Shook, Hardy & Bacon L.L.P.

ISSUE 442 | JUNE 8, 2012

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FDA Rejects "Corn Sugar" Petition

The Food and Drug Administration (FDA) has rejected a Corn Refiners Association (CRA) petition urging the authorization of "corn sugar" as an alternate name for high-fructose corn syrup (HFCS). According to FDA's May 30, 2012, response, CRA had asked the agency (i) "to amend the generally recognized as safe (GRAS) affirmation regulation for HFCS (21 CFR 168.11) to designate 'corn sugar' as an optional name for HFCS"; (ii) "to eliminate 'corn sugar' as an alternate name for dextrose"; and (iii) "to replace all references to 'corn sugar' with 'dextrose'" in the GRAS regulations for corn sugar (21 CFR 184.1857). The trade association had apparently argued, among other things, that consumers confused by the name "high-fructose corn syrup" "incorrectly believe that HFCS is significantly higher in calories, fructose and sweetness than sugar."

In rejecting the petition, FDA countered that its regulations define sugar as "a solid, dried, and crystallized food; whereas syrup is an aqueous solution or liquid food… Thus, the use of the term 'sugar' to describe HFCS, a product that is a syrup, would not accurately identify or describe the basic nature of the food or its characterizing properties." The agency also declined to amend the GRAS status for dextrose, noting that "corn sugar" "has been used to describe dextrose for over 30 years" in both scientific literature and public discourse. As a result, warned FDA, changing "HFCS" to "corn sugar" could put consumers with hereditary fructose intolerance and other such conditions at risk because these individuals currently understand "corn sugar" to be a fructose-free ingredient.

The decision has reportedly drawn support from consumer groups such as the National Consumers League as well as the Sugar Association, which recently backed sugar producers in litigation against HFCS manufacturers. "The FDA's ruling represents a victory for American consumers," said one plaintiff's attorney in a May 30 Sugar Association press release. "It reaffirms what most consumer advocates, health experts and policy officials have been saying all along: only sugar is sugar. HFCS is not sugar. The next step is for the federal court to end the CRA's misleading propaganda campaign."

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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CRA, however, has criticized FDA's response for failing to resolve consumer confusion or address evidence that HFCS is nutritionally identical to other sugars."The Food [and] Drug Administration denied our petition to use the term corn sugar to describe high-fructose corn syrup on narrow, technical grounds," opined CRA President Audrae Erickson in a May 30 statement. "In light of the FDA's technical decision, it is important to note that the agency continues to consider HFCS as a form of added sugar, and requires that it be identified to consumers in the category of sugars on the Nutrition Facts Panel on foods and beverages." Additional details about the "corn sugar" litigation appear in **Issue 415** of this *Update*. *See The Wall Street Journal,* May 30, 2012; *Law360* and *The National Law Journal,* May 31, 2012.

EPA Sets Meeting, Teleconference to Address MCLG for Perchlorate

The Environmental Protection Agency's (EPA's) Science Advisory Board (SAB) has **announced** a July 18-19, 2012, public meeting of the SAB Perchlorate Advisory Panel and September 25 public teleconference to address a maximum contaminant level goal (MCLG) for the rocket fuel constituent perchlorate. Perchlorate contamination has been detected in samples of milk, drinking water and lettuce, and exposure at high levels has been linked to thyroid dysfunction and neurological problems in children. *See Federal Register,* May 30, 2012.

EFSA Issues Opinion on Dietary Exposure to Mineral Oil Hydrocarbons

The European Food Safety Authority (EFSA) has issued a **scientific opinion** on dietary exposure to mineral oil hydrocarbons (MOH) found mainly in "food packaging materials, food additives, processing aids, and environmental contaminants such as lubricants." According to a June 6, 2012, press release, EFSA's Panel on Contaminants in the Food Chain (CONTAM) focused on two types of MOH: (i) aromatic hydrocarbons identified as potentially genotoxic and carcinogenic; and (ii) saturated hydrocarbons that "can accumulate in human tissue and may cause adverse effects in the liver."

The CONTAM Panel apparently found low levels of saturated MOH in all of the food groups tested, "with some high levels found in 'Bread and rolls' and 'Grains for human consumption' due to their use, respectively, as release/non-sticking agents and spraying agents (used to make grains shiny)." It also reported the presence of both saturated and aromatic MOH in dry foods such as "'pudding' dessert mixes and noodles," attributed to the use of recycled paper/cardboard packaging for these products.

