Shook, Hardy & Bacon L.L.P.

ISSUE 471 | FEBRUARY 15, 2013

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATIONS, REGULATIONS AND STANDARDS

FTC Alters Four Loko Flavored Malt Beverage Labeling Requirements

Evidently in response to public comments, the Federal Trade Commission (FTC) has modified its agreement with Phusion Projects, LLC to require an alcohol facts panel on certain sized cans of its Four Loko fruit-flavored malt beverage. ***In re Phusion Projects, LLC*, No. C-4382 (FTC, order entered February 6, 2013)**. The agreement resolves charges that the company and its principals falsely claimed that a 23.5-ounce can contained "the alcohol equivalent of one or two regular 12-ounce beers, and that a consumer could drink one entire can safely on a single occasion." To the contrary, according to FTC's administrative complaint, the products contain the alcohol equivalent of four to five 12-ounce cans of beer.

Without admitting liability, the company has agreed to label any container of Four Loko or other flavored malt beverage with more than two servings of alcohol with an alcohol facts panel. The panel will set forth the "the container size, percentage alcohol by volume, number of servings in the container, and serving size in fluid ounces." U.S. dietary guidelines deem 0.6 ounces of pure alcohol to constitute a single serving. The agreement also requires that any container with more than 2.5 servings of alcohol be made resealable by August 6, 2013. The company will not be permitted to "depict any covered product containing 1.2 or more fluid ounces of ethanol being consumed directly from the container." *See FTC News Release*, February 12, 2013.

FDA Consent Decree with Juice Company Requires Hiring of Labeling Expert

The Food and Drug Administration (FDA) recently entered a consent decree with Puerto Rico-based Jonlly Fruits, Inc. requiring the company to hire independent experts in labeling, sanitation and Hazard Analysis Critical Control Point (HACCP) before it can begin again to make and sell its fruit and juice products. *United States v. Jonlly Fruits, Inc.*, No. 13-1043 (U.S. Dist. Ct., D.P.R., approved January 17, 2013).

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

or

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

The labeling expert is required to "review Defendants' labeling and ensure that all such labels are in compliance with the applicable FDA regulations." The other experts are required to develop written protocols and employee training programs and to conduct comprehensive facility inspections. In the meantime, the company has agreed to destroy "all in-process and finished articles of food" currently in its custody, control or possession.

According to FDA, the company and its president, Bartolo Pérez Romàn, "have a long history" of failing to comply with current good manufacturing practice and the juice HACCP regulations. The company's products have allegedly been prepared under "insanitary conditions" and "bear nutrient content claims such as 'light,' and 'no sugar,' without complying with FDA regulations for such claims." A March 2011 warning **letter** to the company cited violations discovered during a two-week inspection in 2010. *See FDA News Release*, January 25, 2013.

FDA Extends Comment Deadline for GE Salmon Assessments

The Food and Drug Administration (FDA) has **extended** until April 26, 2013, the comment period for two draft environmental assessments of the proposed conditions of use submitted by AquaBounty Technologies, Inc., in support of a new animal drug application concerning a genetically engineered (GE) Atlantic salmon and a preliminary finding of no significant impact for those specific conditions of use.

FDA has pushed back the deadline in response to "a request for an extension to allow interested persons additional time to submit comments." Additional details about the proposed rule appear in Issue **466** of this *Update*. *See Federal Register,* February 14, 2013.

FDA Meetings to Target Produce Safety Standards

The Food and Drug Administration (FDA) has **announced** two additional public meetings to discuss 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 preventive controls for human food (the preventive controls proposed rule). The meetings are scheduled for March 11-12 in Chicago and March 27-28 in Portland, Oregon.

FDA anticipates that the proposed produce safety rule would "reduce foodborne illnesses associated with the consumption of produce." The proposed preventative controls rule would evidently apply to human food and require domestic and foreign facilities that must register under the Federal Food, Drug, and Cosmetic Act to have written plans that identify hazards, specify the steps that will be put in place to minimize or prevent those hazards, monitor results and act to correct problems that arise. *See Federal Register*, February 13, 2013.

