Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

House Bill Would Amend New Menu Nutrition Disclosure Requirements

Representative John Carter (R-Texas) has introduced a bill (H.R. 6174) that would change the nutrition disclosure requirements for chain restaurants and other food outlets enacted in the Affordable Care Act that was recently upheld as constitutional by the U.S. Supreme Court.

Under the proposal, (i) delivery and take-out restaurants would be able to post calorie information on their Websites; (ii) pizza shops would be allowed to provide calorie-per-slice labeling rather than whole-pizza totals and could publish average totals instead of calorie data for every possible combination of ingredients; (iii) stores would be protected from lawsuits where the nutrient disclosures are "within acceptable allowances" including "allowances for variation in serving size, inadvertent human error in formulation of menu items, and variations in ingredients"; and (iv) the term "restaurant" would be redefined to mean "a retail food establishment that derives more than 50 percent of its total revenue from the sale of food of the type described in subclause (i) or (ii) of clause (A)."

According to Carter, the latter provision recognizes "the differences between grocery store delis, convenience stores, and chain restaurants and ensures the regulations are not unreasonable or unnecessarily burdensome." The legislation was introduced after a group of national pizza chains formed a coalition to combat the new menu labeling regulations that the Food and Drug Administration has developed to implement the law. Details about the coalition's effort appear in Issue 444 of this *Update*. *See Press Release of Representative John Carter*, July 24, 2012.

GAO Report Criticizes FDA Food Recall Process

The Government Accountability Office (GAO) has issued a July 26, 2012, report criticizing the Food and Drug Administration's (FDA's) efforts to implement a comprehensive food advisory and recall process. As directed by the FDA Food Safety Modernization Act, GAO reportedly assessed the agency's

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ability to order recalls and effectively inform consumers and retailers about food safety issues, concluding that although FDA has established internal procedures "describing the steps it will take to order a food recall ... these procedures are not yet public and the agency has not issued regulations or industry guidance to clarify its ordered food recall process."

In particular, the report faults FDA for failing to fashion "a comprehensive food recall communication policy and related implementation plans." Noting that recent foodborne illness outbreaks have drawn national attention to food supply safety issues, GAO argues that FDA has not yet drafted measures to better manage its communication challenges or worked with the U.S. Department of Agriculture (USDA) and other federal agencies to determine "what, if any, additional approaches are needed for advising consumers about recalls." The report also calls FDA's data on ordered recalls of nonfood products "unreliable," raising questions about whether similar data on ordered food recalls "can be relied upon to report accurate information to Congress and the public."

"Without this information, the agency cannot ensure that it applies practices uniformly or consistently or that it gives clear information to the food industry or to consumers and the public," states the report, which asks whether various government mechanisms, such as subsidized insurance, should be made available "to compensate food producers in case of an erroneously ordered food recall or erroneous food-related advisory."

In the interest of greater transparency, GAO also urges FDA to clarify its food recall process. To these ends, the report recommends that the Department of Health and Human Services direct FDA to (i) document the agency's process for ordering food recalls in publicly available procedures, regulations or industry guidance that "include information on how the agency will weigh evidence on whether a recall is necessary"; (ii) "improve information sharing among its databases that contain recall data"; (iii) "develop, in conjunction with other federal agencies, a coordinated plan for crisis communications"; (iv) "consult with USDA on lessons learned in advising consumers about recalls to determine whether any of [USDA's] practices may be feasible at FDA"; and (v) "develop a policy for communications during emerging events."

"When GAO asked FDA officials how they had responded to these recommendations, they provided information on some actions they are taking. However, FDA's stated actions do not fully implement these recommendations," concludes the report, citing earlier assessments of the agency's food recall capabilities. "As a result of not implementing them, FDA may be missing opportunities to more comprehensively address its communications challenges."

FDA Seeks Comments on Recordkeeping Burdens for Certain Beer Makers

FDA has **issued** a request for comments on a proposed information collection that will add the manufacturers of certain beers as respondents to its labeling regulations and seeks Office of Management and Budget approval of allergen labeling for these beers.

The agency explains that after the Alcohol and Tobacco Tax and Trade Bureau determined that certain beers, which are made from substitutes for malted barley, such as sorghum, rice or wheat, do not meet the definition of "malt beverage" and are thus not subject to its regulations, the Food and Drug Administration (FDA) prepared **draft guidance** to assist these manufacturers in complying with its labeling regulations.

