Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Proposed Legislation Would Ban BPA in Food and Beverage Containers

U.S. Rep. Edward Markey (D-Mass.) has re-introduced legislation (H.R. 2248) that would prohibit the use of bisphenol A (BPA) in all food and beverage containers. Titled the "Ban Poisonous Additives Act 2013," the bill would "ban reusable food and beverage containers (e.g., thermoses) and other food containers (e.g., canned food and formula) that contain BPA from being sold or introduced into commerce."

"It's time to take the worry out of feeding America's kids by taking the BPA out of infant formula, canned goods, and other food and beverage containers," said Markey, who has been working to remove BPA from food and beverage containers since 2008. "Parents, consumers, and doctors are all asking to get BPA out of our bodies. It's time to ban this chemical and move to safer alternatives."

The proposed legislation would also (i) permit the U.S. Food and Drug Administration (FDA) to issue one-year waivers if a facility "demonstrates that it is not technologically feasible to replace bisphenol A in the certain type of container or containers for such particular food product or products"; (ii) require manufacturers that receive a waiver to submit "a plan and timeline for removing bisphenol A from such type of container or containers for that food product or products" and to "display a prominent warning on the label that the container contains bisphenol A"; and (iii) require FDA to review substances that have been previously approved for use in manufacturing food and beverage containers and to limit the use of substances that FDA determines may pose health risks.

The proposal is supported by 19 other Democratic members of Congress and endorsed by the American Nurses Association, Clean Water Action, Breast Cancer Fund, Consumers Union, Environmental Working Group, and other consumer protection organizations. *See Rep. Edward Markey News Release,* June 4, 2013.

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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FSIS Proposes Labeling Mechanically Tenderized Beef Products

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has issued a **proposal** that would require beef products undergoing a mechanical tenderization process be labeled as such and include new cooking instructions to ensure proper handling. According to an agency spokesperson, "Ensuring that consumers have effective tools and information is important in helping them protect their families against foodborne illness." Some cuts of beef are apparently pierced by needles or sharp blades to break up muscle fibers and increase tenderness. With the possible introduction of pathogens into the interior of such products, FSIS notes that they "may pose a greater threat to public health than intact beef products, if they are not cooked properly." Public comments will be requested within 60 days of publication in the *Federal Register*. *See FSIS News Release*, June 6, 2013.

Animal Welfare Institute Petitions FSIS for Humane Slaughter Methods

The Animal Welfare Institute (AWI) has submitted a **petition** to the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) asking that the agency require all slaughter establishments to create and implement written animal-handling plans to decrease the "needless suffering of animals during slaughter."

Citing more than 1,000 humane slaughter violations that allegedly occurred at state and federally inspected slaughter plants from 2007 through 2012, AWI calls on FSIS to write regulations that require (i) "all workers who have contact with animals be trained in humane handling," (ii) "stunning equipment be routinely tested and maintained," and (iii) "backup stunning devices be available in both the stunning and holding areas of every slaughter plant."

According to AWI, the agriculture department recommended eight years ago that all slaughter plants take a "systematic approach to humane slaughter by developing a comprehensive, written animal handling plan," yet just 35 percent of federally inspected plants and few state-inspected plants evidently have such plans in place. "It is disturbing that slaughterhouses are allowed to kill animals without having such a plan in place," said AWI President Cathy Liss. "It is equally unacceptable that untrained employees are allowed to handle and slaughter the animals, and that routine testing of equipment used to stun animals is not required." *See AWI News Release,* June 4, 2013.

Connecticut Passes GM Labeling Legislation

Connecticut lawmakers have passed a bipartisan bill (**H.B. 6527**) that will require labeling on foods that contain genetically modified (GM) ingredients, making it the first state in the nation to enact such legislation. Designated as "An Act Concerning Genetically-Engineered Food," the bill was unanimously

passed in the Senate and by a 134-3 vote in the House. Governor Dan Malloy (D) has reportedly indicated that the final step in its passage, his signature, will "not be an issue." "This is important stuff. . . and I think the rest of the world is starting to understand that."

The bill's passage came after House and Senate conferees reached a compromise following debate over a different version of the proposal. At issue was whether to allow the law to take effect automatically or to attach a "trigger" that would require neighboring states to pass similar legislation before Connecticut's law would be implemented and enforced. The final version requires that four other states—with a combined population of at least 20 million people—pass similar legislation, and one of those states must border Connecticut.