Horsemeat Investigation Spreads Across EU

Citing public concerns about the presence of horsemeat in beef products, European Union (EU) Health and Consumer Policy Commissioner Tonio Borg recently called an emergency meeting of agricultural ministers and urged member states to conduct random DNA testing on processed beef products for three months beginning March 1, 2013. The measure builds on an ongoing investigation initiated by the U.K. Food Safety Agency (FSA) and Food Safety Authority of Ireland, which first reported finding equine and porcine DNA in beef products in January 2013 and have since ramped up testing protocols after other member states, including France and Germany, allegedly received contaminated products from suppliers across the European Union. *See European Food Safety Authority,* February 11, 2013.

According to various media reports, retailers in 16 countries have sold mislabeled horsemeat to millions of consumers, a development that has prompted officials to demand criminal sanctions against those deemed responsible for what French President Francois Hollande called an "abuse of profits and unacceptable behavior." Regulators have apparently traced some of the meat in question from local suppliers through distributors in France, Cyprus and the Netherlands, and ultimately to abattoirs in Romania. "There are plants and companies in Romania exporting horsemeat but everything was according to the standards, and the source and the kind of meat was very clearly put as being horsemeat," Romanian Prime Minister Victor Ponta told two reporters in separate interviews. "We checked all the production facilities, and it's now very clear that no fraud has been committed by Romanian companies or under Romanian territory." *See The Irish Examiner* and *The New York Times,* February 11, 2013; *BBC News,* February 11 and 13, 2013; *Associated Press,* February 13, 2013.

Meanwhile, FSA has already raided one meat plant in West Yorkshire suspected of supplying horse carcasses to another processor and made arrests at both companies. "I ordered an audit of all horse producing abattoirs in the U.K. after this issue first arose last month and I was shocked to uncover what appears to be a blatant misleading of consumers," said FSA Director of Operations Andrew Rhodes. "I have suspended both plants immediately while our investigations continued." *See FSA Press Releases,* February 12 and 14, 2013.

Additional details about the horsemeat investigation appear in issues **467**, **469** and **470** of this *Update*.

UK Agency Upholds Complaint Targeting Weetabix App

The U.K. Advertising Standards Authority (ASA) has **upheld** a complaint lodged by the Family and Parenting Institute (FPI) against Weetabix Ltd.'s product-branded app, concluding that the "WeetaKid" game, which prompted players to scan QR codes during game-play, "was persuasive and negative,

and could lead children to understand that if they did not eat Weetabix they were failing in some way." Focusing on several online games created by Weetabix, FPI apparently challenged whether (i) the WeetaKid app "exploited the credulity, loyalty, vulnerability or lack of experience of children by making them feel inferior or unpopular for not buying a product"; (ii) the WeetaKid app "included a direct exhortation to children to buy an advertised product"; (iii) advergames "on the Weetos and Nickelodeon websites were obviously identifiable as marketing communications"; and (iv) some of the advergames "advertised Weetos Bars, which would be classified as a product high in fat, salt or sugar (HFSS), and therefore condoned or encouraged poor nutritional habits or an unhealthy lifestyle in children."

Although ASA dismissed the other three complaints after reviewing Weetabix's response to the allegations, the agency ultimately agreed with FPI that the WeetaKid app failed to adequately distinguish between "the WeetaKid 'world' as a whole" and actions that children might take in the real world. In particular, ASA took issue with "the language and tone" of prompts such as "What?! No Weetabix?! Why make things harder for yourself?" and "Tired is not a good look for you. Why not eat something?," partly because it was unclear whether such exhortations were directed at the in-game character or the player. The agency also faulted the app for giving players the impression that scanning product QR codes to "re-energize" the character at the outset of the game would result in better performance, even though this was not actually the case.

"We considered it likely that children would understand that scanning the QR code on a Weetabix pack would improve WeetaKid's performance in the games, and if they had not done so they would miss out on part of the functionality of the app and would not be able to do as well in the game as they otherwise would," stated ASA. "We therefore considered it likely that children would ask their parents to purchase Weetabix in order that they could scan the QR code, and we were concerned that the frequency with which the prompts appeared would be likely to prompt children to ask their parents to purchase Weetabix on a frequent basis."

Based on these considerations, ASA ruled that the WeetaKid app breached CAP Code (Edition 12) rules 5.2 and 5.2.1 (Credulity and Unfair Pressure) by allegedly exploiting "children's credulity and vulnerability" and making them "feel inferior if they did not eat, buy or encourage their parents to buy Weetabix." *See ASA Decision,* February 13, 2013.