On the basis of the labeling regulations discussed in the guidance, the agency provides estimates of the average burden per disclosure for each regulation—that is, "12 respondents will each label 2 products annually, for a total of 24 labels" and "the manufacturers will spend 7.25 hours on each label to comply with FDA's labeling regulations and the requirements of section 403(w)(1) of the [Food, Drug, and Cosmetic] Act, for a total of 174 hours." Comments on the burden estimates are requested by August 23, 2012. *See Federal Register*, July 24, 2012.

USDA Deregulates GE Sugar Beets

The U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) has **determined** that genetically engineered (GE) sugar beets are "no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms." According to the agency, the crop, which is engineered to tolerate the herbicide glyphosate and is known as "Roundup Ready®, is "unlikely to pose a plant pest risk and, in fact, is not a plant pest." Thus, the crop is no longer subject to federal GE regulation.

The determination ends a lengthy dispute that began when organic farmers claimed that APHIS failed, when deregulating the crop in 2005, to properly consider the crop's propensity to cross-pollinate nearby fields of conventional sugar beets and the likelihood that herbicide-resistant weeds would also result from planting the GE crop. A federal court agreed and ordered the preparation of an environmental impact statement (EIS). The Environmental Protection Agency published the final EIS on which APHIS based its deregulation decision in June 2012. *See Federal Register,* July 20, 2012.

NOP Addresses Tetracycline, Formic Acid and Attapulgite Use in Organics

The U.S. Department of Agriculture's National Organic Program (NOP) has issued a **final rule** revising the National List of Allowed and Prohibited

Substances with regard to the use of tetracycline, formic acid and attapulgite during the production and processing of organic crops and food ingredients.

According to NOP, the most recent iteration of the National List permitted the use of tetracycline "for fire blight control only" in apple, pear and other organic fruit crops until October 21, 2012. The final rule has amended the National List to specify that the substance can be used to control fire blight in apple and pear crops only and to extend the expiration date until October 12, 2014.

In addition, NOP has added formic acid to the National List "solely for use as a pesticide within honeybee colonies" to suppress infestations of *Varroa* mites and approved attapulgite, a substance generally regarded as safe by the Food and Drug Administration "when used as an adjuvant for pesticide chemicals," "as a processing aid in the handling of plant and animal oils." The final rule took effect August 3, 2012.

FSIS, EPA Announce "First-Ever" Microbial Risk Assessment Guideline

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) and U.S. Environmental Protection Agency (EPA) have **announced** the availability of a guideline "for conducting microbial risk assessment (MRA)." Intended for government risk assessors and other public stakeholders, the guidance seeks to promote transparency and consistency between the two agencies as they conduct risks assessments of food- and water-borne disease.

According to a July 31, 2012, EPA press release, the MRA guideline for the first time "lays out an overarching approach to conducting meaningful assessments of the risks to Americans posed by pathogens in food and water." The agency has also touted the measure as a way to improve the quality of data "collected by public health scientists charged with protecting Americans from pathogen-related risks in food and water."

"This guidance contributes significantly to improving the quality and consistency of microbial risk assessments, and provides greater transparency to stakeholders and other interested parties in how federal agencies approach and conduct their microbial risk assessments," said EPA Science Advisor Glenn Paulson. "Based on the success of this project, we are seeking further opportunities to combine our technical expertise in our continuing efforts to protect the Americans' health."

EFSA Calls for Additional Scientific Data on Aspartame

As part of an ongoing food additive assessment, the European Food Safety Authority (EFSA) has **requested** additional scientific data on aspartame "related to 5-benzyl-3,6-dioxo-2-piperazine acetic acid (DKP) and other primary or secondary degradation products from aspartame."

Asked by the European Commission in 2011 to reevaluate the safety of aspartame as a food additive, EFSA's Scientific Panel on Food Additives and Nutrient Sources Added to Food initially called for aspartame data by September 30, 2011, but has since determined that there is further need for "data on products which can be formed from aspartame in different types of foodstuffs, in particular on [DKP], depending [for example] on pH, temperature and storage time."

