Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FDA Declines to Change Mercury Action Levels for Fish

The Food and Drug Administration (FDA) recently **denied** a citizen petition seeking to replace "the FDA action level of 1.0 parts per million (ppm) mercury in fish with an action level, regulatory limit or tolerance no greater than 0.5 ppm mercury in fish in order 'to protect women of childbearing age, pregnant and nursing women, children and the most vulnerable populations.'" Filed by the Center for Biological Diversity and Got Mercury, the petition also asked FDA, among other things, to (i) enforce the new limit "and/or prohibit the sale of seafood that contains mercury concentrations that exceed it," (ii) require retailers to post point-of-sale warnings or otherwise label fish "known to be high in methylmercury," and (iii) conduct "regular, widespread" testing for mercury and publicize the results.

In denying the petition, FDA noted the agency is authorized "but not required" to set a tolerance, action level or regulatory limit for methylmercury in fish. To this end, FDA argued that establishing a regulatory limit or action level would require it to establish that "fish containing 0.5 ppm or more mercury are adulterated," even though "the mere presence of an added poisonous or deleterious substance does not render food adulterated under section 401(a)(1)" of the Food, Drug, and Cosmetic Act. Moreover, even if an action level has been exceeded, the agency "has the burden of establishing de novo in an enforcement proceeding that the food was adulterated," contrary to the petition's suggestion that an action level is enforceable "simply by demonstrating that is has been exceeded… or that it is a rule."

FDA also found that the evidence presented by the petitioners as to the health effects of methylmercury on both the general population and specific subpopulations did not justify revising the current action level of 1.0 ppm. "Your petition failed to provide sufficient data or information, such as specifics relating to actual injuries within certain susceptible subpopulations or estimates of risk, to persuade FDA that commercial fish with more than 0.5 ppm of mercury pose a reasonable possibility of injury to these susceptible populations," concludes the agency. "In our view, the better approach to risk

management—and the one that is being taken—is targeted recommendations on how to obtain benefits that fish can provide to the fetus and young children while minimizing any effects from methylmercury." Additional details about Got Mercury's campaign appear in Issue 378 of this *Update*.

USDA Proposes Amendments to COOL Rule

The U.S. Department of Agriculture (USDA) has issued a proposed rule that would revise Country of Origin Labeling (COOL) requirements for muscle cuts of meat and amend the definition of "retailer" to include "any person subject to be licensed as a retailer under the Perishable Agricultural Commodities Act."

Under the proposed rule, "origin destinations for muscle cut covered commodities derived from animals slaughtered in the United States would be required to specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation." According to USDA, the proposed rule would also "eliminate the allowance for any commingling of muscle cut covered commodities of different origins." The proposal does not change "existing country of origin labeling of imported muscle cuts derived from animals slaughtered in another country."

The agency said that it "expects that these changes will improve the overall operation of the program and also bring the current mandatory COOL requirements into compliance with U.S. international trade obligations." The proposed rule changes follow a June 2012 World Trade Organization ruling which found that U.S. meat-labeling laws discriminated against imported livestock from other countries such as Canada and Mexico. FDA will accept comments on the proposal until April 11, 2013. *See Federal Register,* March 12, 2013.

Upcoming Codex Meeting to Target Pesticide Residues

The U.S Department of Agriculture (USDA) and U.S. Environmental Protection Agency (EPA) have scheduled a March 28, 2013, public meeting in Arlington, Virginia, to address draft U.S. positions for discussion at the 45th Session of the Codex Committee on Pesticide Residues of the Codex Alimentarius Commission during a May 6-13 meeting in Beijing. Agenda items include (i) a report by the 2012 joint Food and Agriculture Organization and World Health Organization meeting on pesticide residues; (ii) a discussion paper on principles and guidance for estimating maximum residue limits for pesticides; and (iii) a discussion paper on guidance for establishing maximum residue limits for pesticides for minor and specialty crops. *See Federal Register,* March 14, 2013.

