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ISSUE 480 | APRIL 19, 2013

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

White House Budget Aims to Slash Horsemeat Inspection

A proposal in the Obama Administration's 2014 budget would prohibit the funding of horsemeat inspection, essentially eliminating the possibility that horse slaughter—which has reportedly been banned since 2006—will resume in the United States. Language in the budget specifies that no federal funds may be used to pay the "salaries or expenses of personnel" to inspect horses slaughtered for human consumption.

A ban on horse slaughter has been in place since 2006, but a rider that prevented the U.S. Department of Agriculture (USDA) from financing the inspection of horsemeat expired in 2011. According to a news source, no horse slaughter facilities currently operate in the United States, but the USDA reportedly says it has recently received several applications to open slaughtering facilities.

Animal and horse advocates claim that horse slaughter is cruel and poses serious food safety issues because horses are sometimes dosed with drugs that are allegedly harmful to humans. President and CEO of The Humane Society of the United States Wayne Pacelle said, "It's a fool's errand to inspect tainted horse meat, and this Administration is wise to reject that path and to embrace the idea, even indirectly, that horses belong in the stable and not on the table."

Others, including A. Blair Dunn, a lawyer who represents the owners of a New Mexico facility that was apparently hoping to start processing horses this summer, noted that the budget item was not likely to become law. "I know of a few members of Congress who are not likely to let it remain in the budget," Dunn reportedly told a news source. "All this means is more debate and more hardship for my clients because they've made these investments to modify their plant already." *See Humanesociety.org.,* April 10, 2013; *The New York Times,* April 10, 2013.

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Proposal to Include Non-Nutritive Sweeteners in Milk Standard Receives Thousands of Comments

The Food and Drug Administration (FDA) has reportedly **received** "more than 30,000 comments" in response to its request for information about a petition filed by dairy-industry groups asking the agency to drop special labeling requirements for flavored milks that contain artificial sweeteners such as aspartame. The International Dairy Foods Association (IDFA) and the National Milk Producers Federation (NMPF) have asked FDA "to amend the standard of identity for flavored milk and 17 other dairy products (including nonfat dry milk, heavy cream, eggnog, half-and-half and sour cream) so that non-nutritive sweeteners are among the standard ingredients," thus exempting the products from having to make nutrient content claims such as "reduced calorie" in a more prominent location.

"If we granted the petition, a carton of chocolate milk made with non-nutritive sweeteners would simply say 'chocolate milk,' the same as a carton made with nutritive sweeteners, such as sugar," said FDA Food Labeling and Standards Director Felicia Billingslea. "You would need to read the ingredient list, which is typically on the back or the side of the product, in order to tell the difference between the two."

According to FDA, the dairy groups give the following reasons for the proposed amendments: (i) "Studies show school-age children are more likely to consume flavored milk than regular milk"; (ii) "Flavored milk labels that bear nutrient content claims such as 'reduced calorie' are unattractive to children"; (iii) "The proposed amendments would promote more healthful eating practices and reduce childhood obesity"; and (iv) "Updating the standard of identity for milk in this way would promote honesty and fair dealing by creating consistency in the names of flavored milk products."

FDA said that it recognizes the importance of this decision and is interested in hearing from the public and industry about the petition, particularly on issues such as: (i) "Will the proposed change in FDA's milk labeling regulations provide sufficient information for consumers to understand what is in the milk they're buying?" and (ii) "Will the proposed change in FDA's milk labeling regulations create an increased burden for consumers who want to know whether a product contains a nutritive or non-nutritive sweetener."

The public has until May 21, 2013, to submit comments. Additional details about the petition filed by IDFA and the NMPF appear in Issue **472** of this *Update*.

FDA Proposes Requirements for Selenium in Infant Formula

The Food and Drug Administration (FDA) has **issued** a proposed rule that would add selenium to the list of nutrients required in infant formula as well as establish minimum and maximum levels for the mineral in this context.

Under the proposed rule, which recognizes selenium as an essential nutrient, infant formula labels would also need to list the amount per 100 kilocalories of formula.

According to FDA, the selenium content of soil varies widely by geographic region, leading to either chronic selenium toxicity or dietary deficiencies that can result in diseases such as cardiomyopathy. Recognizing that formula "is intended to be the sole source of nutrition for infants," FDA has proposed "2.0 µm selenium/100 kcal as the minimum level for selenium in infant formulas and 7.0 µm selenium/100 kcal as the maximum level." The agency will accept comments on the proposed rule until July 1, 2013. *See Federal Register,* April 16, 2013.

