

FOOD & BEVERAGE LITIGATION UPDATE



CONTENTS

Legislations, Regulations and Standards

Senators Call on Energy Drink Makers to Answer Questions About Products.....	1
Codex Committees Invite Participation in Electronic Working Groups.....	1
Irish Food Safety Authority Finds Horse, Pork DNA in Beef Products.....	2
OEHA Schedules Public Workshop on Proposed Prop. 65 Listing for Styrene ...	3

Litigation

FTC Commissioners Order POM Wonderful to Conduct Tests Before Asserting Health Benefits	3
Burger King Franchisee to Pay \$25,000 to Cashier Fired for Wearing Skirt Prescribed by Faith	4
Consumer Fraud Suit Against Honey Maker Dismissed with Prejudice	5
Former Steakhouse Server Seeks to Revive Collective Wage-and-Hour Claims	5
Red Bull Drinker Claims Product No Stronger Than Coffee	6
Kraft Sues Kellogg & Keebler Alleging Packaging Patent Infringement	7

Other Developments

NEJM Publishes Results of Sugar-Sweetened Beverages Poll	7
CSPI Issues 2013 "Xtreme Eating" Report	8
AP-NORC Surveys Public Opinion on Obesity-Related Issues.....	8

Media Coverage

WSJ "Numbers Guy" Questions Usefulness of BMI.....	9
--	---

Scientific/Technical Items

BPA Alternative Claimed to Disrupt Hormones.....	9
Fast Food Consumption Allegedly Linked to Asthma, Allergies	10
ER Visits Due to Energy Drinks Reportedly on the Rise.....	11
Weight Bias in the Courtroom Focus of New Study	11

LEGISLATIONS, REGULATIONS AND STANDARDS

Senators Call on Energy Drink Makers to Answer Questions About Products

Democratic U.S. Sens. Edward Markey (Mass.), Richard Durbin (Ill.) and Richard Blumenthal (Conn.) have issued [letters](#) to 14 energy drink companies, including Red Bull, Pepsi Co. Inc. and Monster Energy, seeking answers to more than a dozen questions. Responses are requested by February 1, 2013.

Noting that the Food and Drug Administration (FDA) is investigating the industry, the senators contend that "[t]he blurred distinction between supplements and conventional foods or beverages combined with recent published reports by the Substance Abuse and Mental Health Services Administration (SAMHSA) and FDA regarding consumption of energy drinks has led to significant consumer confusion and concern about the safety and use of these products."

Among other matters, the senators ask (i) whether each company's product is a "supplement, conventional food/beverage or neither," (ii) how each company presents nutritional information on product labels, (iii) how much caffeine is present in the company's product and whether this information is provided, (iv) whether the company includes other stimulant ingredients in calculating the amount of caffeine in its product, and (v) if the company markets its energy product to children or teenagers. They also ask whether the companies have performed any studies "to examine the potential for serious health consequences of using your product(s), including caffeine toxicity, stroke, anxiety, arrhythmia, and in some cases death." *See Press Release of Sen. Edward Markey, January 17, 2013.*

Codex Committees Invite Participation in Electronic Working Groups

According to a [notice](#) published by the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS), several Codex Alimentarius committees have invited member countries and observer organizations to join electronic working groups (eWGs).

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com



or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

The Food Hygiene Committee seeks participation on a parasites eWG to further develop proposed draft guidelines on controlling the zoonotic parasites *Trichinella spp.* and *Cysticercus bovis*. The Fish and Fish Products Committee seeks participation on a food additives eWG "to prepare proposals for food additives in the standards for fish and fishery products, following the approach taken for the Standard for Smoked Fish and to focus on technological justification for those food additives." This committee also seeks participants for fish sauce and scallop meat eWGs. The Nutrition and Foods for Special Dietary Uses Committee seeks participation on a nutrient reference values eWG and an addition of essential nutrients to foods eWG. Deadlines for and more details about submitting an indication of interest are included in the notice.

Established in 1963 by the World Health Organization and the Food and Agriculture Organization of the United Nations, the Codex Alimentarius Commission, with more than 180 member countries, develops international food safety standards that are often incorporated into national food safety laws. FSIS coordinates U.S. Codex activities. See *U.S. Codex News*, January 11, 2013.

Irish Food Safety Authority Finds Horse, Pork DNA in Beef Products

The Food Safety Authority of Ireland (FSAI) has [published](#) the results of an investigation "examining the authenticity of a number of beef burger, beef meal and salami products available from retail outlets in Ireland." According to a January 15, 2013, FSAI press release, the agency's study revealed "the presence of horse DNA in some beef burger products," raising concerns about "the traceability of meat ingredients and products entering the food chain."