"MOH contamination of food by the use of recycled paperboard as packaging material may be a significant source of dietary exposure," stated the CONTAM Panel, which urged EFSA to revisit the temporary Acceptable Daily Intakes (ADIs) of saturated MOH and flagged aromatic MOH "as being of potential

concern" given its alleged toxicity. "[MOH] can be effectively prevented by the inclusion of functional barriers into the packaging assembly. Other measures may include segregation of recovery fiber sources intended for recycling and the increasing of the recyclability of food packages by avoiding the use of materials and substances with MOH in the production of food packages."

Canada Targets Food Safety Inspections

The Canadian government has issued a **discussion document** outlining a plan for a "stronger, more comprehensive inspection approach to further strengthen food safety." Titled "Improved Food Inspection Model: The Case for Change," the plan represents the Canadian Food Inspection Agency's (CFIA's) latest effort to keep up with a changing global "food landscape." Last year, CFIA was allocated $100 million over a five-year period to modernize Canada's food safety inspections.

According to CFIA, the agency operates eight separate food inspection programs for dairy, eggs, fish and seafood, fresh fruits and vegetables, imported and manufactured food, maple, meat, and processed products that include honey. "Having eight food programs has resulted in the development and use of different risk management frameworks, inspection methods, and compliance verification and enforcement approaches," the document states. "This challenges the CFIA to manage risks consistently across different types of establishments and different foods."

CFIA's plan includes providing more consistent oversight and risk management for both imported and domestic foods, and better training and tools for front-line inspectors. The agency seeks input from stakeholders by July 31, 2012. *See CFIA Press Release,* June 1, 2012.

OEHHA Issues Prop. 65 Guidance on Chlorothalonil in Tomatoes

The California Office of Environmental Health Hazard Assessment (OEHHA) has issued **interpretive guidance** on chlorothalonil in tomato products, concluding that the average consumer does not eat enough fresh tomatoes or tomato products to exceed the No Significant Risk Level (NSRL) for the pesticide. According to OEHHA, a NSRL for chlorothalonil of 41 micrograms (µg) per day will take effect on June 15, 2012, at which point businesses causing exposures in excess of the NSRL must comply with Proposition 65 (Prop. 65) warning requirements.

OEHHA evidently based its upper-bound limit estimates on USDA pesticide residue surveys taken in 2003, 2004, 2007, and 2008, as well as National Health and Nutritional Examination Survey data on tomato consumption. "Consumption of chlorothalonil residues by the average consumer of toma-

toes does not result in exposures that exceed the Proposition 65 NSRL of 41 µg/day for the chemical, where the residue levels in tomatoes are at recent historical levels measured for chlorothalonil in USDA surveys," concludes the interpretive guidance, which aims to provide information for the general public and businesses to facilitate Prop. 65 implementation.

Idaho Reverses Course, Agrees to Allow Sale of Five Wives Vodka®

After the Idaho State Liquor Division director was informed that a Utah-based distillery was considering suing the agency and state for refusing to allow the sale of Five Wives Vodka® in Idaho, the agency apparently decided that the product will now be allowed on state liquor store shelves and in bars. Discussing Idaho's initial rejection of the distillery's application, Director Jeff Anderson reportedly acknowledged that "people of the LDS faith" would not likely be shopping in liquor stores; still, he was quoted as saying, "that does not mean that we are not sensitive to them."

Jonathan Turley, a George Washington University Law School public-interest law professor, had informed Anderson of the distillery's intent to sue the agency and the state if the director (i) refused to reverse his rejection of bar requests for Five Wives Vodka® special orders, and (ii) based a refusal to include the product on the state's "general list," when the company renewed its application, on religious objections to its packaging. According to a news source, Turley successfully represented the family featured on the cable TV show "Sister Wives," a reality program documenting a polygamous lifestyle, by asking that the state not criminalize the family's conduct; prosecutors have apparently announced that they will not bring criminal charges against the family.

