz, expressing concern over the practices used by some Web services to track online behavior. The congressmen, who co-chair the Bi-Partisan Privacy Caucus, cited an August 18 *Wall Street Journal* article that raised questions about "supercookies," files installed on computers which apparently allow Websites "to collect detailed personal data about users" and which persist "even when consumers choose to delete regular cookies." Believing that such practices should be banned, Barton and Markey call on FTC "to investigate the usage and impact of supercookies on the Internet and consumers."

"We believe that an investigation of the usage of supercookies would fall within the FTC's mandate as stipulated in Section 5 of the Federal Trade Commission Act with respect to protecting Americans from 'unfair and deceptive acts or practices,'" wrote Barton and Markey, who in a separate **letter** asked FTC to single out Facebook after a blogger drew attention to its tracking tools. The congressmen drew particular attention to Facebook's alleged use of "Like" buttons across the Internet to collect information "even *after its users had logged out of Facebook*."

"I am very disturbed by news that supercookies are being used to collect vast amounts of information about consumers' online activities without their knowledge," said Markey in a September 27 press release. "Companies should not be behaving like supercookie monsters, gobbling up personal, sensitive information without users' knowledge. Consumers, not corporations should have the choice about if, how or when their personal information is used. I will continue to closely follow this issue and look forward to the FTC's response." *See Representative Markey Press Release,* September 28, 2011.

Upcoming Codex Meeting to Discuss Food Import, Export Inspections

The Office for the Under Secretary for Food Safety, the U.S. Department of Agriculture and the Food and Drug Administration have **announced** an October 4, 2011, public meeting in Washington, D.C., to provide information and receive public comments on draft U.S. positions to be discussed at the 19th session of the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) on October 17-21 in Cairns, Australia.

CCFICS is responsible for such things as "harmonizing methods and procedures which protect the health of consumers, ensure fair trading practices and facilitate international trade in foodstuffs." Agenda items include relevant activities of the World Health Organization and draft guidelines for national food-control systems. *See Federal Register,* September 27, 2011.

LITIGATION

Supply Chain Suit Claims Pet Food Contaminated with GM Rice

Companies that have successfully been sued by farmers for alleged losses caused by the contamination of their conventional rice crops with a genetically modified (GM) strain have removed to federal court a case filed by a pet food manufacturer alleging harm from the GM contamination of its products. *The Nutro Co. v. Bayer AG*, No. 11-01674 (U.S. Dist. Ct., E.D. Mo., E. Div., removal notice filed September 26, 2011). According to the complaint, the defendants "directly and proximately caused large monetary damages to Plaintiff's businesses, in part, because the sale and use of GM food, including rice, is restricted, prohibited, or otherwise limited in the EU and other domestic and foreign markets where Plaintiff sells its products."

Relying on contamination findings made by juries in the farmers' rice contamination lawsuits, the Nutro Co. claims that the defendants' LL601 GM rice contaminated the conventional rice it uses as an ingredient in its dog and cat foods, and that it was forced to pull contaminated product from European distributors in 2006 and then resupply those markets with "reformulated, certified GM-free product." The company was apparently required to find alternative sources of uncontaminated rice and rice bran and even reformulated some of its products, "at great expense," to eliminate rice bran as an ingredient.

Alleging negligence, negligence per se, public and private nuisance, strict products liability, absolute liability for ultra-hazardous activity, fraudulent and negligent misrepresentation, and interference with contractual or business relations, the plaintiff seeks damages in excess of $10 million, exemplary damages, disgorgement, restitution, interest, attorney's fees, and costs. The suit was filed in a Missouri state court in August 2011.

EEOC Files Disability Discrimination Lawsuit on Behalf of Morbidly Obese Man

The Equal Opportunity Employment Commission (EEOC) has filed a claim under the amendments to the Americans with Disabilities Act against a company that allegedly discharged a morbidly obese man. *EEOC v. BAE Sys., Inc.*, No. 11-03497 (U.S. Dist. Ct., S.D. Tex., Houston Div., filed September 27, 2011). According to the EEOC, "at the time of his discharge, [Ronald] Kratz was qualified to perform the essential function of his job as a material handler II. BAE refused to engage in any discussion with him to determine whether reasonable accommodations were possible that would have allowed him to

continue to perform the essential function of his job … The suit asserts that BAE replaced Kratz with someone who was not morbidly obese."