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LITIGATION

New York City Takes Appeal from Ruling on Soft-Drink Size Limits

Immediately after a New York court determined that the New York City Department of Health and Mental Hygiene lacked the authority and a rational basis to adopt a prohibition on the sale of sugary beverages in containers larger than 16 ounces, the city filed a notice of appeal, which will reportedly be heard during the first week of June 2013. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. NYC Dept. of Health & Mental Hygiene*, No. 653584/12 (N.Y. App. Div., filed March 12, 2013). Declaring the rule invalid, the state's supreme court—New York's trial court—enjoined and permanently restrained the city from implementing or enforcing it.

The "Portion Cap Rule" was set to take effect on March 12, but New York Supreme Court Judge Milton Tingling, after exploring at length the scope of the Department of Health's authority as reflected in city charters dating back to the 1600s, found that it lacked "the authority to limit or ban a legal item under the guise of 'controlling chronic disease,' as the Board attempts to do herein." According to the court, while the health department "may supervise and regulate the food supply of the city when it affects public health, . . . the Charter's history clearly illustrates when such steps may be taken, i.e., when the City is facing eminent [sic] danger due to disease. That has not been demonstrated herein."

As for the rational-basis prong of the challenge mounted by organizations representing minority, restaurant and beverage interests, the court found the rule "fraught with arbitrary and capricious consequences," citing "uneven enforcement even within a particular City block" and "loopholes," such as application to some but not all food establishments, exclusion of beverages with "significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds" and no limitations on refills. In the court's view, "The Portion Cap Rule, if upheld, would create an administrative Leviathan and violate the separation of powers doctrine. The Rule would not only violate the separation of powers doctrine, it would eviscerate it. Such an evisceration has the potential to be more troubling than sugar sweetened beverages."

In a statement, Mayor Michael Bloomberg claimed that "in the end, the courts will recognize the Board of Health's authority to regulate the sale of beverages that have virtually no nutritional value, and which—consumed in large quantities—are leading to disease and death for thousands of people every year. There are many instances where a lower court decision has gone against us and then been reversed. If lower court rulings had always stood, Grand Central Terminal would have been knocked down forty years ago." Center for Science in the Public Interest Executive Director Michael Jacobson agreed, stating, "We are confident that the city will prevail here. Many years hence,

people will look back and think it was crazy for sugar drinks to ever be served in 32- and 64-ounce pails."

The American Beverage Association responded in a statement, "The court ruling provides a sigh of relief to New Yorkers and thousands of small businesses in New York City that would have been harmed by this arbitrary and unpopular ban. With this ruling behind us, we look forward to collaborating with city leaders on solutions that will have a meaningful and lasting impact on the people of New York City." Cato Institute Senior Fellow Walter Olson opined that the court "struck down the soda ban in a sweeping opinion that does everything but hand Mayor Poppins his umbrella and carpetbag," and noted that the court, "struck down the ban permanently both on the merits and as overstepping the rightful legal powers of the New York City Department of Health—meaning that the board cannot go back and reissue the regulations on its own authority even if it should develop a better factual basis for them."

The day after the court issued its ruling, *The New York Times* published an article titled "Minority Groups and Bottlers Team Up in Battles Over Soda" to discuss the funding that the beverage industry has apparently provided to its "steadfast" allies, that is, "advocacy groups representing the very communities hit hardest by the obesity epidemic." Writer Nicholas Confessore spoke with representatives of some of the organizations that brought the successful legal challenge to the mayor's soft-drink initiative and found that most echoed the industry in calling for a focus on education, calorie labeling and exercise to address obesity in the United States. He also discusses how companies, such as PepsiCo, have sponsored these organizations' events and provided grants as part of their diversity and inclusion campaigns. A PepsiCo spokesman said, "We never ask our foundation or community relations partners to engage in public policy issues on our behalf."