In his June 6, 2012, **letter**, Turley asserted that the state had not only unfairly refused to allow Idaho consumers to buy and bars to sell his client's product, but state officials allegedly disparaged the company and the product by referring to it as "low class." The letter claimed that the agency's actions were arbitrary and capricious and "constitute flagrant violations of the United States Constitution." Turley indicated that any lawsuit against the state would include claims of interference with interstate commerce; establishment of religion; and denial of free speech, due process and equal protection. According to Turley, "Businesses and citizens in Idaho have asked to buy 'Five Wives Vodka,' and this small American business wants to sell that product in your state. The only barrier has been neither market demand nor consumer preference, but the arbitrary imposition of religious objections to the packaging of the product. Such a basis would not satisfy the lowest standard of scrutiny in a constitutional challenge." *See Ad Age,* May 29, 2012; *Inside Counsel* and *The Salt Lake Tribune*, June 7, 2012.

NYC Proposes Limit on Sugary Beverage Sizes

New York City Mayor Michael Bloomberg's (I) Task Force on Obesity recently garnered national attention by proposing to limit the size of sugar-sweetened beverages sold at local food service establishments. In a May 31, 2012, **report** outlining several public health initiatives, the Task Force claims that "[s]ugary drink portion sizes have exploded over recent years" and urges a maximum size for these beverages as a way "to help reacquaint New Yorkers with 'human size' portions." To this end, Bloomberg has introduced a measure that—if adopted by the city's Board of Health at a June 12 hearing—would prohibit restaurants, food carts, delis, movie theaters, stadiums, and arenas from offering sugar-sweetened beverages in sizes that exceed 16 ounces.

"Limiting the size of sugary drinks to no more than 16 ounces at food service establishments will help us confront the obesity and diabetes epidemics, which now affect millions of New Yorkers," said Health Commissioner Thomas Farley in a June 5 press release. "This intervention will begin to curb the thousands of empty and unnecessary calories New Yorkers consume from sugary drinks every year, and educate people about the health risks they pose."

Meanwhile, the food service industry and its trade organizations have expressed concern that the initiative not only oversteps the government's authority but would do little to curb obesity rates. "We appreciate the mayor's concern for public health but the current proposal goes much too far. No one understands private enterprise and business better than the mayor. People want choices. Restaurants are serving the public what it wants and we all hope that will continue," said one spokesperson for the New York State Restaurant Association (NYSRA). "If we want New York City to remain the restaurant capital of the world, we must stop placing these burdensome restrictions on what can and can't be served here."

While both the American Beverage Association and National Restaurant Association are reportedly contemplating legal action, several media sources have speculated that such attempts are likely to fail, in part because the proposal is administratively narrow and does not apply to alcohol, juices, dairy-based drinks or those with fewer than 25 calories per eight-ounce serving. "Based on history, I think [Bloomberg] has the power to do this," New York City Councilman Peter Vallone Jr. told *Law360*. "Although it would be better to have a law than a health department edict, because a law can't be changed by the next health commissioner." *See The New York Times,* May 30, 2012; *Law360* and *NYSRA Statement,* May 31, 2012; *Advertising Age,* June 3, 2012.

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LITIGATION

Court Orders FDA to Complete Safety Review of Antibiotics Used in Animal Husbandry

A federal court in New York has determined that the Food and Drug Administration (FDA) arbitrarily denied petitions filed by advocacy organizations in 1999 and 2005 requesting the initiation of proceedings to withdraw approval from certain uses of antibiotic drugs in livestock. ***Natural Resources Defense Council v. FDA*, No. 11 Civ. 3562 (THK) (U.S. Dist. Ct., S.D.N.Y., decided June 1, 2012)**. The ruling follows the court's March 2012 grant of summary judgment to the plaintiffs on their first claim for relief. Additional information about that ruling appears in **Issue 432** of this *Update*. The most recent ruling relates to the third claim for relief, that is, whether FDA violated the Administrative Procedure Act when it denied the two petitions "requesting that the FDA withdraw approval of certain uses of certain classes of antibiotics in food-producing animals."