News sources have reported that Kratz, who weighed 450 pounds when the military vehicle manufacturer hired him, gained 200 pounds over the 16 years he was employed. He claims that his weight never interfered with his job performance for which he received high ratings. Still, about two years ago, Kratz reported for an overtime shift and was told he was too heavy to continue performing the work. He claims that the company refused his offer to take a demotion. While he has apparently been unable to find another job, he has dropped more than 300 pounds through surgery and a diet and exercise program.

An EEOC attorney reportedly said that Kratz was instructed to wear a seatbelt that did not fit when he drove a forklift. He apparently never received the extender he requested and was fired two weeks later. The Arlington, Virginia-based company issued a statement indicating that it "believes it acted lawfully in this matter and given that the issue is the subject of pending litigation it would not be appropriate to comment further. BAE Systems takes pride in the diversity of the company and in supporting employees with disabilities." EEOC seeks injunctive relief and remedies to make Kratz whole, such as back pay, reinstatement, pecuniary losses, damages for emotional pain and suffering, and punitive damages.

New Lawsuit Claims Bear Naked Foods Not "100% Pure and Natural"

California residents have filed a putative class action in federal court against a company that promotes its granola, cookie and trail mix products as "100% Pure and Natural," despite making them with some purportedly synthetic ingredients. *Thurston v. Bear Naked, Inc.*, No. 11-4678 (U.S. Dist. Ct., N.D. Cal., Oakland Div., filed September 21, 2011). Seeking to represent a nationwide class of consumers, the plaintiffs allege that they would not have purchased the defendant's products at a premium price if they had known that "synthetic ingredients were used in the product." According to the complaint, the company's products contain cocoa processed with alkali, glycerin and lecithin.

The plaintiffs allege unlawful, unfair and fraudulent business practices and false advertising under California law; violation of the Consumers Legal Remedies Act; and restitution based on quasi-contract/unjust enrichment. They seek restitution, compensatory and punitive damages, injunctive relief, attorney's fees, costs, interest, and "[a]n order requiring an accounting for, and imposition of, a constructive trust upon, all monies received by Bear Naked as a result of the unfair, misleading, fraudulent and unlawful conduct alleged herein."

Texan Claims Naked Juice Is Not All Juice and Contains GMOs and Unnatural Ingredients

A Texas resident has filed a putative nationwide class action against the Naked Juice Co., alleging that its "100% Juice," "100% Fruit," "All Natural," and "non-GMO" beverage products are falsely labeled because they contain synthetic and genetically modified (GM) ingredients. *Sandys v. Naked Juice Co.*, No. 11-08007 (U.S. Dist. Ct., C.D. Cal., filed September 27, 2011). The complaint claims that the defendants concealed the nature, identity and source of their products' added ingredients, such as vitamins and "natural flavors," and that the plaintiff paid a premium price for falsely labeled products and ingested substances she did not expect and did not consent to. The plaintiff also contends that some of the product ingredients are harmful to human health and the environment as well as to the workers who produce them.

Alleging numerous violations of state and federal consumer fraud and product warranty laws, negligence and negligent misrepresentation, strict liability, assault and battery, and conspiracy, the plaintiff seeks restitution; disgorgement of profits; compensatory, lost expectancy, emotional distress, and mental anguish damages; medical monitoring; statutory penalties; punitive damages; attorney's fees; costs; interest; and declaratory and injunctive relief. The plaintiff also requests that the defendants be ordered to immediately recall "any and all units of Falsely Labeled Products."

Trade Groups and Dairy Coops Accused of Slaughtering Cows to Keep Milk Prices High

According to a news source, two antitrust lawsuits were filed in a California federal court this week alleging that dairy trade groups and coops manipulated dairy prices between 2003 and 2010 under a program that slaughtered more than 500,000 cows. The suits reportedly allege that the National Milk Producers Federation and major dairy farmer cooperatives, under a "dairy herd retirement program," cost consumers in excess of $9.5 billion. Plaintiff's counsel Steve Berman released a statement claiming that the lawsuits, brought on behalf of individual consumers in California, New York and Wisconsin, as well as Compassion Over Killing, "will protect consumers from artificially inflated milk prices and also will prevent the unnecessary and shameful killing of tens of thousands of cows each year."

