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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

DeLauro Targets Failure of USDA's Computerized Sampling System

U.S. Rep. Rosa DeLauro (D-Conn.) has sent an August 23, 2013, **letter** to U.S. Department of Agriculture (USDA) Under Secretary for Food Safety Elisabeth Hagen about "the ongoing problems with the Public Health Information System (PHIS) used by the Food Safety [and] Inspection Service (FSIS)." Citing reports that PHIS recently experienced a system-wide shutdown that lasted three days and allowed "millions of pounds of meat products" to leave processing plants without being tested for *E. coli*, DeLauro has asked USDA to provide a record of similar major incidents as well as an "analysis of the problems with the system, the impact on food safety and steps being taken to remedy these problems, including those related to software and connectivity." She has also asked for details about the parameters of the PHIS contract "that ensure long-term solutions are made to issues that arise in the system," in addition to "the metrics included in the contract and an evaluation of those metrics to ensure the PHIS is meeting USDA's goal of providing real time sampling of meat products and analyses that identify any issues before an outbreak occurs."

"The multitude of problems with the PHIS include, among others, deficient software, system errors, outages, high maintenance needs, and loss of connectivity," concludes DeLauro. "These issues are system-wide, occurring not just in certain rural areas, but all across the United States. Most concerning, these issues lead to inspectors spending more time addressing PHIS problems than conducting inspections, as well as delays or cancellation of product sampling." Additional details about the most recent PHIS shutdown appear in Issue **495** of this *Update*. *See Rep. Rosa DeLauro Press Release,* August 23, 2013.

USDA Seeks Comments on *Salmonella* Testing Process

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) has **issued** a request for comments regarding changes to its procedure for *Salmonella* verification sampling of raw beef products. Among

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For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

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

or

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

If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

other things, FSIS stated that it will (i) begin "analyzing for *Salmonella* all raw beef samples that it collects for Shiga toxin-producing *Escherichia coli* (STEC) analysis," including all raw ground beef, beef manufacturing trimmings, bench trim, and other raw ground beef components; (ii) increase the raw ground beef sample used for *Salmonella* analysis from 25 grams to 325 grams; and (iii) discontinue *Salmonella* sampling set procedures in ground beef products, except in those establishments that exceeded the standard for *Salmonella* in their most recent tests. FSIS intends to use the results from its verification sampling program to develop new *Salmonella* performance standards for ground beef products and to estimate *Salmonella* prevalence in raw ground beef and trimmings. Comments will be accepted until September 27, 2013. *See Federal Register,* August 28, 2013.

FDA Information Collection Focuses on Animal Feed Manufacturers

The Food and Drug Administration (FDA) has **announced** an information collection requiring "renderers, feed manufacturers, and others involved in feed and feed ingredient manufacturing and distribution to maintain written procedures specifying the cleanout procedures or other means, and specifying the procedures for separating products that contain or may contain protein derived from mammalian tissue from all other protein products from the time of receipt until the time of shipment."Intended to ensure compliance with regulations that prohibit certain animal proteins in ruminant feed to prevent the spread of bovine spongiform encephalopathy, the information collection will allow inspection personnel to confirm that an individual firm's written procedures have been followed at the time of inspection. FDA has estimated that this information collection will involve an average annual burden of 14 hours per recordkeeping. Comments are requested by September 26, 2013. *See Federal Register,* August 17, 2013.

ECHA Announces Public Consultation on Proposal to Reclassify BPA

The European Chemicals Agency (ECHA) has **announced** a public consultation seeking feedback on a **proposal** submitted by the French Agency for Food, Environmental and Occupational Health and Safety (ANSES) to reclassify bisphenol A (BPA) based on its alleged reproductive toxicity. According to ECHA, the proposal would upgrade the harmonized classification and labeling (CLH) of BPA from reproductive toxicity category 2 (hazard statement code H361f, "*suspected of damaging fertility*") to reproductive toxicity category 1B (hazard statement code H360F, "*may damage fertility*").