As a result, EFSA has delayed its findings and instead requested data on "the presence and levels of DKP found in aspartame-containing foodstuffs (including beverages) found on the market" as well as "the formation of DKP and other primary or secondary degradation products from aspartame and the amounts formed." In particular, the agency has appealed for information about DKP, aspartame and its primary or secondary degradation products "(i) immediately after addition of aspartame; (ii) following the food production (under all processing conditions); (iii) following storage under various conditions (e.g. temperature, light and time); (iv) following preparation for serving." The call for scientific data also includes "any information on the DKP stereoisomer used as test material in the biological and toxicological studies on DKP previously provided to EFSA" and "any data on the presence of DKP in foodstuffs from sources other than aspartame."

"The purpose of this call for data is to offer interested parties and all stakeholders the opportunity to submit any available documented information, published or unpublished, including also original raw data on the products which can be formed from aspartame (E 951) in the different types of foodstuffs taking into account the conditions of manufacturing and storage and the direct use as a table top sweetener," concluded EFSA, which will accept submissions until September 30, 2012.

Chilean Senator Seeks to Enforce Fast-Food Toy Ban

Chilean Senator Guido Girardi has reportedly filed a formal complaint with the country's Ministry of Health, alleging that fast-food companies have violated a new ban on using toys and other giveaways to market children's meals. According to media sources, the complaint claims that several fast-food restaurants have flouted the law, along with other food manufacturers that purportedly use crayons, stickers and similar incentives to market products which appeal to children. Girardi has asked the Ministry of Health to enforce sanctions if the companies named in the complaint do not begin complying with the toy ban.

"These businesses know that this food damages the health of children and they know that the law is in effect. They're using fraudulent and abusive means," said Girardi, who apparently drafted the law. "These corporations threatened that if the law was approved there would be no more money for

children's foundations, the sick, or athletes, but we were finally able to create a great alliance between the civil society and scientists to defeat these lobbyists." *See The Associated Press,* August 1, 2012.

LITIGATION

Tenth Circuit Limits *E. Coli* Insurance Coverage

The Tenth Circuit Court of Appeals has determined that a 2008 *E. coli* outbreak involving food prepared and served at a restaurant and a catered event constituted a single occurrence under the relevant insurance policies, thus reversing a magistrate judge's conclusion that there were two occurrences and application of the policies' aggregate limits rather than their "per occurrence" limits. ***Republic Underwriters Ins. Co. v. Moore*, No. 11-5075 (10th Cir., decided July 20, 2012)**.

The outbreak apparently infected 341 individuals, and one person died. When it appeared that the policy limits would be exceeded, the insurers brought this interpleader action, requesting that the court declare that the "per occurrence" limits applied, providing $3 million in coverage. Agreeing with the insurance companies, the Tenth Circuit stated, "[h]ere, all the injuries were proximately caused by the restaurant's ongoing preparation of contaminated food. Hence, there was but one occurrence. It does not matter that the food was served with other food items prepared at another location because the contamination originated at the restaurant. Nor does it matter that the precise underlying cause of the contamination is unknown because the fact remains that the contamination originated at the restaurant."

Claims Narrowed in "All Natural" Suit Against Dreyer's Grand Ice Cream

While a federal court in California has dismissed warranty claims filed under federal law against an ice cream manufacturer sued for allegedly misleading consumers by labeling its products with the phrases "All Natural Flavors" and "All Natural Ice Cream," most of the plaintiffs' state law-based claims will proceed. *Astiana v. Dreyer's Grand Ice Cream, Inc.,* No. C-11-2910 EMC; *Rutledge-Muhs v. Dreyer's Grand Ice Cream, Inc.*, No. C-11-3164 EMC (U.S. Dist. Ct., N.D. Cal., order entered July 20, 2012).

The plaintiffs allege that Dreyer's and Edy's ice cream products should not bear labels stating "All Natural Flavors" because they contain between one and five artificial and/or synthetic ingredients, and the company's Haagen-Dazs ice cream products should not bear labels stating "All Natural Ice Cream" because they contain cocoa processed using a synthetic and/or artificial alkalizing agent. They allege violation of written warranty under the Magnuson Moss Warranty Act; common law fraud; unlawful, unfair and fraudulent business

practices and false advertising under California's Business & Professions Code; violation of the California Consumers Legal Remedies Act; and restitution based on quasi-contract/unjust enrichment.

