Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Federal Lawmakers Introduce "Do Not Track Kids" Act

U.S. Sen. Edward Markey (D-Mass.) and U.S. Rep. Joe Barton (R-Texas) have reportedly **introduced** joint legislation (S. 1700 and H.R. 3481) that would expand the Children's Online Privacy Protection Act of 1998 (COPPA) to cover children older than age 12 and establish new rules for collecting, storing and disclosing their personal information. Titled the Do Not Track Kids Act of 2013, the initiative includes provisions that "would extend protection to teens ages 13 to 15 by prohibiting Internet companies from collecting personal and location information from teens without their consent and would create an 'eraser button' so parents and children could eliminate publicly available personal information content, when technologically feasible."

According to Markey, who in September 2013 **asked** the Federal Trade Commission to investigate Facebook's decision to change its privacy settings for teens, the legislation seeks to draw congressional attention to "the speed with which Facebook is pushing teens to share their sensitive, personal information widely and publicly online." To this end, the new rules would also (i) "prohibit[] Internet companies from collecting personal and location information from anyone under 13 without parental consent"; (ii) "require[] consent of the parent or teen prior to sending targeted advertising to children and teens"; (iii) "establish[] a 'Digital Marketing Bill of Rights for Teens' that limits the collection of personal information of teens, including geo-location information of children and teens"; and (iv) "require[] online companies to explain the types of personal information collected, how that information is used and disclosed, and the policies for collection of personal information."

"Although the Internet is an incredible place for children to learn and share, it has also become a tool for trollers and trackers to target them and sell their information to advertisers," added Sen. Richard Blumenthal (D-Conn.) in a November 14, 2013, press release. "The Do Not Track Kids Act would strengthen online safeguards for children by providing new tools for oversight, including parental permission for collecting personal information and storing photos—practices rapidly becoming more rampant." *See Press Releases of Senator Edward Markey,* November 14 and 15, 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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Senators Question Use of Toys to Market Energy Drinks

U.S. Sens. Richard Blumenthal (D-Conn.), Dick Durbin (D-Ill.), John Rockefeller (D-W.V.), and Edward Markey (D-Mass.) have written a **letter** to Rockstar, Inc. CEO Russell Weiner, questioning the energy drink company's relationship with Ronin Syndicate, the manufacturer of remote-controlled toys crossed-branded with the Rockstar logo. Responding to consumer complaints on social media sites, the senators pointed to a July 31, 2013, hearing held by the Commerce, Science, and Transportation Committee investigating the alleged health risks of caffeinated energy drinks. In particular, they noted that Rockstar Chief Operating and Financial Officer Janet Weiner told committee members that "Rockstar's target demographic is persons 18 to 35 years of age and their company does not market products to children under 12 years of age."

"Despite statements from your company that Rockstar, Inc. does not market to children, examples of what appear to be targeted marketing of your products to children have come to our attention," states the November 15, 2013, letter, which focuses on the "Rockstar Energy Drink RC Wakeboard Boat" sold by national and online retailers. "On the Target website this product is featured in the 'toy' section with a manufacturer's suggested age of '8 years and up.' Additionally, the website for Ronin Syndicate features several other toys with the Rockstar Energy Drink name and logo."

More specifically, the letter's signatories ask the energy drink manufacturer to provide a written response explaining its partnership with Ronin Syndicate and detailing what steps the company will take to address the issue. "These products can be dangerous for children because of the high levels of caffeine, and these kinds of marketing pitches aimed at children are one of the reasons why emergency room visits concerning these energy drinks are skyrocketing," Blumenthal was quoted as saying. "We're asking this company and all the energy drink companies to stop their pitches and marketing ploys to children using toys, as well as social media and celebrities and athletic stars." *See CNN's The Lead,* November 15, 2013.

FDA Issues Second FERN Report

The U.S. Food and Drug Administration (FDA) has **issued** the "Second Biennial Report to Congress on the Food Emergency Response Network (FERN)" as required under Section 202(b) of the Food Safety Modernization Act. Administered by FDA and the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS), "FERN is an integrated, secure laboratory system for federal, state, and local government agencies engaged in food safety and food defense activities" responsible for detecting, identifying and responding to situations involving "biological, chemical, or radiological contamination of food."

