Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Senators Call for Meeting with FDA over 5-Hour Energy® Link to 13 Deaths

Senators Dick Durbin (D-Ill.) and Richard Blumenthal (D-Conn.) have reportedly called for a meeting with Food and Drug Administration (FDA) Commissioner Margaret Hamburg after reports surfaced that the agency has received adverse event reports indicating that the caffeinated energy supplement 5-Hour Energy® may have been linked to the deaths of 13 people in the past four years. The product has apparently been mentioned in 90 filings submitted to the agency; the reports include more than 30 that purportedly involved serious injuries such as heart attacks, convulsions and a spontaneous abortion.

The senators have questioned the safety of energy drinks in three letters to the agency in recent months; their latest letter states, "[W]e request a meeting with you on the steps FDA is taking regarding highly caffeinated energy drinks and to ensure they are safe for their intended use and in combination with other energy drink ingredients." The senators also reportedly asked FDA to (i) examine interactions between caffeine and other energy drink stimulants, and (ii) issue final guidance distinguishing between liquid dietary supplements and beverages. FDA has indicated that it is investigating the circumstances of the deaths allegedly involving 5-Hour Energy®, and product distributor Living Essentials issued a statement claiming that the product is safe when used as directed. The company also said that it was "unaware of any deaths proven to be caused by the consumption of 5-Hour ENERGY®."

Unlike other caffeinated beverages, such as Red Bull® and Monster Energy®, 5-Hour Energy® is sold in a two-ounce bottle, or "shot." Like the other products, it is not labeled with its caffeine content. Consumer Reports recently indicated that each bottle contains approximately 215 milligrams, compared to eight ounces of coffee which can contain anywhere from 100 to 150 milligrams of caffeine. The product also apparently contains high levels of some B vitamins and taurine. According to an agency spokesperson, Living Essentials submitted the 13 fatality reports as required by a law pertaining to companies marketing energy drinks as dietary supplements. Those companies marketing energy drinks as beverages are not required to submit such reports.

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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Because some supplement manufacturers may not be aware of their reporting obligations, and because consumers and doctors may be unaware that they can file incident reports with the agency, the FDA data could be inaccurate. For example, while 50,000 products are marketed as dietary supplements or weight loss products, FDA received just 2,000 reports in 2011 of fatalities or serious injuries allegedly involving these categories of products. Yet, the Substance Abuse and Mental Health Services Administration reported 13,000 emergency room visits in 2009 purportedly associated with the consumption and use of these types of products. *See The New York Times,* November 14, 2012; *Living Essentials Response* (undated); *Law360*, November 15, 2012.

Congress Approves Whistleblower Enhancements Legislation

The U.S. Senate has approved a **bill** (S. 743), as amended by the House, that will strengthen whistleblower protections applicable to federal employees. According to the Government Accountability Project's Food Integrity Campaign, the new legislation, if signed into law as expected by President Barack Obama (D), will protect previously vulnerable employees, such as a Food Safety and Inspection Service (FSIS) district office manager who reports complaints by FSIS poultry inspectors that a company has increased line speeds making it impossible for workers to remove all potentially contaminated fowl from the line. The new law would also protect a Food and Drug Administration (FDA) inspector who exposes falsified *Salmonella* records at a produce operation and an FDA researcher whose findings on a controversial food ingredient are stifled by management. *See Food Integrity Campaign News Release*, November 13, 2012; *FoodQualityNews.com, Meatingplace.com*, November 15, 2012.

FDA Issues Notice on Records Collected in User Fee System

The Food and Drug Administration (FDA) has issued a **notice** about a new system of records involving information collected from those required to submit user fees to the agency. The notice outlines the types of information collected relating to fees assessed under the Freedom of Information Act, Animal Drug User Fee Act, Animal Generic Drug User Fee Act, and Food Safety Modernization Act, among others. The notice also pertains to fees assessed under the authority of the Federal Food, Drug, and Cosmetic Act, such as "color additive certification fees and export certificate fees."