FDA Plans to Double Comment Period on FSMA Implementing Regulations

Food and Drug Administration (FDA) Commissioner Margaret Hamburg has reportedly informed Senate appropriators that the agency would extend for 120 days the comment period for two proposed rules—one relating to fresh produce and the other to food processors—issued in January 2013 to implement the Food Safety Modernization Act (FSMA). According to Hamburg, "We appreciate that these are complex rules, the proposed rules, to go through and analyze, and we do intend to extend the comment period so that we can hear all of the concerns and address them fully, and I think it's a reasonable request." Hamburg also reportedly indicated that a rule requiring restaurants to post calorie information is a "high priority" for the agency, but hesitated when asked if it would be issued by October 1, at the start of the new fiscal year. *See CQ Healthbeat News*, April 18, 2013.

NTP *Ginkgo Biloba* Report Draws Energy Drink Warning from CSPI

The National Toxicology Program (NTP) recently **released** its peer-reviewed report on the toxicology and carcinogenesis of *Ginkgo biloba,* "an herbal remedy and dietary supplement purported to improve memory and brain function." Based on long-term studies in which researchers "deposited solutions of *Ginkgo biloba* extract in corn oil directly into the stomachs of male and female mice and rats five times a week for two years," the report concluded that animals exposed to *Ginkgo biloba* extract "experienced increased rates of a variety of lesions in the liver, thyroid, and nose" as well as "increased incidences of cancers of the thyroid gland… in male and female rats and male mice and liver cancers in male and female mice."

Citing these studies, the Center for Science in the Public Interest (CSPI) has since issued a warning to consumers, advising them to avoid a number of products, including energy drinks, that list ginkgo as an ingredient. According to CSPI, the Food and Drug Administration has already sent "warning labels [sic] to several drink companies…, stating that ginkgo is not generally recognized as safe, or GRAS, for use in food, though it is legal as an herbal supplement."

"Ginkgo has been used in recent years to let companies pretend that supplements or energy drinks with it confer some sort of benefit for memory or concentration," said CSPI Executive Director Michael Jacobson. "The evidence for those claims has been dubious, at best. The pretend benefits are now outweighed by the real risk of harm." *See CSPI News Release,* April 18, 2013.

EC Issues Results of Contaminated Beef Investigation

The European Commission (EC) has **released** the results of its investigation into beef products contaminated with horsemeat, reporting that 5 percent of tested products were contaminated with horse DNA and 0.5 percent of tested horse carcasses were contaminated with the pain reliever phenylbutazone (bute). The investigation apparently involved 7,259 tests carried out by 27 member states in addition to 7,951 tests conducted by food business operators, including producers, processors and distributors.

Based on these results, the Commission has reiterated the European Food Safety Authority's (EFSA's) assessment that bute contamination poses a low risk to consumers. "Today's findings have confirmed that this is a matter of food fraud and not of food safety," said EU Commissioner for Health and Consumers Tonio Borg. "Restoring the trust and confidence of European consumers and trading partners in our food chain following this fraudulent labeling scandal is now of vital importance for the European economy given that the food sector is the largest single economic sector in the EU."

To this end, the Commission will meet with food industry experts to discuss whether to extend the current testing program as part of an effort "to enhance consumer confidence." It has also proposed changes to "the EU food chain legislative framework (the 'animal and plant health package')," including measures designed to strengthen official controls and provide "a legal basis to impose dissuasive financial sanctions on food fraudsters" that take into account financial gain resulting from the fraud. *See EFSA Press Release,* April 15, 2013; *EC Press Release,* April 16, 2013.

LITIGATION

Federal Court Pares Consumer Fraud Claims in Splenda Essentials® Suit

A federal court in California has granted in part and denied in part the defendants' motion to dismiss the first amended complaint in a putative class action alleging that the companies falsely label and market Splenda Essentials with Antioxidants®, Splenda Essentials with Fiber® and Splenda Essentials with B Vitamins®. *Bronson v. Johnson & Johnson, Inc.*, No. 12-4184 (U.S. Dist. Ct., N.D. Cal., order entered April 16, 2013).