Among other successes, FDA reports that FERN "has been vital in responding to major outbreaks of foodborne disease attributed to many products, including

spinach, pet food, and peanut butter." The network has also provided surge capacity for federal and state responses to both natural and industrial emergencies, in addition to handling large-scale, non-emergency projects, such as arsenic testing in fruit juices and rice products, and conducting targeted surveillance testing for specific events.

FDA Food Recalls by Unit Double in Third Quarter

According to data recently issued by Stericycle Expert Solutions, the number of food recalls documented by the U.S. Food and Drug Administration (FDA) during the third quarter (Q3) of 2013 declined 14 percent compared to the previous quarter. Of the foods recalled, 44 percent, an increase of 8 percent from the previous quarter, were classified as Class I recalls, which means they can potentially cause illness or death. The volume of Q3 recalls—seven million units—however, doubled the number of units recalled in Q2, with a 17-percent increase in the number of companies involved. According to FDA, one recall affected 2.5 million units, three recalls affected between 500,000 and one million units, and eight recalls affected between 100,000 and 500,000 units. As in previous years, allergens were the single largest cause of food recalls, representing more than 40 percent of recalls reported during Q3. One company was involved in 24, or more than 9 percent, of recalls, in Q3.

FDA Extends Comment Periods for Proposed FSMA Rules

Due to the recent government shutdown, the U.S. Food and Drug Administration (FDA) has extended the public comment period for several proposed rules related to the implementation of the Food Safety Modernization Act (FSMA). FDA has extended the deadline for comments on (i) "Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Rule: Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption" until March 15, 2014; and (ii) "Foreign Supplier Verification Programs for Importers of Food for Humans and Animals" and "Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications" until January 27.

ASA Finds "Prices May Vary" Language Misleading

The U.K. Advertising Standards Agency (ASA) has upheld a complaint claiming that a TV advertisement with a "prices may vary" disclaimer was misleading because the complainant was unable to purchase the product for the stated price. Created by Kentucky Fried Chicken (Great Britain) Ltd. (KFC), the commercial in question indicated that families could "save a fiver" by purchasing "the new KFC Family Burger Box," instead of buying the components a la carte. On-screen text apparently clarified, "Item[] shown £20.51 if bought individually. Prices may vary."

According to ASA, Kentucky Fried Chicken explained that the phrase "prices may vary" "referred to both the a la carte menu pricing of individual items, the price of the Family Burger Box and the exact saving made between those two prices." To convey this information, the company chose the text "prices may vary" rather than "price may vary" "to be clear that this referred to all the prices quoted in the ad." In addition, Kentucky Fried Chicken argued that even though it was "legally unable to fix pricing within all the franchisee stores, and could only recommend pricing," the adjusted menu prices in the stores selling the Family Burger Box for more than £14.99 still led to consumer savings of at least £5. Clearcast, which approves TV advertising in the United Kingdom, endorsed this reasoning, adding that the guidance on "price may vary" claims "has been in place for over six years, without complaint from viewers."

Although ASA acknowledged that most restaurants sold the Family Burger Box at the quoted price and that "the savings in all stores was over £5," the agency nevertheless found that "the ad did not explicitly state whether 'prices may vary' referred to the items totaling £20.51, the Family Burger Box price of £14.99, or both." As a result, ASA concluded that "it was not sufficiently clear that 'prices may vary' referred to all prices quoted in the ad," ruling that the commercial breached the rules for misleading advertising, substantiation and prices.

OEHHA Changes Listing Basis for Chemicals Added to Prop. 65 List in 1987

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has **changed** the basis for listing 1,2-dibromo-3-chloropropane (DBCP), an agricultural fumigant that persists in groundwater despite being banned from use by the U.S. Environmental Protection Agency in 1979. "Based on changes to certain federal regulations that affect the bases for the original listings, OEHHA has accordingly changed the bases for listing these chemicals," according to the agency. DBCP was originally added to the Prop. 65 list of chemicals known to the state to cause reproductive toxicity in 1987 under the Labor Code, and its listing date will remain the same. Another chemical subject to the notice is ethylene oxide, which is used to make the raw material (PET) in plastic bottles. *See OEHHA Press Release*, November 21, 2013.