The court dismissed the federal claim with prejudice, agreeing with Dreyer's that the word "natural" is just descriptive and does not "give any assurance" that the product is defect free, a defining element under the Magnuson Moss Warranty Act. The court also noted that no authority supports the plaintiffs' position that food which contains artificial and/or synthetic ingredients is defective. Regarding the plaintiff's state law-based claims relating to the Dreyer's/Edy's use of "All Natural Flavors" labeling, i.e., it is misleading because it suggests that all of the ingredients in the ice cream (not just the flavoring ingredients) are natural when they are not, the court denied Dreyer's motion to dismiss. The court found that reliance on a federal nutrition labeling law to support a preemption argument was misplaced because the claims focus on flavoring and also found that a reasonable consumer might interpret "All Natural Flavors" to mean "all natural ingredients."

Still, the court dismissed as preempted or duplicative all but the § 17200 unlawful business practice claim based on a violation of the Food, Drug, and Cosmetic Act and the California Health & Safety Code § 110100(a), "but only to the extent the claim is predicated on an unlawful business practice (not an unfair or fraudulent one)."

As to the claims relating to the "All Natural Ice Cream" label on Haagen-Dazs products, the court rejected two of Dreyer's contentions as "without merit and hardly worth addressing." They included that the plaintiffs' claims were implausible because "ice cream is not a wholesome or healthy food" and "ice cream is not a natural food." According to the court, the plaintiffs "do not claim that ice cream is a wholesome or healthy food," nor do they claim that it may be found in nature. Citing *Williams v. Gerber Products Co.*, 522 F.3d 934 (9th Cir. 2008), the court also notably rejected the company's attempted reliance on the ingredient list to "correct" purportedly deceptive representations on the front of its packaging. Thus, the court refused to dismiss the state-law claims with respect to the Haagen-Dazs ice cream.

As for the plaintiffs' standing to assert claims relating to products they had not purchased, the court found that they had "alleged sufficient similarity between the products they did purchase and those that they did not; any concerns of [the defendant] and/or the Court about material differences are better addressed at the class certification stage rather than at the 12(b)(6) stage."

Idaho Court Allows Potato Antitrust Litigation to Proceed

A federal court in Idaho has denied all pending motions to dismiss in litigation brought by direct and indirect potato purchasers who allege that the defendants violated antitrust laws by agreeing to reduce the supply of potatoes in the United States to increase their price. *In re Fresh & Process Potatoes Antitrust Litig.*, No. 4:10-MD-2186-BLW (U.S. Dist. Ct., D. Idaho, filed July 27, 2012). The plaintiffs contend that the defendants formed cooperatives which agreed to limit crop acreage and paid farmers to destroy existing potatoes or refrain from growing additional potatoes. Assessing the allegations in the plaintiffs' amended complaint, the court determined that they met the plausibility pleading standard required under the U.S. Supreme Court's *Twombly* and *Iqbal* rulings.

Court Finalizes Nutella® Settlement, Slashes Counsel Fees

A federal court in New Jersey has rejected the claims of objectors questioning class notice and most of the settlement terms in a deal which resolves allegations that Ferrero USA, Inc., the company that makes the hazelnut spread Nutella®, misled consumers about the nutritive value of its product; while the court entered an order finally approving the settlement, it did reduce counsel fees by $1.25 million. *In re Nutella Mktg. & Sales Practices Litig.*, No. 11-1086(FLW)(DEA) (U.S. Dist. Ct., D.N.J., decided July 31, 2012). Additional information about the objectors' challenge appears in **Issue 444** of this *Update*. Counsel had sought $3.75 million fees, an amount the objectors claimed was unwarranted. According to the court, the reduced fees represent 25 percent of the value of the gross settlement fund, injunctive relief, costs and the incentive award to the class representatives.

CSPI Sues General Mills, Claims "All Natural" Labels on Products with HFCS Mislead

The Center for Science in the Public Interest (CSPI) has filed a putative class action on behalf of two named California residents against General Mills alleging that its use of "All Natural," "Natural," and "100% Natural" product representations on its Nature Valley® food products is deceptive because they contain high-fructose corn syrup (HFCS), high-maltose corn syrup, and maltodextrin and rice maltodextrin. *Janney v. General Mills*, No. C12-3919 (U.S. Dist. Ct., N.D. Cal., filed July 26, 2012). According to the complaint, these ingredients are not "minimally processed," yet the defendant purportedly "takes wrongful advantage of consumers' strong preference for foods made entirely of natural ingredients" with words and images in its marketing and on product labels evocative of the outdoors and nature.

