ISSUE 446 | JULY 13, 2012

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Slaughter Issues Results from Food Industry Survey on Antibiotic Use

U.S. Representative Louise Slaughter (D-N.Y.) has **released** the responses to a February 16, 2012, letter sent to 60 food producers and retailers "asking them to disclose their policies on antibiotic use in meat and poultry production." After analyzing the results, Slaughter has purportedly revealed that "while a small number of industry leaders provide antibiotic-free meat and poultry products, an overwhelming majority of food production companies routinely feed low-doses of antibiotics to healthy food-animals."

In particular, Slaughter has used these findings to bolster support for the Preservation of Antibiotics for Medical Treatment Act (PAMTA), "which would end the routine use of antibiotics on healthy animals" and "preserve the effectiveness of medically important antibiotics." To this end, she has also highlighted a recent Consumers Union report, "**Meat On Drugs**," as evidence that consumers would purchase antibiotic-free products in supermarkets. "Through my survey, the food industry has provided us valuable information, and with that knowledge we must act," said Slaughter. "I urge consumers to consider today's findings when shopping, and I urge the FDA and my colleagues in Congress to strengthen our laws in order to fight the growing threat of superbugs. Until we do, the routine use of antibiotics will continue to breed antibiotic-resistant bacteria that threaten human health." Additional details about Slaughter's food industry survey appear in **Issue 428** of this *Update*.

FDA Collaborates on Public Foodborne Bacteria Genome Database

The Food and Drug Administration (FDA) will take part in a collaborative effort to create a public database that will contain 100,000 foodborne pathogen genomes to help facilitate the identification of those responsible for outbreaks involving bacteria such as *Salmonella, Listeria* and *E. coli*. Called "The 100K Genome Project," the undertaking will apparently be a five-year genetic sequencing program openly accessible to researchers and others helping to develop tests that would identify the type of bacteria present in a

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sample within days or hours. According to one project participant, "Each year in the United States there are more than 48 million cases of foodborne illness. A problem of this magnitude demands an equally large countermeasure." *See FDA News Release*, July 12, 2012.

USDA Revamps Drug Residue Testing Program

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) has issued a July 6, 2012, **notice** announcing its decision to restructure its National Residue Program to permit more extensive compound testing of meat, poultry and egg products. According to FSIS, the revamped program aims to reduce the number of samples analyzed while allowing the agency to assess more compounds per sample using improved multi-residue methods. In particular, these methods will enable FSIS to screen for pesticides and environmental contaminants as well as legal and illegal veterinary drugs such as antibiotics, anti-inflammatories and growth promoters.

"Under the new system, one sample may be tested for as many as 55 pesticide chemicals, 9 kinds of antibiotics, various metals, and eventually more than 50 other chemicals," explained the agency in a July 2 press release, which noted that the previous program required FSIS to collect one sample per animal and to isolate just one chemical at a time. "If an establishment has samples containing illegal residue levels, FSIS will notify the Food and Drug Administration, which may review practices of producers supplying the establishment with livestock or poultry, and FSIS may subject the establishment to increased testing and review."

Slated to take effect 30 days after publication in the *Federal Register,* the new procedures will also increase the annual number of samples per slaughter class from 300 to 800. As a result, FSIS has estimated that in 2012 it will run "6,400 samples through 12 multi-residue methods across nine production classes of meat and poultry, which represent 95 percent of the meat and poultry consumed domestically." These classes will evidently cover "Bob Veal, Beef Cows, Dairy Cows, Steers, Heifers, Market Swine, Sows, Young Chicken, and Young Turkey," with the agency anticipating that "Bob Veal, Beef Cows, and Sows may show some increase in violations, while Dairy Cows, Steers, Heifers, Market Swine, Young Chicken, and Young Turkey may show no change in violations." FSIS has thus invited interested parties to submit comments on the planned changes via mail or the federal eRulemaking Portal.

