

## FOOD & BEVERAGE LITIGATION UPDATE



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## LEGISLATIONS, REGULATIONS AND STANDARDS

### DeLauro Challenges FSIS Inspection Protocols for Imported Meats, Poultry and Eggs

U.S. Rep. Rosa DeLauro (D-Conn.) has responded to a January 25, 2013, *Federal Register* [notice](#) describing a “new” Food Safety and Inspection Service (FSIS) method of conducting “ongoing equivalence verifications of the regulatory systems of countries that export meat, poultry, or processed egg products to the United States.”

According to DeLauro’s [letter](#) to U.S. Department of Agriculture (USDA) Secretary Tom Vilsack, “it seems that FSIS fundamentally changed the process used to assess ongoing equivalency with our trade partners without publishing a single public notice in the *Federal Register* on the revisions or seeking public comment on the proposed changes. It appears that the agency has been implementing and refining these changes for several years.” She was particularly disturbed that FSIS has failed to disclose these changes in budgetary justification documents submitted to Congress since 2009. DeLauro also claimed in the letter that FSIS has exhibited “indifference to the advisory committees” that Congress established “to advise USDA on food safety policy.”

DeLauro, who is a senior member of the House subcommittee that funds USDA, demands answers to a series of questions including whether the agency will publish a risk assessment on the changes, what impact the changes have had on the department’s budget and how FSIS uses “the expertise of its external advisory committees to inform its policy decisions on contemporary food safety issues.” Her concerns have been echoed by representatives of food safety advocacy organizations, including the Consumer Federation of America and Food & Water Watch whose executive director reportedly said, “[I]t is time for the Obama administration to fund this vital consumer program adequately and stop trying to rationalize the ways it has weakened it. Publishing a Federal Register notice four years after the fact and requesting comments on the new policy is both futile and insulting.”

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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.

Comments on the FSIS notice are requested by March 26, 2013. Among other matters, the policy involves on-site system audits once every three years, self-reporting and port-of-entry reinspections. According to the notice, FSIS shifted in the late 1990s from an emphasis on food establishment inspections "to assessing a country's food regulatory system." See *CQ News* and *Rep. Rosa DeLauro's News Release*, January 25, 2013.

### CDC Issues Study on Food-Borne Illnesses

The Centers for Disease Control and Prevention (CDC) has issued a [report](#) titled "Attribution of Foodborne Illness, Hospitalizations, and Deaths to Food Commodities by using Outbreak Data, United States, 1998-2008," based on data involving 17 food categories and the roughly 48 million people who "get sick from food eaten in the United States" each year.

While produce is evidently responsible for more food-borne illness (46 percent) than other food categories, meat and poultry apparently cause more death (29 percent) and dairy "accounted for the most hospitalizations" (16 percent). CDC's estimates are based on the 4,589 food-borne disease outbreaks reported over an 11-year span. The report cautions that the findings should not cause people to "avoid certain categories of food," because many food-borne bacteria can be killed by cooking to proper temperatures and a varied diet is important to a healthy lifestyle.

Center for Science in the Public Interest (CSPI) Food Safety Director Caroline Smith DeWaal responded to the study by focusing on the role of dairy products as "big contributors to foodborne illness," contending that "[t]he risk from dairy products has increased in recent years with the increased rise in popularity of unpasteurized raw milk and cheeses. People who consume unpasteurized dairy products have no protection from hazards like *E. coli* O157 and *Salmonella* that are commonly found in dairy cattle." She advocates rapid implementation of the Food Safety Modernization Act to address the CDC study's findings that produce, such as leafy greens, is a "top contributor" to food-borne illness. See *CSPI News Release*, January 29, 2013.

### FDA Announces Public Meeting to Discuss Proposed Food Safety Rules

The Food and Drug Administration (FDA) has [announced](#) a public meeting to discuss "the proposed rules to establish standards for the growing, harvesting, packing, and holding of produce for human consumption (the produce safety proposed rule) and for current good manufacturing practice and hazard analysis and risk-based preventative controls for human food (the preventative controls proposed rule)." Under the Food Safety Modernization Act, the new produce safety rules would impose "science- and risk-based standards for the safe production and harvesting of fruits and vegetables," while the preventative controls rule would require both foreign and domestic food

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manufacturers “to develop a formal plan for preventing their food products from causing foodborne illness.”