BPA Ban Proposed in New Jersey

Joining the nearly dozen states that have enacted laws to restrict bisphenol A (BPA) in food packaging—particularly with respect to children's food and beverage containers—New Jersey lawmakers have introduced a **bill** that

would make it illegal to sell or distribute food and beverage containers intended for use by young children that contain the chemical.

The bill cites BPA studies alleging "cause for concern about the hazards of exposure to it, such as possible neural and behavioral effects caused by BPA in utero, and further concern that the chemical could cause problems in developing fetuses and young children."

Introduced by Assemblyman Troy Singleton (D-Burlington) and known as the "Child Food and Beverage Packaging Act," the legislation would make it "an unlawful consumer fraud practice for a person to sell, offer for sale or distribute for sale in the state a food or beverage storage container made with or composed of BPA and intended for use by young children."

Beverage Tax Proposed in Rhode Island and Vermont

A group of Rhode Island legislators has proposed a **bill** that would impose a statewide penny-per-ounce tax on sugar-sweetened beverages. More specifically, the tax would apply to "any nonalcoholic beverage, whether naturally or artificially flavored, whether carbonated or noncarbonated, sold for human consumption, containing sugar, corn syrup or any other high-calorie sweetener, including, but not limited to, cola and other flavored drinks, and all other drinks and beverages commonly referred to as 'soft drinks,' 'sodas,' 'sports drinks' or 'energy drinks.'"

Exemptions to the tax would include 100-percent fruit and vegetable juices, infant formula and milk products. Products intended by manufacturers for use as dietary supplements or for weight-reduction aids would be exempt as well.

Meanwhile, Vermont lawmakers have proposed a similar bill that would impose a penny-per-ounce **tax** on the sale of beverages containing added sugar or high-fructose corn syrup. Fifty percent of the revenues generated would be directed to the State Health Care Resources Fund, while the other half would evidently subsidize the Vermont Healthy Weight Initiative. *See BurlingtonFreePress.com,* February 6, 2013.

LITIGATION

FDA Claims No Obligation to Ban Use of Antibiotics in Animal Feed

During oral argument before a Second Circuit Court of Appeals panel, the Food and Drug Administration (FDA) reportedly argued that it had "no obligation" to complete proceedings that the agency initiated to withdraw approval from certain uses of antibiotic drugs in livestock. *Natural Res. Def. Council v. FDA*, No. 12-2106 (2d Cir., argued February 8, 2013). Assistant U.S. Attorney Ellen London said, "It's completely discretionary as to when to enforce the

law as to certain drugs," in urging the court to reverse a district court order requiring it to hold the withdrawal proceedings announced in 1977 notices. According to a news source, one of the panel judges appeared to agree with FDA's position, suggesting that it could, in theory, be forced to divert resources from high priorities on the basis of lawsuits filed against it.

More information about lower court rulings in the case appear in Issues 432 and 442 of this *Update*. *See Law360*, February 8, 2013.

Ninth Circuit Returns Contaminated Burger Case to District Court

The Ninth Circuit Court of Appeals has reversed a district court ruling dismissing the emotional distress claims filed by a deputy sheriff who alleged that Burger King employees served him a hamburger tainted with spit, in light of a Washington Supreme Court ruling that the state's product liability law would allow relief for emotional distress damages in the absence of physical injury. ***Bylsma v. Burger King Corp.*, No. 10-36125 (9th Cir., decided February 12, 2013)**. Details about the state high court ruling in response to the question certified to it by the Ninth Circuit appear in Issue 470 of this *Update*.

The Ninth Circuit remanded the matter to the district court with instructions to give the deputy sheriff the opportunity to amend his complaint to conform to Washington law and then to allow the lower court to determine whether he has pleaded "the necessary facts to support his emotional damages claim under the [state's product liability law] as now interpreted." The sheriff did not consume the hamburger once he observed the contamination, but still claimed that he had lingering physical and emotional problems that required professional treatment.