Dismissed with leave to amend were claims brought under the Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act to the extent that the claims include statements made on the defendants' Website or in print ads. The court found that the plaintiffs failed to allege that they relied on these statements when purchasing the products. Also dismissed with leave to amend are claims about the Fiber and B Vitamins products because the plaintiffs relied on lack of scientific substantiation theories which cannot be asserted by private plaintiffs under California law unless they cite sources demonstrating that the product statements were false. The final claim dismissed with leave to amend was unjust enrichment; apparently, the plaintiffs failed to contest the motion as to this claim and did not specify in their complaint that the claim was based on quasi-contract.

Dismissed without leave to amend were preempted claims challenging: (i) express nutrient-content product statements, such as "20% of the daily value of antioxidant vitamins C and E" and "1 gram of fiber," because the Food and Drug Administration (FDA) does not require companies to distinguish between synthetically derived antioxidants and those derived from fruit or that synthetically derived fibers do not provide the same health benefits as those found in foods; and (ii) the Splenda Essentials name, because the word "essentials" is mere non-actionable puffery.

The court denied the motion to dismiss as to allegations that "the phrase 'like those found in fruits and vegetables' placed next to a photo of berries misleadingly suggests that the antioxidants are actually derived from fruits and vegetables, or that they produce the same health benefits as fruits and vegetables." The court also allowed the plaintiffs to claim that "the statement on the Splenda Essentials with B Vitamins label that the product will 'help support a healthy metabolism'" is misleading because (i) FDA regulations pertaining to product "structure/function" claims apply to dietary supplements and not to foods; (ii) the plaintiffs' claims are not impliedly preempted because "[t]he FDA has not created nuanced regulatory guidelines relating to food structure/function claims"; and (iii) the "safe harbor doctrine" does not bar the plaintiffs' claims as to the B Vitamin label because "even if structure/function claims are permitted by the FDA, the safe harbor defense does not apply" to allegedly "misleading" labels.

The court left intact the plaintiffs' claims that Splenda Essentials with Antioxidants' "labeling is misleading because it suggests that the antioxidants contained in the product, vitamins C and E, were derived from fruits and vegetables, when they are actually ascorbic acid and synthetically created vitamin E," with the court finding that the "lack of substantiation" theory would be allowed because the plaintiffs had cited at least one source "saying that the vast majority of antioxidant benefits from fruit come from the entire fruit, and not just the vitamin C." The court refrained from dismissing the plaintiffs' implied warranty claims to the extent that the food label challenges were not preempted by federal law and were otherwise allowed.

False Ad Claims Allowed Against Foie Gras Producer

A federal court in California has decided that some consumer-fraud claims brought by an animal rights group and a company that makes vegan faux foie gras against Hudson Valley Foie Gras (HVFG) over statements that the defendant's product is "the humane choice" may proceed. *Animal Legal Def. Fund v. HVFG, L.L.C.*, No. 12-5809 (U.S. Dist. Ct., N.D. Cal., order entered April 12, 2013). While California prohibits the production of foie gras, which involves force-feeding ducks, the law does not prevent out-of-state producers, such as New York-based HVFG, from marketing in the state or shipping its product there.

While the court reportedly acknowledged that a definition for "humane" is "hard to pin down," it found that the plaintiffs might be able to prove use of the term by HVFG false if the production process is shown to cause ducks an undue amount of pain. The court dismissed the Animal Legal Defense Fund from the lawsuit for lack of standing, but allowed the claims of Regal Vegan, an HVFG competitor, to proceed. According to the court, "A theoretical educational competition for the 'hearts and minds' of consumers is insufficient to give [the animal rights group] Lanham Act standing. No re-pleading could cure this deficiency." Although dismissed from the suit, the Animal Legal Defense Fund hailed the ruling as a "landmark victory."

Meanwhile, the organization reportedly filed a lawsuit in March against a Napa Valley restaurant, claiming that it was continuing to sell foie gras to patrons by referring it as a "gift." La Toque executive chef Ken Frank noted that similar litigation filed by a different group failed in 2012; the restaurant randomly gives foie gras to La Toque diners on a daily basis, but neither lists it on the menu nor charges for it. Another animal rights organization, People for the Ethical Treatment of Animals (PETA) is reportedly threatening to sue two Orange County restaurants that also provide foie gras to customers "for free" with the purchase of a $55 glass of Sauternes. PETA's counsel was quoted as saying, "If you order a side salad, and it's listed as a salad, and you get tomatoes, nobody thinks you're getting free tomatoes. If it's part of a dish which he is charging money for, it's a sale, it's a transaction and it's prohibited." *See Napa Valley Register*, March 15, 2013; *Animal Legal Defense Fund News Release*, April 12, 2013; *Courthouse News Service,* April 16, 2013; *NYDailyNews.com*, April 17, 2013.