Once the contingency is met, distributors that sell unlabeled products containing GM ingredients would be fined $1,000 per product per day, and the Department of Consumer Protection would be able to seize the products. The law will not apply to alcoholic beverages, foods not packaged for retail and intended for immediate consumption, farm products sold at roadside stands or farmers' markets, and "Food consisting entirely of, or derived entirely from, an animal that was not genetically engineered, regardless of whether such animal was fed or injected with any genetically engineered food or any drug that was produced through means of genetic engineering." Foods subject to the law must bear the clear and conspicuous statement "Produced with Genetic Engineering."

Senate President Donald Williams, (D-Brooklyn) said that the bill would make a "critical difference. We have made history in the state of Connecticut, and this issue is so important in terms of the safety of our food supply and the health of the men, women, and children in this country," Williams said. "We know these GM[] foods are tied directly to increased use of herbicides and pesticides that are wreaking havoc in our environment." *See Governor Malloy News Release,* June 1, 2013; *CT News Junkie,* June 3, 2013.

NYC Health Department Expands Campaign to All Sweetened Beverages

The New York City (NYC) Department of Health and Mental Hygiene has reportedly launched an ad campaign targeting beverages with added sugars, such as sports drinks, teas and energy drinks. Part of a four-year "Pouring on the Pounds" campaign that has compared sweetened soft drinks to sugar packets and fat globs, the new TV ads apparently feature the physical effects of diabetes, an overweight man drinking a neon-blue beverage and a surgeon manipulating a diseased heart with tweezers. The effort comes on the eve of the city's appearance before a state appeals court to defend its vacated limits on the size of sugar-sweetened beverages sold in certain retail venues. Oral

argument is scheduled for June 11, 2013. Additional information about the lower court's ruling appears in Issue 475 of this *Update*. *See Bloomberg News*, June 3, 2013.

LITIGATION

False "100% Natural" Labeling Suit Against General Mills Dismissed

A federal court in Minnesota has dismissed a putative class action alleging that General Mills misleads consumers by labeling its Nature Valley products as "Natural" or "100% Natural" when they actually contain highly processed ingredients such as high-fructose corn syrup, high-maltose dextrin syrup and maltodextrin. *Chin v. General Mills, Inc.*, No. 12-2150 (U.S. Dist. Ct., D. Minn., decided June 3, 2013). Additional details about the original complaint appear in Issue 453 of this *Update*.

The court dismissed all counts relating to Nature Valley products that the plaintiffs did not purchase, according to their first amended complaint, ruling that they lacked standing to bring such claims. The court dismissed a breach of written warranty claim brought under the Magnuson-Moss Warranty Act because labeling a product as "100% Natural" is not a written warranty under the law; rather, it is a "product description." Implied warranty claims under the Act and state law were also dismissed because the applicable sections "do not apply to remote purchasers of products" as they require the existence of a contract between the plaintiff and defendant.

The court also dismissed express warranty claims under state law, agreeing with General Mills that its "100% Natural" claim could not be "viewed in isolation and must be read in the context of the entire package, including the ingredient panel," and "that the specific terms included in the ingredient list must inform the more general term '100% Natural.'" According to the court, "the specific terms determine the scope of the express warranty that was allegedly made to the Plaintiffs." The plaintiffs' fraud-based claims were dismissed because they failed to satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b). In this regard, the court stated, "Plaintiffs make several statements regarding ingredients that are 'highly processed,' but fail to plead what they understood this term to mean and how it does or does not relate to the '100% Natural' statement."

Wheat Farmer Sues Monsanto over Alleged GM Cross-Pollination of Conventional Crops

Kansas wheat farmer Ernest Barnes has filed a lawsuit against Monsanto Co. alleging losses stemming from the discovery of genetically modified (GM) wheat plants in a conventional wheat field in Oregon. *Barnes v. Monsanto Co.*, No. 13-1218 (U.S. Dist. Ct., D. Kan., filed June 3, 2013). The Oregon

farmer apparently tried to eradicate the plants with Monsanto's RoundUp® glyphosate weed killer, but when they survived the application, he submitted samples to Oregon State University where they allegedly tested positive for Monsanto's glyphosate-resistant trait. Monsanto purportedly planted GM wheat in fields across the United States, but the crop was never submitted for approval by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), and GM wheat has not been approved for cultivation or sale anywhere in the world.

According to Barnes's complaint, news about the discovery immediately resulted in the suspension of U.S. wheat imports by a number of trading partners, including Japan and South Korea. Alleging negligence, negligent undertaking, res ipsa loquitur, gross negligence, public nuisance, private nuisance, common law strict liability in tort—ultrahazardous activity, and common law negligence per se, the plaintiff seeks damages in excess of $100,000, costs and interest.