"France welcomes any new classification proposal for other endpoints such as carcinogenicity, development or lactation but believes that the emergency for regulating BPA is high enough justifying targeted CLH report and ATP inclusion at [sic] the first place," states ANSES in its dossier, which includes

an evaluation of BPA studies published since the last CLH evaluation was undertaken in 2002. In addition, ECHA has emphasized that the current public consultation "is targeted at the adverse effects on sexual function and fertility only, not on developmental toxicity or other hazard classes than reproductive toxicity." It will accept comments on ANSES's proposal until October 11, 2013.

In a related development, Bloomberg BNA's *Product Safety & Liability Reporter*™ recently published an overview of the regulatory and legislative developments aimed at curbing the use of BPA in consumer products. Titled "Bisphenol A Debate Transforms Toxicology as Market Forces Outpace Research Efforts," the article notes that in addition to the European Union, at least 17 governments and a dozen U.S. states have acted to limit the use of BPA in baby bottles or other food containers even though scientists have not yet reached a consensus on its safety. "Six government agencies around the world have concluded BPA is safe as used. The European Food Safety Authority and World Health Organization reached the same conclusion, although the Food Safety Authority is updating its risk analysis," notes the *Reporter*. "France, however, found that bisphenol A poses health concerns, and Sweden is leaning in that direction."

In particular, the article claims that consumer opposition combined with the willingness of governments to ban BPA in specific products has fueled the confusion over BPA, igniting a heated debate among regulators, researchers and the public that has prompted industry to scale back its BPA use even though the substance works to prevent the formation of botulin toxins in can linings. The dispute has also led some authorities such as the Environmental Protection Agency to reconsider how they evaluate the effects of endocrine disruptors at levels traditionally not considered in risk assessments.

"Notwithstanding broad disagreement about the safety of bisphenol A, the individuals BNA interviewed agreed that some issues came together to give BPA its high profile," concludes the article, which features a list of the governments that have banned or limited the substance's use in food and consumer product applications. "These include the point in time when bisphenol A grabbed the attention of scientists; the public's widespread exposure to bisphenol A through food and drink packaging; campaigns linking baby pictures and baby bottles to fears about infant health; and industry's ability to quickly find substitutes for BPA's use in baby bottles, which led to public expectations that alternatives were readily available for other applications of the chemical." *See Bloomberg BNA,* August 28, 2013.

UK Issues Warning About Fake Manuka Honey

The U.K. Food Standards Agency has reportedly issued a nationwide warning about misleading and illegal claims for manuka honey, a product derived from the manuka tree in southeastern Australia and New Zealand and

endorsed by many celebrities who claim that it contains unique anti-bacterial and medicinal properties. According to news sources, manuka honey commands prices 10 to 20 times higher than other types of honey. Tests by the U.K. Food Environment Research Agency (Fera), New Zealand's Unique Manuka Factor Honey Association (UMFHA) and others, however, suggest that many of the products labeled "manuka honey" contain none of its unique active properties, prompting industry leaders to demand a crackdown on a "potentially huge fraud."

Industry data have apparently revealed that New Zealand—the main source of manuka honey—produces only 1,700 tons of the honey each year, while consumption data show that an estimated 10,000 tons is sold worldwide annually, with 1,800 tons sold in the United Kingdom alone. Based on these findings, the New Zealand Ministry for Primary Industries has reportedly issued a statement indicating that it is actively working with industry and New Zealand Trade and Enterprise to develop labeling guidance for manuka honey and "provide clarity for producers and consumers." Noting that she took damage to the New Zealand brand "very seriously," New Zealand Food Safety Minister Nikki Kaye has also apparently recommended an "international standard" in the long term.

Meanwhile, UMFHA spokesperson John Rawcliffe has announced a partnership with overseas agencies to create a testing regime, including a collaboration with Fera to establish a verification program in the United Kingdom. *See New Zealand Herald,* August 25 and 26, 2013; *The Australian.com,* August 26, 2013.