According to FDA, this information is unclassified and can be used for "routine purposes," a term that FDA further elaborates in the notice. As FDA notes, "[t]he Privacy Act allows FDA to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected." Routine use includes disclosure to other agencies, the Department of Justice, Department of Homeland Security, entities under the Debt Collection Improvement Act, banks, courts, and agency contractors. The notice also provides information about record storage, retention,

disposal, and access. The new system of records took effect November 14, 2012, and the "routine uses" will take effect on December 31, 2012. Comments may be submitted by December 31. *See Federal Register,* November 14, 2012.

Danes Welcome Decision to Reject Fat and Sugar Tax

Danish lawmakers have killed a controversial "fat tax" one year after its implementation, finding that the tax's negative effect on the economy and small businesses far outweighed any health benefits.

According to news sources, nations such as Germany, Switzerland and the United Kingdom have held up the tax, which applies to foods containing more than 2.3 percent saturated fat, as a potential model for addressing obesity and other health concerns. But in Denmark, the tax has become a source of pain for consumers, food producers and retailers as the nation's economy struggles.

The Danish tax ministry has evidently said that fat and sugar taxes have drawn criticism for increasing prices for consumers and companies alike, and putting Danish jobs at risk, as well as for encouraging Danes to travel across the border to buy cheaper foods. As the tax ministry thus stated, "The suggestions to tax foods for public health reasons are misguided at best and may be counter-productive at worst. Not only do such taxes not work, especially when they choose the wrong foods to tax, [but] they can become expensive liabilities for the businesses forced to become tax collectors on the government's behalf." *See Danish Tax Ministry Statement,* November 10, 2012.

Others in the industry concur. "Instead of imposing arbitrary taxes, we have to empower consumers to make healthier choices that will lead to a balanced diet and healthy lifestyle by providing clear nutrition labeling, developing healthier choices and changing recipes to reduce the saturated fat, salt and energy content of many much loved brands," Food and Drink Federation Director Terry Jones told reporters. *See FoodManufacture.co.uk,* November 13, 2012.

The Danish government has also canceled a proposed sugar tax that would have taken effect in January 2013. Additional information about the fat tax appears in Issue 412 of this *Update.*

Victoire for Nutella® Fans

France's National Assembly has reportedly rejected a proposed tax on palm oil that appeared to be a go earlier in the week. On November 12, 2012, the French Senate voted 186-155 against the so-called "Nutella tax," which aimed to impose a 300-percent tax on palm oil, a key ingredient in the beloved hazelnut-chocolate spread that is high in saturated fats.

Arguing that palm oil poses a threat to public health, lawmakers initially proposed the measure as part of a larger bill focused on financing the national health care system and encouraging manufacturers to use healthier alterna-

tives. According to news sources, Nutella® is 20-percent palm oil, so had the tax passed, the price of the popular spread would have likely increased by about 0.06 Euros per kilo, or about three-and-one-third cents per pound. But the anticipated price increase apparently upset French consumers, who have traditionally been among Nutella's® most vocal fans. The spread is a common filling for crepes eaten both at breakfast and for dessert. *See Business Insider,* November 8, 2012; *FoodNavigator.com,* November 16, 2012.

Soft-Drink Tax Rejected in Ireland

The Irish food and drink industry has reportedly rejected government proposals to impose a sugar tax on soft or "fizzy" drinks, calling the tax a "discriminatory" measure that "would have no health benefits and would further hit already hard-pressed Irish consumers." Commenting on the issue, Food and Drink Industry Ireland (FDII) cited the "fat tax" initiative in Denmark that was reversed this week after authorities found it did not change consumer behavior but instead led to higher inflation and an increase in cross-border shopping.

As FDII Director Paul Kelly explained, "Fiscal measures specifically aimed at altering behavior are complex to design and can be highly unpredictable. Ireland already imposes high taxes on many foods. While most foods are exempt from VAT, the standard rate of 23% applies to confectionary items like sweets, chocolate, crisps, ice-cream and soft drinks. An additional tax on sugar or soft drinks would leave Irish consumers out of pocket, paying one of the highest tax rates in Europe. The impact would be highly regressive, with a disproportionate impact on low-income families that spend a higher proportion of income on food." *See FDII Press Release,* November 13, 2012.

