Shook, Hardy & Bacon L.L.P.

ISSUE 415 | OCTOBER 28, 2011

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

House Committee Begins Investigating Jensen Farm Owners in *Listeria* Outbreak

The House Committee on Energy and Commerce has **requested** that the owners of Jensen Farms, identified as the source of the cantaloupe contaminated with *Listeria monocytogenes* responsible for a nationwide foodborne illness outbreak, schedule a briefing with committee staff.

The October 21, 2011, letter also asks that Ryan and Eric Jensen "preserve all documents and communications that may be relevant to understanding the reasons for the contamination and distribution of contaminated products from Jensen Farms." The committee requests that the staff briefing "occur in person no later than November 3, 2011."

FDA Issues Guidance on Detention of Human, Animal Food

The Food and Drug Administration (FDA) has **issued** industry guidance concerning the "administrative detention of human or animal food." Providing information about FDA's authority under the Food Safety and Modernization Act to hold adulterated or misbranded food and prevent it from reaching the marketplace, the **guidance** explains who can approve an administrative detention order, what food may be subject to detention, who receives a copy of the order, and the appeals process. *See Federal Register,* October 25, 2011.

FDA Issues Guidance on Evaluating Safety of Flood-Affected Crops

The Food and Drug Administration (FDA) has announced the availability of **guidance** aimed at helping industry evaluate the safety of flood-affected crops for human consumption. According to FDA, growers are responsible for ensuring the safety of food affected by flood waters, which "may have been exposed to sewage, chemicals, heavy metals, pathogenic microorganisms, or other contaminants." *See Federal Register,* October 24, 2011.

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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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EU Member States Endorse Stronger Measures to Prevent Dioxin Contamination in Food, Feed

The European Commission (EC) has reportedly endorsed proposed safety measures aimed at better preventing dioxin contamination in animal food and feed. Prompted by a widespread investigation into an outbreak of the toxin that struck German meat and egg farms in late 2010, the draft regulation will be sent to the European Parliament and the European Council for review before the EC can give its official approval. Implementation is expected throughout the European Union by mid-2012. Details of the outbreak were covered in Issues **376**, **377** and **381** of this *Update*.

According to the EC, Germany's dioxin outbreak occurred when fatty acids intended for technical and industrial use were mixed with vegetable feed fat used in the production of animal feed. To reduce such risks from happening in the future, EU member states approved EC Standing Committee on the Food Chain and Animal Health safety measures designed to "avoid food recalls from the market and significant financial costs to the consumers and industries."

The draft regulation calls for animal feed businesses that process crude vegetable oils, manufacture products derived from oils of vegetable origin, and blend fats to be registered and approved by industry regulators. In addition, industry must keep those fats meant for feed and food "strictly segregated" during production and transport from those fats intended for technical use in the chemical industry; product labels must also "explicitly mention their intended use." To reduce citizen exposure, the proposal also includes EU-wide mandatory minimum dioxin testing that "will focus on the risky products at the moment they enter the feed chain." *See EC Press Release,* October 21, 2011.

NYC Health Department Unveils New Anti-Soft Drink Campaign

The New York City Department of Health and Mental Hygiene has unveiled the latest installment of its "Pouring on the Pounds" campaign that describes "how drinking just one 20-ounce soda a day translates to eating 50 pounds of sugar a year." According to an October 24, 2011, press release, the 30-second TV commercial aims to serve as "a stark reminder to New Yorkers about how sugary drinks can lead to obesity, which can cause diabetes, heart disease, stroke, arthritis and some cancers." It will be supplemented by bilingual subway ads demonstrating how far a 160-pound person would need to walk at 3.5 miles per hour to burn off the calories from one sugary beverage.

"The majority of New York City adults are now overweight or obese, as are 4 in 10 elementary school children and the health consequences are staggering," said New York City Health Commissioner Thomas Farley. "Sugary drinks are the largest single source of added sugar in the diet, and a child's risk of obesity increases with every additional daily serving of a sugary drink."