One of the lawsuits, ***Edwards v. National Milk Producers Federation***, seeks to certify 27 state classes and a District of Columbia class, alleging violation of state antitrust and restraint of trade laws and unjust enrichment. The plaintiffs seek declaratory relief; restitution for the purchase of milk or fresh milk products "at inflated prices"; actual, statutory, punitive, or treble damages; interest; restitution and/or disgorgement; costs; attorney's fees; and interest. *See Hagens Berman Press Release*, September 27, 2011; *The National Law Journal*, September 29, 2011.

Del Monte Dismisses Lawsuit Seeking to Lift Cantaloupe Import Restrictions

Del Monte Fresh Produce N.A. has filed a notice of dismissal in a Maryland federal court after the Food and Drug Administration (FDA) agreed to lift the import alert it imposed on cantaloupes from Guatemala that had purportedly been linked to a *Salmonella* outbreak. *Del Monte Fresh Produce N.A., Inc. v. United States*, No. 11-02338 (U.S. Dist. Ct., D. Md., dismissed September 27, 2011). Additional details about the case appear in **Issue 407** of this *Update*.

According to an FDA spokesperson, the agency lifted the restrictions on the basis of a company submission that included an independent audit showing that the Guatemalan farm was following good agricultural practices and tests indicating that none of the farm's cantaloupes were positive for *Salmonella*. Public health advocates had reportedly called the lawsuit a bullying tactic, and Center for Science in the Public Interest's Caroline Smith DeWaal said, "We would certainly hope that FDA has proof that the conditions that may have led to the outbreak have been cleaned up."

Meanwhile, deaths linked to *Listeria*-contaminated cantaloupes from a farm in Colorado are continuing to rise; the Centers for Disease Control and Prevention has reportedly confirmed 13 deaths and 72 illnesses from the nationwide outbreak. Hundreds of pounds of the fruit have been recalled and the farm has ceased production and distribution in what federal officials have called the deadliest foodborne disease outbreak in more than a decade. Costco has reportedly indicated that it is considering setting melon-handling standards and is likely to require suppliers to test the fruit for pathogens before shipping them to the company. The company's head of food safety has apparently called on the industry to research best practices for washing or cleaning cantaloupes to remove contaminants. *See The New York Times*, September 27 and 28, 2011; *USA Today*, September 29, 2011.

EU Court of Justice Allows Concurrent Use of Budweiser Trademark in the UK

The European Union Court of Justice has determined that Anheuser-Busch and Czech competitor Budejovicky Budvar may both use the Budweiser trademark in the United Kingdom. Case C-482/09, *Budejovicky Budvar v. Anheuser-Busch Inc.* 2011 ECJ (Sept. 22, 2011). Emphasizing the exceptional circumstances of the case, the court found that because the companies used the marks in good faith for nearly 30 years and because U.K. consumers "are well aware of the difference between the beers of Budvar and those of Anheuser-Busch, since their tastes, prices and get-ups have always been different," the company that owns the earlier trademark cannot "obtain the cancellation of an identical later trade mark designating identical goods." The court relied on European law to decide the case and in so doing rejected an advocate general opinion that indicated the issue must be decided as a matter of national law. Information about a related decision appears in **Issue 388** of this *Update*.

OTHER DEVELOPMENTS

PHAI Publishes Materials to Support Suits Against Companies Marketing Food to Children

Cara Wilking, a Public Health Advocacy Institute (PHAI) staff attorney, has authored an **issue brief** intended to provide a legal foundation for consumer protection lawsuits against food companies that advertise "unhealthy food and beverage products" to children in a manner that she describes as "pester power" marketing. She explains that such marketing "targets children who, unable to purchase products for themselves, nag, pester and beleaguer their parents into purchasing unhealthy food products for them." Wilking's premise is that "[p]ester power marketing tactics are similar to oppressive and unscrupulous 'high pressure' sales tactics," and that parents, for a number of reasons, are unable to say "no" when their children beg for these products in public.

According to Wilking, two primary legal theories can support private litigant claims and are also "applicable to actions initiated by state attorneys general to protect the public interest." Those theories are (i) "pester power marketing as unfair 'indirect' marketing to parents," and (ii) "pester power marketing as unlawful direct marketing to children." PHAI researchers have studied the consumer protections laws of every state, and Wilking explains how the two theories fit into the different protections provided under those laws. A separate PHAI **paper** discusses the researchers' findings from the state-law survey.