Slated for February 28, 2013, in Washington, D.C., the public meeting aims to solicit comments on the proposed measures and inform the public about the rulemaking process. FDA has asked interested parties to submit oral presentation requests by February 8 and to register in advance by February 20. The agency will continue to accept written and electronic comments until May 16, 2013. Additional details about the two proposed standards appear in Issue [466](#) of this *Update*. See *Federal Register*, January 31, 2013.

### Upcoming Codex Meeting to Discuss Food Labeling

The U.S. Department of Agriculture’s Food Safety and Inspection Service and the Food and Drug Administration (FDA) have [announced](#) an April 17, 2013, public meeting in Washington, D.C., to provide information and receive public comments on agenda items and draft U.S. positions for discussion during the 41st Session of the Codex Committee on Food Labeling of the Codex Alimentarius Commission in Charlottetown, Prince Edward Island, Canada, on May 14–17.

Agenda items include (i) implementation of the World Health Organization global strategy on diet, physical activity and health, including a proposed draft revision of the “Guidelines on Nutrition and Health Claims concerning Non-Addition of Sodium Salts”; (ii) guidelines for the production, processing, labeling, and marketing of organically produced foods, including use of ethylene as a sprouting inhibitor for onions and potatoes, and organic aquaculture; (iii) date marking; and (iv) the labeling of food derived from crops biofortified by natural selection. See *Federal Register*, January 31, 2013.

### FSA Publishes Science Priorities for 2013

The U.K. Food Standards Agency (FSA) has [published](#) its “Forward Evidence Plan for 2013,” outlining its “priority science and evidence activities for the coming year.” Although subject to budgetary confirmation, the plan seeks to alert stakeholders to new and ongoing activities as well as identify additional research areas and sources of funding in support of FSA’s Strategic Plan 2010–2015, which the agency last updated in January 2013.

In particular, FSA has prioritized activities related to (i) “microbiological food safety, including campylobacter, *E. coli*, listeria and norovirus”; (ii) “food and feed hygiene policy”; (iii) “chemical safety of food, including metals and organic contaminants”; (iv) “the next round of the FSA strategic challenge call”; and (v) “diet and health related work funded by the FSA in Scotland and Northern Ireland.” The agency has requested feedback on the plan by February 15, 2013. See *FSA Press Release*, January 31, 2013.

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### UK Agency Rules Cereal Ad Does Not Promote “Excessive Consumption”

The U.K. Advertising Standards Authority (ASA) has [declined](#) to uphold five complaints alleging that a TV commercial for Weetabix Ltd’s Weetos breakfast cereal promoted “poor nutritional habits and an unhealthy lifestyle in children, because... it encouraged excessive consumption.” According to ASA, the ad in question showed a child eating Weetos for breakfast and later in the day as a snack, with the product’s tagline stating “FOR BREAKFAST AND BEYOND.”

Rebutting the allegations, Weetabix reportedly said that “the ad was light-hearted but did not encourage excessive consumption” or poor nutritional habits, especially since the cereal advertised was “not a high[] fat, salt or sugar (HFSS) product as defined by the Food Standards Agency.” The company also argued that the portions shown in the commercial were consistent with marketing conventions and standards, as well as research indicating that consumers often ate Weetos for snacks and meals other than breakfast.

“[Weetabix] considered that to encourage excessive consumption of a product that was not classed as an ‘unhealthy’ food the ad would need to encourage children to consume highly excessive quantities of the cereal, which, although subjective, would involve significantly more cereal than was shown,” reported ASA in its ruling. “However, the boy was shown eating sparingly from a regular sized bowl and later taking a small amount from a comparatively small container.”