In a *Slate* commentary, Emily Bazelon suggests that the court engaged in "conservative judicial activism" to invalidate the rule, "substituting his judgment" for that of the Department of Health. According to Bazelon, "[w]hen it comes to other sorts of laws like this one, which need only be justified by some reasonable basis, courts are generally supposed to let the democratic process play out. If the voters don't like Bloomberg's limit on sugar-drink sales, they can replace them with a mayor who will repeal it. . . . Judge Tingling walked on by all of that in striking down the Department of Health order. And of course he's not the first conservative judge to find that activism from the bench is awfully appealing when it allows you to sweep away laws you don't like." *See Mayor Michael Bloomberg Press Release, The Daily Caller* and *CSPI Statement*, March 11, 2013; *The New York Times*, March 12, 2013; *Reuters* and *Slate*, March 13, 2013.

Deceptive Ad Claims Settled with Muscle Milk® Maker

The company that makes the Muscle Milk® line of nutrition products has agreed to settle putative class claims that it misrepresented the products' nutritional value. *Delacruz v. CytoSport, Inc.*, No. 11-3532 (U.S. Dist. Ct., N.D. Cal., Oakland Div., motion to approve settlement filed March 7, 2013). Details about the complaint appear in Issue **403** of this *Update*. A court order leaving just one issue in the case—an allegation that labeling claims of "healthy fats" in a Muscle Milk® product could deceive because a reasonable consumer would expect the product to contain unsaturated and not saturated fats—is summarized in Issue **436** of this *Update*.

Under the proposed agreement, the company would pay the equivalent of $5.275 million for awards to the named plaintiff and class members, a *cy pres* award, injunctive relief, class notice and settlement administration costs, attorney's fees and expenses, and products in kind. Claimants with proof of purchase would receive up to $30 each; other class members would be able to submit claims for up to $10. A maximum of $85,000 would be paid to the American Heart Association, and plaintiff's counsel would be paid 23.7 percent of the total settlement fund value as well as costs of up to $87,500. If the court approves the proposal, any residual funds "will be distributed in the form of distribution of CytoSport's products to the American Cancer Society, and to elderly persons and hospital patients."

Halel Fraud Settlement Critic Now Free to Oppose It on Facebook®

According to a news source, a Michigan judge has lifted a gag order imposed on an attorney who posted information on his Facebook® page critical of a proposed settlement of claims that a McDonald's Corp. franchisee sold as halel certain chicken products without complying with Islamic standards; the court has also granted his request to reopen the class period thus extending the time for class members to object, intervene or opt out. *Ahmed v. McDonald's Corp.*, No. 11-014559 (Mich. Cir. Ct., Wayne Cnty., order entered March 12, 2013). Additional information about the case and attorney Majed Moughni's claims of unlawful prior restraint appears in issues **468**, **471** and **473** of this *Update*.

In her supplemental notice, Judge Kathleen Macdonald notes, "[a]s you probably know, there was a great deal of attention given to this proposed settlement from the news media (newspapers, television, radio and internet sources) and in social media. For certain legal reasons, I have issued this Supplemental Notice to give Class Members more time to consider the proposed settlement as well as to provide specific clarification of the rights of Class Members and how to exercise them." Moughni has reportedly indicated that he was pleased the gag order was lifted, but concerned whether he may face sanctions for his statements, claiming that counsel for McDonald's have threatened him with $30,000 for the fees and costs associated with reopening the notice period. He also said

he would continue to oppose the settlement, contending that "it is the wrong settlement and the money goes to the wrong people." *See Law360*, March 13, 2013.