Anheuser-Busch to Sell Brewery & U.S. Beer Rights to Fend Off DOJ Antitrust Claims

In the wake of an antitrust lawsuit filed by the U.S. Department of Justice (DOJ) seeking to enjoin the acquisition of Mexican brewer Grupo Modelo, Anheuser-Busch InBev (ABI) has reportedly agreed to sell a massive Modelo brewery, including full U.S. rights to the Corona® and Modelo® brands, to Constellation Brands, said to be the world's largest wine company, for $2.9 billion. Additional information about the antitrust litigation appears in Issue 469 of this *Update*. The brewery, Compañía Cervecera de Coahuila, situated near the U.S.-Mexico border, produces Corona®, Corona Light® and Modelo Especial®.

Constellation, which filed a motion to intervene in the DOJ lawsuit to protect its interests, stands to gain greater access to the American beer market under a revised agreement that would establish Constellation's Crown Imports beer division as completely independent. Under the deal's original terms, Constellation would have paid its joint venture partner Modelo $1.85 billion for the

50-percent share it does not already own in Crown Imports, but would have entered an exclusive agreement with ABI to supply Constellation with Modelo beer to import into the United States.

If DOJ were to prevail, it was apparently anticipated that Modelo would seek to buy out Constellation's stake in Crown, a move that would leave Constellation with a predominantly wine-based business characterized by "agricultural volatility and little brand loyalty." Among Constellation's brands are Robert Mondavi® and Ravenswood®. After the revised agreement became public, Constellation's share price reportedly climbed nearly 36 percent in early trading on February 14, 2013.

DOJ's concern with the original agreement was that it would increase ABI's control of the American beer market and allow it to charge more for the products while reducing choice for local consumers. ABI CEO Carlos Brito reportedly said, "We decided to restructure the transaction to address concerns from the Justice Department. We are focused on getting this to the finish line." DOJ did not offer any comment on the proposal other than to indicate that it would give any proposal serious consideration as it continues "to prepare for litigation." *See Reuters*, February 8, 2013; *The New York Times*, February 14, 2013.

Court Orders Attorney to Cease Facebook® Criticism of Halal Fraud Settlement

A Michigan court has reportedly entered an order specifying what will appear on the Facebook® page of the attorney who filed a complaint seeking to set aside a settlement resolving claims that a McDonald's Corp. franchisee purported to sell halal chicken when some of the products were not prepared according to Islamic law. Additional details about the settlement appear in Issue **468** of this *Update*.

The court ordered Dearborn-based attorney Majed Moughi to remove any criticism of the proposed settlement from the site, which is apparently popular as a source of news in the Muslim community—drawing 20,000 views each month, prominently post the settlement agreement itself, provide the names of anyone who "liked" or supported the original post, and refrain from discussing the settlement with anyone who might be affected or the media. According to a news source, the Facebook® page has effectively become static because any new posts or comments must be removed to keep the settlement "front and center."

Moughi apparently contended in the complaint, which the court has dismissed, that the settlement fund should be distributed as cash awards to those who purchased and consumed the allegedly non-halal products in violation of their faith rather than be paid to a museum that is not connected to Islam or to a clinic in a Detroit mosque that is not likely to be used by the Dearborn residents who frequented the fast-food restaurant at issue in the

litigation. Moughi reportedly referred to the settlement as a "backroom deal" on his Facebook® page and drew some 1,300 supporters.

The attorneys for the class and McDonald's apparently sought the court's orders to stop Moughi from making what they contended were false and defamatory statements about the settlement. The judge's order has generated concerns among civil liberties groups that claim it is "clearly overbroad on its face and unconstitutional." Others have evidently said that the order is sufficiently narrow and that the First Amendment does not protect the "right to deceive and mislead people about their rights under a class action settlement." *See USAToday,* February 4, 2013; *Detroit Free Press*, *ABA Journal* and *UPI,* February 13, 2013.

Court Provides Roadmap for Plaintiff to Amend False Claims Suit Against Tea Company

A federal court in California has deferred ruling on the motion to dismiss filed in a consumer protection lawsuit against R.C. Bigelow, Inc. to give the plaintiff an opportunity to amend her complaint. *Khasin v. R.C. Bigelow, Inc.*, No. 12-2204 (U.S. Dist. Ct., N.D. Cal., order entered February 6, 2013). Indicating that it was inclined to allow most of her state-law claims to proceed and to dismiss her federal claims, the court counseled the defendant "that the Court did not find its arguments regarding preemption and abstention under the doctrine of primary jurisdiction persuasive."