Just Another 'Meatless' Monday in LA

The Los Angeles City Council has reportedly approved a resolution endorsing the international "meatless Mondays" campaign, which aims to reduce meat consumption for health and environmental reasons. According to news sources, in a unanimous 12–0 vote, the council approved the resolution endorsing the campaign and encouraging residents to give up meat for one day a week. The resolution apparently makes Los Angeles the largest city to adopt the campaign started in 2003 in conjunction with the Johns Hopkins' Bloomberg School of Public Health. Other U.S. cities that have reportedly endorsed meatless Mondays include Washington, D.C., San Francisco and Raleigh, N.C.

Introduced by Councilwoman Jan Perry and Councilman Ed Reyes, the resolution cites statistics showing that more than one half of Los Angeles County residents are overweight. The campaign claims that cutting meat consumption can reduce the risk of cancer, heart disease, diabetes, and obesity. *See The Los Angeles Times,* November 12, 2012.

LITIGATION

First Circuit Upholds $14.1-Million Judgment in Starbucks Tip-Sharing Class Action

The First Circuit Court of Appeals has determined, as a matter of first impression, that Starbucks Corp. violated a Massachusetts law prohibiting restaurant tips to be shared with employees who have managerial responsibilities, because the "upscale coffee house" chain allowed tips collected in tip jars by the cash registers of its Massachusetts shops to be shared by shift supervisors and baristas. ***Matamoros v. Starbucks Corp.*, Nos. 12-1189, -1277 (1st Cir., decided November 9, 2012)**.

Massachusetts apparently amended a tip-sharing law in 2004. Under the earlier version, the courts applied a "primary duty" test to decide whether an employee could participate in a tips pool—if the primary duty was to serve customers, he could participate; if the primary duty was to manage, she was ineligible. After amendment, the legislature clearly defined a "wait staff employee" as someone, among other matters, "who has no managerial responsibility." The court agreed with the plaintiffs that this established a bright-line standard, excluding employees with any level of managerial responsibility. An attorney general opinion also supported this interpretation. Reviewing the evidence "describing the work actually performed by the shift supervisors," the court said, "makes it pellucid that shift supervisors possess managerial responsibility. Any other conclusion would blink reality."

The First Circuit also determined that the district court did not abuse its discretion in certifying a statewide class of baristas and that the lower court properly trebled the damages for tips shared with supervisors after July 11, 2008, under a Massachusetts Wage Act provision that took effect the next day, allowing automatic trebling of damages from that point forward. Starbucks had argued that this provision transgressed "due process by requiring the automatic imposition of punitive damages without a finding of reprehensibility." According to the court, the treble damages provision "reflects a reasoned legislative judgment" and is "a liquidated damages provision," not punitive damages. The First Circuit also rejected the plaintiffs' contention that pre-2008 damages should have been trebled, finding that the company's conduct was not outrageous.

In this regard, the court stated, "Outrageousness is often a matter of degree. Most people would think that bilking a widow out of her life's savings is outrageous; some would think that charging $5.25 for a salted caramel mocha frappuccino is outrageous. But everyone would agree that the two acts are qualitatively different, and are not deserving of the same level of opprobrium." The court found no reason to disturb the district court's determination about the company's conduct. Accordingly, the appeals court upheld its $14.1 million judgment.

Ketchup Company Wage-Dispute Class Dismissed Without Prejudice

A federal court in California has dismissed putative class claims filed against H.J. Heinz Co. LP by a factory worker alleging that the company denied employees full wages by improperly rounding their time records while also purportedly penalizing and disciplining workers for "clocking in past scheduled start times or clocking out before scheduled end times." *Mendez v. H.J. Heinz Co., L.P.*, No. CV 12-5652-GHK (DTBx) (U.S. Dist. Ct., C.D. Cal., decided November 13, 2012).

The plaintiff sought to represent putative statewide and nationwide Fair Labor Standards Act (FLSA) classes and alleged violations of the California Labor Code—failure to pay all wages, failure to pay minimum wages owed, failure to timely pay wages at separation, failure to provide accurate wage statements—and violation of the California Business and Professions Code. He also asserted a claim for violation of the FLSA on behalf of the nationwide class.