While one of the named plaintiffs purchased "natural" food for a daughter with type 1 diabetes and the other sought an all-natural diet for a daughter with

ADHD, they do not allege personal injury, claiming instead that they relied on the company's product representations and spent "money on products they otherwise would not have purchased." Seeking to represent a statewide class of product purchasers, the plaintiffs allege violations of California's unfair competition and false advertising laws, and unjust enrichment. They ask the court to (i) declare that the named ingredients "do not occur in nature and are not minimally processed" and the company's practice of labeling these products as "natural" violates state law; (ii) enjoin the company from marketing products with these ingredients in the state with claims of "100% Natural," "All Natural," or "Natural"; and (iii) damages, disgorgement, restitution, costs, and attorney's fees.

Court Asked to Order FDA to Act on Petition to Reduce Mercury Levels in Seafood

Turtle Island Restoration Network and the Center for Biological Diversity have filed a complaint for declaratory and injunctive relief in a federal court in California against the Food and Drug Administration (FDA) to force the agency to act on their June 2011 petition seeking to reduce the allowable level of mercury in seafood. *Turtle Island Restoration Network v. Hamburg*, No. C12-03884-EDL (U.S. Dist. Ct., N.D. Cal., filed July 25, 2012). The organizations claim that while FDA had 180 days, or until December 17, 2011, to respond to the petition, "[t]o date, FDA has neither granted nor denied the petition and has taken no action to reduce human exposure to mercury from commercial fish." They request a court order declaring that FDA has violated the Administrative Procedure Act and requiring the agency to issue a decision on their petition within 30 days.

The plaintiffs contend that FDA's current action level for mercury in seafood at 1 part per million (ppm) "is insufficient to protect public health especially the most vulnerable populations." They allege that "EPA determined that an action level for mercury of 0.5 ppm for recreation and sport caught fish was necessary to protect women of childbearing age," and that "some fish such as swordfish and tuna regularly exceed the 1 ppm limit." Among other matters, the petition asked FDA to reduce the level by 50 percent, develop a widespread testing program, update its advisories, and "[r]equire seafood distributors, retailers, restaurants and all institutions that sell seafood to post the FDA/EPA mercury-in-fish advisory at 'point-of-sale' locations and/or label fish products that are known to be high in mercury." According to the plaintiffs, their members and staff are concerned about mercury contamination in fish and wish to make informed choices about safe seafood consumption. The complaint outlines purported risks to human health from mercury exposure.

Network Executive Director Todd Steiner reportedly said about the complaint, "We are filing suit because the government has failed to respond to reasonable precautions protecting Americans from mercury toxicity in seafood. By

not responding within the 180 days dictated by law, the FDA is demonstrating its lack of due diligence and its obligation to protect women of childbearing age, pregnant and nursing women, children and the most vulnerable populations from harm." *See Turtle Island Restoration Network News Release*, July 25, 2012.

Milk Allergen Recall Spawns Supply-Chain Litigation

A company that supplies specialty ingredients such as vitamins, chemicals and carotenoids to food producers has sued one of its suppliers, alleging that the company was forced to recall from customers more than 33,000 pounds of chromium amino acid chelate after learning that it contained a milk allergen. *DSM Nutritional Prods., LLC v. Triarco Indus., Inc.*, No. C1928-12 (N.J. Super Ct., Morris County, filed July 26, 2012). The plaintiff also allegedly reported the matter to the Food and Drug Administration through the Reportable Food Registry.

According to the complaint, in 2009, the defendant completed a questionnaire designed to inform the plaintiff "of the existence of any allergens or their derivatives contained in the product" sold to the plaintiff. "Not until July 27, 2010," however, "did Defendant correctly label the product as containing a hydrolyzed milk protein, thus advising [the plaintiff] that Defendant's product contained a milk allergen." Alleging breach of contract and violation of the duty of good faith and fair dealing, promissory and equitable estoppel, breach of contract implied in fact, quantum meruit, and breach of express and implied warranty, the plaintiff seeks hundreds of thousands of dollars in damages.