The agency ultimately agreed with Weetabix’s response, concluding that its cereal was not a HFSS product and that “the consumption shown was not excessive.” In addition, ASA noted that the slogan “FOR BREAKFAST AND BEYOND” “was likely to be interpreted as suggesting Weetos could also be eaten as a snack other than at breakfast time, rather than that they should be eaten excessively.” Its final assessment found that the commercial did not breach BCAP Code rules 13.2 and 13.3 (Food, food supplements and associated health or nutrition claims), with no further action necessary.

### German Antitrust Regulator Fines Chocolatiers over Illegal Price-Fixing Cartel

According to a news source, Germany’s Federal Cartel Office (BKA) has imposed €60 million (US\$81.4 million) in fines against 11 chocolate and confectionary companies, including the German subsidiaries of Kraft Foods and Nestlé SA, for allegedly establishing a cartel in the late 2000s to fix prices. While Nestlé has reportedly indicated that it will challenge the fines, claiming that the allegations are unjustified and that BKA misinterpreted the law, a Kraft spokesperson has apparently confirmed that the company will pay its fine.

BKA President Andreas Mundt said, “In 2007 raw materials prices for chocolate production such as milk and cocoa rose sharply. Companies obviously wanted

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to be sure they could pass these costs on to consumers. Competition with competitors was quickly switched off and consumers were burdened with price increases." Prices reportedly rose by as much as 25 percent. Company offices were searched after a whistleblower came forward in 2008, and the investigation apparently led to evidence supporting charges that varying combinations of the companies exchanged pricing information in a series of phone calls, traded information under the guise of a German confectionary association and held illegal, anti-competitive meetings. *See Reuters and Law360, January 31, 2013.*

### Texas Legislator Calls for Beverage Tax

Rep. Joe Farias (D-San Antonio) has proposed a [bill](#) (H.B. 779) that would impose a statewide penny-per-ounce tax on soft drinks, particular sweetened beverages and the powders and syrups used to make them. The tax would increase each year by the same percentage as the "most recent annual revised Consumer Price Index for All Urban Consumers." The legislation, which purportedly aims to fight obesity and supplement funding for health programs in public elementary and secondary schools, calls for 80 percent of the tax revenue collected to go to the Texas Education Agency and 20 percent to the Department of State Health Services.

The proposed tax would apply to all non-alcoholic, carbonated and non-carbonated beverages and mixes that contain natural or artificial sweeteners. Exceptions to the tax would be certain sports drinks, 100-percent fruit and vegetable juices, infant formula, milk products, and beverages containing sweeteners that do not add calories. Water, coffee and tea without caloric additives would be exempt as well. Those who sell or import the beverages into the state for sale would be required to pay the tax each month and file a report with the state controller's office detailing their sales and import figures. They would also be required to obtain an annual permit to sell the beverages. If enacted, the bill would impose a 50-percent penalty on those who fail to pay the tax or fail to file a report with the controller. Violations of the proposed bill would be considered a Class C misdemeanor.

This is apparently the second time Farias has tried to tax soft drink sales in Texas. He filed a similar bill in March 2011 that failed to pass. If enacted, the legislation would take effect September 1, 2013. *See Courthouse News Service, January 31, 2013.*

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**LITIGATION****DOJ Seeks to Stop Beer Merger**

The U.S. Department of Justice (DOJ) has filed an antitrust lawsuit against Belgian brewer Anheuser-Busch InBev SA/NV (ABI) and Mexican brewer Grupo Modelo S.A.B. de C.V., seeking to enjoin ABI's June 28, 2012, acquisition of Modelo. [United States v. Anheuser-Busch InBev SA/NV, No. 13-127 \(U.S. Dist. Ct., D.D.C., filed January 31, 2013\)](#). DOJ contends that the \$20.1 billion deal, which would combine the largest and third largest beer companies in the United States, "would substantially lessen competition for beer in the United States as a whole and in 26 metropolitan areas across the United States, resulting in consumers paying more for beer and having fewer new products from which to choose."