Second Circuit Uphold Terms of Unambiguous Ballpark Vending Contract

In a non-precedential summary order, the Second Circuit Court of Appeals has affirmed a lower court ruling against Kosher Sports, Inc., a New Jersey-based provider of kosher food products, which had a 10-year contract with Queens Ballpark Co., the company that operates Citi Field, where the New York Mets play their home games. *Kosher Sports, Inc. v. Queens Ballpark Co., LLC*, No. 12-2162 (2d Cir., decided March 12, 2013). Kosher Sports claimed that the operating company breached the agreement by refusing to allow it to sell Glatt Kosher hot dogs and sausages and other products on Friday nights and Saturdays. It also claimed that Queens Ballpark failed to provide a suitable location for the company's fourth cart to sell its products at the stadium. The court found that the unambiguous terms of the contract simply "set forth [Kosher Sports'] 'rights' to advertising space, tickets, and freedom from competition" but did not "address the right to sell at any particular time or place." The contract also apparently failed "to provide [Kosher Sports] with a right to place four carts at mutually approved locations." An unsigned email between the companies about cart location was insufficient, in the court's view, to alter the contract's terms.

Class Suit Claims 5-Hour ENERGY® Is Not a Healthy Vitamin Energy Drink

Pennsylvania residents have filed a putative statewide class action in federal court against the company that makes 5-Hour ENERGY® drinks, claiming that they are promoted as a "healthy vitamin-filled energy drink" but are "nothing more than a shot of caffeine." *Thompson v. Innovation Ventures, LLC*, No. 13-336 (U.S. Dist. Ct., W.D. Pa., filed March 7, 2013).

The plaintiffs allege that label representations—"Hours of energy now – no crash later" and "Sugar free"—send a message to consumers that the product "will provide five hours of sustained energy within minutes without experiencing any negative 'crash' side effects later." To the contrary, they claim, this "no crash later" representation is false "as admitted on the Defendant's website and hidden in microscopic language on the back of the bottle which reads: 'No crash means no sugar crash.'" According to the complaint, more than 25 percent of product users "suffer a caffeine crash."

Claiming purely economic losses and seeking class certification, the plaintiffs allege breach of express warranty (in trespass), breach of implied warranty of merchantability (in trespass) and violations of Pennsylvania Unfair Trade Practices and Consumer Protection Law. They seek damages, injunctive relief, attorney's fees, and expenses.

OTHER DEVELOPMENTS

RWJF Issues Recommendations for Healthier Beverages

The Robert Wood Johnson Foundation's (RWJF's) Healthy Eating Research (HER) panel has released a set of age-based **"Recommendations for Healthier Beverages"** that urge government buildings, workplaces and other public venues to increase the availability of water and unflavored milk as replacements for high-calorie beverages. Billed as "an advisory panel of prominent researchers, nutritionists and policy experts," HER evidently arrived at its findings after reviewing "current beverage standards, recommendations, and guidelines from scientific bodies, national organizations, public health organizations, and the beverage industry."

HER has generally recommended that "water should be available and promoted in all settings where beverages are offered" and endorsed unflavored, low-fat and nonfat milk in age-appropriate portions as a way for children to get adequate amounts of calcium, vitamin D, potassium, and other nutrients. The panel would also permit the consumption of small amounts of 100 percent fruit juice—ranging from 0-to-4-ounce portions for preschool children and 0-to-8-ounce portions for adults—provided that each portion is mixed with water and contains no added sweeteners and less than 70 mg of sodium per portion for children ages 2-4 years, less than 100 mg of sodium per portion for children ages 5-10 years, and less than 140 mg of sodium per portion for children and adults ages 11 years and older.

For other types of beverages, HER recommended that products containing "synthetic food dyes, stimulants (e.g., caffeine), and other additives (e.g., electrolytes, artificial flavors)" should be avoided by all children between 2 and 13 years old. In addition, youths between the ages of 14 and 18 should consume "non-caffeinated, non-fortified beverages with no more than 40 calories per container," while adults should also limit their consumption of beverages to those with less than 40 calories per container and should use only low-fat or non-fat milk in caffeinated beverages. The recommendations also note that "when used judiciously, non-nutritive sweeteners could help reduce added sugar intake" for adolescents and adults.

"Consumption of sugary beverages is a key contributor to many obesity-related health issues," concludes the report. "The reduction or elimination of sugar-sweetened beverage consumption has great potential to help Americans reduce caloric intake, improve diet quality, and reduce their risk for obesity."