LITIGATION

Eleventh Circuit Says Farmer Not Entitled to Housing Credit from H-2A Workers

The Eleventh Circuit Court of Appeals has upheld in part a district court ruling that denied migrant workers' claims that a Georgia onion farmer had improperly withheld the cost of housing and meals from their pay, reducing it below minimum wage. ***Ramos-Barrientos v. Bland*, No. 10-13412 (11th Cir., decided October 27, 2011)**.

While the appeals court agreed with the lower court that the farmer could receive wage credits for meal reimbursements, it reversed the summary judgment that the farmer could receive wage credits for housing provided to the workers. The court also upheld the lower court's determination that certain fees that third-party recruiters charged the workers in Mexico could not be recovered from the farmer who was unaware of them and had not agreed by contract to pay them.

The workers and the Secretary of Labor, as *amicus*, contended that the farmer was "not entitled to wage credits for the provision of free housing for the workers, which is required by federal law, 20 C.F.R. § 655.122(d)(1), because this cost primarily benefits the employer. *See* 29 C.F.R. § 531.3(d)(1)." Finding that the relevant rules had been in effect and interpreted consistently since 1967, the court agreed that the cost of housing provided to workers hired through the H-2A program was a mandatory business expense. According to the court, "The cost of housing for the workers near a job site far from their permanent residence did not arise 'in the course of ordinary life,' but instead was required by federal law as a condition of [the farmer's] participation in the H-2A program and arose 'from the employment itself.'"

The Secretary of Labor did not argue in support of the workers' meal reimbursement claim, and the court found that the farmer could receive wage credits for the workers' meals, stating "[u]nlike the cost of work site housing, the workers would have incurred expenses for food 'in the course of ordinary life.'"

First Circuit Denies Insurance Coverage in Deceptive Pomegranate Ad Suits Against Welch

The First Circuit Court of Appeals has upheld a district court ruling that Welch Foods, Inc. was not entitled to defense costs and indemnity under an insurance contract which provided an exclusion for claims involving unfair competition and deceptive trade practices. ***Welch Foods, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 10-2261 (1st Cir., decided October 24, 2011)**. Welch was named as a defendant in two lawsuits alleging that the company misrepresented its 100% Juice White Grape Pomegranate Flavored Three Juice Blend® by featuring pomegranates on the product's label because the juice is primarily apple and grape juice.

The company sought defense costs and indemnity from three of its insurers, and two of them settled the claims. As to the third company, the court determined that while the exclusion terms "unfair competition" and "deceptive trade practice" were not defined in the insurance contract at issue, their plain meaning and reasonable interpretation applied to the claims asserted in the lawsuits filed by a competitor and consumers. So ruling, the court rejected Welch's claim that the policy exclusion applied only to antitrust claims against it.

Court Trims Claims in Sugar vs. HFCS Litigation, Allows Action to Proceed

A federal court in California has issued orders allowing certain claims to proceed in Lanham Act litigation brought by sugar producers against trade associations and companies that make high-fructose corn syrup (HFCS). *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. 11-3473 (U.S. Dist. Ct., C.D. Cal., orders entered October 21, 2011). The plaintiffs allege that an advertising campaign the defendants launched in 2008 to tell the public that "HFCS is corn sugar," "HFCS is natural," and "sugar is sugar" contains false representations about HFCS "that constitute false advertising under the Lanham Act and a violation of the California[] Unfair Business Practices Act."

The defendants filed a motion to dismiss contending that the plaintiffs had failed to state a claim on which relief can be granted. While the court agreed that the plaintiffs had failed to state a claim against individual trade association members, it found the pleadings sufficient to state a claim for false advertising against the trade association under the federal Lanham Act. The court allowed the plaintiffs to amend their complaint to more specifically plead an agency relationship between the trade association and individual member companies. If the plaintiffs are successful in pleading such a relationship in a second amended complaint, their Lanham Act claims against individual sugar companies could be allowed to proceed.