Monsanto has reportedly launched its own investigation into the alleged discovery and is cooperating with APHIS. According to Monsanto, tests on 30,000 samples of 50 varieties of wheat, representing some 60 percent of white wheat acres in Oregon and Washington, showed no GM presence. During a press conference, a company spokesperson reportedly suggested that sabotage was a possibility. "We're not ruling anything out at this point," he said. "We know that the circumstances are highly unusual. We're going to continue to do the research until we get to the answer." The company claims that it last field-tested GM wheat in Oregon 12 years ago. It also claims that its process for closing the wheat-testing program was "rigorous, well-documented and audited." *See Law360*, June 3, 2013; *Reuters*, June 5, 2013.

Suit Filed in California over Hepatitis A Outbreak Linked to Frozen Organic Fruit

A California resident has filed a strict liability lawsuit against a food retailer and the Oregon-based company that produced a frozen organic fruit mix allegedly implicated in a widespread Hepatitis A outbreak. *Brackenridge v. Townsend Farms Corp.*, No. BC510633 (Cal. Super. Ct., Los Angeles Cnty., filed June 3, 2013). According to the complaint, Lynda Brackenridge contracted the disease after purchasing the frozen fruit blend and remains hospitalized in isolation and in guarded condition. Seeking past and future economic and non-economic damages in excess of $25,000, court costs and interest, the plaintiff also alleges negligence and breach of implied warranties.

Federal Court Retains Jurisdiction over "All-Natural" Claims Against Frito-Lay

A federal court in Arkansas has ruled that it has jurisdiction, pursuant to the U.S. Supreme Court's seminal standing decision under the Class Action Fairness Act (CAFA), *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013),

to adjudicate the putative class claims filed by a woman who alleges that Frito-Lay deceives consumers by labeling its Tostitos® and SunChips® products as "All Natural" because they contain genetically modified corn and hexane-extracted soybean oil. *Deaton v. Frito-Lay N. Am., Inc.*, No. 12-1029 (U.S. Dist. Ct., W.D. Ark., El Dorado Div., order entered June 5, 2013).

At issue was whether the defendants had submitted sufficient evidence to show that the amount in controversy exceeded CAFA's $5-million jurisdictional minimum. The plaintiff had stipulated that she would not seek more than $5 million to keep the lawsuit in state court, but conceded that her stipulation could not prevent removal under the *Knowles* decision. The court ruled that the defendants carried their burden, noting that "a fact-finder could easily conclude that Frito-Lay's supplier/retailer sales of over $5 million for both 2010 and 2011 translated to over $5 million in individual consumer sales during the same period. And this amount does not even take into consideration Plaintiff's claims for restitution."

California Plaintiff Has Standing to Sue over Green Tea Antioxidant Claims

A federal court in California has reportedly determined that a named plaintiff in a putative consumer-fraud class action may pursue claims pertaining to the defendant's green tea products but not its black teas. *Khasin v. R.C. Bigelow, Inc.*, No. 12-2204 (U.S. Dist. Ct., N.D. Cal., order entered May 31, 2013). The plaintiff apparently alleges that the defendant made misleading statements in press releases and on its Website about the presence of antioxidants in its tea products, including both green and black teas. Because he did not purchase the black teas, the court ruled that he lacked standing to represent consumers who did purchase them. The court also reportedly dismissed the plaintiff's unjust enrichment claim but refused to dismiss most of his other allegations finding them sufficiently pleaded. *See Bloomberg BNA Product Safety & Liability Reporter*, June 4, 2013.

Celebrity UK Chef Sues Chipotle over Ramen-Noodle Chain-Restaurant Concept

Chef Kyle Connaughton, who has "been employed by some of the most prestigious restaurants in the world," co-authored books and co-presented on United Kingdom (U.K.) TV programs, has sued Chipotle Mexican Grill and its CEO, claiming that he was hired to developed a ramen-noodle fast-food restaurant concept that was doomed to fail because someone else had already created the concept in the context of a confidential business deal with Chipotle that did not come to fruition. *Connaughton v. Chipotle Mexican Grill, Inc.*, No. 155106/2013 (N.Y. Sup. Ct., N.Y. Cnty., filed June 3, 2013).

Connaughton allegedly developed the business plan and concept from 2010-2012 in close collaboration with Chipotle employees. Connaughton later learned on meeting with Momofuku's Noodle Bar chief marketing officer that

Momofuku would sue Chipotle when its ramen restaurant opened because owner David Chang had developed the same concept for Chipotle in 2008. Because Chang could not come to terms with Chipotle owner Stephen Ells, Chang did not authorize any use of his confidential work and refused to nullify a non-disclosure agreement.