The court first determined that it had subject matter jurisdiction over the claim, disagreeing with FDA's assertion that its November 2011 decision to deny both petitions was a matter for agency discretion, not subject to judicial review. On the merits, the court found that FDA repeatedly turned aside requests for agency considerations of antibiotic safety by asserting that such reviews would be time-consuming and resource intensive and that better results would be obtained with voluntary industry action under several agency guidances. According to the court, the Food, Drug, and Cosmetic Act "contains no language indicating that the costs of a withdrawal proceeding—either to the Agency itself or to industry—are to be taken into account when making the decision whether to initiate withdrawal proceedings. Rather, in both approving an initial drug application and determining whether withdrawal is appropriate, the inquiry focuses on whether the drug is safe and effective."

Noting that the agency had neither considered nor addressed the thousands of pages of scientific evidence submitted in support of the petitions relating to the propensity for sub-therapeutic uses of antibiotics in livestock to promote antibiotic-resistant bacteria and the increase in antibiotic-resistant bacteria in humans, the court said, "FDA in refusing to follow the statutory mandate of withdrawal proceedings" and "[d]enying the Petitions on the grounds that it would be too time consuming and resource-intensive to evaluate each individual drug's safety, and withdraw approval if a drug was not shown to be safe, is arbitrary and capricious." The court also noted that the petitions had been pending for 13 and seven years, respectively, thus, "The position that instituting withdrawal proceedings—what the statute mandates—is too time consuming is both ironic and arbitrary."

The court further observed, "For over thirty years, the Agency has been confronted with evidence of the human health risks associated with the widespread subtherapeutic use of antibiotics in food-producing animals, and, despite a statutory mandate to ensure the safety of animal drugs, the Agency has done shockingly little to address these risks." Without compelling FDA to reach a certain conclusion, the court remanded the matter for further proceedings. The agency appealed the court's March ruling to the Second Circuit Court of Appeals on May 21. It is unknown whether FDA will appeal the most recent court ruling.

Frito-Lay Sued for Failure to Disclose GMO Ingredients in Snack Foods

A Florida resident has filed a complaint on behalf of a nationwide class of consumers against Frito-Lay, alleging that it sells the company's snack foods, such as Tostitos® chips, Sunchips® and bean dip, as "All Natural" without disclosing that they contain genetically modified organisms (GMOs). *Foust v. Frito-Lay N. Am., Inc.*, No. 12-cv-21975 (U.S. Dist. Ct., S.D. Fla., filed May 25, 2012). According to the complaint, "The Product poses a potential threat to consumers because medical research and scientific studies have yet to determine the long-term health effects of genetically engineered foods. Recent studies suggest that GMOs may in fact be harmful to a consumer's health." Still, the plaintiff does not allege personal injury, claiming instead that he would not have purchased the product "if he had known that the Defendant could not support their [sic] claim that the Product is all natural because it contains GMOs."

In this regard, the plaintiff notes that he is not contending that Frito-Lay was required to state whether its products were made from GMO plants, "as this issue would be pre-empted under the NLEA [National Labeling and Education Act]. Rather Plaintiff contend[s] that Defendant's affirmative decision to label its Product "ALL NATURAL" without also disclosing the fact the Product contains GMO is misleading, given that the Products were made using GMO." Alleging violations of Florida's Deceptive and Unfair Trade Practices Act, unjust enrichment, negligent and intentional misrepresentation, fraudulent concealment, breach of implied warranty of fitness for purpose and express warranty, and violation of the Magnuson-Moss Act, the plaintiff seeks injunctive relief, actual and punitive damages, attorney's fees, costs, and interest.

New Lawsuits Filed: Cochineal Extract in Starbucks Products, *Salmonella* in Pet Food and Eggs, Frito-Lay Challenge to Order for Production of Employment Data

A California resident has filed a putative class action against Starbucks Corp. alleging that the company deceived consumers by failing to disclose that some of its products were made with cochineal extract, a common food-coloring ingredient made from crushed insects. *Anderson v. Starbucks*

Corp., No. BC485438 (Cal. Super. Ct., Los Angeles County, filed May 25, 2012). Seeking to represent a nationwide class and statewide subclass of consumers, the plaintiff claims that she and the class members, had they known about the company's use of the ingredient, would not have purchased the products for a number of reasons, including objections to consuming animal products, allergic responses to the ingredient or "sheer disgust." Alleging violations of the California Unfair Business Practices Act and False Advertising Act, unjust enrichment, fraud by omission/concealment, and violation of California's Consumers Legal Remedies Act, the plaintiff seeks disgorgement, restitution, compensatory and punitive damages, payment to a *cy pres* fund, corrective advertising, an apology, attorney's fees, and costs.