The court agreed with the defendants that the plaintiff failed to satisfy the minimum pleading requirements because the plaintiff failed to allege "any actual facts, not even bare-bone facts, describing the rounding policy or practices." He also apparently failed to allege sufficient facts "that would plausibly suggest that the rounding policy, whether on its own or in combination with other policies, led to a systematic underpayment of wages." Because, however, the plaintiff alleged that the defendants had an "electronic time keeping system" that was able to "accurately track[] the precise time when employees clock in and clock out," the court found that the complaint gave rise to an "inference that Defendants chose to employ the rounding policy because it produces a more favorable result for Defendants." Thus, the court granted the defendants' motion to dismiss with leave for the plaintiff to amend as to the rounding policy allegations.

The court similarly allowed the plaintiff to amend his (i) FLSA claim, finding "that the deficiency of Plaintiff's FLSA overtime claim may be curable," and (ii) class allegations, which the court found "do not plausibly suggest that the policies are implemented on a statewide basis in California, much less on a national basis." Because the plaintiff did not oppose the defendants' request to strike injunctive relief, the court struck that request. The plaintiff will have 21 days to submit a second amended complaint.

EEOC's Discrimination Claims Against Hawaiian Farming Operations Narrowed

A federal court in Hawaii has dismissed in part a complaint filed by the Equal Employment Opportunity Commission (EEOC) against farmers and a recruiting company that allegedly mistreated Thai workers. *EEOC v. Global Horizons, Inc.*, No. 11-00257 DAE-RLP (U.S. Dist. Ct., D. Hawaii, decided November 8, 2012). The court granted the motion to dismiss "insofar as the Court holds that a 300-day limitations period applies to claims brought by Plaintiff under 42 U.S.C. § 2000e-6" relating to allegations of pattern or practice of discriminatory treatment because of national origin, race, retaliation, and/or constructive discharge. The remainder

of the claims, to the extent they did not involve unlawful employment practices allegedly occurring more than 300 days before a charge was filed with EEOC, are not time-barred and will proceed.

EEOC alleges that defendant Global Horizon promised Thai men temporary visas to work high-paying agricultural jobs in the United States, but took their passports, provided substandard housing and threatened them with physical violence. Among other matters, the court determined that EEOC had sufficiently alleged a hostile work environment, including harassment, intimidation, and hostile and abusive conduct by Global Horizon employees. The litigation involves farms owned and operated by Del Monte Fresh Produce Inc., Captain Cook Coffee Co. Ltd., Kauai Coffee Co. Inc., Kelena Farms Inc., Mac Farms of Hawaii LLC, Maui Pineapple Co. Ltd., Alexander & Baldwin Inc., and Massimo Zanetti Beverage USA Inc.

Lindt and Haribo Spar over Gold-Bears and Teddies

Lindt & Spruengli AG is once again facing trademark litigation over its gold-wrapped chocolate candy, this time for its "Teddy," which Haribo GmbH claims infringes its "Gold-Bears" multi-colored gummy bears product. Lindt was unable to secure a European Union (EU) trademark for its chocolate bunny, but was able to stop Hauswirth in Austria from manufacturing Easter bunnies resembling its bunny. Lindt did not succeed in similar litigation against Reigelein in Germany. Additional information about the EU Court of Justice ruling rejecting the bunny registration appears in Issue 441 of this *Update*.

Lindt and Haribo apparently agreed to ask a German court to resolve their dispute, and an initial hearing occurred in Landgericht Köln in October 2012. The final hearing is scheduled for December 18. Lindt has reportedly indicated that it specifically avoided marketing its bear-shaped candy as a "Gold Teddy," but Haribo complains that the product nevertheless infringes its global trademark, secured through the World Intellectual Property Organization in 1975. *See Confectionary News*, November 9, 2012; *Huffington Post*, November 12, 2012; *Bloomberg*, November 13, 2012.

OTHER DEVELOPMENTS

CSPI Targets Caffeinated Snack Food

The Center for Science in the Public Interest (CSPI) has written a letter to the Food and Drug Administration's Office of Compliance, claiming that caffeinated snack foods violate the agency's determination "that caffeine is generally recognized as safe only in cola-type beverages and only at concentrations at 0.02 percent or less (about 72 mg per 12 oz.)." Singling out a new line of Frito-Lay's Cracker Jack® snacks, Kraft's MiO Energy "water enhancer" and Jelly Belly's "Extreme Sport Beans," CSPI alleges that these products could represent "the beginning of a craze

in which many companies, large and small, disregard FDA's regulation and begin adding caffeine to all kinds of foods and beverages."