After testing for horse and pig DNA in 27 beef burger products, investigators evidently reported that 10 (37 percent) of the samples contained horse DNA and 23 (85 percent) contained pig DNA. The study also found that all 19 salami samples and 21 of 31 beef meal products contained pig DNA, though none of these items contained horse DNA. In addition, notes FSAI, "[t]races of horse DNA were also detected in batches of raw ingredients, including some imported from The Netherlands and Spain."

FSAI has apparently linked the beef burger products containing horse DNA to two processing plants in Ireland and one in the United Kingdom. The retailers have agreed to remove the implicated batches from the market, with one deciding to recall all of its products and replace them with new ones. "In nine of the ten beef burger samples from these retailers, horse DNA was found at very low levels," concludes FSAI. "However, in one sample from Tesco, the level of horse DNA indicated that horsemeat accounted for approximately 29% relative to the beef content."

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

“Whilst, there is a plausible explanation for the presence of pig DNA in these products due to the fact that meat from different animals is processed in the same meat plants, there is no clear explanation at this time for the presence of horse DNA in products emanating from meat plants that do not use horsemeat in their production process,” said FSAI Chief Executive Alan Reilly. “In Ireland, it is not in our culture to eat horsemeat and therefore, we do not expect to find it in a burger. Likewise, for some religious groups or people who abstain from eating pig meat, the presence of traces of pig DNA is unacceptable. We are working with the meat processing plants and the Department of Agriculture, Fisheries and the Marine to find out how horse DNA could have found its way into these products.”

OEHHA Schedules Public Workshop on Proposed Prop. 65 Listing for Styrene

At the request of a polystyrene custom mold manufacturer, California EPA’s Office of Environmental Health Hazard Assessment (OEHHA) will conduct a February 14, 2013, [public workshop](#) “concerning OEHHA’s intent to list styrene as a chemical known to cause cancer under the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65 [Prop. 65]).”

According to the agency’s notice, discussions “should be limited to whether the National Toxicology Program (NTP) Report on Carcinogens has identified styrene as a human carcinogen or potential human carcinogen. OEHHA cannot consider scientific arguments concerning the weight or quality of the evidence considered by NTP.” The hearing will be [Webcast](#). OEHHA has also extended the public comment period until February 28. See *OEHHA News Release*, January 17, 2013.

LITIGATION

FTC Commissioners Order POM Wonderful to Conduct Tests Before Asserting Health Benefits

The Federal Trade Commission (FTC) has issued a final decision in a complaint alleging that POM Wonderful made false and misleading claims by advertising its pomegranate juice products with health-benefit assertions that the company contended were backed by medical research. [In re POM Wonderful LLC, No. 9344 \(FTC, decided January 10, 2013\)](#). Additional information about the matter appears in [Issue 441](#) of this *Update*.

Henceforth, two randomized, controlled clinical trials (RCTs) will be required before POM can make a claim that any of its products treat, prevent or reduce the risk of heart disease, prostate cancer or erectile dysfunction (ED). Any efficacy or health benefit claims falling short of disease claims will require

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

substantiation consisting of “competent and reliable scientific evidence . . . that must be sufficient in quality and quantity when considered in the light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.” FTC declined complaint counsel’s request that the company should be prohibited from making disease-related establishment and efficacy claims unless the claims are pre-approved by the Food and Drug Administration, finding that requiring two RCTs sufficiently accomplishes certainty and enforceability goals.

The commissioners voted unanimously to uphold the administrative law judge’s (ALJ’s) initial decision, but found deceptive claims in 36 ads and promotional materials, more than the 19 cited in the ALJ’s ruling. The commission also found that a higher level of substantiation would be necessary to support POM’s establishment claims because “experts in the fields of heart disease, prostate cancer, and ED would find that causation has been shown only if RCTs have been conducted and the appropriate data demonstrates that each study’s hypothesis has been fully supported.” According to FTC, an RCT requires (i) test and control groups, (ii) random assignment to test and control groups, (iii) an examination of known variables, (iv) statistical significance, and (v) double-blinding.