At least two lawsuits have been filed against Diamond Pet Foods and a retailer, alleging that dog food tainted with *Salmonella* sickened an infant and was responsible for the death of a pet. *Eisenberg v. Diamond Pet Food Processors of S.C., L.L.C.*, No. 12-cv-3127 (U.S. Dist. Ct., D.N.J., filed May 25, 2012); *Marciano v. Schell & Kampeter, Inc. d/b/a Diamond Pet Foods*, No. CV-12-2708 (U.S. Dist. Ct., E.D.N.Y., filed May 30, 2012). The plaintiff in *Eisenberg* alleges that his 8-week-old son was hospitalized for three days after contracting an infection from exposure to *Salmonella*-tainted dry dog food. Counsel has reportedly indicated that it was unknown how the child contracted the illness; samples of the family's pet food apparently did not test positive for salmonella, although the child allegedly contracted the rare strain linked to the recalled pet food. *See MSN.com*, May 31, 2012.

The plaintiff in *Marciano* seeks to certify national and New York classes of pet food purchasers, alleging that the recalled dog food sickened two of her pets, one of which died. She alleges breach of implied and express warranty, negligence, strict product liability, unjust enrichment, and violations of New York consumer fraud statutes. She seeks actual, consequential and treble damages; injunctive and declaratory relief; interest; attorney's fees; and costs.

A California resident has filed a wrongful death suit against an egg producer and restaurant, alleging that the consumption of *Salmonella*-tainted eggs caused his father's death. *Marlais v. Quality Egg, LLC*, No. RG12632871 (Cal. Super. Ct., Alameda County, filed June 1, 2012). According to the complaint, some two months after his father died in 2010, the defendants issued a recall of more than 228 million shell eggs, and the Food and Drug Administration found significant objectionable conditions at the Iowa-based egg producer's facility. Alleging strict products liability, negligence and breach of implied warranties, the plaintiff seeks wrongful death and survivorship damages, economic and non-economic damages, interest, and court costs.

Frito-Lay, Inc. has filed a complaint against the U.S. Department of Labor (DOL) in a Texas federal court seeking judicial review of a final administrative order requiring the company to produce certain employment information.

Frito-Lay, Inc. v. DOL, No. 12-CV-1747 (U.S. Dist. Ct., N.D. Tex., Dallas Div., filed June 5, 2012). As a federal contractor, Frito-Lay is subject to an executive order and regulations prohibiting discrimination. DOL's Office of Federal Contract Compliance Programs (Office) enforces the order "primarily through agency-initiated compliance evaluation and complaint investigations."

According to the complaint, the Office issued a standard compliance review scheduling letter in July 2007 "for a routine desk audit of Frito-Lay's Dallas Baked Snack facility" and sought data for the 2006 affirmative action plan year and the first half of 2007. Frito-Lay apparently complied with the request and heard nothing more until fall 2008, when the Office requested data dating back to July 2005 and forward to December 2007. Again, Frito-Lay apparently complied with the request, and the Office subsequently claimed that its analysis "revealed a statistically significant disparity in the hiring rates of females versus males for entry-level Warehouse/Material Handler positions" from June 2006 through December 2007. Frito-Lay alleges that the Office did not thereafter conduct a standard investigation, but instead "took the unusual, if not unprecedented, step of expanding the temporal scope of its compliance review beyond 2007."

The Office allegedly sought additional employment data from January 2008 through October 2009, and Frito-Lay objected to this request "on the grounds that [Office] regulations do not contemplate the agency's investigation of post-Scheduling Letter conduct in compliance reviews." The Office initiated an enforcement action, and an administrative law judge (ALJ) purportedly sustained Frito-Lay's objection and recommended dismissal of the Office's complaint. Thereafter, DOL's Administrative Review Board reversed the ALJ's recommended decision and order finding that the Office had the authority to request the 2008-2009 data because it was pursuing "a concern about a statistically significant disparity."

Challenging the board's order, Frito-Lay alleges that (i) the request for additional data contrary to agency norms violated the Administrative Procedure Act (APA) and the Fourth and Fifth Amendments of the U.S. Constitution, (ii) the board's refusal to close the case in a timely manner violated the APA, (iii) the Office's delay in bringing the enforcement action violated the APA, and (iv) any potential discriminatory hiring claims are time-barred.