Among other matters, the court determined that the trade association's statements about HFCS constituted "commercial speech" which is actionable under the Lanham Act. The court also refused to dismiss the complaint under the primary jurisdiction doctrine in light of the trade association's pending citizen petition before the Food and Drug Administration (FDA) seeking approval of "corn sugar" as a name for HFCS on food labels. According to the court, "resolution of the Citizen Petition before the FDA would not resolve the issues raised by Plaintiffs' suit."

The trade association defendant also filed a motion to strike the plaintiffs' state law claims, and the court agreed to do so under California's "anti-SLAPP" statute, which forbids lawsuits "against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The court found that the trade association

was not subject to the "commercial activity" exception, which would allow a claim against it to proceed, because such organizations "do not themselves sell goods." According to the court, "CRA [Corn Refiners Association], as a trade organization, is not in the business of selling or leasing any goods or services, and has not endorsed a particular brand." Given the plaintiffs' failure to adequately plead an agency relationship, the court held that it would not hold the trade association excepted on the ground that its member companies would be excepted under the law.

The court found the trade association's conduct protected under the anti-SLAPP statute "because the conduct consists of written or oral statements made in a public forum in connection with an issue of public interest," one of the areas covered by the law. The court further found that because the plaintiffs had not presented "any evidence to support their burden on the claims that CRA's statements have influenced any purchasing decisions and that Plaintiffs have suffered an injury," the plaintiffs failed to meet their burden of showing a probability of prevailing on their unfair business competition claim, which is required to defeat the motion to strike on anti-SLAPP grounds.

Federal Court Denies Request to Intervene in Nutella® Lawsuit

A federal court in New Jersey has refused the request to intervene filed by plaintiffs to a California consumer-fraud lawsuit against the company that makes the hazelnut spread Nutella®. *Glover v. Ferrero USA, Inc.*, No. 11-1086 (U.S. Dist. Ct., D.N.J., decided October 20, 2011) (unpublished). The New Jersey action, like its California counterpart, was filed as a putative nationwide class action; the laws under which the cases were filed and the class periods differ. According to the New Jersey court, the intervenors had no interest in litigating the New Jersey case; rather, their stated intent was to dismiss the case or transfer it to California. The court also noted that while the California Nutella® litigation was filed first, "the actions are not truly duplicative." The Judicial Panel on Multidistrict Litigation has refused to consolidate the California and New Jersey actions for pre-trial proceedings.

Fat Content Misrepresentations Alleged Against Milk Marketer

Seeking to represent a nationwide class of consumers, a New York resident has filed a lawsuit in a New Jersey federal court, alleging that Smart Balance, Inc. falsely labels its fat-free milks enhanced with Omega-3 as "Fat Free" when they actually contain 1 gram of fat per serving. *Stewart v. Smart Balance, Inc.*, No. 11-06174 (U.S. Dist. Ct., D.N.J., filed October 19, 2011). Acknowledging that the nutrition facts label indicates that the products contain 1 gram of fat, the plaintiff nonetheless contends that the front-of-package representations are "intentionally confusing and misleading." She alleges that she paid more for the company's products than she would have otherwise paid for alternative

milk options because she relied on the "Fat Free" labels, which she contends violate federal labeling rules.

Alleging violation of the New Jersey Consumer Fraud Act, unjust enrichment, breach of warranty, and injunctive relief, the plaintiff seeks class certification; compensatory, treble and punitive damages; disgorgement; attorney's fees; costs; and an injunction to stop the company from continuing to market, distribute or sell its products with fat content misrepresentations, as well as an order requiring the company to "removing the offending milk cartons from supermarket shelves."

Putative Class Alleges Trader Joe's "All Natural" Products Contain Artificial Ingredients

California residents have filed a putative class action in a federal court against grocery chain Trader Joe's Co., alleging that a number of its "All Natural" products contain synthetic or artificial ingredients and thus are mislabeled and falsely advertised. *Larsen v. Trader Joe's Co.*, No. 11-5188 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed October 24, 2011).