LITIGATION

MDL Court Narrows "All Natural" Claims over Frito-Lay GMO Products

A multidistrict litigation (MDL) court in New York has granted in part the motion to dismiss filed in a putative class action alleging that Frito-Lay North America and PepsiCo., its parent, mislead consumers by labeling various Tostitos®, SunChips® and Fritos Bean Dip® products as "all natural" when they contain genetically modified organisms (GMOs). *In re Frito-Lay N. Am., Inc. All Natural Litig.*, MDL No. 2413 (U.S. Dist. Ct., E.D.N.Y., order entered August 29, 2013). The court dismissed PepsiCo, Inc. from the litigation without prejudice, finding that the complaint failed to allege sufficient facts to support its liability.

Among other matters, the court refused to dismiss the suit on the basis of (i) the primary jurisdiction doctrine (noting that the issues do not require specialized knowledge to resolve and that "the FDA [Food and Drug Administration] is unlikely to respond in a timely manner to any referral from this

Court"), (ii) preemption (finding that FDA's non-binding guidance on the issue lacks preemptive effect), or (iii) standing. According to the court, whether the plaintiffs could pursue their claims as to products they did not purchase is a question of class standing in the Second Circuit and not of Article III standing. The court also declined to rule, on the basis of numerous agency-related documents of which it agreed to take judicial notice, including material from "three federal agencies, states, and industry and consumer groups, . . . that 'natural' does not mean GMO-free." Whether reasonable consumers understand the "All Natural" label in this light is, in the court's view, a question of fact that cannot be determined on a motion to dismiss.

The named putative class representatives in these consolidated actions are residents of New York, California and Florida, seeking to represent a nationwide class of consumers and various statewide subclasses; much of the court's opinion considers whether specific claims can be maintained under certain state laws as to non-residents. As to each state's "safe harbor" provisions, the court refused to find that Frito-Lay had earned their protection, because neither the states nor the federal government has clearly provided for the use of "all natural" labeling for food products. The only claims dismissed with prejudice were the Magnuson-Moss Warranty Act claim and certain New York state-law claims to the extent they were alleged on behalf of non-New York plaintiffs.

For the most part, the court found that the plaintiffs had sufficiently pleaded their claims, except for an allegation that the defendants knew their products were not "all natural" because they contained GMOs. According to the court, simply pleading that a wrongdoer seeks to increase sales and revenue by labeling a product "all natural" "does not support a strong inference of fraudulent intent," because such motives "pertain to virtually any company that manufactures and distributes goods." The court also found that to the extent the plaintiffs' claims "are predicated on advertising and marketing materials beyond the products' labeling," they are insufficiently pleaded. The plaintiffs have 30 days to request that the court allow them to amend the complaint.

Monster Beverage Suit Against City Attorney of San Francisco Survives Motion to Dismiss

A federal court in California has narrowed the issues in litigation filed by Monster Beverage Corp. against Dennis Herrera, San Francisco's city attorney, granting in part and denying in part Herrera's motion to dismiss. *Monster Beverage Corp. v. Herrera*, No. 13-786 (U.S. Dist. Ct., C.D. Cal., order entered August 22, 2013). Additional details about the dispute between the litigants appear in issues 461, 482 and 483 of this *Update*.

The court rejected Herrera's claims that Monster Beverage lacked standing to bring a declaratory judgment action as to issues raised by his threats to sue the company if it fails to change its energy drink products by reducing the caffeine levels and to alter its labeling and advertising. The court also found that the issues are ripe, stating "The dispute here is not abstract and the lawsuit is not premature. The issue here, whether Monster must comply with Herrera's demands pursuant to California state laws, is fit for judicial decision. If the Court were to withhold consideration, then Monster would be forced either to comply with Herrera's demand, or be sued."