Federal Court Orders Production of Marketing Docs in Omega-3 Suit

A federal court in California has ordered Bumble Bee Foods, LLC to produce "documents dating back to 2004 regarding the marketing and labeling strategies for the products [plaintiff] purchased and for products with the same Omega-3 label or with nearly identical labels" in a putative nationwide consumer-fraud class action. *Ogden v. Bumble Bee Foods, LLC*, No. 12-1828 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered April 16, 2013). The named

plaintiff seeks to represent class members who purchased products she did not buy and purchased a product made by a separate company that is not a defendant in the case. According to the court, the discovery dispute was about whether Bumble Bee "must produce discovery on all of its products . . . from eight years prior to the initiation of this lawsuit . . . [and involving] King Oscar."

The court determined that it was not appropriate to consider whether the named plaintiff has standing to pursue claims for products she did not purchase during the discovery phase before class certification. Still, the court required her to show that she has standing to bring her own claims and "then she must show numerosity, commonality, typicality, and that she is an adequate representative of the full class to justify the requested discovery." The court found that the plaintiff's purchase of Bumble Bee tuna salad and King Oscar sardines and allegations that she paid more than she would have "satisfies her obligations at this point to show standing." The court also found that she had sufficiently alleged facts to meet the numerosity, commonality and adequacy requirements.

At issue, according to the court, was whether the plaintiff's claims were typical of the class claims, and it approached the issue relying on a "sufficient similarity" test, that is, whether the named plaintiff can bring claims for class members who purchased food products "sufficiently similar" to the products she bought. The court found that she had "made a prima facie showing of typicality only as to products with similar or identical claims about Omega-3 content, as those labels may have misled class members in the same way that they allegedly misled Ogden even if the products are not the same. She also has established a prima facie showing of typicality for products with essentially the same ingredients as the products she purchased, as those also fall within [the] sufficient similarity test." Products with allegedly false nutrient information not similar to the products the plaintiff purchased, however, do not fall within the sufficiently similar test and therefore she could not show typicality as to those products. So the court denied discovery as to those products.

The court allowed discovery of marketing information dated four years before suit was filed because "[i]nformation about how Bumble Bee decided to add the labels onto the products would either be relevant to Ogden's claims or could lead to admissible evidence supporting her claims." The court refused to order Bumble Bee to produce documents within the exclusive control of King Oscar, finding that the plaintiff did not produce any evidence of Bumble Bee's control other than that "a link from Bumble Bee's website leads to King Oscar's website," which the court found insufficient in the absence of evidence that the two corporations are one legal entity.

$7.5-Million Jury Verdict in Consumer Diacetyl Exposure Suit Upheld

A federal court in Colorado has dismissed the defendants' post-trial motions for judgment as a matter of law or for a new trial thus upholding a $7.5-million jury award to plaintiffs who alleged personal injury from exposure to the diacetyl in microwave popcorn consumed at home. *Watson v. Dillon Cos., Inc.*, No. 08-91 (U.S. Dist. Ct., D. Colo., order entered April 10, 2013). The court scheduled an April 18 hearing on post-trial motions to amend the judgment and for an award of attorney's fees and costs.

According to the court, in light of conflicting evidence as to the defendants' knowledge about purported health effects from diacetyl exposure and whether non-workplace exposures are sufficient to cause injury, a reasonable jury could conclude that the defendants knew about the risk and failed to warn consumers about it. The court also found the punitive damages appropriate because "a reasonable jury could conclude that the Defendants knew about the risk posed to consumers from the diacetyl in their microwave popcorn products, and that this conduct could be construed as willful and wanton." The court further confirmed its earlier rulings, following three fully contested *Daubert* hearings, that the expert testimony of Dr. Egilman was properly admitted at trial.