Lawsuits Concluded: No Trademark for "Texas Toast," No Class Claims for Joe's Crab Shack Employees, No Racial Discrimination Class Claims Against McDonald's, No Wrongful Death Suit Against Dole Food, No Antitrust Action Against Whole Foods

The Sixth Circuit Court of Appeals has determined that the Roskam Baking Co. did not infringe a trademark by using the term "Texas Toast" in selling its packaged croutons. ***T. Marzetti Co. v. Roskam Baking Co.*, No. 10-3784 (6th Cir., decided May 25, 2012)**. Marzetti apparently began using the Texas

Toast mark for its frozen garlic bread in 1995 and then adopted the term for use with a crouton product sold in 2007. The company attempted to register the mark in 2009, but the applications were initially denied "because of the potential likelihood of confusion with the mark Texas toast for bakery goods." Thereafter, they were approved for publication as, "at a minimum, suggestive." The defendant filed an opposition to the trademarks in 2010, and Marzetti, learning about the company's Texas Toast croutons, filed this trademark infringement action. The Sixth Circuit agreed with the district court that the mark is not protectable on the basis of findings that "Texas Toast" is a "generic designation when applied to croutons."

A California court has determined that an overtime and meal-break case brought as a putative class action on behalf of Joe's Crab Shack managers cannot be certified because (i) individual issues predominate over common issues, (ii) the named plaintiffs were not typical class members or adequate class representatives, and (iii) class treatment was not a superior means of resolving the litigation. *Martinez v. Joe's Crab Shack, Inc.*, No. BC377269 (Cal. Super. Ct., Los Angeles County, decided May 25, 2012). Accordingly, the court denied the plaintiffs' motion for preliminary class certification. Among other matters, the court noted that the plaintiffs were unable to estimate the number of hours spent on individual exempt or non-exempt work tasks and that each testified to varying amounts of time spent on such tasks from day to day and week to week. "Thus, the evidence indicates plaintiffs will be vulnerable to the defense that each of them performed exempt tasks more than 50% of their work time. This contrasts with the putative class members who the [third amended complaint] alleges spent more than 50% of their work time performing non-exempt tasks."

A federal court in Illinois has dismissed class action allegations of racial discrimination filed by former employees against McDonald's Corp., agreeing with the company that the plaintiffs failed to exhaust their administrative remedies by first presenting the class claims in an underlying Equal Employment Opportunity Commission (EEOC) charge. *Dovgin v. McDonald's Corp.*, No. 11 C 7883 (U.S. Dist. Ct., N.D. Ill., decided May 25, 2012). Each of the named plaintiffs had apparently focused on "discrete, personal allegations" of racial discrimination when filing their EEOC charges and did not "allege widespread discrimination against any particular class."

According to a news source, a California court has tentatively declined to set aside its dismissal of a wrongful death lawsuit filed by 180 survivors of Colombians allegedly killed near South American banana plantations by paramilitaries purportedly paid by Dole Food Co, Inc. *Perez v. Dole Food Co., Inc.*, No. BC412620 (Cal. Super. Ct., Los Angeles County, decided May 30, 2012). The court dismissed the case in April 2012 after the plaintiffs failed to timely amend their complaint under an appellate ruling that became final in January. The plaintiffs sought to set aside the dismissal, claiming their attorneys were

unaware of the time limit. While the court indicated that it would review some cases before finalizing the adverse decision, it also issued a tentative ruling denying the plaintiffs' request to set aside an order that each of them pay a $16,900 cost bond to guarantee the payment of any costs that may be awarded to Dole. *See Law360*, May 31, 2012.

A California woman who lost her motion to certify a class in an antitrust lawsuit challenging the merger of Whole Foods Market, Inc. and Wild Oats has reportedly agreed to judgment in favor of Whole Foods. *Kottaras v. Whole Foods Mkt., Inc.*, No. 08-1832 (U.S. Dist. Ct., D.D.C.). Additional information about the court's January 2012 ruling denying class certification appears in Issue 425 of this *Update*. *See The BLT: The Blog of LegalTimes*, May 30, 2012.