The court also determined that it was not required to dismiss the action on the basis of *Younger* abstention, because, as Herrera argued, Monster had engaged in "forum shopping and gamesmanship," a contention with which the court disagreed, or on the ground that Herrera has a right to petition under the *Noerr-Pennington* doctrine. As to the latter, the court stated, "Monster does not seek to impose liability on Herrera for sending a demand letter. Rather, Monster seeks declaratory judgment on the legal issues raised in the demand letter."

The court agreed to dismiss Monster's void-for-vagueness claim and its Commerce Clause claim with prejudice, but found that the company was entitled to bring claims under the First Amendment, preemption claims to the extent that Herrera seeks to impose more than required by the Food and Drug Administration (FDA), and primary jurisdiction, finding, "Monster has sufficiently alleged that the FDA has primary jurisdiction because the FDA has special competence over the matters at issue in this case" and "has taken an interest in investigating the matters at issue here. In fact, Herrera urges the FDA to take action regarding energy drinks and acknowledges that the FDA has launched an investigation into these products."

Court Rules Consumer Fraud Claims Against Crisco Maker Not Preempted

A federal court in California has denied the motion to dismiss filed by J.M Smucker Co. in a putative class action alleging that it misleads consumers by labeling four of its Crisco® oil products as "All Natural" because they are purportedly made with genetically modified (GM) corn, canola and soy crops and because they are highly processed. *Parker v. J.M. Smucker Co.*, No. 13-690 (U.S. Dist. Ct., N.D. Cal., order entered August 23, 2013).

Finding that the amended complaint met the plausibility pleading standard, the court ruled that the plaintiff had standing to pursue claims as to products she had not purchased because they were sufficiently similar. In the court's view, "They are all the same kind of product. They all have highly similar labels. Plaintiff alleges the same actionable conduct as to each of them."

The court also rejected the defendant's contention that the claims were preempted in light of the Food and Drug Administration's (FDA's) determination that special labels are not required for GM foods. According to the court, the plaintiff did not seek to require that GM foods be labeled differently from non-bioengineered foods; rather, "[u]nder Plaintiff's theory, Defendant could have simply left 'All Natural' off the labels. But because they included the phrase, Plaintiff claims that the labels are misleading. This is not a preempted theory." The court further noted that "this is not a case in which a plaintiff sued a food producer for not disclosing its use of bioengineered ingredients."

The court declined to find as a matter of law that reasonable consumers would not be misled by the "All Natural" label and found that the plaintiff had sufficiently stated her state law-based claims. As to the defendant's argument that the express warranty claim must be dismissed because the "All Natural" label is puffery, the court ruled that an "All Natural" claim "is an affirmative claim about a product's qualities, and it does not amount to mere puffery because it is not outrageous and generalized." The court further refused to apply the primary jurisdiction doctrine, observing that FDA has declined to rule on "natural" labeling and noting that "referring the matter to the FDA would do little more than protract matters."

No Class Certification for Plaintiffs Alleging Fraud in Sale of Coffee Product

A federal court in Illinois has refused to certify a multistate class of consumers who were allegedly deceived under the consumer protection statutes and unjust enrichment laws of eight named states by a company that, at one time, either misrepresented or failed to indicate that its single serving coffee product contained "instant" or "soluble" coffee rather than fresh ground coffee and a filter. *McManus v. Sturm Foods, Inc.*, No. 11-565 (U.S. Dist. Ct., S.D. Ill., order entered August 26, 2013).

According to the court, the class, defined as all consumers in the eight states who purchased the product from September 2010 until the present, included many who had no injury or had not relied on any product representations. Among the putative class members were individuals who (i) knew that the product was instant coffee and bought it anyway because it made no difference to their purchasing decision, (ii) purchased the product after the company changed the label in 2011 to include the word "instant," or (iii) ordered the product online without seeing the product label. Examining the laws of each state included in the proposed class definition, the court found that the class was fatally overbroad or too indefinite for certification. As to the plaintiffs' unjust enrichment claims, the court similarly found that the proposed class included members who could not have been harmed and also saw "no way to limit class membership without an impermissible plaintiff-by-plaintiff subjective inquiry."