According to the complaint, Modelo is the only major beer company that has consistently resisted ABI's annual price increases and has gained a majority share of some markets in California, New York and Texas by pursuing an aggressive marketing strategy with innovative products and lower prices. Together, the companies would control about 46 percent of the \$80-billion annual U.S. beer market, and competitive pricing for beer would cease, claims DOJ. Efforts the companies apparently undertook to remedy the anticompetitive aspects of the agreement are outlined in the complaint; DOJ claims they are inadequate. DOJ seeks an order permanently enjoining the companies from carrying out the agreement and merger plan.

Among ABI's brands are Busch®, Bud Light®, Stella Artois®, Goose Island®, Beck's® and Michelob®. Modelo makes Modelo Especial®, Negra Modelo®, Victoria®, Pacifico®, and Corona Extra®. See *DOJ Press Release*, January 31, 2013.

**Putative Class Seeks New Recipe for Nestlé Frozen Pizzas**

A California resident has filed a putative nationwide class action against Nestlé USA, Inc., claiming that its use of partially hydrogenated vegetable oil (*trans* fat) in many of its frozen pizza brands, including DiGiorno®, Stouffer's® and California Pizza Kitchen® violates California's Unfair Competition Law and constitutes a nuisance under California Civil Code §§ 3479-3493. *Simpson v. Cal. Pizza Kitchen*, No. 13-164 (U.S. Dist. Ct., S.D. Cal., filed January 21, 2013). In addition to monetary damages, she seeks an order requiring the company to "cease using artificial *trans* fat as an ingredient in the Nestle *Trans Fat Pizzas*."

While the complaint includes detailed information about the purported risks of consuming *trans* fats and notes that California forbids its use in schools or restaurants in amounts greater than a half-gram per serving, nowhere does she allege what quantity of *trans* fat is used in the defendants' products or whether the products are mislabeled. Plaintiff Katie Simpson claims that using *trans* fat in pizza is "unnecessary" and attaches a list of dozens of competing products made without it.

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Claiming that she “lost money as a result of Defendants’ conduct described herein in that she purchased products that, because they were detrimental to her health, were unfairly offered for sale in violation of California law,” Simpson also calls their practices “immoral, unethical, unscrupulous, or substantially injurious to consumers.” She further contends that their conduct “injures competing manufacturers of frozen pizza that do not engage in” such behavior and that the defendants’ actions violate public policy by causing federal and state governments to pay “for treatment of trans fat-related diseases.” She seeks restitution, disgorgement, corrective advertising, a cease and desist order, and an order “abating Defendants’ injurious practices,” as well as interest, attorney’s fees, and costs.

Nestlé has reportedly issued a statement indicating that it was disappointed with the lawsuit and has confirmed in an email that “We plan to eliminate all added TFAs [*trans* fatty acids] in our pizzas by the end of June 2013.” According to a news source, it posted a YouTube® video after the suit was filed in which the president of the company’s pizza division claimed that Nestlé has reduced the amount of *trans* fats in its frozen pizza line by 50 percent since acquiring the business in 2010, the company would have them all removed by this summer, and *trans* fats are clearly marked on package ingredient labels. See *Brandchannel.com*, January 31, 2013.

### Fourth Lawsuit Challenges Length of Subway’s Sandwiches

In addition to a lawsuit filed in Illinois and two filed in New Jersey, a fourth has been filed against Subway Sandwich Shops Inc. in Pennsylvania, alleging that the company’s “Footlong” sandwich “consistently measures significantly less than twelve inches in length.” *Roseman v. Subway Sandwich Shops, Inc.*, No. 130102647 (Philadelphia Cnty. Pa. Ct. Com. Pl., filed January 24, 2013). Information about two of the other lawsuits appears in Issue [468](#) of this *Update*.

The Pennsylvania complaint alleges that this size discrepancy “is not an accident” and that the company knew about the discrepancy “since Subway named its large sandwich the ‘Footlong’ sometime prior to January 24, 2007.” Seeking to certify a class of all persons who purchased a “Footlong” sandwich from a Pennsylvania Subway restaurant since that date, the plaintiff, a New Jersey resident who purports to work in Pennsylvania and regularly purchased the disputed sandwiches in Philadelphia, alleges violations of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law. He asks for damages, treble damages, attorney’s fees, costs, and injunctive and declaratory relief. See *Law360*, January 15, 2013.