FTC disagreed with POM that the misleading advertising claims were protected by the First Amendment and that the company, its owners and marketers were denied due process. POM had claimed that FTC’s approach to its case constituted a retroactive application of its current standard as “articulated in both FTC policy statements and case law.” In this regard, FTC noted that requiring RCTs to substantiate POM’s claims was “founded on the well-established principle that determining the proper level of substantiation is a fact-based and case-specific analysis based on expert testimony as to what constitutes competent and reliable scientific evidence for the claims at issue. Respondents were on notice of this long-standing standard. Therefore, our decision in this case does not raise due process concerns.”

A petition for review of the final order may be filed with a federal appeals court within 60 days. *See FTC News Release*, January 16, 2013.

Burger King Franchisee to Pay \$25,000 to Cashier Fired for Wearing Skirt Prescribed by Faith

The U.S. Equal Employment Opportunity Commission (EEOC) has filed a consent decree with a federal court in Texas to resolve claims that a Burger King franchise operator discriminated against a former cashier on the basis of religion. *EEOC v. Fries Rest. Mgmt., LLC*, No. 12-3169 (U.S. Dist. Ct., N.D. Tex., Dallas Div., filed January 16, 2013). Without admitting liability, the operator has agreed to settle the claims by paying \$25,000 to the former employee, who was allegedly fired for wearing a skirt on the job as required by her

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

Pentecostal Christian religion, in two checks: one for \$5,000 attributable to wages, and one for \$20,000 attributable to claims of mental anguish and suffering.

The Burger King franchisee will also post on employee bulletin boards "its policy against religious discrimination and duty to accommodate" and "conduct an annual training session [in 2013 and 2014] for all district managers and general managers for Defendant's Texas Burger King Restaurants, advising them of the requirements and prohibitions of the federal anti-discrimination laws with a special emphasis on religious discrimination." The consent decree requires court approval. Additional details about the case appear in [Issue 451](#) of this *Update*.

Consumer Fraud Suit Against Honey Maker Dismissed with Prejudice

A federal court in California has dismissed statutory and common law claims filed in a putative class action against Sioux Honey Association Cooperative, alleging that the company falsely labels its Sue Bee Clover Honey® product as "honey," despite removing the pollen from the product. *Ross v. Sioux Honey Ass'n Coop.*, No. 12-1645 (U.S. Dist. Ct., N.D. Cal., decided January 14, 2013). The court found the claims preempted or insufficiently pleaded in the plaintiff's third amended complaint and, concluding that any further amendment would be futile, granted the motion to dismiss with prejudice.

So ruling, the court declined to rule that the plaintiff lacked standing to bring the suit, finding that her pleadings satisfied the requirements of *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011), in which the California Supreme Court recognized that allegations of economic injury arising from reliance on a product manufacturer's alleged misrepresentations satisfy the injury-in-fact requirement for standing under Article III.

The court determined that the plaintiff failed to plead facts sufficient to show that pollen is a "characterizing component" of honey "such that its removal must be noted on an affixed label" under state or federal law and that she failed to plead facts sufficient "to establish that pollen is a valuable constituent of honey. Her amended complaint fails to allege any factual support for her belief that an ordinary consumer would consider pollen to be a constituent of honey, let alone a 'valuable constituent.'"

Former Steakhouse Server Seeks to Revive Collective Wage-and-Hour Claims

A woman who formerly worked as a LongHorn Steakhouse server has asked a federal court for permission to modify her motion for a collective action under the Fair Labor Standards Act following the court's denial of her motion in December 2012 on the ground that she lacked personal knowledge as to practices at the company's steakhouses across the country. *Velez v. GMRI*,

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

Inc., No. 12-4857 (U.S. Dist. Ct., N.D. Ill., E. Div., filed January 14, 2013). The suit involves claims that the defendant failed to pay minimum wages. As part of her motion, the plaintiff seeks leave to amend her complaint “both to correct the LongHorn corporate entities brought in as defendants, and to clarify the claims brought under the collective procedure.”

According to the motion, “the only claim on which Plaintiff seeks collective treatment is the claim that Defendants required tipped employees to perform non-tipped duties while paid the tip-credit wage rate, in violation of the minimum wage provisions of the Fair Labor Standards Act [FLSA]. In their answer, the LongHorn entities admit that the employer of the LongHorn servers did take the tip-credit on wages paid to those employees. Because servers unlawfully paid the tip-credit wage rate who worked overtime hours would not have had their regular rate lawfully calculated, Plaintiff likewise brings a collective claim under the maximum hours provisions of the FLSA.” The plaintiff would also amend her complaint to limit notice of the action to servers who worked at her restaurant.