Rudd Center Seeks to Redefine "Child-Directed Advertising"

The Rudd Center for Food Policy & Obesity has published a **study** urging a broader definition of "child-directed" TV advertising than the one currently employed by the industry-backed Children's Food and Beverage Advertising Initiative (CFBAI). Jennifer Harris, et al., "Redefining 'Child-Direct Advertising' to Reduce Unhealthy Television Food Advertising," *American Journal of Preventative Medicine,* March 2013. According to the study, CFBAI covers TV advertising only "during programs for which children make up 35% or more of the viewing audience." By comparison, Rudd Center Director of Marketing Initiatives Jennifer Harris and her colleagues have suggested that broadening the definition of child-directed advertising "to include programs with a child-audience share of 20% or higher and/or 100,000 or more child viewers would cover 70%-71% of food advertising seen by children but just one third of ads seen by adults."

To support this recommendation, the study's authors used Nielsen data from all national TV programs aired in 2009 to estimate what percentage of the total audience comprised children ages 2-11 years. They also examined Nielsen advertising data on "the number of food and beverage advertisements viewed by preschoolers (aged 2-5 years); older children (aged 6-11 years); and adults (aged 18-49 years) during programs with various child-audience compositions." Their results evidently indicated that, although food advertising during programs with "a very high" child-audience share (greater than 50 percent) had declined between 2009 and 2004, "food advertising viewed by children during other programming also appears to have increased."

"In 2004, children viewed approximately 2000 ads for food and beverages during programming with a child-audience share <20%," states the study. "In 2009, children viewed more than 2300 ads for these products during similar programming. As adults viewed 29% more food advertising in 2010 versus 2004, it appears that increased adult-targeted advertising also has affected ads viewed by children."

In addition, the study notes that expanding CBFAI's definition to include programs with a greater than 20 percent child-audience share or more than 100,000 child viewers would cut down on advertisements for "the least-healthy" products, including carbonated beverages, baked goods and candy. It also proposes adopting nutrition standards for all food advertising and expanding the definition of children to cover youths older than age 12.

"The present analysis suggests that the [Federal Trade Commission] could regulate food advertising during child-directed programming under its jurisdiction over unfair and deceptive marketing. Or the U.S. Congress could legislate such restrictions without infringing on companies' right to communicate with adults," conclude the authors. "Although any government restrictions would likely result in legal challenges by the industry, prohibiting marketing

of nutrient-poor foods on TV programs with a child-audience share of 20% or higher would affect just 7% of food ads that adults now view, and therefore should withstand these challenges."

PHAI Publishes Issue Brief on Viral Marketing to Children

The Public Health Advocacy Institute (PHAI), with support from the Robert Wood Johnson Foundation's Health Eating Research program, has released a legal issue brief titled "It's Not Just for Teens: Viral Marketing to Young Children." Intended as a guide for state attorneys general and claiming that "[f]ood marketers are in the forefront of using viral marketing online," the paper contends that this use of "viral marketing techniques to young children warrants careful scrutiny under state consumer protection laws." The paper describes how (i) this marketing works, (ii) companies make money from the practice and (iii) the practice is deceptive. According to PHAI, "Viral marketing turns children into unwitting viral marketers promoting a company's brand image and products to their friends. . . . Despite the sophistication of the technology they use, children today remain uniquely 'unqualified by age or experience' to evaluate viral marketing and firms use deceptive tactics to hide the true intent of viral marketing."

As an example, the paper focuses on a McDonald's advergame that "deceptively told children that they were sending their friends a game when in fact they were sending their friends commercial advertisements [thus turning them] into unpaid sales agents by using deception to get them to provide their friends' first names and email addresses—information that is used to generate valuable personalized email advertising messages to recruit other potential child-customers and gain access to their data." The paper concludes, "Children who receive viral marketing messages like personalized email advertisements are exposed to marketing for products that are potentially detrimental to their health like fast food and sugary cereals. . . . The use of viral marketing tactics to market unhealthy food products to young children deserves special scrutiny by state regulators under the state UDAP [Unfair and Deceptive Acts and Practices] authority."