In particular, the consumer group has raised concerns that caffeinated snacks like "Cracker Jack'D" are child-friendly even if they are not marketed directly to children. "Kids will naturally be attracted to a tasty, finger-friendly snack food packaged and advertised with familiar Cracker Jack artwork," opines CSPI's November 14, 2012, **letter** to PepsiCo, Inc. and Frito-Lay North America. "Also, several state and city-law enforcement officials and United States senators recently expressed concern about the caffeine content and marketing of energy drinks… Those or other officials may well be concerned about the marketing of caffeinated snack foods… Some parents might even resort to the courts to recoup the damages caused by those products."

CSPI has thus urged the companies to refrain from marketing these products, citing the American Academy of Pediatrics in its call to discourage caffeine consumption among young people. "Unless the FDA begins enforcing its regulations, I fear that we'll see caffeine being added to ever-more improbable drinks and snacks, putting children, unsuspecting pregnant women, and others at risk," said CSPI Executive Director Michael Jacobson. "How soon before we have caffeinated burgers, burritos, or breakfast cereals?" *See CSPI News Release,* November 14, 2012.

7Up Sodas with Antioxidants to Disappear from Store Shelves

Dr. Pepper Snapple Group has reportedly announced that it will remove its 7UP products with antioxidants from the market by early 2013. The company evidently denied that its decision was related to a lawsuit filed against it by the Center for Science in the Public Interest (CSPI), which had alleged that the products were falsely advertised. Additional information about CSPI's lawsuit appears in Issue **461** of this *Update*. According to a Dr. Pepper statement, the decision to reformulate the product for consistency across its brands was made in 2011 and that it had met with CSPI to discuss the organization's claims this summer. The company also noted that its 7UP Cherry clearly states on the label that it is a "cherry-flavored soda that does not contain juice." *See Associated Press*, November 8, 2012.

OPC Releases Report on Self-Regulatory Marketing in Australia

The Obesity Policy Coalition (OPC) has sent a **report** to Australian officials on the country's current self-regulatory system for food marketing, which OPC has described as "seriously flawed." According to the coalition, the codes developed by the food industry to govern marketing to children "are extremely complex," resulting in "a litany of loopholes" that companies have allegedly exploited "to promote their products despite childhood obesity sitting at record levels."

In particular, the report claims that self-regulatory codes (i) do not apply to all food advertisers or all age-groups of children, (ii) "only cover advertising that is 'directed primarily to children,'" (iii) fail to cover many forms of promotion and media, and (iv) rely on "unclear" criteria for determining what is healthy or unhealthy. It also finds the administration and enforcement of these codes "grossly inadequate" since "the scheme relies entirely on complaints from the public." Faulting the Advertising Standards Board for issuing decisions that are purportedly "inconsistent with Australian Communications and Media Authority's positions on brand promotions and giveaways," the report concludes that self-regulation has "not reduced children's exposure to unhealthy food advertising," in part because "there is an inherent conflict of interest in self-regulation which clearly works against effective codes."

"The government must now call 'time' on the charade of self-regulation and legislate to give children meaningful protection from the influence of unhealthy food marketing," said OPC Executive Manager Jane Martin in a November 12, 2012, press release. "Legislation to comprehensively restrict junk food marketing and advertising would be one of the most effective and cost-effective interventions to address the childhood overweight and obesity crisis."

Meanwhile, the Australian Association of National Advertisers (AANA) has publicly disputed the findings, calling the report's accusations "nonsense" given the low number of consumer complaints about food and beverage advertising. "Once again the OPC has produced a document with no new evidence or data to suggest that adverting contributes to unhealthy outcomes and conveniently matches its pre-determined agenda," AANA Acting CEO Alina Bain said. "The AANA is working with the Australian Government through the Australian National Preventative Health Agency… to monitor food marketing to children. We're determined to work with Government and stakeholders to help ensure that advertising does not contribute to unhealthy or unsafe outcomes, that's in everyone's best interest." *See AANA Press Release,* November 12, 2012.