### Dole Agrees to Work on Guatemalan Water Project to Settle Misrepresentation Claims

Without admitting liability, Dole Food Co. has reportedly settled a putative class action that claimed the company misrepresented its environmental practices in

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Guatemala. *Laderer v. Dole Food Co. Inc.*, No. 12-09715 (U.S. Dist. Ct., C.D. Cal., Los Angeles, motion to dismiss filed January 26, 2013).

According to the complaint, the plaintiff would not have purchased the company's bananas or "paid as much for them," had he known that its "production methods contaminate water supplies, destroy wetlands, cause flooding, destroy the crops of local communities, and/or cause illnesses in children." The complaint cited company materials indicating its "unwavering commitment" to "environmental responsibility and social accountability" and alleged violation of consumer fraud laws.

Under the agreement, "[i]n coordination with social programs already undertaken by Dole's independent grower in Guatemala, Dole and the non-profit organization Water and Sanitation Health, Inc. will collaborate together on a water filter project to assist the local communities in Guatemala." According to the company, its grower "is fully certified by numerous independent certifying agencies" and "is already a long-standing champion for the local communities," making "significant charitable contributions to enhance social welfare, health, and well-being." See *Business Wire*, January 25, 2013.

### OTHER DEVELOPMENTS

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#### PepsiCo to Remove BVO from Gatorade

Apparently motivated in part by an online petition started by a 15-year-old from Mississippi, PepsiCo has reportedly decided to remove brominated vegetable oil (BVO), a flame retardant, from Gatorade®. Sarah Kavanagh posted the petition on Change.org after she read about studies linking BVO to possible health effects, and it was signed by more than 200,000 who agreed with her call for its removal. Additional information about the petition appears in Issue [463](#) of this *Update*. The company will not remove BVO from Mountain Dew® products.

A company spokesperson reportedly said that PepsiCo has been testing alternatives for about a year, but because it continues to believe that the ingredient is safe, was not going to change the formulation until the petition met with such a response. Kavanagh taped a segment for "The Dr. Oz Show" and visited *The New York Times* while she was in New York. When she learned about PepsiCo's announcement a few days later, she excused herself from algebra class to call her mother, saying "Mom, we won."

New York University Nutrition Professor Marion Nestle observed on her blog, "A teenager with social media skills accomplished what CSPI [the Center for Science in the Public Interest] has been trying to do for *decades*." CSPI Executive Director Michael Jacobson applauded PepsiCo's decision, but also noted, "Gatorade without BVO is nutritionally no better than with it. A typical 20-ounce bottle has 130 calories, all from its 34 grams of refined sugars, which promote obesity, diabetes, and heart disease." Nestle also reported that the Food and Drug Administration



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“removed BVO from its list of ingredients Generally Recognized As Safe in 1970, but in 1977 allowed companies to use it on an ‘interim’ basis. It says getting rid of it is ‘not a priority.’” See *CSPI News Release* and *The New York Times Diner’s Journal*, January 25, 2013; *Food Politics*, January 29, 2013.

### **Kelly Brownell to Lead Duke University’s Sanford School of Public Policy**

Duke University has announced the selection of Kelly Brownell, who currently directs Yale University’s Rudd Center for Food Policy and Obesity, as dean of its Sanford School of Public Policy. According to a January 30, 2013, news release, Brownell will replace the Sanford School’s founding dean, Bruce Kuniholm, as head of undergraduate and graduate studies, which focus on “child and family policy, national security, international development and many other issues facing society.”