ATNI Report Ranks Food and Beverage Companies

The first edition of a global "Access to Nutrition Index," evaluates the "nutrition-related commitments, performance and disclosure practices of 25 of the world's largest food and beverage manufacturers." Contending that food and beverage companies "must do more to increase access to nutritious products and positively exercise their influence on consumer choice and behavior," the report ranked Danone and Nestlé among its top performers, but stated that even these companies "have significant room for improvement."

Housed at the Global Alliance for Improved Nutrition (GAIN), the three-year initiative was funded by GAIN, the Bill & Melinda Gates Foundation and Wellcome Trust. According to Access to Nutrition Index (ATNI) Executive Director Inge Kauer, the report "is not intended to name and shame companies, but instead to high-

light strong practices and to provide a means for companies to benchmark their approach to nutrition against their peers and identify areas for improvement. The Index also aims to serve as an independent source of information for stakeholders interested in engaging with the food and beverage industry on nutrition issues." The report, which will be issued every two years, focuses on practices that affect both obesity and undernutrition. *See ATNI News Release*, March 12, 2013.

CSPI Ad Criticizes Nickelodeon for Airing "Junk" Food Commercials

The Center for Science in the Public Interest (CSPI) has targeted Nickelodeon and parent company Viacom, Inc. with a full-page "wanted" ad in the March 14, 2013, issue of *The Hollywood Reporter,* featuring mug shots of an unshaven and dishevveled SpongeBob SquarePants, whom the ad warns "should be approached with caution as he may be armed with nutritionally dangerous foods." The ad contends that Nickelodeon is "wanted" for impersonating a responsible media company, while it actually markets junk food and obesity to children.

According to CSPI, "Unlike Disney and Ion Media's Qubo, Nickelodeon has yet to set nutrition standards for which foods it will advertise to young children through television, its websites, apps, and other media. Nickelodeon, NickToons, and Nick Jr. recently have advertised unhealthy products such as Cocoa Puffs, Air Heads candies, Chuck E. Cheese's restaurants, and Fruit Roll-Ups." CSPI further states, "[t]he SpongeBob SquarePants bar is made from water, several forms of sugar, and a long list of preservatives, artificial food dyes, and other additives." *See CSPI New Release,* March 13, 2013.

As You Sow Crowdfunds to Finance Nano-Ingredient Testing

Advocacy organization As You Sow, which recently issued a report on nanomaterials in food, is continuing to test products for nano-scale ingredients and has conducted a crowdfunding **campaign** to finance the initiative. Further details about the report appear in Issue **470** of this *Update.* The organization apparently succeeded in raising the $6,000 needed to test Betty Crocker Whipped Frosting®, which purportedly contains the same coloring additive found in Dunkin' Donuts, a product highlighted in the report.

GWU Professor Requires Students to Lobby for Anti-Obesity Measures

George Washington University Professor John Banzhaf has reportedly issued an assignment to some 200 undergraduate students requiring them to lobby their local legislators in favor of measures, such as the limits on sugary beverages in New York City found invalid this week by a federal court, that will address obesity. Claiming that the assignment is fully consistent with the university's advertised claims—"Your Four Years at GWU Can Change the Course of History" and "Faculty and Students Don't Just Study the World, They Work to Change It—Banzhaf, known for crusading with his law students against cigarette manufacturers, says he will

show, through the students in his Food & Politics class, how "even undergraduates can have a significant impact on public health problems." *See PRLog*, March 4, 2013.

MEDIA COVERAGE

NYT Reports on "Anti-Bloomberg" Bills Gaining Traction at State Level

The New York Times has reported that an "anti-Bloomberg" bill intended to curtail the ability of local governments to pass food regulations has gained significant support in Mississippi, where Governor Phil Bryant (R) is expected to sign the measure into law. "It is easy to view the new Mississippi law with an ironic eye," writes Atlantic Bureau Chief Kim Severson, pointing to obesity rates in the state. "But the legislation is the latest and most sweeping expression of a nationwide battle in which some government officials, public health leaders and food supply reformers are pitted against those who would prefer the government quit trying to control what people eat."