According to the complaint, "The labeling of products as 'All Natural' carries implicit health benefits important to consumers—benefits that consumers are often willing to pay a premium for over comparable products that are not 'All Natural.' Trader Joe's has cultivated and reinforced a corporate image that has catered to this 'All Natural' theme and has boldly emblazed this claim on each and every one of its foods identified above, despite the fact Trader Joe's uses synthetic ingredients in the products identified above." The listed products include cookies, biscuits, cheese, fruit jellies, and apple juice sold under the Trader Joe's label. The purported synthetic ingredients include potassium carbonate, xanthan gum, sodium citrate, and ascorbic acid. The plaintiffs acknowledge that these ingredients are listed on product labels, but contend that Trader Joe's did not disclose that these ingredients are synthetic.

Claiming purely economic damages, that is, failure to receive the products bargained for and paying a premium for products purporting to be all natural "rather than paying the lesser amount for non-natural alternatives," the plaintiffs seek the certification of a nationwide class. They allege common law fraud; unlawful, unfair and fraudulent business practices under California law; false advertising under California law; violation of the Consumers Legal Remedies Act; and restitution based on quasi-contract/unjust enrichment. They request restitution; compensatory, statutory and punitive damages; "[a] declaration and order enjoining Trader Joe's from advertising its products misleadingly, in violation of California's Sherman Food, Drug and Cosmetic Law and other applicable laws and regulations"; attorney's fees, costs and interest; and an accounting and the imposition of a constructive trust on all "monies received by Trader Joe's as a result of the unfair, misleading, fraudulent and unlawful conduct alleged."

Lawsuit Claims "Hyperoxygenated" Water Fails to Deliver Promised Benefits

A California resident has filed a putative nationwide class action against Austrian and British companies that sell Oxygizer®, a "designer water" product promoted as an athletic performance aid, alleging that increased oxygen content cannot deliver the benefits claimed. *Ghazarian v. Oxy Beverages Handelsgelsellschaft mbH*, No. 11-8860 (U.S. Dist. Ct., C.D. Cal., filed October 26, 2011). The companies purportedly promote the product with claims that (i) it aids rapid muscle recovery by increasing the level of oxygen in the body, (ii) the glass bottle eliminates or reduces oxygen loss, (iii) it is the only water with a proven positive effect on the body, (iv) the product is patented, (v) it transports oxygen in body cells to regenerate them, (vi) the water strengthens the immune system and improves cardiovascular and respiratory function, and (vii) it helps office workers who are deprived of oxygen in large cities.

According to the plaintiff, each of these claims is false. She cites several studies refuting the claims and notes that the Federal Trade Commission has brought actions against other "oxygen water" companies for deceptive trade practices. The plaintiff alleges that she purchased one bottle of the water and "did not and could not have obtained any of the beneficial effects of the water advertised by the defendants." Alleging fraud, negligent misrepresentation and unfair trade practices, the plaintiff seeks special, general and punitive damages; attorney's fees and costs; restitution; and injunctive relief, including requiring the companies to change the product's name and cease making the alleged misrepresentations.

European General Court Annuls EC Decision Removing Triclosan from Food Contact Substance List

The European General Court (ECG) has determined that the European Commission (EC) erred in removing the antibacterial chemical 2,4,4'-trcihloro-2'-hydroxydiphenyl ether (triclosan) from the list of additives that may be used to make plastic materials and other articles that come into contact with foods. Case T-262/10, *Microban Int'l Ltd. v. EC* (ECG, decided October 25, 2011). The court first determined that the EC's action constituted a regulatory act of direct concern to the applicants, companies that make the additive. The court then ruled both that the EC based its decision on the wrong law and failed to follow the correct procedures in removing triclosan from the list.

The court noted that the chemical was previously included on the provisional list of additives which can continue to be used subject to national law on the basis of a European Food Safety Authority determination in 2004 that "although triclosan was a substance for which an acceptable or tolerable daily intake could not be established, its use could none the less be accepted." Apparently, the EC later decided not to include the chemical on the list of allowable food-contact chemicals and removed it from the "provisional" use

list simply because a manufacturer withdrew its application for the authorization of triclosan's use. According to the court, the withdrawal of an application is not a sufficient basis for not including or removing a substance from the food additive lists.