EFSA Issues Scientific Statement on Safety of Meat and Milk from Healthy Clones

At the European Commission's request, the European Food Safety Authority (EFSA) has published a **scientific statement** on the safety of food products derived from animal clones. In its June 2012 statement, EFSA reaffirms its earlier statements and opinions, noting that no new information has changed

its conclusion that meat and milk from healthy cattle and pig clones and their offspring are no different "compared with those from healthy conventionally bred animals." EFSA also finds no evidence that cloning farmed animals poses any particular threats to genetic diversity or biodiversity. Still, the scientific statement underlines that animal health and welfare "were compromised in a proportion of clones, mainly observed as increased mortality within the post-natal and juvenile period of calve and piglet clones, as well as in a proportion of the surrogate dams that were affected by abnormal pregnancies." *See EFSA News Release*, July 5, 2012.

Washington Extends BPA Ban to Sports Bottles

The Washington Department of Ecology has implemented the second part of a statewide measure "banning the sale of certain products containing BPA," which now includes sports bottles with capacity up to 64 ounces. As of July 1, 2012, sport bottles containing bisphenol A (BPA) can no longer "be made, sold or distributed" in the state in accordance with a 2010 law passed by the state legislature. The first phase of the law, which took effect July 1, 2011, already prohibits "bottles, cups or other containers intended for children under age 3 that contain BPA," although "cans designed to hold or pack food will still be allowed to contain BPA."

"A number of national and international scientific organizations have expressed concerns that BPA can interfere with the body's hormonal system," said the department in a July 11, 2012, press release. "Recent studies suggest some children may be exposed to enough BPA in their diet to be harmful… BPA can affect brain development, behavior, and the prostate gland."

LITIGATION

Court Rulings: Damages Apportioned Along Supply Chain in *E. Coli* Litigation, Taco Bell Cleared of Unauthorized Text Message Claims, "Heart Attack" and "Bypass" Sandwich Dispute Resolved, False Ad Suit over Muscle Milk® to Proceed, Skinny Girl Margarita® "All Natural" Claims Survive Motion to Dismiss, Conditions Imposed on Pesticide Spraying

The Wisconsin Supreme Court has decided which of the parties sued over an *E. coli* outbreak that sickened dozens of Sizzler Steak House patrons in 2000 and caused the death of a 3-year-old are liable for consequential damages, indemnity and costs under various supply chain and insurance contracts. ***Estate of Brianna Kriefall v. Sizzler USA Franchise, Inc.*, Nos. 2009AP1212 & 2010AP491 (Wis., decided June 29, 2012)**. Among other matters, the court ruled that Sizzler was entitled to (i) recover consequential damages for the meat supplier's breach of implied warranties despite limiting language in the continuing guaranty provision of their contract, and (ii) indemnity from the meat supplier for Sizzler's advance partial payment to the family of the

deceased child "because the payment was not voluntary and the jury found that Sizzler was zero percent liable for the E. coli contamination." The court also ruled that Sizzler could not recover its attorney's fees despite a jury finding that it was not responsible for the contamination. According to the court, Sizzler did not meet a narrow exception to the American rule which requires each party to pay its own costs and fees.

A federal court in California has dismissed putative class claims alleging that Taco Bell Corp. violated the Telephone Consumer Protection Act when Nachos BellGrande® promotional text messages were sent in 2005 to 17,000 individuals in the Chicago area. *Thomas v. Taco Bell Corp.*, No. 09-cv-01097-CJC (ANx) (U.S. Dist. Ct., C.D. Cal., S. Div., decided June 25, 2012). According to the court, to hold the company vicariously liable under the law as the person making a call using an automatic dialing system to a number for which the called party is charged for the call, the plaintiff had to show that the company controlled the manner and means of the text-message campaign. While a company representative knew about the campaign and approved and funded it, Taco Bell did not direct or supervise the text-message campaign which was carried out by a separate local owners' advertising entity in which the representative had a minority vote, the entity's advertising agency and the company that actually prepared and sent the text message.