Formed in the early 2000s to tackle obesity by taking on "Big Food" and to continue advocacy and litigation-support efforts against "Big Tobacco," PHAI is affiliated with Northeastern University School of Law and headed by law professor and anti-tobacco advocate Richard Daynard.

Food & Water Watch Report Critical of GE Products

A new Food & Water Watch **report** claims that the "genetic engineering [GE] of crops and animals for human consumption is not the silver bullet approach for feeding a growing population that the agribusiness and biotechnology industries claim it is. Conversely, studies find that GE plants and animals do not perform better than their traditional counterparts and raise a slew of health, environmental and ethical concerns."

According to the consumer watchdog, potential GE food risks include "increased food allergies and unknown long term health effects in humans; the rise of superweeds that have become resistant to GE-affiliated herbicides; the ethical and economic concerns involved with the patenting of life and corporate consolidation of the seed supply; and the contamination of organic and non-GE crops and livestock through cross-pollination and seed dispersal."

Food & Water Watch recommends that U.S. regulators (i) "enact a moratorium on new U.S. approvals of genetically engineered plants and animals; (ii) "institute the precautionary principle for GE foods"; (iii) "develop new regulatory framework for biotech foods"; (iv) "improve agency coordination and increase post-market regulation"; (v) "require mandatory labeling of GE foods"; and (vi) "shift liability of GE contamination to seed patent holders." *See Food & Water Watch News Release,* September 29, 2011.

Nutritionists Urge USDA to Reconsider Food Stamp Test

Two nutritionists have published **commentary** in the September 2011 issue of the *Journal of the American Medical Association* that calls for the federal government to revisit a ban on using food stamps to purchase sugar-sweetened beverages. Authored by Yale Rudd Center for Food Policy & Obesity Director Kelly Brownell and Harvard School of Public Health Professor David Ludwig, the article responds to the U.S. Department of Agriculture's (USDA's) rejection of a New York City proposed pilot program that would have prohibited soda purchases under the federal Supplemental Nutrition Assistance Program (SNAP). Additional details about USDA's decision appear in **Issue 407** of this *Update*.

The article notes that opposition to the proposal came from industry groups like the American Beverage Association but also "prominent antihunger groups," some of which felt the ban would stigmatize SNAP recipients "and make them less likely to want to participate in the program." To meet this challenge, the authors propose restructuring SNAP and similar programs "to align government spending with the long-term public health and economic interests of the nation." It also calls on USDA to conduct its own pilot studies in an effort to provide policy-makers with "objective data" on the purchase of sugar-sweetened beverages using SNAP benefits.

"The government purchases millions of servings of sugar sweetened beverages for SNAP participants each day," conclude Brownell and Ludwig. "This practice arguably erodes diet quality and promotes chronic illness among individuals who are at increased risk of obesity related disease because of limited financial resources. Moreover, the costs of treating chronic illness associated with increased sugar-sweetened beverage consumption in this population will fall primarily to taxpayers. "

Citizens for Health Launches Food Labeling Website, March on D.C.

The consumer group Citizens for Health has launched a Website, **FoodIdentityTheft.com**, that purportedly aims to inform Americans "about misleading labeling on many food, beverage and health products." Claiming that "some food companies are trying to steal consumer's [sic] rights to know what's in the foods they eat," the Website covers issues such as "the proposed name

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change of High Fructose Corn Syrup" and urges readers to contact federal agencies to oppose relabeling the ingredient "corn sugar." The site also targets tomato sauces advertised as using "only the finest tomatoes" and blueberry-flavored products that allegedly contain "absolutely no blueberries."

"Many consumers believe that the U.S. government will protect us from false advertising or stop corporations from making unproven claims about their products," said the site's senior editor Linda Bonvie in a September 27, 2011, Citizens for Health press release. "But the truth is, corporations and their lobbyists have a huge influence in Washington. We as consumers have to protect ourselves, stay informed, and tell our legislators and government agencies that we won't accept being lied to."

Dedicated to the "natural health consumer," Citizens for Health has also organized a march from New York City to the White House "to demand that all Genetically Engineered Foods be properly labeled." The **event**, scheduled for October 1-16, 2011, includes a number of stops and rallies along the way. Participants in the "GMO Right2Know March" will travel to the United Nations and to food coops, markets and museums in five states and the District of Columbia. *See Citizens for Health Press Release*, September 29, 2011.

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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.