Canadian Wheat Board Sues to Stop Legislation That Would Dismantle Single Desk

The Canadian Wheat Board, which apparently serves as the marketing organization for western Canadian wheat, durum wheat and barley farmers, has filed a **lawsuit** against the Minister of Agriculture and Agri-Food, in his capacity as Minister Responsible for the Canadian Wheat Board, alleging that he failed to consult with the board as required by law before "causing to be introduced in Parliament on October 18, 2011," a bill that would create an open market and essentially eliminate the board's "exclusive statutory marketing authority in respect of wheat and barley." The board claims to have "a legal mandate to extract the highest overall returns for farmers by effectively leveraging the powers of the single desk."

According to a news source, the board narrowly approved the legal action; directors elected by farmers, for the most part, supported it, while those appointed by the government voted against it. Opposition farmer Henry Vos, calling the lawsuit "an absolute, total waste of money," resigned and, in an open letter to farmers, claimed that what was happening on the board was "in a word, wrong." Director and farmer Allen Oberg, who filed an affidavit supporting the lawsuit, alleges that the agriculture minister published an open letter in several newspapers declaring the government's intention to eliminate the single desk "very soon" and stating, "So happy birthday monopoly! We'll help you blow out your candles. Farmers will finally get their wish." Oberg contends that the minister "has refused to consult with the Board regarding the elimination of the Single Desk, has refused to hold a producer vote and has dismissed the results of the [board's] plebescite, in which the majority of producers voted to maintain the Single Desk." *See The Globe and Mail*, October 26, 2011.

OTHER DEVELOPMENTS

Pew Research Center Questions Regulatory Oversight of Food Additives

A recent **study** analyzing federal oversight of substances added to food has reportedly concluded that the current program, while expediting the review process, both inhibits transparency and delegates critical food safety decisions to manufacturers. Thomas Neltner, et al., "Navigating the U.S. Food Additive Regulatory Program," *Comprehensive Reviews in Food Science and Food Safety,* October 2011. Based on research conducted by the Pew Health

Group, the study was designed "to assist food science and technology professionals and others to navigate the food additive regulatory program to more fully understand the program's structure and operation." In particular, the authors examined how FDA has used the Food Additives Amendment Act of 1958 to categorize and regulate (i) food additives, (ii) substances generally recognized as safe (GRAS), (iii) pesticide chemicals or residues, (iv) substances sanctioned before the Act came into effect, (v) color additives, (vi) drugs in animal feed, and (vii) dietary supplements.

The researchers reported that since the late 1990s, when the Food and Drug Administration (FDA) shifted "from promulgating rules for its decisions for food contact and GRAS substances to reviewing manufacturer safety decisions," there has been an uptick in food additive submissions but "limited public opportunity to provide input." According to study, FDA and other regulators such as the Environmental Protection Agency and Federal Emergency Management Agency "made approximately 40% of the 6000 safety decisions allowing substances in human food," with these decisions accounting for "an estimated 66% of the substances currently believed to be used in food." The remainder of the decisions, however, were apparently undertaken by manufacturers and a trade association "without FDA review by concluding that the substances were [GRAS]."

The study authors ultimately questioned whether a regulatory program that emphasizes flexibility and efficiency during the premarket review process can adequately address safety issues arising after the fact. "The choice of how to bring a substance to market is, therefore, especially significant in the care of manufacturers that might put their short-term financial interests—getting their product to market—over the long-term interests in the protecting the American consumers' health," they concluded. "Except for pesticide chemicals or residues and, to some extent, drugs in animal feed, once the decision has been made that a substance is safe and the product is on the market, a manufacturer does not have an obligation to regularly reassess its safety decision or notify FDA of new science or increased consumption of substance."