A federal court in New York has determined that a kosher delicatessen has not infringed the trademark of a chain of Heart Attack Grill restaurants, one of which offers patrons the Single Bypass Burger, Double Bypass Burger, Triple Bypass Burger, and Quadruple Bypass Burger. *Lebewohl v. Heart Attack Grill LLC*, No. 11-3153 (U.S. Dist. Ct., S.D.N.Y., decided July 5, 2012). Further details about the case appear in **Issue 394** of this *Update*. According to the court, the New York City deli's current use of the Instant Heart Attack Sandwich mark does not violate the defendant's rights, the deli may "modestly expand its use of that mark," and it may lawfully use the Triple Bypass Sandwich mark on a limited basis under a concurrent use arrangement agreed to by the parties. So ruling, the court rejected the U.S. Patent and Trademark Office's determination that the deli's use of the Instant Heart Attack mark was likely to cause confusion; the court found that the products are not sold in the same locations and the companies pitch to "vastly different consumers."

Ruling for a second time on the adequacy of a putative class claimant's pleading that certain Muscle Milk® product representations are false and misleading, a federal court in California has granted in part and denied in part the defendant's motion to dismiss. *Delacruz v. Cytosport, Inc.*, No. C 11-3532 (U.S. Dist. Ct., N.D. Cal., decided June 28, 2012). Additional information about the court's ruling on the plaintiff's first amended complaint appears in **Issue 436** of this *Update*. The court found that, by adding to her complaint information about Food and Drug Administration rules regarding what constitute healthy ingredients, the plaintiff provided objective criteria by which the

court could assess whether the term "healthy fats" on a product label could constitute deceptive labeling. The court dismissed claims as to misrepresentations based on the company's "good carbohydrates" statement, an allegation that "0g Trans Fat" on a product label "distracts consumers from the product's unhealthy fat and saturated fat content," and the claim that a long-standing advertising campaign misled the public. The court ordered the plaintiff to notice any motion for class certification for hearing on November 8, 2012.

A federal court in New Jersey has determined that New Jersey plaintiffs who allege that Skinny Girl Margarita® products are falsely marketed as "all natural" because they contain a chemical preservative may assert a claim for unjust enrichment under New Jersey law. *Stewart v. Beam Global Spirits & Wine, Inc.*, No. 11-5149 (U.S. Dist. Ct., D.N.J., decided June 29, 2012). The court rejected the defendants' argument that it is a "'well-settled' principle of New Jersey law that a plaintiff who purchases a product from a third-party retailer may not maintain an unjust enrichment claim against the product manufacturer." Unlike the defendants, the court looked to state-court cases and explained how they differed from a case involving an allegedly falsely marketed product purchased through a retailer. In this regard, the court stated, "This Court is of the view that it would be inequitable to suggest that the Beam defendants can insulate themselves from liability on an unjust enrichment claim simply by asserting that retail sales by liquor stores cut off any relationship between the consumers and the manufacturer. This is particularly true in this case where Plaintiffs cannot seek a remedy directly from the liquor stores based on misrepresentations allegedly made by the Beam Defendants themselves as to the 'all-natural' nature of Skinny Girl Margarita."

A Colorado court has allowed the owner of a small farm to spray his property with a pesticide containing malathion to kill mosquitoes, but has imposed stringent conditions so that the spray will not drift onto an adjacent organic farm property. *Macalpine v. Hopper*, No. 10CV220 (Delta Cnty. Dist. Ct., Colo., decided July 5, 2012). One of the organic farm's owners has leukemia and has apparently been advised to avoid pesticides that will allegedly further impair his suppressed immune system, leaving him susceptible to infection. The pesticide-spraying farmer is married to a woman who contracted West Nile virus from a mosquito and has been warned to avoid further exposure due to her severe reaction. The couple cares for a granddaughter whose physical and behavioral disorders require her to be inside when mosquitoes are inactive and who finds some relief from outside activity during the evening. Inexpert initial spraying contaminated the organic farm, so the court required future spraying to be conducted by properly licensed individuals only, under certain weather conditions and at specified distances from the organic farm.