Court Tentatively Rejects "All Natural" Ice Cream Suit Settlement

A federal court in California has issued a tentative rejection of a settlement reached in a putative class action alleging that Ben & Jerry's Homemade Inc. falsely claims that its ice cream is all natural despite containing genetically modified ingredients. *Tobin v. Conopco Inc.*, No. 1205881 (U.S. Dist. Ct., N.D. Cal., notice filed April 15, 2013).

The court's notice of tentative ruling also raises questions for hearing including (i) "what is the parties' best argument that venue is proper in this district," (ii) are the plaintiff's claims typical of the class claims in light of the defendants' contention that she lacks standing to bring her claims under the New Jersey Consumer Fraud Act, (iii) is the parties' proposed notice the best practicable, (iv) do the proposed *cy pres* charities have any nexus to the claims, and (iv) is it appropriate to reduce the funds available for settlement purposes to cover fees and administrative costs.

According to a news source, the named plaintiff in this class action opted out of a $7.5 million proposed settlement in similar litigation to which the court here refers in framing the issues. Colleen Tobin apparently criticized the other deal because only 5,500 product purchasers submitted claims to share a $33,000 settlement fund. She reportedly contends that her suit and new agreement resolve issues with disproportionate attorney's fees—said to be 50 times the amount received by the class—and excessive charity awards for a defendant's foundation. *See Law360*, April 16, 2013.

Illinois Appeals Court Rules "Freaky Fast" Food Delivery Injury Suit May Proceed

A divided Illinois appeals court has determined that Jimmy John's Enterprises and one of its franchisees must continue to defend four of seven claims in a personal injury suit arising from a motor vehicle accident involving one of its delivery drivers. *Reynolds v. Jimmy John's Enters., LLC*, No. 4-12-139 (Ill. App. Ct., 4th Dist., decided April 2, 2013). The plaintiff, who was riding a motorcycle when the accident occurred and purportedly sustained permanently disabling injuries, alleged that the driver was negligently supervised and trained and thus made an illegal turn into his path in an effort to comply with the food company's promise of "freaky fast" food delivery, that is, that "deliveries will be made within 15 minutes of receiving the sandwich order."

Finding that the defendants did not properly bring their motion to dismiss under the state's procedural rules, the court majority found that the trial court erred in granting it as to all claims. Still, because the plaintiff did not argue trial court error on appeal as to the "implied authority," "joint venture" and "principal/apparent authority" claims in counts V-VII, the court found any challenge to their dismissal forfeited on remand. The claims that remain are negligent training and supervision against both defendants. A dissenting judge would have affirmed, arguing that the court could have considered arguments incorrectly raised in a motion to dismiss by deeming the motion as one for summary judgment.

Settlement over False Halel Ads for McDonald's Chicken Approved

According to a news source, a Michigan state court has approved a settlement of claims that a McDonald's franchisee falsely advertised some of its chicken products as halel, or prepared in accordance with Muslim dietary restrictions. *Ahmed v. Finley's Mgmt. Co.*, No. 11-014559-CZ (Mich. Cir. Ct., Wayne Cnty., settlement approved April 17, 2013). The settlement was approved despite objections that the $700,000 settlement fund would be unfairly distributed, for the most part, to two charities without compensating those harmed by the purported fraud. Additional information about the litigation appears in issues **468**, **471**, **473**, and **475** of this *Update*.

The attorney who was a member of the class, posted objections to the settlement on his Facebook® page and successfully defeated a gag order imposed by the court has reportedly indicated that he does not plan to appeal after plaintiffs' counsel assured him that some of their $233,000 in fees would be donated to additional local charities. Despite McDonald's assurances that it was committed to community interests, Majed Moughni said that he and other local Muslims who also objected to the settlement are leading a boycott of the fast-food restaurant chain. *See Law360*, April 17, 2013.

OTHER DEVELOPMENTS

Vermont AG Signals Interest in Food Marketing to Kids

Vermont Attorney General (AG) Bill Sorrell will reportedly join other state AGs for a conference on "the current state of food industry marketing to kids," scheduled for May 2013 at Yale University's Rudd Center for Food Policy and Obesity.

After introducing a Dartmouth College pediatrics professor to the Vermont House Committee on Health Care to address youth marketing by the food industry, Sorrell noted that the state AGs will consider "labeling, advertisements and the like, and look at what, under existing authority, we might be able to do, and how we might be in a position to espouse change within our state legislatures." Sorrell was able to insert a tax on sugar-sweetened beverages into legislation pending before the committee in March, fulfilling a recommendation in an obesity report issued by his office in 2010.