According to the court, the plaintiff has filed claims on behalf of a putative class alleging that the company misrepresents the health benefits of drinking tea and promotes and labels its green tea products with antioxidant assertions "expressly condemned by the Food and Drug Administration [FDA]." The court found the substance of many of the plaintiff's allegations unclear or too detailed in terms of FDA regulation and recommends that she amend the complaint to clarify (i) "what statements and/or omissions mislead reasonable consumers or misbranded Bigelow's tea products," (ii) "what specific statements Plaintiff viewed on Bigelow's website before she purchased Bigelow's tea and relied upon in making such purchases," and (iii) "when she viewed each alleged statement."

The court also urged her to allege, as to class members who purchased other Bigelow products, "how the packaging on these unspecified tea products is similar to the packaging on Green Tea with Lemon or the other two teas she purchased." Noting that it was also inclined to limit the claims to the green tea products, the court urged the plaintiff, if she files an amended complaint no later than March 1, 2013, "to show that the Court would have jurisdiction under CAFA [the Class Action Fairness Act] of this more narrowed purported class."

Colorado Supreme Court Disqualifies Marler Clark from Food-Borne Illness Suit

A divided Colorado Supreme Court has determined that a trial court did not abuse its discretion when it refused to grant the motion for *pro hac vice* admission filed by Seattle-based law firm Marler Clark to represent a plaintiff in a food-borne illness lawsuit. ***In re Liebnow v. Boston Enters. Inc.*, No. 12SA83 (Colo., decided February 4, 2013)**.

Counsel for the defendant had apparently consulted with Drew Falkenstein, a member of the Marler Clark firm, before plaintiff's counsel asked another member of the firm to step in and represent the plaintiff. Defense counsel and Falkenstein "talked about defense counsel's planned theory of the case," advice on a trial expert and Falkenstein's recommendation that a lettuce distributor be added as a nonparty defendant after he had researched *E. coli* outbreaks using Marler Clark's publicly accessible database and finding such an outbreak at another local restaurant chain. "[T]he trial court concluded that Falkenstein's consultation with defense counsel created a nonwaivable conflict of interest that would prohibit him from representing the plaintiff" under a professional conduct rule and imputed the conflict to the Marler Clark firm.

The state supreme court majority agreed, finding that the conduct rule "applies not only to attorney-client relationships but also to attorneys' relationships with third persons." Citing ABA Opinion 98-411, which cautions that consultations between lawyers may trigger a conflict of interest that could restrict the consulted lawyer's ability to represent a current or future client, the court found it applicable here where defense counsel "revealed confidential information about her case, including her theory of the case and trial strategy, that could materially limit the consulted attorney's ability to represent the opposing party in this case due to the consulted attorney's potential responsibility to keep the information confidential." Defense counsel changed her theory on Falkenstein's advice and decided to use the recommended expert. Among other matters, the supreme court also noted that "it would not be possible for Falkenstein to cross-examine the expert without the jury hearing about his recommendation."

The two dissenting jurists argued that the majority did not give sufficient consideration to a plaintiff's choice of counsel or to the "requirement that significant prejudice be found before disqualification is appropriate." According to the dissenters, "the majority erroneously disqualified counsel in this case and, moving forward, needlessly chills the casual consultations among attorneys that are so vital to the profession."

Danone to Cease Labeling New Brand as "Greek Yogurt"

According to a press report, the U.K. High Court has ordered Danone to remove any reference to "Greek yogurt" on the packaging for its newly launched product Danio®. The matter is currently before the court in litigation involving Greece-based yogurt maker Fage, which sued U.S.-based Chaboni Inc. in November 2012 after that company launched its "Greek yogurt" product line in the United Kingdom. While Danone is not apparently required to remove offending products already on store shelves under the injunction, it began complying with the January 30, 2013, court order on products made after that date.