Red Bull Drinker Claims Product No Stronger Than Coffee

A New York resident has filed a putative nationwide class action against the company that makes Red Bull energy drinks, alleging that the product does not, as advertised, “give you wings,” that is, provide more benefit than a cup of coffee. *Careathers v. Red Bull GMBH*, No. 12-369 (U.S. Dist. Ct., S.D.N.Y., filed January 16, 2013). According to the complaint, the defendants allegedly base their claims that the product will “significantly improve a consumer’s physiological and mental performance beyond what a simple cup of coffee or caffeine pill would do” on scientific studies. The plaintiff claims, “there is no genuine scientific research and there are no scientifically reliable studies in existence that support the extraordinary claims of Defendants.”

The complaint outlines the beverage’s history and development, beginning as tonic created in Thailand in the 1980s, and cites research that analyzed energy drink ingredients and concluded, “With the exception of some weak evidence for glucose and guarana extract, there is an overwhelming lack of evidence to substantiate claims that components of [energy drinks], **other than caffeine**, contribute to the enhancement of physical or cognitive performance.” The complaint also cites a January 2013 *New York Times* article on the subject of energy drink performance. The plaintiff claims that the defendants’ claims are deceptive and misleading, and that the plaintiff and putative class would not have purchased the product and would “not have paid a premium price” for the product had they known that the “energy drinks cannot perform as advertised and promised.”

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

Seeking to certify a nationwide class and statewide subclass of product purchasers, the plaintiff alleges breach of express warranty, unjust enrichment and violations of state consumer protection laws. He seeks injunctive relief, including the cessation of misleading advertising and packaging, a public information campaign and corrective advertising; a constructive trust or disgorgement to pay restitution; *cy pres* distribution; compensatory damages; interest; attorney's fees; and costs.

Kraft Sues Kellogg & Keebler Alleging Packaging Patent Infringement

Kraft Foods Global Brands LLC has filed a complaint in an Illinois federal court against Kellogg and Keebler, claiming that the companies' cookie packaging infringes re-sealable food container patents that Kraft owns. *Kraft Foods Global Brands LLC v. Kellogg N. Am. Co.*, No. 13-321 (U.S. Dist. Ct., N.D. Ill., E. Div., filed January 16, 2013). According to the complaint, the infringing products involve the defendants' Keebler Sandies® line of products, including shortbread, pecan shortbread and dark chocolate almond cookies. Kraft alleges that it informed the defendants of the infringement during an August 2012 meeting, but despite that knowledge, "Defendants continue to commit acts of infringement." Kraft seeks injunctive relief, destruction of infringing products, an accounting, damages, a determination that the case is "exceptional," attorney's fees, costs, and interest.

OTHER DEVELOPMENTS

NEJM Publishes Results of Sugar-Sweetened Beverages Poll

The *New England Journal of Medicine (NEJM)* has [published](#) the results of a recent poll asking readers whether governments should regulate sugar-sweetened beverages. After presenting two arguments for and against government regulation, the poll received 1,290 votes from readers in 75 countries, with 68 percent of voters favoring "regulation of sugar-sweetened beverages to help reduce the burden of obesity." In particular, the *NEJM* pollsters noted that the one outlier was the United States, where only 58 percent of voters favored regulation compared to the 84 percent from other countries.

"Readers opposed to government regulation of sugar-sweetened beverages pointed out that the problem of obesity involves much more than the excess consumption of sugary drinks and that limitations on portion size or taxes on soft drinks will not alter the fundamental issue—that people need to change the way they live their lives," concluded the "Clinical Decisions" article, which also included reader comments arguing for regulation as part of a comprehensive public health effort. In addition, some voters apparently highlighted "the irony of government regulation of sugar-sweetened beverages at the

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

same time that the government is providing generous subsidies to agricultural producers of sugar and high-fructose corn syrup, the very products that are helping to fuel the obesity epidemic." See *NEJM*, January 17, 2013.

CSPI Issues 2013 "Xtreme Eating" Report

The Center for Science in the Public Interest (CSPI) has [released](#) its 2013 "Xtreme Eating" report, which singled out restaurant foods that are allegedly laden with excessive calories, fat and sodium. Claiming that some restaurants seem to "scientifically engineer[] these extreme meals with the express purpose of promoting obesity, diabetes, and heart disease," the report condemns menu items from The Cheesecake Factory, Maggiano's Little Italy and other retailers that in some cases purportedly contain as much as "four-and-a-half days' worth" of recommended fat and more than a day's worth of recommended calories.