Putative Class Alleges Plant Sterols in Butter Product Fail to Block Dietary Cholesterol

A California resident has filed a putative class action against Smart Balance, Inc., alleging that the 100 mg of plant sterols in a single serving of the company's spreadable butter products do not, as advertised, block the absorption of dietary cholesterol. *Aguilar v. Smart Balance, Inc.*, No. 12CV1862L BGS (U.S. Dist. Ct., S.D. Cal., filed July 27, 2012). The named plaintiff seeks to represent either a multi-state class of consumers or a California class.

According to the complaint, studies show that, to reduce cholesterol, "a minimum of 0.8 grams, and preferably 2 grams, of plant sterols must be consumed daily." Given the purportedly modest amount of sterols in the defendants' products, the plaintiff claims that half a container would need to be consumed in one day "to realize even the minimum amount of cholesterol reduction benefit." The plaintiff claims that she purchased the product relying on the cholesterol benefit representations and did not get the benefit of her bargain. "Had Plaintiff known the truth about Defendants' misrepresentations

and omissions, she would not have purchased Smart Balance Light Butter & Canola Oil."

Alleging violations of the state's Unfair Competition Law and Consumers Legal Remedies Act, and breach of express warranty, the plaintiff seeks damages in excess of $5 million, restitution, disgorgement, injunctive relief, a corrective advertising campaign, attorney's fees, and costs.

Salami Maker Seeks $33.1 Million from Recall in Default Judgment Against Seasonings Co.

Daniele International, Inc. has requested that a federal court in Rhode Island enter a $33.1-million default judgment against a spice and seasonings company that allegedly supplied the *Salmonella*-tainted pepper which resulted in a recall of more than 1.2 million pounds of salami products in 2010. *Daniele Int'l, Inc. v. Wholesome Spice & Seasonings, Inc.*, No. 10-1558 (U.S. Dist. Ct., D.R.I., motion filed July 30, 2012). The defendant has purportedly failed to respond to the complaint or to Daniele's motion for entry of default. The plaintiff contends that its damages totaled $33,181,174.

Suit Claims Restaurant Chain Does Not Make Mahi Mahi Products as Advertised

Seeking to represent everyone who purchased a Mahi Mahi dish in Sharky's Woodfired Mexican Grills throughout California, four Los Angeles County residents have filed suit alleging that the menu items do not contain Mahi Mahi fish as advertised. *Chenier v. Sharky's Franchise Group, LLC*, No. 30-2012-00587784-CU-BT-CXC (Cal. Super. Ct., filed July 31, 2012). The plaintiffs claim that they would not have purchased the products had they known the products were not made with Mahi Mahi. They allege violations of the California Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act, negligent and intentional misrepresentation, and breach of express warranty, and seek disgorgement, restitution, public disclosure, injunctive relief, compensatory and punitive damages, attorney's fees, and costs.

OTHER DEVELOPMENTS

Nutritionist Objects to DHA Health Claim on Milk

A nutritionist who published a study about the health effects of omega-3 fatty acids in the *American Journal of Clinical Nutrition* has objected to Dean Foods Co.'s decision to cite her work in marketing the health benefits of its Horizon organic milk fortified with docosahexaenoic acid (DHA). Penn State University Professor Penny Kris-Etherton apparently took issue with Horizon milk labels that used her paper to support a claim that "many Americans don't get the

recommended DHA from their everyday diet." According to Kris-Etherton, however, her research did not establish an optimum level of DHA consumption for the average consumer.

"It's not right—it's inaccurate," she was quoted as saying. "It's a marketing strategy to sell more of their milk."

Kris-Etherton's concerns have evidently led Whole Foods Market Inc. to review its policy on DHA health claims and Dean Foods to consider voluntarily withdrawing the citation. "It's appropriate to use published scientific studies as references for support of a statement," a Dean Foods' spokesperson told the press. "However, per the author's request, we are considering removal of the claim within our next round of packaging changes in 2013." *See Bloomberg Businessweek,* July 25, 2012; *Bloomberg,* July 27, 2012.

SCIENTIFIC/TECHNICAL ITEMS

Study Allegedly Supports NYC *Trans* Fat Ban

A recent study has reportedly concluded that a New York City regulation restricting the use of partially hydrogenated vegetable oil by all food service establishments "was associated with a substantial and statistically significant decrease in the *trans* fat content of purchases at fast-food chains, without a commensurate increase in saturated fat." Sonia Angell, et al., "Change in Trans Fatty Acid Content of Fast-Food Purchases Associated with New York City's Restaurant Regulation," *Annals of Internal Medicine,* July 2012.