In a statement Danone said, "This ruling is in place until the High Court has determined, as part of a separate case with another manufacturer, whether the use of 'Greek yogurt' is only possible for yogurt produced in Greece or if it refers to a particular type of yogurt made using a specific process. In the meantime we will continue to consider our legal position with regard to these proceedings." Danone also reportedly said that the term was used on Danio® labels because it refers to the straining process that thickens the yogurt and makes it high in protein. "We stand by our position that 'Greek yogurt' refers to the way in which the product is made and does not hold a protected designation of origin status, either in the UK or abroad." *See DairyReporter.com*, February 13, 2013.

OTHER DEVELOPMENTS

CSPI Urges FDA to Set Limit for "Added Sugars" in Beverages

The Center for Science in the Public Interest (CSPI) has **submitted** a petition to the Food and Drug Administration, asking the agency to set limits on the amount of sucrose and high-fructose corn syrup (HFCS) allowed in beverages. CSPI also implores FDA to make the Generally Recognized As Safe (GRAS) status of HFCS and sucrose contingent on such limits, which would gradually be phased-in, while calling on the agency to (i) "revise the 'Sugars' line on Nutrition Facts labels to address 'added sugars'"; (ii) "set targets for lower levels of added sugars in foods (apart from soft drinks and other beverages) that provide significant amounts of sugar to the general populations or population sub-groups"; (iii) "conduct a public education campaign to encourage consumers to consume less added sugars"; and (iv) "work with the food industry and interested federal, state, and local agencies to encourage reduced use and consumption of added sugars—including encouraging (1) limits on the sale of over-sized beverages containing added sugars in restaurants and from vending machines and (2) the development of means of reducing the use of added sugars."

In particular, the petition argues that the "current scientific consensus is that added sugars are unsafe at the levels consumed," according to a February 13, 2013, press release. Although the petition stops short of recommending a "safe" amount of added sugars, CSPI nevertheless cites 10 grams as "as reasonable limit" previously identified by health agencies for use in beverages. "Like a slow-acting but ruthlessly efficient bioweapon, sugar drinks cause obesity, diabetes, and heart disease," said CSPI Executive Director Michael Jacobson. "The FDA should require the beverage industry to re-engineer their sugary products over several years, making them safer for people to consume, and less conducive to disease."

Meanwhile, public health officials from Baltimore, Boston, Los Angeles, Philadelphia, Seattle, and other cities signed a February 13, 2013, **letter** to FDA Commissioner Margaret Hamburg in support of the petition. "The food and beverage industries—manufacturers, restaurants, and supermarkets—market high-sugar foods and beverages aggressively and have made little effort to reduce the sales and/or the sugar content of those products," opine the signatories. "Just as the Institute of Medicine and state and local health officials have urged regulatory action to lower sodium consumption, we urge the FDA to (a) adopt regulatory and voluntary measures to reduce the amounts of added sugars in beverages to safe levels; (b) encourage industry to voluntarily reduce sugar levels in and the marketing of other high-sugar foods; and (c) mount, perhaps together with the Centers for Disease Control and Prevention and U.S. Department of Agriculture, a high-profile education campaign to encourage consumers to choose lower-sugar or unsweetened foods and beverages."

CSPI Blasts Girl Scouts of America for Misleading Consumers

Girl Scouts of America is facing sharp criticism from the Center for Science in the Public Interest (CSPI) for marketing new mango-flavored crème cookies as a "delicious" and "nutritious" snack, with "all of the nutrient benefits of eating cranberries, pomegranates, oranges, grapes, and strawberries." In a **letter** to Girl Scouts of America CEO Anna Maria Chávez, CSPI asserts that by marketing these new cookies as a "delicious new way to get your vitamins," the youth organization is "misleading its members and undermining their health."

CSPI further alleges that the cookies not only lack the "nutrient benefits" claimed on the Girl Scouts' Website, but contain "4 grams of heart-disease promoting saturated fat and 11 grams of tooth-decaying sugars per three-cookie serving." The health advocacy watchdog encourages the organization to stop marketing the cookies as "healthful" and seek other ways of fundraising.

CAMY Identifies Alcohol Brands Associated with Underage Drinking

The Boston University School of Public Health and Johns Hopkins Bloomberg School of Public Health's Center on Alcohol Marketing and Youth (CAMY) have published a study identifying alcohol brands allegedly consumed by underage youth. Michael Siegel, et al., "Brand-Specific Consumption of Alcohol Among Underage Youth in the United States," *Alcoholism: Clinical & Experimental Research,* February 2013. According to a February 11, 2013, CAMY press release, the top 25 brands that study participants reported consuming during a 30-day period "account for nearly half of youth alcohol consumption," with 27.9 percent of study participants reporting that they consumed Bud Light, 17 percent reporting that they consumed Smirnoff malt beverages, and 14.6 percent reporting that they consumed Budweiser.