The court concluded with a Rule 23 analysis and found that the plaintiffs could not show commonality, typicality, predominance, or superiority. The court also found that the plaintiffs could not seek injunctive relief because it was secondary to the damages claim "and thus not properly certified under R.23(b)(2)."

Who Is the Most Interesting Man in the World®?

The Mexican brewer that makes Dos Equis® beer and has advertised it with a distinctive campaign since 2007 has brought a trademark and copyright infringement lawsuit against a New Jersey-based company and its president for an advertising campaign that allegedly mimics the brewer's "Most Interesting Man in the World®" ads. *Cervezas Cuauhtémoc Moctezuma, S.A. de C.V. v. KCI, Inc.*, No. 13-5044 (U.S. Dist. Ct., D.N.J., filed August 22, 2013). According to KCI's LinkedIn page, the company offers storage area network (SAN) maintenance services.

The complaint alleges that defendants have filed trademark applications for and use in a YouTube video the marks "The Most Interesting SAN Architect in the World" and "I Don't Always Use Third Party Companies When I Buy and Maintain SAN Equipment But When I Do It's Always Team KCI . . . Stay Convergent My Friend." This compares with the brewer's registered marks "The Most Interesting Man in the World" and "STAY THIRSTY MY FRIENDS." The latter expression is used as part of an equity actor's declaration "I don't always drink beer but when I do, I prefer Dos Equis. Stay thirsty my friends."

Alleging federal trademark and copyright infringement, unfair competition, trademark dilution, likelihood of confusion, false suggestion of a connection, and violation of character rights, the plaintiff seeks injunctive relief, damages and enhanced damages, the delivery for impoundment of all copies of the defendants' video, attorney's fees, costs, and abandonment of the pending trademark applications.

Federal Court Could Rule in COOL Dispute Within Two Weeks

According to a news source, the federal court that heard a challenge to the U.S. Department of Agriculture's (USDA's) revision to its country-of-origin labeling (COOL) rules to comply with a World Trade Organization ruling stated during the hearing that it would issue a decision on the plaintiffs' request for a preliminary injunction within 14 days. *Am. Meat Inst. v. USDA*, No. 13-1033 (U.S. Dist. Ct., D.D.C., oral argument held August 27, 2013). Additional information about a dispute that has split trade associations representing different parts of the meat production industry appears in issues **490** and **495** of this *Update*.

The organizations seeking the injunction reportedly argued that "[t]his is a regulation the agency concedes is a *de minimis* benefit . . . for a *de maximus* cost." They contend that the new rules violate their First Amendment rights and could put them out of business. A USDA attorney apparently argued that the new rule "provides more information" and that food-label accuracy was its critical aim. The court did not indicate how it would rule, but noted that the statute requiring COOL "says American consumers need to know where the meat comes from." Asking attorneys representing both sides of the dispute whether Congress approved a law that cannot be implemented without triggering an international trade dispute, the court also reportedly observed that the "co-mingling" of meat products across borders, which the plaintiffs contend will be banned under the rule, is the real issue, that is, the "dog being wagged by the tail of the labeling." *See Politico, Law360* and *Grainews.ca*, August 27, 2013.

LEGAL LITERATURE

Law Review Comment Explores FTC Oversight of Food Health Claims

The *University of San Francisco Law Review* has published a student comment titled "Snake Oil in Your Pomegranate Juice: Food Health Claims and the FTC," that examines existing statutes and regulatory authorities enabling the Federal Trade Commission (FTC) and Food and Drug Administration (FDA) to regulate the burgeoning "functional food" market. 47 U.S.F.L. Rev. 783. The author focuses on litigation involving health claims made by the manufacturers of POM Wonderful® pomegranate juice products, noting that the industry has been watching it closely to learn what standards will be applied to the science supporting health-related claims thus allowing companies to make such claims. According to the author, the case illustrates why the current regulatory framework is inadequate. She concludes, "If case-by-case litigation continues to define the parameters of permissible claims, consumers will continue to be misled, and all brands will pay the price."