The Sanford School’s announcement highlights Brownell’s work on nutrition policy, as well as his highly publicized stance against “big sodas” and his contributions to both the public and academic discourse on the topic of obesity. “In Kelly Brownell we have a new dean ready to take the Sanford School to the next level after the superb leadership of Bruce Kuniholm,” said Duke Provost Peter Lange. “Kelly has an extraordinary record as a researcher while also being deeply committed to translating his findings into meaningful public policy to improve the lives of people. He understands the deeply interdisciplinary nature of that effort and recognizes how Sanford can be positioned to expand its impact.”

### **Burger King Drops UK Supplier Implicated in Horsemeat Scandal**

Burger King has reportedly dropped one of its suppliers after finding traces of horse DNA in beef provided for sale in the United Kingdom and Ireland. The restaurant chain apparently tested its own products in the wake of a Food Safety Authority of Ireland (FSAI) investigation that allegedly found horse DNA in beef patties and meals linked to three processing plants, one of which apparently received its product from a Polish distributor.

“Our independent DNA tests results on product taken from Burger King® restaurants were negative for any equine DNA. However, four samples recently taken from the Silvercrest plant have shown the presence of very small trace levels of equine DNA,” said a company statement on *PR Newswire*. “This product was never sold to our restaurants. Within the last 36 hours, we have established that Silvercrest used a small percentage of beef imported from a non-approved supplier in Poland. They promised to deliver 100% British & Irish beef patties and have not done so. This is a clear violation of our specifications, and we have terminated our relationship with them.” Additional details about the FSAI investigation appear in Issue [467](#) of this *Update*. See *the Daily Mail* and *Bloomberg BusinessWeek*, January 31, 2013.

**New Study Reexamines Role of Egg Consumption in Coronary Heart Disease**

A recent meta-analysis has reportedly concluded that, contrary to previous assumptions, “higher consumption of eggs (up to one egg per day) is not associated with an increased risk of coronary heart disease [CHD] or stroke.” Ying Rong, et al., “Egg consumption and risk of coronary heart disease and stroke: dose-response meta-analysis of prospective cohort studies,” *British Medical Journal*, January 2013. To investigate “the potential dose-response association between egg consumption and risk of [CHD] and stroke,” researchers analyzed eight articles with 17 reports totaling 3,081,269 person years and 5,847 incident cases for CHD and 4,148,095 person years and 7,579 incident cases for stroke.

The results evidently failed to show any significant association between consuming up to one egg per day and the risk of developing CHD or stroke, although in diabetics “higher egg consumption was associated with a significantly elevated risk of [CHD].” To explain these findings, the study’s authors not only suggested that the effects of dietary cholesterol on blood cholesterol concentrations “are relatively small,” but that “epidemiological studies have found weak or little association between dietary cholesterol intake and cardiovascular disease risk.”

“Apart from dietary cholesterol, saturated fat and dietary patterns might also influence blood cholesterol levels, suggesting that compliance with general dietary recommendations instead of simply reducing egg consumption could have a greater effect on the risk of cardiovascular disease,” they concluded. “Additionally, individual differences in response to dietary cholesterol vary greatly, which could affect the association between egg consumption and risk of coronary heart disease and stroke.”

**SSB Intake Allegedly Alters Cardiometabolic Markers in Children**

A recent analysis of young children enrolled in the National Health and Nutrition Examination Survey (NHANES) 1999-2004 has reportedly claimed that sugar-sweetened beverage (SSB) consumption “was independently associated with alterations in lipid profiles, increased markers of inflammation, and increased waist circumference in children.” Ethan Kosova, et al., “The Relationships between Sugar-Sweetened Beverage Intake and Cardiometabolic Markers in Young Children,” *Journal of the Academy of Nutrition and Dietetics*, February 2013. Analyzing data from 4,880 NHANES participants ages 3 to 11, the study relied on 24-hour dietary recall interviews to gauge SSB consumption in addition to examining the following cardiometabolic markers: (i) total cholesterol concentrations, (ii) high-density lipoprotein (HDL) cholesterol, (iii) low-density lipoprotein (LDL) cholesterol, (iv) triglyceride, (v) C-reactive protein (CRP), (vi) waist circumference, and (vii) body mass index percentile for age-sex.