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New Claims Filed: Medical Monitoring Sought for Animals from Pet Food Co., Foie Gras Ban Challenged, Trade Secret Dispute over Beer Bottle Design, Challenge to "Guiltless" Alcohol Beverage Trademark

A New York resident has filed a putative class action against Diamond Pet Foods and Amazon.com, seeking medical monitoring for pets that consumed recalled *Salmonella*-tainted pet food. *Cohen v. Schell & Kampeter, Inc., d/b/a Diamond Pet Foods*, No. 12-3299 (U.S. Dist. Ct., E.D. N.Y., filed July 2, 2012). Plaintiff Steven Cohen alleges that he fed his dogs Taste of the Wild® brand pet food, purchased from Amazon.com, and that they became ill, vomiting frequently, "which caused damage to Plaintiff's property." Seeking to certify a nationwide class and statewide subclass of consumers, the plaintiff alleges breach of implied and express warranty, strict products liability, violations of state consumer fraud laws, negligence, and unjust enrichment. In addition to medical monitoring, the plaintiff seeks actual damages or restitution, attorney's fees, costs, and interest.

A Canadian non-profit representing the interests of foie gras producers, a New York-based foie gras producer and a company that operates restaurants in California have filed a lawsuit challenging the constitutionality of the state's ban on the sale of any product that is the result of force-feeding a bird for the purpose of enlarging its liver beyond normal size. *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 12-5735 (U.S. Dist. Ct., C.D. Cal., W. Div., filed July 2, 2012). The plaintiffs contend that the law violates the Due Process Clause because it is void for vagueness, that is, the law "does not provide a person of ordinary intelligence fair notice of what amount of food he may cause a duck to consume," and imposes significant penalties if the ducks sold in California "are deemed to be products of ducks fed more than section 25982 allows." They further allege that the imposition of a penalty without requiring *mens rea* for conduct not involving public health or safety constitutes a due process violation and that the prohibition on the sale of products legal in other states and countries violates the Commerce Clause.

Two Dutch companies have filed suit against Anheuser-Busch InBev, alleging that the company stole their trade secret for the design of a "bag in a bottle" beer bottle that can be used to re-create the draft beer experience at home. *AFA Dispensing Group B.V. v. Anheuser-Busch InBev S.A.*, No. 1222-cv-09165 (St. Louis Cir. Ct., Mo., filed July 5, 2012). According to the complaint, the plaintiffs discussed the design in meetings to explore a business partnership with Anheuser-Busch representatives who later indicated they were not interested in further pursuing a bag-in-bottle beer dispensing system. The plaintiffs allege that they later learned that Anheuser-Busch was pursuing such technology and filed patent applications for its Draftmark® system relying on plaintiffs' trade secret. Alleging violation of the Missouri Uniform Trade Secrets Act and breach of contract, the plaintiffs seek $25,000 in compensatory damages, $150 million in punitive damages, a permanent injunction, attorney's fees, and costs.

U.S. and Canadian companies that sell and distribute lower calorie and carbohydrate Lulu B.® cocktails in bottles referring to the products as a "guiltless indulgence" and "guilt-free" have filed a lawsuit against a Wisconsin company that claims to have registered the "Guiltless" trademark for non-alcoholic cocktail mixers and applied to register the trademark for wine coolers. *The Wine Group, LLC v. Martita's Mixers, LLC*, No. 12-cv-01753 (U.S. Dist. Ct., E.D. Cal., filed July 2, 2012). The plaintiffs seek a declaration that the trademark application is void because the defendant did not have a bona fide intention to use the mark on wine coolers and that their use of the term "guiltless" does not constitute unfair competition because the packaging and goods are dissimilar and the term "is not a unique identifier."

Antibiotic Drug Residues in Meat Lead to Consent Decree with DOJ

A federal court in Wisconsin has reportedly approved a consent decree between the U.S. government a Wisconsin livestock operation that allegedly violated federal drug laws by failing to maintain adequate animal treatment records, using new animal drugs illegally and failing to adequately distinguish between medicated and non-medicated animals for sale for use as human food. The Food and Drug Administration (FDA) initially warned the owner of Nolan Livestock in 2004 that a U.S. Department of Agriculture inspection revealed the presence of an illegal antibiotic in the edible tissues of its dairy cows. Under the consent decree, the owner must cease operations and then resume only when it has documented to FDA's satisfaction that it has corrected the problems observed and has instituted appropriate procedures to prevent a recurrence. *See U.S. Department of Justice News Release*, June 26, 2012; *FDA News Release*, July 10, 2012.