Since its introduction by Sen. Tony Smith (R-Harrison), who owns a barbeque restaurant, the bill has apparently garnered support from other food retailers as well as agricultural interests, such as the farm bureau and Mississippi Poultry Association. Broader in scope than similar measures passed in Alabama, Arizona, Florida, and other states, the Mississippi version would prevent cities and counties from limiting portion sizes, establishing menu-labeling laws or restricting "the sale of food based on how it was grown, which would protect food made with genetically modified grain," according to Severson. In particular, the article notes that states and industry proponents pursuing these bills have since described federal menu-labeling laws as "plenty of regulation" or expressed concern that local interventions like incentive-item bans could create "a patchwork of regulations that would be difficult to enforce and put an undue burden on small-business owners."

"We see the writing on the wall with what's happened in other parts of the country and we want to make sure we stay one step ahead of the process," Mississippi Hospitality and Restaurant Association Director Mike Cashion was quoted as saying. Additional details about the state legislature's approval of the bill appear in Issue 472 of this *Update*.

Mother Jones Dismisses New BPA Findings, Citing Industry Ties

Food writer Tom Philpott has authored a March 13, 2013, *Mother Jones* article taking issue with a meta-analysis of bisphenol A (BPA) studies that toxicologist Justin Teeguarden recently presented at the American Association for the Advancement of Science. Funded by the U.S. Environmental Protection Agency, the meta-analysis covered 150 exposure studies and 130 toxicity studies, and ultimately concluded that "people's exposure may be many times too low for BPA to

effectively mimic estrogen in the body," according to a recent press release issued by the Department of Energy's Pacific Northwest National Laboratory (PPNL).

In particular, Teeguarden argued that human BPA exposure usually occurs at levels well below detection, pointing to the combined results of exposure studies apparently showing "that human blood levels of BPA are expected to be too far below levels required for significant binding to four of the five key estrogen receptors to cause biological effects." His research also noted that the "low doses" defined in animal toxicity studies "actually span an immense range of concentrations" that for the most part fall outside current human exposures, raising questions about the accuracy of these models when applied to human health. "The term low-dose cannot be understood to mean either relevant to human exposures or in the range of human exposures. However, this is in fact what it has come to mean to the public, as well as many in the media," Teeguarden was quoted as saying.

Philpott has countered, however, that recent media coverage of Teeguarden's presentation failed to mention that the meta-analysis has not yet been published in a peer-reviewed journal. His review of the presentation in *Mother Jones* also criticized the toxicologist for his alleged industry ties and implied that the federal research laboratory PNNL, which operates under an entity known as Battelle, is not wholly independent of corporate interests since it once designed a chemical exposure framework for the American Chemistry Council.

"[I]n the past Teeguarden has received support from the plastics industry for research on BPA and other hormone disruptors—and has co-authored work with industry employed scientists," opined Philpott in regard to Teeguarden's previous studies funded by the American Plastics Council. "All of which is merely to point out that Teeguarden shouldn't be thought of as a government scientist. He is a researcher who has collaborated with and been funded by the chemical industry, and works for an organization that also has worked with the chemical industry."

SCIENTIFIC/TECHNICAL ITEMS

BPA Exposure Allegedly Tied to Development of Asthma

A recent study has reportedly identified "an association between postnatal urinary bisphenol A (BPA) concentrations and asthma in children." Kathleen Donohue, et al., "Prenatal and postnatal bisphenol A exposure and asthma development among inner-city children," *Journal of Allergy and Clinical Immunology,* March 2013. Columbia University researchers apparently used urinary samples collected from pregnant women during their third trimesters and from their children at ages 3, 5 and 7 years to conclude that BPA concentrations (i) "at age 3 years were associated positively with wheeze at ages 5 years … and 6 years," (ii) "at age 7 years were associated with wheeze at age 7," and (iii) "at ages 3, 5, and 7 years were associated with asthma measured at ages 5 to 12 years."