As the Pew Health Group's Food Additive Project Director Thomas Neltner elaborated in an October 26, 2011, press release, this 50-year-old system "does not stand up well to scrutiny based on today's standards of science and public transparency." Neltner, who also led the study, instead urged increased public and scientific input during the review process to enhance consumer protection. "In an age of growing demand for public transparency, there is virtually no meaningful opportunity for participation in decisions about large classes of substance added to the food supply," he was quoted as saying.

Common Sense Media Examines Digital Media Use Among Young Children

The nonprofit organization Common Sense Media (CSM) has issued a report titled *Zero to Eight: Children's Media Use in America* that documents how infants, toddlers and young children are exposed to media "on everything from television to mobile devices to apps." Billed as the first national research study to examine young children's use of iPads and other new devices "along with older media platforms such as television, computers and books," the report concludes that digital media "has become a regular part of the media diet of children ages 0 to 8, with four in 10 2- to 4-year olds and half (52%) of 5- to 8-year-olds using smartphones, video iPods, iPads or similar devices."

Working on CSM's behalf, the research consultant Knowledge Networks "used a probability-based online panel designed to be representative of the United States" to survey 1,384 parents from May 27-June 15, 2011. Building on previous studies conducted by the Kaiser Family Foundation, the report distinguishes between digital media, such as "console video games, computers, cell phones, handheld video game players, video iPods, and iPads or other tablet devices," and mobile media, which includes "cell phones, video iPods, and iPads or other tablet devices."

According to an October 25, 2011, CMS press release, the survey results evidently indicated that (i) "42% of children under 8 years old have a TV in their bedrooms"; (ii) 52% "of all 0- to 8-year-olds have access to a new mobile device such as a smartphone, video iPod, or iPad/tablet"; and (iii) 38% of children this age "have used one of these devices, including 10% of 0- to 1-year-olds, 39% of 2- to 4-year-olds, and more than half (52%) of 5- to 8-year-olds." The report also noted that, in a typical day, "0- to 1-year-olds spend more than twice as much time watching television and DVDs (53 minutes) as they do reading or being read to (23 minutes)," with some young children already learning to media multitask.

"Much of the focus in recent years has been on the explosion of media use among teenagers, whereas our study examines media use among young children during crucial developmental years," said CMS CEO James Steyer. "Last week, the American Academy of Pediatrics reaffirmed their position that children under age 2 should not engage in any screen time, yet the data shows infants and toddlers are growing up surrounded by screens. This use data is an important first step toward understanding how the prevalence of media and technology affects the development of our youngest kids."

MEDIA COVERAGE

Brownell Calls Soft Drink Industry "Bad as Big Tobacco"; Rudd Center to Issue New Report

Kelly Brownell, director of Yale University's **Rudd Center for Food Policy & Obesity**, recently authored **commentary** for *Time* magazine's online opinion section, advocating "a penny-per-ounce tax on any beverage with added sugar." According to Brownell's October 24, 2011, article, "Nearly 20 states or cities in the U.S. have considered or are considering the possibility of a tax on sugar-sweetened beverages (SSBs)," but their efforts have allegedly been thwarted by the beverage industry "in ways reminiscent of the tobacco industry when it came under attack in the 1950s."

Drawing parallels between the two products, Brownell dismisses claims that SSB taxes would be "discriminatory" and ineffective by pointing to successful government efforts to reduce smoking. He also calls out groups such as Americans Against Food Taxes for seeking to emulate grassroots movements and contribute to obesity-related research. In particular, Brownell criticizes the Foundation for a Healthy America for purportedly donating $10 million to the Children's Hospital of Philadelphia during a time when the city's mayor sought to introduce an SSB tax. "The tobacco industry paid scientists who did research disputing links between smoking and lung cancer, the addictive nature of nicotine, and the dangers of second-hand smoke," he opines. "The soda industry funds scientists who reliably produce research showing no link between SSB consumption and health."