"I hope the Obama Administration promptly finalizes overdue calorie labeling rules for chain restaurants," said CSPI Executive Director Michael Jacobson. "Not only do Americans deserve to know what they're eating, but, as our Xtreme Eating 'winners' clearly indicate, lives are at stake. And perhaps when calories become mandatory on menus, chains will begin innovating in a healthier direction, instead of competing with each other to make Americans heavier and sicker." See *CSPI Press Release*, January 16, 2013.

AP-NORC Surveys Public Opinion on Obesity-Related Issues

A recent [survey](#) conducted by The Associated Press-NORC Center for Public Affairs Research (AP-NORC) indicates that even though Americans apparently understand many of the reasons behind increasing rates of obesity and the alleged link between obesity and chronic health conditions, people are split on their support for government policies that would affect consumers' food and beverage choices.

"The American public has clearly gotten the message about obesity as a major public health issue, including its connection to other major health problems," said Trevor Tompson, director of the AP-NORC Center. "What is less clear is consensus about how to address the issue and a surprising number of overweight people who are not told by their physicians that it is an issue that needs attention."

For example, one-third of those surveyed said the government should be deeply involved in finding ways to curb obesity, while a similar proportion wanted little or no role for government in addressing the issue. The rest appeared to be somewhere in the middle. Fifty-three percent of those surveyed apportioned significant responsibility for "solving the problem" to the food industry.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

MEDIA COVERAGE

WSJ “Numbers Guy” Questions Usefulness of BMI

Wall Street Journal columnist Carl Bialik recently authored two related articles questioning whether body mass index (BMI) is a reliable data point insofar as it “lumps together all body mass, including bone, muscle and beneficial fat, rather than singling out the more dangerous abdominal fat, which most researchers see as the real threat to health.” In particular, Bialik focuses on a recent U.S. Centers for Disease Control and Prevention (CDC) report finding that out of 2.9 million people involved in 97 studies, those participants whose BMI classified them as overweight had a 6 percent lower risk of death than those classified as normal weight.

But Bialik notes that several scientists have since criticized the results of CDC’s report, partly because threshold BMIs in the mid-to-high 20s tend to paint “a wide range of body types... with the same brush.” He adds that Pennington Biomedical Research Center Executive Director Steven Heymsfield, who co-authored commentary accompanying the CDC report in *JAMA*, has also estimated that BMI misclassifies approximately 5 to 10 percent of the U.S. population. “It is reliable as a measure of over-weight but not over-fat,” elaborated Heymsfield in a January 11, 2013, *WSJ* blog post. “There are both false positives and false negatives, people who are overweight but not over-fat and vice versa.”

Despite these shortcomings, Bialik suspects that studies continue to rely on BMI because the measurements are low-cost and easy to obtain, even though the co-director of the Office of Obesity Research at the National Institute of Diabetes and Digestive and Kidney Diseases has described BMI “as a screening tool, rather than a diagnostic one.” As a result, some researchers like Heymsfield have apparently advocated including waist circumference alongside BMI as a more direct measure of abdominal fat. “You can get a better fix by also including waist-circumference measures,” he reportedly said. “They can put you into groups of high and low risk in the overweight range. I think it’s a good second step.” See *The Wall Street Journal*, January 11 and 12, 2013.

SCIENTIFIC/TECHNICAL ITEMS

BPA Alternative Claimed to Disrupt Hormones

A recent study has reportedly [claimed](#) that low exposures of a bisphenol A (BPA) alternative known as bisphenol S (BPS) also disrupt estrogen, raising questions about the chemical’s impact on human health. Rene Vinas and Cheryl Watson, “Bisphenol S Disrupts Estradiol-Induced Nongenomic Signaling in Rat Pituitary Cell Line: Effects on Cell Functions,” *Environmental*

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

Health Perspectives, January 2013. University of Texas researchers apparently sought to “characterize the non-genomic activities of BPS” at low doses by examining how it mimics “the effects of physiologic estrogens via membrane-bound estrogen receptors” in rat pituitary cells, “alone and together with the physiologic estrogen estradiol (E₂).”

The results evidently showed that, like BPA, BPS “disrupts membrane-initiated E₂-induced cell signaling, leading to altered cell proliferation, cell death, and PRL [prolactin] release.” According to the study’s authors, BPS has replaced BPA in some thermal papers and plastics because it is “less likely to leach from plastic containers with heat and sunlight,” although the substance “still escapes the polymers in small quantities under normal use.”