Contending that "the information communicated by Chipotle staff to Mr. Connaughton was information communicated to Chipotle by Momofuku," Connaughton claims that implementation of his ramen concept would violate the non-disclosure agreement and he would be accused of stealing Chang's concept thus ruining "his professional reputation." According to the complaint, Ells fired Connaughton after a confrontation about the pre-existing ramen-noodle business dealings and purported fraud. Connaughton seeks compensatory and punitive damages for the defendants' alleged fraudulent inducement of his employment and unjust enrichment.

Texas Ice Cream Business Brings Trademark Infringement Case Against Amy's Kitchen

Austin-based Amy's Ice Creams has reportedly filed a trademark infringement lawsuit in a federal district court against Amy's Kitchen, which makes frozen lunch and dinner entrées with organic and non-genetically modified ingredients. While the two companies have apparently co-existed without difficulty for more than 20 years, Amy's Ice Creams, now with 15 shops throughout Texas, claims that it recently learned about the frozen food company's plan to launch a line of frozen treats. Amy's Kitchen is based in California, and its products are sold nationally.

Ice cream company founder Amy Simmons reportedly said, "We don't want them to go into ice cream because there will be obvious confusion." According to the complaint, the confusion would not be limited to Texas consumers, as the ice cream company "is well known beyond the state. The success of Amy's [Ice Creams] has been featured in such publications as Inc., Southern Living, Wall Street Journal, Newsweek, People and Fast Company, and Amy's [Ice Creams] has been profiled on the Food Network, ABC, and is referenced in multiple university textbooks." *See Austin American-Statesman* and *Hispanic-Business.com*, June 5, 2013.

OTHER DEVELOPMENTS

APHA's Annual Meeting to Include Sessions on Food Taxation, Labeling, Marketing, and Legal Strategies

The American Public Health Association's 141st annual meeting and exposition is slated for November 2-6, 2013, in Boston, Massachusetts. Expected to attract more than 13,000 physicians, researchers, epidemiologists, and related

health specialists, and featuring a myriad of presentations, the meeting will include a session on "Regulating for the Public's Health: Food and Beverages, Drugs, and Emerging Technologies."

Among the presentations during this session are the legal considerations of antibiotics in food animals, focusing on a court order requiring that the Food and Drug Administration (FDA) complete proceedings to withdraw approval of certain antibiotics (presented by Centers for Disease Control and Prevention senior attorney Heather Horton), and "Legal strategies to increase funding and improve the FDA's authority over food labeling violations and questionable claims" (presented by Rudd Center for Food Policy and Obesity attorney Jennifer Pomeranz). Pomeranz contends that FDA lacks sufficient authority and funding to address misbranded food products and "[t]he result has been a proliferation of claims on packaged food that create a misleading impression of health." Pomeranz will propose "an innovative method for increased funding and increased authority for FDA to address questionable claims on food products" involving a congressionally created "deterrence-based system of enforcement."

Pomeranz will also participate in a session addressing "Preventing over-consumption of fast food by young people: Strategies to improve fast food nutritional quality and reduce restaurant visits." Her specific topic is "Regulation of fast food restaurant marketing and retail practices." Other topics during this session include (i) "Have fast food restaurants become healthier for children?: Progress, purchases, and public relations"; (ii) "Fast-food marketing to children and adolescents: Increasing youth engagement with brands"; (iii) "Effect of fast-food advertising on children's consumption and weight outcomes"; and (iv) "Changes in the New York City restaurant environment."

Another session, titled "Modeling the cost effectiveness of childhood obesity interventions and policies: an evaluation of methods to evaluate four strategies in the United States," will include a discussion on the "Cost-effectiveness of a sugar-sweetened beverage excise tax in the United States." This presentation will focus on a study that "quantifies the expected health and economic benefits of a national [sugar-sweetened beverage] excise tax of 1 cent per ounce." The researchers conclude that while such a tax "would save $1,289 for every dollar spent administering the tax over the lifetime of the cohort and in addition generate $12.6 billion in annual revenue (2005 dollars)," it would also "substantially reduce BMI and healthcare expenditures, and increase healthy life and revenue for health promotion."

OECD Issues Survey Summary on Regulatory Oversight of Nanotechnology in Foods

The Organisation for Economic Co-operation and Development (OECD) has released a **summary** of survey results pertaining to the regulatory framework in 12 countries that provide oversight of nanotechnology in food and medical

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products. Conducted in 2011-2012, the survey addressed (i) "the regulatory frameworks being used to provide oversight for the use of nanotechnology in the relevant field," (ii) "the legislative frameworks relevant to these regulatory frameworks," and (iii) "relevant government supported research programmes and institutions." OECD has concluded that food ingredients, additives, colorings, and contact substances "that may contain nanomaterials or otherwise involve the application of nanotechnology are covered under existing national and/or regional legislative and regulatory frameworks that are relevant and applicable to foods." *See OECD News Release*, May 28, 2013.

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