OTHER DEVELOPMENTS

Drastic Measures Proposed to Combat Childhood Obesity in Britain

In response to evidence that British children appear to be getting fatter, the Academy of Medical Royal Colleges in London has reportedly **recommended** imposing a 20-percent tax on sugary soft drinks for one year as an experiment to see whether it reduces consumption by kids. The group has also called for a ban on TV ads for foods high in saturated fats, sugar and salt until 9 p.m., and has suggested that the government develop "formal

recommendations on reducing the proximity of fast food outlets to schools, colleges, leisure centers and other places where children gather."

Meanwhile, the British Soft Drinks Association and other industry groups have publicly opposed such steps, claiming that most soda sold in Britain does not contain added sugar and that a new tax would hurt consumers who can "ill afford it." The country's Food and Drink Federation has also contended that existing restrictions on TV ads targeting kids have had "little effect, so expanding them makes no sense." *See Businessweek.com,* August 12, 2013.

MEDIA COVERAGE

Kitchen Spices Allegedly a Source of *Salmonella*

A recent article in *The New York Times* reports that the U.S. Department of Agriculture (USDA) is set to release a three-year-long study concluding that imported spices, particularly those from India and Mexico, are contaminated with *Salmonella*—reportedly the most common source of food-borne illness—at twice the rate of all other imported foods. "In a study of more than 20,000 food shipments," the article states, "[USDA] found that nearly 7 percent of spice lots were contaminated with salmonella, twice the average of all other imported foods. Some 15 percent of coriander and 12 percent of oregano and basil shipments were contaminated, with high contamination levels also found in sesame seeds, curry powder and cumin. Four percent of black pepper shipments were contaminated."

"*Salmonella* is a widespread problem with respect to imported spices," Deputy U.S. Food and Drug Administration Commissioner Michael Taylor was quoted as saying. "We have decided that spices are one of the significant issues we need to be addressing right now." The article indicates that Westerners are "particularly vulnerable" to contaminated spices because spices are often added at the table, so "bacterial hitchhikers are consumed live and unharmed." In India and most other Asian countries, spices are evidently added during cooking and, because bacteria do not survive high temperatures, contamination is less of a problem there.

According to the article, Mexico and India had the highest share of contaminated spices—about 14 percent of the samples from Mexico contained *Salmonella* compared with 9 percent from India. Because India reportedly ships nearly four times the amount of spices to the United States that Mexico does, however, officials noted that its contamination problems are "particularly worrisome," and government officials in that country are evidently taking USDA's concerns seriously. "The world wants safe spices, and we are committed to making that happen," a Spices Board of India spokesperson was quoted as saying. *See The New York Times,* August 27, 2013; *NPR's The Salt,* August 29, 2013.

SCIENTIFIC/TECHNICAL ITEMS

Researchers Track Alcohol Brand Mentions in Pop Songs

Boston University School of Public Health and Johns Hopkins Bloomberg School of Public Health researchers have identified the alcohol brands most frequently mentioned in popular music, raising questions about whether public health efforts should focus on reducing youth exposure "to these positive messages about alcohol use." Michael Siegel, et al., "Alcohol Brand References in U.S. Popular Music, 2009-2011," *Substance Use & Misuse,* August 2013. Relying on *Billboard Magazine's* most popular song lists in the urban, pop, country, and rock categories for 2009, 2010 and 2011, the study's authors found that 23 percent of the 720 surveyed songs mentioned alcohol and 6.4 percent included a mention of a specific alcohol brand, with four brands alone—Patron tequila, Hennessy Cognac, Grey Goose vodka, and Jack Daniel's whiskey—accounting for more than half of all alcohol brand mentions.