EU General Court Finds Scotch Maker's "Royal Shakespeare" Trademark Invalid

The European Union (EU) General Court has affirmed a ruling of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and dismissed the application of a beverage company to register "Royal Shakespeare" as a word mark for its scotch whiskey. ***Jackson Int'l Trading Co. Kurt D. Brühl GmbH & Co. KG v. OHIM*, Case T-60/10 (Gen. Ct., decided July 6, 2012)**. According to the court, the Royal Shakespeare Co. had registered "Royal Shakespeare Company" three years before Jackson International sought to register its mark, the theater company's mark has a reputation before the public at large and not among an elite as argued by Jackson International, and the beverage maker's use of the mark would take "unfair advantage of the distinctive character or the repute of the earlier trade mark."

LEGAL LITERATURE

Andrew Torrance, "Planted Obsolescence: Synagriculture and the Law," *Idaho L. Rev.*, 2012

University of Kansas School of Law Professor Andrew Torrance discusses in this **article** the promises of synthetic biology, which takes genetic engineering (GE) one step further by designing organisms from scratch, and its potential perils. Dubbed "synagriculture," the new technology is apparently being developed by those dedicated to sharing, spreading and pooling innovative biotechnologies and eschewing patent, copyright, trademark, and trade secrecy to protect inventions. Part of the Do-It-Yourself biology movement, synagriculture, according to the author, represents a democratization of GE crop and livestock development, which some contend has given agricultural companies too much control over farmers. After reviewing an array of GE legal issues, Torrance concludes, "it would be well and wise for the law to prepare itself to reexamine the brave new world of synagriculture with brand new eyes."

OTHER DEVELOPMENTS

WTO Rejects U.S. Appeal in COOL Dispute

The World Trade Organization Appellate Body has partially rejected the U.S. Office of the Trade Representative's (USTR's) appeal in a dispute with Canada and Mexico over "country of origin" labeling (COOL) for beef and pork products. After WTO's Dispute Settlement Panel ruled in November 2011 that specific provisions of the U.S. COOL program provided less favorable treatment to Canadian and Mexican livestock, USTR appealed the ruling on the ground that COOL does not impose unfavorable treatment of imported products because it "requires meat derived from both imported and domestic livestock to be labeled under the exact same set of circumstances." Additional details about the appeal appear in **Issue 433** of this *Update*.

In upholding the Dispute Panel's assessment, the WTO Appellate Body agreed that "the COOL measure treats imported livestock differently than domestic livestock," in part because it creates "an incentive in favor of processing exclusively domestic livestock and a disincentive against handling imported livestock." But the appeals panel also concurred that the United States has the right to enact COOL regulations in general and reversed the initial finding that COOL was "inconsistent" with Article 2.2 of the Technical Barriers to Trade (TBT) Agreement by being more trade-restrictive than necessary. Once the WTO Dispute Settlement Body has adopted these rulings, it will grant "a reasonable period of time" for the United States to comply with the TBT Agreement.

"We are pleased with today's ruling, which affirmed the United States' right to adopt labeling requirements that provide information to American consumers about the meat they buy," said U.S. Trade Representative Ron Kirk in a June 29, 2012, statement. "The Appellate Body's ruling confirms that families can still receive information on the origin of their meat and other food products when they shop for groceries… We are also pleased that the Appellate Body overturned the initial finding that COOL is more trade restrictive than necessary to provide consumers with valuable information on the food they buy. In doing so, the Appellate Body agreed with the United States and declined to accept any of the alternatives that Canada and Mexico claimed we should have used instead."

Cancer Group Asks Surgeon General to Study Impact of Sugar-Sweetened Beverages

The American Cancer Society Cancer Action Network (ACS CAN) has sent a July 3, 2012, **letter** to U.S. Department of Health and Human Services Secretary Kathleen Sebelius, asking the U.S. Surgeon General's Office to issue a report "that examines how the consumption of sugar-sweetened beverages impacts the health of Americans." Noting that the 2012 Cancer Prevention Guidelines stress the importance of a healthy diet and weight in reducing "one's lifetime risk of developing or dying from cancer," ACS CAN has called for an "articulate, science-based and comprehensive national plan of action" to combat rising obesity rates.