“People automatically think low doses do less than high doses. But both natural hormones and unnatural ones like [BPS] can have effects at surprisingly low doses,” said Cheryl Watson, ultimately recommending that further research focus on building a profile of the risks associated with the entire class of chemicals. “I think we should all stop and be very cautious about just accepting this as a substitute for BPA. And not just BPS. We should question the whole process about how we introduce chemicals into the marketplace without properly testing them first.” See *Environmental Health News*, January 17, 2013.

Fast Food Consumption Allegedly Linked to Asthma, Allergies

Research based on the International Study of Asthma and Allergies in Childhood (ISAAC) Phase Three has reportedly linked fast food consumption to asthma and eczema severity in kids. Philippa Ellwood, et al., “Do fast foods cause asthma, rhinoconjunctivitis and eczema? Global findings from the International Study of Asthma and Allergies in Childhood (ISAAC) Phase Three,” *Thorax*, January 2013. Analyzing data from more than 319,000 13- to 14-year-old adolescents in 51 countries and more than 181,000 6- to 7-year-old children in 31 countries, the study evidently relied on written questionnaires that asked participants about their asthma, rhinoconjunctivitis and eczema symptoms, as well as their dietary habits.

In addition to “a potential protective effect on severe asthma... associated with consumption of fruit ≥ 3 times per week,” the results allegedly found that children and adolescents who consumed fast food three or more times per week had an increased risk of severe asthma, severe rhinoconjunctivitis and severe eczema. “If the association between fast foods and the symptom prevalence of asthma, rhinoconjunctivitis and eczema is causal, then the findings have major public health significance owing to the rising consumption of fast foods globally,” concludes the study’s abstract, which noted that “similar patterns for both ages were observed for regional analyses, and were consistent with gender and affluence categories and with current symptoms of all three conditions.”

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

“Three or more weekly servings [of fast food] were linked to a 39% increased risk of severe asthma among teens and a 27% increased risk among children, as well as to the severity of rhinitis and eczema, overall,” further explains a January 14, 2013, ISAAC Steering Committee press release. “The authors suggest that there are plausible explanations for the findings: fast food contains high levels of saturated and trans fatty acids, which are known to affect immunity, while fruit is rich in antioxidants and other beneficial compounds.”

ER Visits Due to Energy Drinks Reportedly on the Rise

New [research](#) from the Substance Abuse and Mental Health Services Administration (SAMHSA) reportedly indicates that the number of emergency room (ER) visits involving energy drinks has doubled nationwide—from about 10,000 to more than 20,000—from 2007 to 2011. The statistics were gathered through the Drug Abuse Warning Network.

“Consumption of energy drinks is a rising public health problem because medical and behavioral problems can result from excessive caffeine intake,” according to the report. “A growing body of scientific evidence documents harmful health effects of energy drinks, particularly for children, adolescents and young adults.” Among other things, the report also indicated that people ages 18 to 25 accounted for the largest group of ER patients, and men accounted for about two-thirds of those treated.

The U.S. Food and Drug Administration is reportedly considering the findings in its broad review of the safety of energy drinks this spring. See *The DAWN Report: Update on Emergency Department Visits Involving Energy Drinks: A Continuing Public Health Concern*, January 10, 2013; Associated Press, January 16, 2013.

Weight Bias in the Courtroom Focus of New Study

A recent study investigating weight bias in the courtroom has apparently concluded that both the “weight and gender of a defendant may affect juror perceptions of guilt and responsibility.” N. A. Schvey, et al., “The influence of a defendant’s body weight on perceptions of guilt,” *International Journal of Obesity*, January 2013. The study relied on responses from 471 lean and overweight adults “who read a vignette describing a case of check fraud while viewing one of four images (a lean male, a lean female, an obese male or an obese female)” and then “rated the defendant’s culpability on a 5-point Likert scale and completed measures of anti-fat attitudes.”

According to the study, “male participants judged the obese female defendant as significantly guiltier than the lean female defendant,” although female respondents “judged the two female defendants equally regardless of body

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 467 | JANUARY 18, 2013

weight.” Lean male participants also apparently believed that “the obese female defendant was more aware of insufficient funds... [and] more likely to issue another fraudulent check in the future as compared with the lean female defendant.” In addition, the researchers found “no differences in assessments of guilt or culpability between the obese male and the lean male defendant among any of the participants.”

“This finding is consistent with previous research, indicating that obese females suffer more weight-related stigmatization than males,” conclude the study’s authors. “The finding that weight bias may extend to the courtroom is concerning and signals the need for greater awareness and prevention of weight-based discrimination in legal settings.”

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-215-278-2555
San Francisco, California
+1-415-544-1900
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

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.