The study's authors reportedly based their findings on Internet surveys completed by 1,032 participants aged 13 to 20 years who responded to questions about "their past 30-day consumption of 898 brands of alcohol among 16 alcoholic beverage types, including the frequency and amount of each brand consumed in the past 30 days." The results evidently showed that "of the top 25 consumed brands, 12 were spirits brands (including four vodkas), nine were beers, and four were flavored alcohol beverages."

"For the first time, we know what brands of alcoholic beverages underage youth in the U.S. are drinking," said CAMY Director David Jernigan. "Importantly, this report paves the way for subsequent studies to explore the association between exposure to alcohol advertising and marketing efforts and drinking behavior in young people."

SCIENTIFIC/TECHNICAL ITEMS

Researchers Identify Antibiotic-Resistant Bacteria in Pig Manure

A new study has reportedly confirmed the presence of antibiotic-resistant genes (ARGs) in manure samples harvested from swine farms in China, raising concerns about the widespread use of therapeutic antimicrobials in livestock and livestock feed. Yong-Guan Zhu, et al., "Diverse and abundant antibiotic resistant genes in Chinese swine farms," *PNAS,* February 2013. Researchers apparently used high-capacity quantitative PCR arrays to assess "the type and concentrations of ARGs at three stages of manure processing to land disposal at three large-scale (10,000 animals per year) commercial swine farms."

The results from all the manure samples evidently revealed 149 unique ARGs, with "the top 63 ARGs being enriched 192-fold (median) up to 28,000-fold (maximum) compared with their respective antibiotic-free manure or soil controls." In particular, the findings suggested that antibiotics and heavy metals found in the manures had the potential to co-select for resistance

traits and further exacerbate "the risks of transfer of ARGs from livestock animals to human-associated bacteria."

"This study highlights that ARGs in swine farms are not only diverse but are also remarkably abundant, which together offers a higher statistical probability of dispersal, further selection, and/or horizontal transfer in the environment," wrote the study's authors, who described their conclusion as alarming. "[U]nmonitored use of antibiotics and metals on swine farms has expanded the diversity and abundance of the antibiotic resistance reservoir in the farm environment… Policies and management tools to facilitate prudent use of antibiotics and heavy metals, including their combined use, in animal industries and animal waste management are needed."

Meanwhile, the Food and Drug Administration's Center for Veterinary Medicine (CVM) recently **released** its third annual report on the sale and distribution of antimicrobials approved for use in food-producing animals. According to CVM, which gathers data from antimicrobial drug sponsors as required by the Animal Drug User Fee Act (ADUFA), the antimicrobials sold for use in domestic animals in 2011 included the following drug classes: Aminoglycosides, Cephalosporins, Ionophores, Lincosamides, Macrolides, Penicillins, Sulfas, and Tetracyclines. At the same time, however, CVM has warned stakeholders that comparing data on animal and human antibiotics is difficult due to variables such as "the number of humans versus that of food-producing animals during the data period, differences in physical characteristics (such as weight) between humans and the various species of animals, molecular weights and dosages of the different antimicrobials as well as other differences in the conditions of use of the antimicrobials."

Despite these cautions, the Pew Charitable Trusts has since **published** an infographic based on the same ADUFA reports behind CVM's summary, claiming that antibiotic sales for meat and poultry product reached a "record high" in 2011. The infographic specifically alleges that during this period, "29.9 million pounds of antibiotics were sold in the United States for meat and poultry production," a figure that is 3.9 times greater than the amount of antibiotics sold to treat human illnesses. "These practices are contributing to the emergence of drug-resistant superbugs that make infections more difficult and costly to treat. In 2011, more antibiotics were sold for use in meat and poultry production than ever before," opines the Pew's report, which urges Congress and FDA "to rein in the overuse of antibiotics in food animal production."