"Fat-Blocking" Soda Launches in Japan

PepsiCo, Inc. has reportedly launched a "fat-blocking" soda in Japan, sparking media interest in the latest product to take advantage of a Japanese government study finding that the water-soluble fiber supplement dextrin blocks fat absorption in the digestive system. According to various sources, "Pepsi Special" containing "indigestible dextrin" has received a "Food for Specified Heath Uses" label in Japan, which awards the designation to products with a demonstrated health benefit.

Although Pepsi Special will not be available in markets outside Japan, the product has already attracted criticism from scientists and consumer groups questioning whether dextrin is as safe and effective as advertised. "Unless Pepsi can provide data from controlled studies in humans to the contrary, their claim

should be regarded as bogus and deceptive," Harvard School of Public Health Chair of Nutrition Walter Willett told *Time* magazine. This sentiment was echoed by Center for Science in the Public Interest Executive Director Michael Jacobson, who added, "You shouldn't add good things to bad things because that could encourage people to eat something that isn't healthy for them." *See Time and Today Health,* November 15, 2012.

MEDIA COVERAGE

Marketers, Tech Companies Oppose Proposed Children's Online Privacy Rules

According to a November 5, 2012, *New York Times* article, technology and media companies have joined trade groups and marketing associations in opposing the Federal Trade Commission's (FTC's) efforts to update provisions implemented under the Children's Online Privacy Protection Act (COPPA). As regulators look to expand the types of data-collection activities covered by COPPA, companies such as Facebook, Google and Twitter have reportedly pushed back against these proposals as unduly onerous and likely to stifle all Web-based services created for children.

Industry analysts have purportedly noted that once FTC requires parental consent for companies to use customer code numbers to track children, the agency "might someday require… similar consent for a practice that represents the backbone of digital marketing and advertising—using such code numbers to track the online activities of adults." Furthermore, social media platforms have apparently taken issue with a plan to hold third parties liable "if they know or have reason to know that they are collecting personal data on children's sites."

"The social networks say they cannot keep track of the many sites that download their software plug-ins, and they cannot know whether they are inadvertently collecting data on children's sites," reports *Times* journalist Natasha Singer. "Google and Apple made a similar argument, telling regulators that app platforms like Android and iTunes store should not be held liable for the data collection practices of the children's apps they sell."

But children's advocates have vocally defended the proposed rules as necessary to protect children's identities online. "Until there are some rules, marketers will continue to use what they have to penetrate children's lives," said American University Communications Professor Kathryn Montgomery, who previously urged Congress to pass COPPA. "Without constraints, it could easily get out of hand."

Marion Nestle Discusses Food Marketing with *Childhood Obesity*

New York University Nutrition Professor Marion Nestle recently gave an **interview** with *Childhood Obesity's* features editor, Jamie Devereaux, on healthy food access, the role of packaged foods in diets, and "the topic of peer pressure in

eating fast food, sugar-sweetened beverages, and brand-name snacks." While supporting federal policy to increase fresh fruit and vegetable consumption in low-access areas, Nestle noted barriers to cooking at home such as a lack of proper equipment and a narrow food selection exacerbated by income inequality. But she also blamed industry for allegedly fostering peer pressure among young consumers to choose certain foods and beverages above others.

"Food marketers deliberately target children and adolescents for marketing, much of it designed to associate the product to the emotional gains from peer bonding," Nestle opined. "The purpose of food advertising is to make kids think they are supposed to be eating kids' food—food made just for them—and that they know more about what they are supposed to eat than their parents do… Kids don't need kids' food. If adults are eating healthfully, kids should be eating the same foods that adults eat." *See Childhood Obesity,* October 2012.

SCIENTIFIC/TECHNICAL ITEMS

CDC Highlights Calories Consumed from Alcoholic Beverages

The Centers for Disease Control and Prevention (CDC) has **released** a study claiming that on any given day, adult consumers of alcoholic beverages imbibe approximately 16 percent of their total caloric intake from alcoholic beverages—"the same contribution to overall calories as the 16 [percent] from added sugars among U.S. children." Samara Joy Nielsen, et al., "Calories Consumed from Alcoholic Beverages by U.S. Adults, 2007-2010," *NCHS Data Brief,* November 2012. According to the study, which used data from the National Health and Nutrition Examination Survey, the adult population consumes on average "almost 100 calories per day from alcoholic beverages." Divided between the sexes, however, the data reportedly showed that men drank 150-calories worth of alcoholic beverages each day whereas women consumed "a little over" 50 calories.