"We know there is a direct link between excessive consumption of sugar-sweetened beverages and obesity, and the adverse health effect can be profound in children as they grow into adults and throughout their lives," states the letter. "As was the case in 1964, when the Surgeon General first revealed to the broad American public the dangers of tobacco consumption, an unbiased and comprehensive report on the impact of sugar-sweetened beverages could have a major impact on the public's consciousness and perhaps begin to change the direction of public behavior in their choices of food and drinks."

Meanwhile, the American Beverage Association (ABA) has reportedly countered that soda and other sugar-sweetened beverages should be not singled out by such policies. "We already have studies from the federal government and independent third parties that demonstrate soft drinks are not a unique or significant contributor to obesity," one ABA spokesperson was quoted as saying. *See Reuters,* July 3, 2012.

MEDIA COVERAGE

Stephanie Strom, "Has 'Organic' Been Oversized?," *The New York Times,* July 7, 2012

"The fact is, organic food has become a wildly lucrative business for Big Food and a premium-price-means-premium-profit section of the grocery store," writes *Times* correspondent Stephanie Strom in this July 7, 2012, article about perceived conflicts of interest on the National Organic Standards Board (NOSB). According to Strom, who tracks the consolidation of organic brands under larger corporations, "[t]he industry's image—contented cows grazing on the green hills of family-owned farms—is mostly pure fantasy. Or rather, pure marketing. Big Food, it turns out, has spawned what might be called Big Organic."

Strom argues that Big Organic has "come to dominate" the 15-member NOSB, which determines the national list of nonorganic ingredients permitted in "certified organic" products. In particular, she claims that some seats reserved for farmers or scientific experts have gone to corporate executives or other representatives from large organic food processors with a stake in promoting their own production methods. As a result, the owners of some smaller concerns have reportedly accused the board of diluting the certification standards by continuing to approve new nonorganic substances, such as carrageenan or docosahexzenoic acid algae oil (DHA), that are allegedly unnecessary in organic products. "At first, the list was largely made up of thing like baking soda, which is nonorganic but essential to making things like organic bread," notes Strom. "Today, more than 250 nonorganic substances are on the list, up from 77 in 2002."

Meanwhile, the expansion of the national list has apparently caught the attention of groups like the Cornucopia Institute, which recently published a paper titled **"The Organic Watergate"** and filed complaints about NOSB's composition with the U.S. Department of Agriculture (USDA) and its Inspector General. But USDA Deputy Secretary Kathleen Merrigan has since refuted these claims, telling Strom that the organic sector's general growth—as opposed to specific corporate interests—has driven the national list decisions as new products are offered to consumers. "The list is really very small," she said. "It's really very simplistic and headline-grabbing to throw out these sorts of critiques, but when you get down into the details, there are usually very rational and important reasons for the actions the board has taken."

SCIENTIFIC/TECHNICAL ITEMS

Collaborating with Industry to Address Obesity Is a Mistake, Says Kelly Brownell

Yale University Rudd Center for Food Policy and Obesity's Kelly Brownell has provided a "Perspective" **article** for *PLoS Medicine's* ongoing series about "Big Food." Titled "Thinking Forward: The Quicksand of Appeasing the Food Industry," the July 3, 2012, article contends that public-health efforts to collaborate with the food industry to address obesity are a mistake. According to Brownell, "The food industry has had plenty of time to prove itself trustworthy," but because food companies "must sell less food if the population is to lose weight, . . . this pits the fundamental purpose of the food industry against public health goals." Brownell calls for the industry to be regulated. "Left to regulate itself, industry has the opportunity, if not the mandate from shareholders, to sell more products irrespective of their impact on consumers. Government, foundations and other powerful institutions should be working for regulation, not collaboration."