To this end, Brownell warns that the current opposition to SSB taxes risks a backlash similar to that experienced by tobacco companies. "The beverage industry has been successful thus far in fighting off significant taxes through heavy lobbying, questionable tactics, and the attempt to appear public-health minded, but they, too, are likely to be embarrassed as light shines upon them," he concludes. "As they scramble to protect their profits, their actions may ultimately hurt their cause and pave the way for the very government actions they seek to prevent."

Meanwhile, the Rudd Center will conduct a telephone conference for credentialed media on October 31, 2011, at 8:30 a.m. (Eastern), to "release a report on sugared drink nutrition and marketing to youth." *See CQ Healthbeat*, October 27, 2011.

SCIENTIFIC/TECHNICAL ITEMS

Study Investigates Prenatal BPA Exposure and Hyperactivity in Girls

A recent **study** has reportedly claimed that prenatal exposure to bisphenol A (BPA) could affect "behavioral and emotional regulation" in girls ages 3 and younger. Joe Braun, et al., "Impact of Early-Life Bisphenol A Exposure on Behavior and Executive Function in Children," *Pediatrics,* October 2011. The results appear to confirm earlier research led by Harvard School of Public Health researcher Joe Braun that was covered in **Issue 322** of this *Update*.

Using a prospective birth cohort of 244 mothers and their 3-year-old children, the study authors measured gestational BPA exposure at 16 and 26 weeks and birth, as well as childhood exposure at 1, 2 and 3 years of age. Although they detected BPA in more than 97 percent of gestational and childhood urine samples, researchers also found that, especially among girls, "each 10-fold increase in gestational BPA concentrations was associated with more anxious and depressed behavior… and poorer emotional control and inhibition."

"The results of this study suggest that gestational BPA exposure might be associated with anxious, depressive, and hyperactive behaviors related to impaired behavioral regulation at 3 years of age," concluded the study. "This pattern was more pronounced for girls, which suggests that they might be more vulnerable to gestational BPA exposure than boys."

Meanwhile, the American Chemistry Council (ACC) has disputed the findings, drawing attention to "significant" design flaws and the study's own reservations about its clinical relevance. "The researchers themselves acknowledge that it had statistical deficiencies, including its small sample size and the potential for the results being due to chance alone," stated an October 24, 2011, ACC press release. "Parents and consumers need information about actual, real-world safety. Recent, robust research funded by the EPA and conducted by scientists at the government's Pacific Northwest National Laboratory, CDC and FDA do not support the findings of this study."

Study on Soda Consumption and Violence Revisits "Twinkie Defense"

A recent study has reportedly associated non-diet soft drink consumption among teenagers with an increased risk for violent tendencies, raising questions about the legitimacy of the so-called "Twinkie Defense" used in the 1979 trial of Dan White for the assassination of San Francisco Mayor George Moscone and Supervisor Harvey Milk. Sara Solnick and David Hemenway, "The 'Twinkie Defense': the relationship between carbonated non-diet soft drinks and violence perpetration among Boston high school students," *Injury Prevention,* October 2011. A collaboration between Harvard School of Public Health Professor David Hemenway and University of Vermont Economics

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Professor Sara Solnick, the study relied on questionnaires completed by more than 1,800 Boston public high school students ages 14 to 18 years.

According to an October 28, 2011, *Harvard Crimson* article, the results evidently showed that "teens who drank more soft drinks were between nine and fifteen percent more likely to be violent" even after researchers accounted for other factors, "including gender, age, ethnicity, body mass index, alcohol use, tobacco use, and sleep." As Hemenway explained, "The more soda the students drank, the more likely the students were to perpetrate violence. It was violence in all areas—against peers, against dates, against siblings—and they were even more likely to carry guns."

Although Hemenway and Solnick noted that there may be "a direct cause-and-effect relationship" between soft drink consumption and violence due to sugar and caffeine content, they were equally quick to theorize about other causes. "People who drink a lot of soda are missing out on other proper nutrition, and that may lead to aggression and violence," Solnick said. "There are so many different factors that contribute to the problem, and we want to untangle all of them."

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