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According to the study, multivariate linear regression analyses evidently demonstrated that “SSB intake in children aged 3 to 11 years is positively associated with known cardiovascular disease factors.” In particular, the authors noted that SSB intake was independently associated with lower HDL cholesterol levels, increased waist circumference and increased CRP concentrations, a measure of systemic inflammation. “This is the first study to examine SSB intake in young children and its associations with cardiometabolic markers,” conclude the authors. “Although prospective studies are needed to confirm these results, our study adds to the mounting evidence now present across all age groups about the potential deleterious effects of SSB intake on cardiovascular and metabolic health.”

### Dietary Quality of Fast-Food Menus Criticized

A study evaluating “five popular fast-food chains’ menus in relation to dietary guidance” has allegedly concluded that despite varied offerings, full menus “scored lower than 50 out of 100 possible points on the HEI-2005 [Healthy Eating Index-2005].” Sharon Kilpatrick, et al., “Fast-food menu offerings vary in dietary quality, but are consistently poor,” *Public Health Nutrition*, January 2013. Researchers with Yale University’s Rudd Center for Food Policy and Obesity, Arizona State University and the National Cancer Institute analyzed the total nutritional content of menus from Burger King, McDonald’s, Subway, Taco Bell, and Wendy’s using the HEI-2005 to calculate scores for all 12 index components for a total of 100 points. Nine of these components evidently “assess adequacy of amounts of food groups and oils in relation to MyPyramid recommendations, whereas the remaining three are referred to as moderation components because they measure constituents that should be limited in the diet (i.e. Saturated Fat, Sodium, Calories from Solid Fats and Added Sugars).”

According to the study, the HEI-2005 results revealed that fast-food menu scores “for Total Fruit, Whole Grains and Sodium were particularly dismal,” with no menu or subset of menu items receiving a score higher than 72 out of 100 points even though “kids’ menus scored 10 points higher on average” and items marketed as healthy or nutritious “scored 17 points higher on average” compared to the full menu. “The addition of fruits, vegetables, and legumes; replacement of refined with whole grains; and reformulation of offerings high in sodium, solid fats and added sugars are potential strategies to improve fast-food offerings,” argue the study’s authors. “The HEI may be a useful metric for ongoing monitoring of fast-food menus.”

### Dutch Marketing for Functional Food Product Reveals Regulatory Shortcomings

Dutch social and political science professors have presented a case study on marketing a functional food in the European Union (EU) to demonstrate that non-textual marketing, which the European Food Safety Authority (EFSA) is apparently ill-equipped to regulate, plays a larger role in consumer purchasing decisions than textual product messages. Herman Lelieveldt and Cris Boonen, “EU Health

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Claims Regulation and the Marketing of Functional Foods: A Regulatory Void?," 3 *European Journal of Risk Regulation* 577 (2012).

They considered a marketing campaign for Optimel Control®, a yogurt drink first launched in the Netherlands in 2007 with great success but later withdrawn after expansion to other countries due to insufficient sales volume. It contained an ingredient that EFSA ruled in 2011 was not effective to control or manage weight.

According to the study, the textual health claims constituted "a relatively small element in conveying the 'stay in control' message of Optimel Control." Those claims, which were allowed at the time, were actually "a very small element in the full marketing campaign," which featured wasp-waisted bottles and videos of women who could apparently stay slim by the simple expedient of consuming the yogurt rather than working out or dieting. By studying social media messages, the authors concluded that consumers associated the product with rapid weight loss "even if the textual health claims of Optimel were more modest than that. The massive non-textual marketing campaign led consumers to interpret the health effects of Optimel differently from the carefully stated textual claims Optimel used."

Noting that the EU regulatory framework does not "sufficiently take account of non-textual claims" and that asking EFSA "or another agency to also start evaluating non-textual claims as part of pre-market approval of products" would "amount to a regulatory nightmare," the authors suggest that non-textual product messages be regulated by means of unfair commercial practices legislation. This would, according to the authors, allow "for a monitoring of deceptive practices at the national level by the appropriate authorities."

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