Outdoor Food Advertising Allegedly Linked to Obesity Risk

A recent study has reportedly identified "a relationship between the percentage of outdoor food advertising and overweight/obesity." Lenard Lesser, "Outdoor advertising, obesity, and soda consumption: a cross-sectional study," *BMC Public Health,* January 2013. Funded by the Robert Wood Johnson Foundation, the study relied on telephone survey data on adults aged 18 to 98 years "collected from 220

census tracts in Los Angeles and Louisiana," comparing "self-reported information on BMI and soda consumption with a database of directly observed outdoor advertisements."

The results evidently showed that "the higher the percentage of outdoor advertisements promoting food or non-alcoholic beverages within a census tract, the greater the odds of obesity among its residents, controlling for age, race and educational status." In particular, the study reported that "for every 10% increase in food advertising, there was a 1.05… greater odds of being overweight or obese," so that "compared to an individual living in areas with no food ads, those living in areas in which 30% of ads were for food would have a 2.6% increase in the probability of being obese."

"[T]he summary of research in other areas points to an effect of outdoor advertising on the intentions of viewers of those ads. This analysis finds parallel results to the previous research on alcohol, tobacco, and food: those who live in areas with higher percentages of food advertising have a greater odds of obesity than those living in areas with a lower percentage of food ads," concluded the study's authors, who nevertheless noted the limitations of their research insofar as it was unable to determine which survey respondents were actually exposed to the advertisements during a given time period. "The reasonable way to prove a causal relationship would be to reduce outdoor food advertising in certain neighborhoods and determine whether obesity rates change. Given the health crisis associated with obesity, such measures may be warranted."

Researchers Examine Effect of Advergames on Children's Food Intake

Researchers with the University of Amsterdam's School of Communication Research and Radboud University's Behavioral Science Institute have published a study examining the effect of advergames on children's actual food intake. Frans Folkvord, et al., "The effect of playing advergames that promote energy-dense snacks or fruit on actual food intake among children," *American Journal of Clinical Nutrition,* February 2013. The study focused on 270 children asked to play an advergame that promoted an energy-dense snack, fruit, or a non-food product, and then monitored "the free intake of energy-dense snacks and fruit."

The study's authors ultimately reported that "an advergame containing food cues increased general energy intake, regardless of the advertised brand or product type (energy-dense snacks or fruit), and this activity particularly increased the intake of energy-dense snack foods." They also noted that participants who played the fruit advergame "did not consume more fruit than did those in the other groups," instead choosing more energy-dense food than fruit from the available options. This latter finding contrasted with expectations that fruit-promoting advergames would increase fruit intake among participants.

"Thus, consistent with our expectations, the effects were not product type or brand specific but transferred to other energy-dense snacks that were available,"

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 471 | FEBRUARY 15, 2013

explained the researchers, who in a separate analysis examined the effect of the advertised brand on the children's food consumption. "The spillover effect of food commercial on different products other than the advertised product has also been found with television commercials... Playing advergames that contain food messages, regardless of whether they promote energy-dense snacks or fruit, resulted in greater energy-dense caloric intake."

Artificially Sweetened Beverages Allegedly Linked to Type 2 Diabetes

A recent study claims that both sugar-sweetened beverage (SSB) and artificially sweetened beverage (ASB) consumption was associated with type 2 diabetes (T2D) risk in 66,118 women enrolled in a European prospective study. Guy Fagherazzi, et al., "Consumption of artificially and sugar-sweetened beverage and incident type 2 diabetes in the Etude Epidemiologique aupres des femmes de la Mutuelle Generale de l'Education Nationale—European Prospective Investigation into Cancer and Nutrition cohort," *American Journal of Clinical Nutrition*, February 2013. French researchers reported that "women in the highest quartiles of SSB and ASB consumers were at an increased risk of T2D" compared with those who did not drink SSBs or ASBs, although randomized trials are still needed "to prove a causal link between ASB consumption and T2D."

"SSB and ASB consumption were shown to be directly and indirectly (possibly mediated by adiposity) linked with increased risk of T2D," concluded the study. "Extensive and lasting changes in public policy are required to curb the worldwide diabetes and obesity epidemics, and limiting the consumption of SSBs and ASBs may be an important strategy to do so…. Meanwhile, a precautionary principle could be applied to the promotion of ASBs, which are still largely recommended as a healthy substitute to SSBs."

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