OTHER DEVELOPMENTS

Report Examines U.S. Food Sector Workers

The Food Chain Workers Alliance has issued a report claiming that most U.S. workers across the food sector—from production, processing, distribution, retail, and service—earn low wages with few health benefits, a situation that can pose safety risks to both employees and the public.

Titled "The Hands That Feed Us: Challenges and Opportunities for Workers Along the Food Chain," the 92-page report based its findings on nearly 700 surveys and interviews with employers and workers in the sector, which employs 20 million people and comprises one-sixth of the country's workforce.

Among the report's findings of workers surveyed: (i) more than 86 percent reported earning low or poverty wages, (ii) 79 percent said they either do not have a single paid sick day or do not know if they do, (iii) 83 percent do not receive health insurance from their employers, (iv) 53 percent admitted to working while sick, (v) 57 percent reported an injury or health problem on the job, (vi) 35 percent reported using the emergency room for primary health care, (vii) 52 percent said they did not receive health and safety training from their employers, and (viii) 33 percent said they were not always provided necessary equipment to do their jobs.

The report recommended, among other things, that policymakers increase the minimum wage for tipped workers and "improve food safety and the public's health by guaranteeing food system workers health benefits such as paid sick days and access to health care." It also suggested that consumers educate "food justice advocates about the need to include sustainable working conditions for food workers within the definition of sustainable food."

SCIENTIFIC/TECHNICAL ITEMS

BPA Diglycidyl Ether Linked to Adipogenic Changes in Stem Cells

Researchers with the University of California, Irvine, have allegedly demonstrated that low doses of bisphenol A (BPA) diglycidyl ether (BADGE) can turn adult stem cells and pre-fat cells into fat cells, raising questions about the obesogenic effect of a chemical commonly used in food packaging materials. Raquel Chamorro-García, et al., "Bisphenol A Diglycidyl Ether Induces Adipogenic Differentiation of Multipotent Stromal Stem Cells Through a Peroxisome Proliferator Activated Receptor Gamma-independent Mechanism," *Environmental Health Perspectives,* May 2012. The study's authors evidently used multipotent mesenchymal stromal stem cells (MSCs) to evaluate BADGE's effects on "adipogenesis, osteogenesis, gene expression and nuclear receptor activation." Their results purportedly indicated that BADGE, a combination of BPA and epichlorohydrin, can induce adipogenic differentiation in both MSCs and preadipocytes at low concentrations "comparable to those that have been observed in limited human biomonitoring."

"There is an urgent need to understand the mechanisms underlying the predisposition to obesity and related disorders. In this study, we identified unexpectedly potent effects of a ubiquitously used chemical, BADGE, on adipogenesis in MSCs at nanomolar levels," stated the researchers, who have urged further studies to analyze BADGE at "biologically realistic" concentrations. "While exposure data are currently limited, this is in the same range as reported human exposures. Therefore, it will be essential to determine the levels of BADGE and its routes of exposure, metabolism and retention in humans."

Childhood Obesity Allegedly Linked to Blindness

A recent study has reportedly claimed that children who are overweight or obese "are more likely to have a neurological disease known as idiopathic intracranial hypertension [IIH], a rare condition that can result in blindness." Sonu Brara, et al., "Pediatric Idiopathic Intracranial Hypertension and Extreme Childhood Obesity," *Journal of Pediatrics,* May 2012. Researchers apparently analyzed data from 900,000 participants in the Kaiser Permanente Southern California (KPSC) Children's Health Study, concluding that 57 (73.1 percent) of the 78 KSPC children and adolescents diagnosed with IIH were overweight or obese. These children were also more likely to be age 11 or older at diagnosis as well as white, non-Hispanic and female.

"Consistent with two previous studies, we found that female sex and obesity first emerge as strong IIH risk factors in postpubertal age children," reported the study's authors. "Extremely obese adolescents were 16 times more likely than normal weight children to have IIH whereas moderately obese or

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overweight children were only 3.5-6 times more likely to have IIH, respectively… These findings are novel and suggest that the risk of IIH is highest among overweight/obese White non-Hispanic teenage girls. Our findings also suggest that careful screening of these at risk individuals for headaches, blurred vision, and eye movement abnormalities may lead to earlier detection and, thus, opportunity for treatment to prevent vision loss."

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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.