"We've been focusing on sugar-sweetened beverages. This is something new," said CDC epidemiologist and study co-author Cynthia Ogden. In particular, the study noted that beer, wine and spirits are "a top contributor to caloric intake," with 19 percent of men consuming more than 300 calories from alcoholic beverages and 12 percent of women consuming more than 150 calories from alcoholic beverages on any given day.

Meanwhile, the Center for Science in the Public Interest's director of nutrition policy, Margo Wootan, apparently told reporters that health officials "should think about enacting policies to limit alcoholic intake." While noting that New York City "was smart to start with sugary drinks," Wootan called for the Obama administration to reexamine its plan to exempt alcoholic beverages from calorie disclosure requirements in restaurants. "It could give people the wrong idea," she reportedly said. *See Associated Press,* November 15, 2012.

Research Allegedly Links Cattle Farming to Peripheral Neuropathy

A recent study has allegedly linked cattle farming to an "increased prevalence of self-reported symptoms associated with peripheral neuropathy," raising questions about the role of *Campylobacter jejuni* infection in Guillain-Barré Syndrome (BGS). Leora Vegosen, et al., "Neurologic Symptoms Associated with Cattle Farming in the Agricultural Health Study," *Journal of Occupational and Environmental Medicine,* October 2012. According to the study, *C. jejuni* "is the most frequently identified antecedent to [GBS]," "the leading cause of acute flaccid paralysis in the United States and worldwide." Relying on data from 8,887 cattle farmers enrolled in the Agricultural Health Study, which originally sought to assess associations between pesticides and certain health outcomes, researchers concluded that "the prevalence of both reported numbness and weakness was increased in cattle farmers as a group" compared to farmers without livestock exposure.

"This association is consistent with, but does not specifically indicate, an association between occupational exposures in cattle farming and increased prevalence of *C. jejuni*-associated autoimmune peripheral neuropathy," states the study. "Despite the high prevalence of *Campylobacter* in cattle, there is a dearth of research on peripheral neuropathy in cattle farmers, and this study provides important information and rationale for further research to address this issue… Further clarification of this potentially important health risk would be beneficial to informing the development and implementation of policies to protect the health of farmworkers and rural communities."

Study Examines Food Contaminant Exposures

University of California, Los Angeles, and University of California, Davis, researchers have published a study examining the health effects of foodborne toxin exposure in children and adults. Rainbow Vogt, et al., "Cancer and non-cancer health effects from food contaminant exposures for children and adults in California: a risk assessment," *Environmental Health,* November 2012. Based on self-reported food frequency data as well as food chemical levels obtained from publicly available databases, the study estimated exposure to multiple food contaminants for preschool age children (2-4 years), school-age children (5-7 years), parents of young children, and older adults.

The results allegedly showed that cancer benchmark levels "were exceeded by all children (100%) for arsenic, dieldrin, DDE, and dioxins," while non-cancer benchmarks were exceeded by more than 95 percent of preschool-age children for acrylamide and by 10 percent of preschool-age children for mercury. The data also indicated that "the greatest exposure to pesticides from foods included in [the] analysis were tomatoes, peaches, apples, peppers, grapes, lettuce, broccoli, strawberries, spinach, dairy, pears, green beans, and celery."

Although the study's authors conceded that the food-frequency survey could have resulted in "under and over estimation," they still recommended certain

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"dietary strategies to reduce exposure to toxic compounds for which cancer and non-cancer benchmarks are exceeded by children." In particular, they have urged consumers to seek out "organically produced dairy and selected fruits and vegetables to reduce pesticide intake," consume less animal foods "to reduce intake of persistent organic pollutants and metals," and consume "lower quantities of chips, cereal, crackers, and other processed carbohydrate foods to reduce acrylamide intake."

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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.