According to Sorrell, "The food industry marketing to kids these non-nutritious, high-sugar and fat content fast-food meals is playing a part in the obesity problems we face. And we've got to attend to that either through existing laws and policies, or with new ones to come." Assistant AG Wendy Morgan reportedly acknowledged that the office has just begun to consider youth marketing and said, "We do know there are serious First Amendment concerns." *See Rutland Herald*, April 11, 2013.

EWG Report Focuses on "Superbugs in Supermarkets"

According to an Environmental Working Group (EWG) analysis, more than one-half of meat and poultry samples tested in 2011 contained antibiotic-resistant bacteria. Using findings from the federal government's National Antimicrobial Resistance Monitoring System, the **report** asserts that "store-bought meat tested in 2011 contained antibiotic-resistant bacteria in 81 percent of raw ground turkey, 69 percent of raw pork chops, 55 percent of raw ground beef and 39 percent of raw chicken parts."

"Consumers should be very concerned that antibiotic-resistant bacteria are now common in the meat aisles of most American supermarkets," said EWG nutritionist Dawn Undurraga. "These organisms can cause foodborne illnesses and other infections. Worse, they spread antibiotic-resistance, which threatens to bring on a post-antibiotic era where important medicines critical to treating people could become ineffective." *See EWG News Release,* April 15, 2013.

Harvard Public Health Chair Advocates Strategies to Reduce Obesity

Harvard School of Public Health Chair of Nutrition Walter Willett recently published an editorial in *BMJ,* urging policy makers to consider a range of strategies to curb obesity rates and thereby reduce the incidence of diabetes and cardiovascular mortality. The April 9, 2013, editorial responds to a study concluding that population-wide weight loss in Cuba between 1980 and 2010 "was accompanied by diabetes mortality falling by half and mortality from coronary heart disease falling by a third," while a rebound in body weight "was associated with an increased diabetes incidence and mortality, and a deceleration of the decline in mortality from coronary heart disease." Manuel Franco, et al., "Population-wide weight loss and regain in relation to diabetes burden and cardiovascular mortality in Cuba 1980-2010: repeated cross sectional surveys and ecological comparison of secular trends," *BMJ,* April 2013.

"The current findings add powerful evidence that a reduction in overweight and obesity would have major population-wide benefits," writes Willett of the study. "Medical treatment of people at high risk for disease will have limited impact on mortality rates if the primary causes of disease are not dealt with, and reviews agree that solutions will require multisectoral approaches. Potential strategies include education efforts, redesign of built environments to promote physical activity, changes in food systems, restrictions on aggressive promotion of unhealthy food and drinks to children, and economic strategies such as taxation."

Social Policy Researcher Contends Anti-Obesity Initiatives Don't Work

In a Spring 2013 Breakthrough Institute **paper**, social policy research associate Helen Lee suggests that public health advocates have gone astray in modeling anti-obesity efforts on anti-tobacco efforts that have done little to address either overeating or smoking in any appreciable way. Titled "The Making of the Obesity Epidemic: How Food Activism Led Public Health Astray," the paper argues that research does not support a link between obesity and increased mortality, unless the obese are also poor and lack access to adequate health care. In fact, Lee notes that mortality from diabetes and cardiovascular disease, often associated with excess weight, has decreased significantly because these diseases are treatable.

Lee believes that "embracing obesity strategies that reinforce the notion that the poor are victims of an environment that is rigged against them" will not help them in the long run and that the better strategy would be to focus on "policy interventions that reinforce behaviors associated with better life outcomes." She takes particular issue with food advocates Marion Nestle and Michael Pollan who point to the food industry as the source of all obesity-related issues. She suggests that the public health community has overlooked the multiplicity of healthy practices that lead to longevity, such as managing

one's weight, getting regular sleep, and exercising, in favor of reducing the "obesity epidemic" to "single factors." Lee argues that "nutrition education and school gardening programs are probably a lot less valuable than curriculums that show young people how to manage desires for unhealthy foods."