Two Hawaiian Counties Tighten Restrictions on Biotech Companies, GM Crops

Two Hawaiian counties have reportedly passed legislation designed to tighten regulations on biotech companies and the planting of genetically modified (GM) crops. After delaying the ballot to appoint a new member as a replacement for Nadine Nakamura, who vacated her seat to become Mayor Bernard Carvalho's managing director, the Kauai County Council apparently voted 5-2 to override the mayor's veto of a **bill** requiring agricultural companies to disclose information about their pesticide use and establishing no-spray zones around schools, residences, medical facilities, roads, and waterways. Slated to take effect in August 2014, the initiative has drawn criticism from seed and biotech companies,

which have already considered taking the matter to court. Carvalho has also purportedly warned that the law could be open to challenge under state and federal preemption rules, the state's Right to Farm Act and provisions in the County Charter. Additional details about the legislation appear in Issue 503 of this *Update*. *See Civil Beat,* November 16, 2013; *PBS.org* and *The Huffington Post,* November 17, 2013.

Meanwhile, the Hawaii County Council has approved (6-3) a measure seeking to restrict the expansion of GM crops on the Big Island. Introduced by council member Margaret Wille, the bill would permit the continued cultivation of transgenic papayas and other preexisting GM crops on the island but would prohibit the introduction of new GMOs as well as "open air testing of [GMOS] of any kind." To this end, the legislation would require those currently involved "in the open air cultivation, propagation, or development of genetically engineered crops or plants" to register their facilities and locations within 90 days after the rules take effect. If signed into law by Mayor Bill Kenoi, who has not yet taken a public position on the matter, the bill would also impose fines of $1,000 per day for violations. *See Civil Beat, Hawaii Tribune-Herald* and *The Huffington Post,* November 19, 2013.

San Francisco Supervisors Issue Second Proposal for SSB Tax

San Francisco Supervisor Eric Mar has reportedly unveiled a proposal for a tax on sugar-sweetened beverages (SSBs) similar to one released in late October by Supervisor Scott Weiner. Both proposals target SSB distributors, both impose a 2-cents-per-ounce tax and both reportedly expect to raise $30 million annually to fund health and nutrition programs to combat diabetes and other health issues allegedly associated with consumption of soft drinks, energy drinks and other SSBs. According to a news source, Wiener and two other supervisors are co-sponsoring Mar's legislation, but Mar said all four supervisors will work together to combine both proposals into one piece of legislation that they plan to put before voters in November 2014. *See SFGate.com,* November 22, 2013.

LITIGATION

Second Circuit Dismisses Starbucks Tip-Sharing Suit

In a summary order, the Second Circuit Court of Appeals has affirmed a lower court's dismissal of employee claims that Starbucks Corp. violated New York law by allowing shift supervisors to share store tip pools with baristas. *Barenboim v. Starbucks Corp.*, No. 10-4912 (2d Cir., decided November 21, 2013). Details about the New York Court of Appeals ruling on which the Second Circuit relied appear in Issue 489 of this *Update*.

The New York court rejected the baristas' claims that state law barred "any employee with 'even the slightest degree of supervisory responsibility' from

sharing tips." Because it was "undisputed that Starbucks's shift supervisors spend a majority of their time performing the same duties as baristas, and are primarily responsible for serving food and beverages to customers," the Second Circuit found "no genuine dispute of material fact as to whether § 196-d permits shift supervisors to participate in Starbucks's tip pools."

vSingle-Serve Coffee Class Denied Certification

A federal court in Illinois has denied a request that it reconsider an earlier order denying certification of a multi-state class of single-serve coffee purchasers allegedly deceived into believing that the product was ground coffee and not instant; the court has also granted the defendants' motions for summary judgment. *Suchanek v. Sturm Foods, Inc.*, No. 11-565 (U.S. Dist. Ct., S.D. Ill., decided November 20, 2013). Information about the court's previous ruling appears in Issue 496 of this *Update*.