"Even in cases where alcohol companies are not directly promoting the mention of their brands in music lyrics, they may still be tacitly endorsing the way in which their brands are portrayed," warns the study, which claims that many performers not only glamorize underage alcohol consumption in their songs but are sponsored by alcohol brands. "If companies are not protesting or disavowing the mentions of their brands in contexts that are inconsistent with the industry's voluntary codes for portraying their brand images in advertisements, this could suggest that the companies are endorsing the context in which their brands are being portrayed in popular music, such as being associated with intoxication, underage drinking, or the use of alcohol to entice women into having sex." *See Johns Hopkins Bloomberg School of Public Health Press Release,* August 28, 2013.

Study Claims Fast Food Companies Not Adhering to Child Marketing Pledges

A recent **study** funded by the Robert Wood Johnson Foundation has claimed that fast food TV advertisements directed at children have allegedly failed to abide by Children's Advertising Review Unit and Children's Food and Beverage Advertising Initiative recommendations that food products—as opposed to toys, movie tie-ins and brands—should be the focus of youth marketing messages. Amy Bernhardt, et al., "How Television Fast Food Marketing Aimed at Children Compares with Adult Advertisements," *PLoS One,* August 2013. After reviewing all nationally televised advertisements for the top 25 quick service restaurants (QSRs) in the United States, researchers with the Geisel School of Medicine at Dartmouth and Public Health Advocacy Institute reported that 99 percent of the 92 QSR children's meal advertisements that aired between July 1, 2009, and June 30, 2010, were attributable to either McDonald's or Burger King. They also purportedly found that—compared with adult advertisements over the same period—visual branding, food

packaging and street views of the QSR restaurants were all more common in child-directed advertising, while "toy premiums or giveaways were present in 69% vs. 1% and movie tie-ins present in 55% vs. 14% of children's vs. adult advertisements."

"Given health concerns about obesity and its relation to fast food consumption, enhanced oversight of QSR marketing to children at the local, state and federal level is needed to align QSR advertising to children with health promotion efforts and existing principles of honest and fair marketing to children," concludes the study. "We suggest that annual evaluations are needed. In order to be effective, however, the monitoring needs to be conducted by an agency like the FTC [Federal Trade Commission]. If the same problems continue to be found in more contemporary advertisements despite continued self-regulation, further governmental action aimed at children's food advertising may be warranted."

Rudd Center Report Criticizes Cereal Marketing to Youth

The Yale Rudd Center for Food Policy & Obesity has published a study that criticizes cereal companies for allegedly promoting high-sugar products to children and portraying "unhealthy eating behaviors" in TV advertisements. Megan LoDolce, et al., "Sugar as Part of a Balanced Breakfast? What Cereal Advertisements Teach Children About Healthy Eating," *Journal of Health Communication,* August 2013.

According to the study's authors, who reportedly analyzed 158 cereal advertisements that aired between 2008 and 2009 for messaging type, creative techniques and the eating behaviors modeled, 87 percent of ads viewed by children promoted high-sugar products and "were significantly more likely to convey unrealistic and contradictory messages about cereal attributes and healthy eating." In particular, the analysis suggested that 91 percent of high-sugar cereal ads directed at children "ascribed extraordinary powers to these products," while 67 percent "portrayed healthy and unhealthy eating behaviors."

"These findings also raise ethical and public health concerns about the messages used in advertising to promote products of questionable nutritional quality," opine the researchers, who describe their study as the first to combine exposure and content analyses of children's cereal advertisements. "Recent public health efforts, such as the Interagency Working Group nutrition recommendations and cereal company plans to reduce the sugar content in their child-targeted cereals, will help improve the nutritional quality of cereal products promoted in advertising to children. However, these efforts do not address the confusing and potentially misleading messages and

creative techniques used to promote these products and their potential effects on children's understanding of nutrition and healthy eating." *See Rudd Center Press Release,* August 27, 2013.

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-215-278-2555
San Francisco, California
+1-415-544-1900
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

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.