Another **article** in the series, "'Big Food,' the Consumer Food Environment, Health, and the Policy Response in South Africa," claims that large, multinational food and beverage companies have a commanding presence in the market and are "implicated in unhealthy eating." The authors, with several institutions that include the Bloomberg School of Public Health and Johns Hopkins University, note among other matters that McDonald's has made significant market progress in South Africa, setting a record by opening 30 restaurants in just 23 months. The article explores how the industry has made its processed products more widely available, affordable and acceptable in the country and suggests that the government "develop a plan to make healthy foods such as fruit, vegetables, and whole grain cereals more available, affordable, and acceptable, and non-essential, high-calorie, nutrient-poor products, including soft drinks, some packaged foods and snacks, less available, more costly, and less appealing to the South African population." The authors recommend starting with the regulation of promotional activities and "imposing taxes on unhealthy food products."

An **article** providing the perspective from Brazil claims that traditional food systems and dietary patterns have also been displaced in this country "by ultra-processed products made by transnational food corporations" and links increasing incidences of obesity and major chronic diseases with this phenomenon. Titled, "The Impact of Transnational 'Big Food' Companies on the South: A View from Brazil," the article observes that while "intense pressures, which include ubiquitous television and internet propaganda designed to turn eating and drinking into constant individual snacking," are threatening congregate eating practices, "food and drink consumption is not yet dislocated and isolated from family and social life in Brazil. This is probably the most important factor protecting national and regional traditional food

systems," including minimally processed foods prepared and eaten by the family at home.

Still, the Brazilian market has purportedly been saturated at least since the 1970s with "ultra-processed products," and obesity rates, while comparatively low at 14 percent of adults in 2009, have increased as consumption of these products has increased from 20 percent of calories in the 1980s to 28 percent currently.

Recognizing that traditional food systems that, in some respects, are responsible for undernutrition in the country and could be improved, the authors call for government to adopt policies that protect traditional dietary patterns by supporting cooperatives and family farmers, protecting and stabilizing the prices of healthy staple foods and making minimally processed foods more affordable and available. They also recommend that government "reduce the volume of salt and sugar entering food supplies" and adopt information and education programs at national and state levels "to reinforce this legislation." They further advocate for a worldwide prohibition on "the hydrogenation process that generates industrial saturated fats and trans-fats."

BPA Exposure Allegedly Leads to Inter-Species Mating in Shiner Fish

A recent study has reportedly claimed that two species of shiner fish exposed to bisphenol A (BPA) were more likely to mate in mixed-species pairings. Jessica Ward and Michael Blum, "Exposure to an environmental estrogen breaks down sexual isolation between native and invasive species," *Evolutionary Applications,* July 2012. After collecting specimens from rivers throughout Georgia, scientists evidently used a controlled environment to study the effects of short term BPA exposure on both the red shiner fish (*Cyprinella lutrensis),* an invasive species, and the native blacktail shiner fish (*Cyprinella venustra).* Their results allegedly showed that males exposed to BPA lost some of their distinctive coloring, leading females to more frequently choose mates not of their own species.

"Until now studies have primarily focused on the impact to individual fish, but our study demonstrates the impact of BPA on a population level," explained one of the study's authors in a July 11, 2012, University of Minnesota press release. "Our research shows how the presence of these manmade chemicals leads to a greater likelihood of hybridization between species. This can have severe ecological and evolutionary consequences, including the potential for the decline of our native species."

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UPCOMING CONFERENCES AND SEMINARS

McDonough to Present on Preemption at ACI's FDA & USDA Compliance Boot Camp

Shook, Hardy & Bacon Agribusiness & Food Safety Practice Co-Chair Madeleine McDonough will participate in the American Conference Institute's (ACI's) "FDA & USDA Compliance Boot Camp: An In-Depth and Comprehensive Course on Regulatory Requirements for the Food and Beverage Industry," scheduled for October 3-4, 2012, in Chicago. Joining a faculty of expert in-house counsel, regulatory officials and seasoned practitioners, McDonough will address "Preemption Fundamentals: Overview of Recent Case Decisions and How to Successfully Assert Federal Preemption."

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FOOD & BEVERAGE LITIGATION UPDATE

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.