New York Comptroller Resolves Shareholder Resolutions on Political Spending Disclosures

New York State Comptroller Thomas DiNapoli has reached agreements with several *Fortune* 500 companies, including Dr. Pepper Snapple Group, to disclose their corporate political spending. The agreements apparently resolve shareholder resolutions that DiNapoli filed on behalf of the state's pension fund, which holds more than 600,000 shares of Dr. Pepper Snapple Group, valued at some $26.1 million. DiNapoli stated, "Shareholders have a right to know how companies are using corporate money for political purposes. To date, eighteen companies have reached agreements with the New York State Common Retirement Fund to disclose their political spending—it's time for more good corporate citizens to follow their lead." Among the other companies that have reached similar agreements in past years are Yum! Brands Inc. and PepsiCo. Inc. *See NYS Comptroller Thomas DiNapoli News Release*, April 9, 2013.

SCIENTIFIC/TECHNICAL ITEMS

"Western-Style" Diet Allegedly Linked to Premature Mortality

A new study has purportedly linked a "Western-style" diet to a greater risk of premature death in middle-age adults. Tasnime Akbaraly, et al., "Does Overall Diet in Midlife Predict Future Aging Phenotypes? A Cohort Study," *American Journal of Medicine,* May 2013. Using data from the British Whitehall II cohort study, researchers evidently examined the dietary patterns and adherence to the Alternative Healthy Eating Index (AHEI)—"a validated index of diet quality"—of 5,350 adults with a mean age of 51 years. After a 16-year follow-up that included screenings conducted every 5 years, the study's authors apparently categorized participant outcomes into the following groups: (i) "ideal aging, defined as free of chronic conditions and high performance in physical, mental and cognitive functioning tests—4.0 percent"; (ii) "nonfatal cardiovascular event—12.7 percent"; (iii) "cardiovascular death—2.8 percent"; (iv) "noncardiovascular death—7.3 percent"; and (v) "normal aging—73.2 percent."

Based on these classifications, the study's authors reported that subjects "with low adherence to AHEI increased their risk of cardiovascular and noncardiovascular death," while those who followed "a 'Western-type diet' consisting of fried and sweet food, processed food and red meat, refined grains, and high-fat dairy products lowered their chances for ideal aging." The study noted, however, that "the mechanisms underlying the association between the 'Western-type food' dietary pattern and lower odds of ideal aging remain unclear and need further investigation."

"We showed that specific dietary recommendations such as the one provided by the AHEI may be useful in reducing the risk of unhealthy aging, while avoidance of the 'Western-type foods' may actually improve the possibility of achieving older ages free of chronic disease and remaining highly functional," concludes the study. "A better understanding of the distinction between specific health behaviors that offer protection against diseases and those that move individuals towards ideal aging may facilitate improvements in public health prevention packages." *See American Journal of Medicine Press Release,* April 15, 2013.

Researchers Claim Restricting Sugary Drink Sizes May Increase Consumption

A recent study has reportedly claimed that "restricting larger-sized drinks may have the unintended consequence of increasing soda consumption rather than decreasing it." **Brent Wilson, et al., "Regulating the Way to Obesity: Unintended Consequences of Limiting Sugary Drink Sizes," *PLoS One*, April 2013**. Researchers apparently conducted a behavioral simulation in which 100 University of California, San Diego, students "were offered varying food and drink menus" that replaced larger drink offerings with bundles of smaller drinks. According to the study, the menus given to participants included: (i) an Unregulated menu offering 16 oz, 24 oz or 32 oz drinks for sale; (ii) a Bundle menu offering 16 oz drinks, a bundle of two 12 oz drinks, or a bundle of two 16 oz drinks for sale; and (iii) a No Bundle menu offering only 16 oz drinks for sale.

The results evidently showed that participants bought "significantly more ounces of soda from the Bundle menu than from the Unregulated menu" but "significantly fewer ounces of soda from the No Bundle menu than from the Unregulated menu." In addition, the study's authors noted that revenue "was significantly higher for the Bundle menu" than for both the Unregulated menu and no Bundle menu.

"These data suggest that a sugary drink restriction may not be effective in reducing consumption when businesses are able to sell bundles of soda that add up to the original, larger drink size," they concluded. "Proponents of the

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New York City sugary drink limit are likely anticipating only the small 16 oz size being offered with the medium and large sizes being eliminated from the menu. They may, therefore, be concerned if businesses convert their jumbo-sized sugary drinks into multiple, smaller packages of sugary drinks."

OFFICE LOCATIONS

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FOOD & BEVERAGE LITIGATION UPDATE

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

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

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