According to the court, "[t]he problem with the proposed class here is that showing reliance or causation—as required to establish liability—requires an investigation of each purchaser." The court details the purchasing experiences of each named plaintiff in this consolidated action and finds that most did not read the packaging, understood what the word "soluble" means or purchased the product due to price, shelf placement, imagery, or because they liked to try new things. Finding that the plaintiffs failed to show evidence to support their claims, the packaging "is not designed to mislead consumers," and "[i]t says what it is," the court entered judgment for the defendants and closed the case docket.

Court Refuses to Dismiss "All Natural" Frozen Smoothie Kit Claims

A federal court in California has denied the motion to dismiss putative class claims that Jamba Juice falsely labels its frozen smoothie kits as "all natural," finding that while the plaintiffs lack standing to assert claims related to products they did not buy, "they may seek to represent a class of people who have purchased those products, as long as all plaintiffs, named and absent, have standing in their own right, and as long as the prerequisites to class certification are satisfied." *Lilly v. Jamba Juice Co.*, No. 13-2998 (U.S. Dist. Ct., N.D. Cal., order entered November 18, 2013). The court will address whether the named plaintiffs may represent the proposed class at class certification and ordered them to file their certification motion by February 3, 2014.

Putative Class Claims Hemp Beverages Not "All Natural"

A California resident has filed a putative nationwide class action against Pacific Foods of Oregon, Inc., alleging that the company falsely labels its Hemp Non-Dairy Beverage® products as "all natural" despite the presence of processed and artificial ingredients and misbrands them by listing as an ingredient "evaporated cane juice." *Perera v. Pac. Foods of Or., Inc.*, No. 13-1788 (U.S. Dist. Ct., C.D. Cal., filed November 13, 2013).

Plaintiff Sadisha Perera claims that she purchased one specific beverage relying on the prominent "all natural" labeling, but seeks to represent class members who purchased a number of other hemp non-dairy products that are purportedly substantially similar. According to the plaintiff, she would not have purchased the products if she had known that ingredients, such as calcium phosphate, disodium phosphate, xanthan gum, and certain vitamins, listed on the product in smaller print, were non-natural. She claims that she did not get the benefit of the bargain in purchasing the defendant's products.

Alleging violations of California's Unfair Competition Law, Sherman Law, False Advertising Law, and Consumers Legal Remedies Act, she seeks equitable relief "to refund and restore to Plaintiff and all Class members all monies they paid for the Pacific Natural Foods Products," injunctive relief, attorney's fees, costs, and interest.

Court Preliminarily Approves $5-Million Muscle Milk® Class Settlement

A federal court in California has given preliminary approval to the settlement of a nationwide class alleging that Cytosport, Inc. misleads consumers by representing that its Muscle Milk® Ready-to-Drink products are healthy and nutritious when they actually contain the same amount of calories and almost as much fat as a doughnut. *Delacruz v. Cytosport, Inc.*, No. 11-3532 (U.S. Dist. Ct., N.D. Cal., order entered November 18, 2013). Additional information about the settlement and litigation appear in Issue 475 of this *Update*. The court has scheduled a May 15, 2014, final approval hearing.

D.C. Court Dismisses Part of "Extra Virgin" Olive Oil Consumer-Fraud Suit

A District of Columbia court has determined that a plaintiff who purchased a bottle of Pompeian-brand extra-virgin olive oil (EVOO) after learning that testing done in 2010 and 2011 concluded that certain EVOO brands did not satisfy U.S. and international EVOO standards has standing to bring certain consumer-fraud claims despite purportedly believing that the product was defective when purchased. *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 163 B (D.C. Super. Ct., order entered November 12, 2013). Thus the court rejected the defendant's "manufactured" or "self-inflicted" injury standing argument. According to the court, "The dispositive consideration is that Plaintiff is a consumer who engaged in a consumer transaction."