The authors also noted, however, that "prenatal BPA concentrations were associated inversely with odds of wheeze at age 5 years," a finding that contradicted their initial hypothesis and led them to suggest, among other things, that "children's greater food consumption in proportion to body weight" might account for their higher urinary BPA concentrations when compared to maternal prenatal samples. "The mechanism by which BPA exposure during early childhood might influence asthma risk in subsequent years remains an open question," concludes the study, which ultimately cites previous research speculating that BPA might influence asthma risk "through upregulation of T_H2 pathways and possibly reductions in regulatory T-cell counts."

European Study Alleges Link Between Processed Meat Consumption and Increased Mortality

A recent study based on the European Prospective Investigation into Cancer and Nutrition (EPIC) has allegedly identified a "moderate positive association" between processed meat consumption and mortality due to cardiovascular diseases, cancer and other causes. Sabine Rohrmann, et al., "Meat consumption and mortality – results from the European Prospective Investigation into Cancer and Nutrition," *BMC Medicine,* March 2013. Relying on EPIC data from 448,568 healthy adults between ages 35 and 69, researchers reported that consuming more than 160 grams (approximately 5.6 ounces) of processed meat per day was related to moderately higher all-cause mortality. In particular, they estimated "that 3.3 % ... of all deaths could be prevented if all participants had a processed meat consumption" of less than 20 grams (0.7 ounces) per day.

The study's authors noted, however, that unlike similar studies undertaken in the United States, their analysis did not find any association between red meat intake and mortality. To account for these differences, they speculated that processed meats typically "have a higher content of saturated fatty acids and cholesterol than fresh red meat" in addition to being salted, cured or smoked. "These processes… lead to an increased intake of carcinogens or their precursors (polycyclic aromatic hydrocarbons, heterocyclic aromatic amines, nitrosamines) or to a high intake of specific compounds enhancing the development of carcinogenic processes (for example, nitrite)," concludes the study. "The difference between the US studies and our result is likely due to the stronger risk estimates observed in the US cohorts compared with our cohort, but may also be explained by higher meat consumption in the US than in Europe."

Celebrity Endorsements Blamed for Kids' "Junk" Food Choices

A University of Liverpool **study** contends that "celebrity endorsement of a food product encourages children to eat more of the endorsed product." The study's authors also assert that children were prompted to eat more of the endorsed product when they saw the TV celebrity in a different context.

Shook, Hardy & Bacon L.L.P.

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The study involved 181 children, ages 8 through 11, some of whom were asked to watch a 20-minute cartoon that included one of three different commercials: one for a particular brand of potato chips endorsed by former soccer star Gary Lineker; one for a different snack food; and one for a toy. Another group of children viewed TV footage of Lineker at an event not related to the snack food. The ads included one for Walker's potato chips featuring the soccer hero; a promo for a snack food with no celebrity endorsement; and a commercial for a toy, also without a celebrity endorsement. During the experiment, kids were offered two bowls of potato chips. One was labeled Walker's chips, the other, "supermarket" chips. Both bowls, however, contained Walker's chips. The study purportedly showed that the children who had watched the commercial with Lineker ate more of the chips labeled with the brand name compared with the kids who watched a commercial for a different food, and those who watched the toy commercial.

"The study demonstrated, for the first time, that the influence of the celebrity extended even further than expected and prompted the children to eat the endorsed product even when they saw the celebrity outside of any actual promotion for the brand. It quantifies the significant influence that the celebrity has over children's brand preferences and actual consumption. This research has consequences for the use of celebrities, and in particular sports stars, in advertising unhealthy or High Fat Salt and Sugar (HFSS) products. If celebrity endorsement of HFSS products continues and their appearance in other contexts prompts unhealthy food intake, then this would mean that the more prominent the celebrity the more detrimental the effects on children's diets," lead researcher Emma Boyland said.

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