Funded by New York City and the Robert Wood Johnson Foundation Health Eating Research Program, researchers between 2007 and 2009 conducted a cross-sectional study matching purchase receipts with available nutrition information and consumer surveys at 168 randomly selected locations of 11 fast-food chains.

Compared with data gathered before the *trans* fat restrictions took effect, the information collected after the regulation's implementation allegedly demonstrated "an associated large and probably clinically meaningful reduction in the *trans* fat content of lunchtime purchases," with "the absolute decrease in *trans* fat per purchase" amounting to 2.4 grams or 21.6 kilocalories. The study also noted that these reductions were not offset by increased saturated fat consumption.

"Given that one third of calories in the United States comes from foods prepared away from home, this suggests a remarkable achievement in potential cardiovascular risk reduction through food policy," stated the study's authors, who argued that their findings had implications "beyond NYC" as other regions consider implementing similar restrictions. "Our results,

therefore, suggest the potential for broader effect of local food policy on a country's food companies."

Caffeinated Oceans Generate Buzz

Researchers with Portland State University and Washington State University, Vancouver, have reportedly detected caffeine in waters off the coast of Oregon, raising questions about the presence of other potential contaminants in the vicinity. Zoe Rodriguez del Rey, et al., "Occurrence and concentration of caffeine in Oregon coastal waters," *Marine Pollution Bulletin,* July 2012. The study apparently analyzed caffeine levels at 14 coastal locations "stratified between populated areas with sources of caffeine pollution and sparsely populated areas with no major caffeine pollution sources." Although levels ranged from below the reporting limit of 8.5 nanograms per liter (ng/L) to 44.7 ng/L, the marine ecologists noted that "caffeine concentration did not correspond with human population density and pollution source."

"Our hypothesis from these results is that the bigger source of contamination here is probably on-site waste disposal," said one of the study's authors. "Wastewater treatment plants, for the most part, have to do with regular monitoring to ensure they are within certain limits."

Meanwhile, the findings have already attracted attention from other researchers, including one hydrologist with the U.S. Geological Survey's Toxic Substances Hydrology Program. "Caffeine is pretty darn ubiquitous, and there is growing evidence that this and other understudied contaminants are out there," Dana Koplin said. "[T]here is a whole universe of potential contaminants including pharmaceuticals, hormones, personal-care products like detergents or fragrances, even artificial sweeteners… Are there environmental or human-health consequences from exposure to these compounds or different mixtures of compounds? Obviously that's the million-dollar question." *See National Geographic,* July 30, 2012.

Study Compares Facts Up Front and Traffic Light Food Labeling

A Yale University Rudd Center for Food Policy and Obesity study has compared the U.S. food industry's "Facts Up Front" labeling scheme to the "Multiple Traffic Light" system used in the United Kingdom, concluding that consumers found both front-of-package systems easier to use than no labels at all, while an enhanced Traffic Light system yielded "the best overall performance." Christina Roberto, et al., "Facts Up Front Versus Traffic Light Food Labels," *American Journal of Preventative Medicine,* July 2012.

Researchers asked 708 adults in an Internet-based survey to compare the nutrient levels of foods as well as estimate saturated fat, sugar, sodium, fiber and protein contents using one of five systems: (i) no label; (ii) Traffic Light;

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(iii) Traffic Light "plus information about protein and fiber (Traffic Light+)"; (iv) Facts up Front; or (v) Facts Up Front "plus information about 'nutrient to encourage' (Facts Up Front+)." The results evidently indicated that respondents using the Traffic light+ labels "performed better than those in the Facts Up Front conditions on measures of nutrition knowledge and label perceptions."

"The findings… suggest that a front-of-package nutrition label can improve the accuracy of judgments about the nutritional quality of foods and beverages," concluded the study. "When individuals compared two products on sugar, saturated fat, and sodium levels only, the Facts Up Front system was most helpful. However, when individuals also compared products based on protein and fiber, the Facts Up Front+ and Traffic Light+ groups… performed equally well. In contrast, when participants judged the levels of specific nutrients in individual products, both versions of the Traffic Light labels were substantially more helpful than the Facts Up Front labels."

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