The court also disagreed with the defendant that the plaintiff lacked expert testimony or that his sampling testing was insufficiently reliable to support two claims of statutory consumer fraud, finding they were matters of fact to be determined by a jury. The court granted the defendant's motion for summary judgment with prejudice, however, on claims that the defendant's acts violated the Tariff Act and violated D.C. law "by selling Pompeian as EVOO imported from Italy." The court ruled that it lacked jurisdiction over the Tariff Act claim because that law "does not provide for a private right of action," and the plaintiff had not

litigated this claim before the International Trade Commission.

Examining in detail the labeling on a bottle of the defendant's EVOO, the court found nothing there to support the plaintiff's claim that it misrepresents its alleged Italian origin. "Contrary to Plaintiff's assertions, there is no label, marking, or any other text on the bottle of Pompeian that states that Pompeian is 'imported from Italy,' solely 'from Italy,' 'of Italian origin,' or any other plain text representation that the bottle came solely from Italy or is solely of Italian origin." The court noted that the label identified other countries of origin, including Italy, and that the name itself would not lead the reasonable consumer to conclude it had come from Italy. In this regard, the court rejected the plaintiff's argument that the company should not be allowed to use its own name on product labels. The court further ruled that the label colors were not, as claimed by the plaintiff, the colors of Italy's flag.

MEDIA COVERAGE

Boston Public Radio Program Asks Whether Sugar Is FDA's Next Target

The public radio program *Here and Now* recently **asked** Corby Kummer, a food writer and senior editor for *The Atlantic,* whether the U.S. Food and Drug Administration's (FDA's) move to revoke the generally recognized as safe (GRAS) status for *trans* fat lays the groundwork for the agency to take a similar action against the use of added sugar in beverages and other products. During the November 18, 2013, interview, Kummer highlighted the history of the movement to prohibit *trans* fat, linking local restrictions such as those implemented by New York City to the growing public awareness that *trans* fats "were harmful at any level."

"I think it's going to be a model for the way soda consumption can be limited in the public, which we certainly need to do," explained Kummer. "It took a long time for scientific consensus to build. And at the beginning, the industry mercilessly exploited any trace of ambiguity in the science, which they have been trying to do with sugar and sodas for a long time. Ambiguity is the friend to industry. But eventually ambiguity just faded."

Kummer noted that public health advocates such as the Harvard School of Public Health's Walter Willett, "who long ago led the charge against *trans* fats," are now urging FDA to set safe levels of added sugars in drinks. "And what I think is the scientific consensus is going to build so that it's really irrefutable and there's nothing industry can do," Kummer concluded. "Industry is very smart. They know what's coming. And so what they're doing while lobbying against every kind of regulation that could possibly restrict the amounts of sugar—I mean, high-fructose corn syrup but it's all sugar, so it's all forms of sugar—in sodas is they're formulating dozens and dozens of different kinds of beverages with lower amounts of sugar. What advocates like CSPI, Centers [sic] for Science in the Public Interest, would really like is much less sugar in every drink."

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SCIENTIFIC/TECHNICAL ITEMS

Phosphorus Intake Allegedly Tied to Increased Mortality Risk

A recent study has reportedly linked high phosphorus consumption to increased all-cause mortality in a healthy adult population, raising concerns about the use of inorganic phosphorus additives in processed food. Alex Chang, et al., "High dietary phosphorus intake is associated with all-cause mortality: results from NHANES-III," *American Journal of Clinical Nutrition,* November 2013. Relying on 24-hour dietary recall surveys from 9,686 participants in the National Health and Nutrition Examination Survey – III, researchers noted an association between high phosphorus intake and all-cause mortality for individuals who consumed more than 1,400 milligrams of phosphorus per day.

"The relation between increasing absolute phosphorus intake and mortality appeared flat until a threshold of ~1400 mg/d, which is an amount of phosphorus consumption that is twice the adult US RDA [recommended daily allowance]," reported the study's authors. Although they acknowledged that their results did not distinguish between organic and inorganic sources of phosphorus, they urged further study to determine whether the identified association was causal: "Because of the prevalence of high phosphorus intake in healthy adults and the widespread use of inorganic phosphorus additives in processed food, our findings may have far-reaching public health implications."

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