Shook, Hardy & Bacon L.L.P.

ISSUE 511 | JANUARY 31, 2014

# FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS



## LEGISLATION, REGULATIONS AND STANDARDS

### Dietary Guidelines Committee Strays into Sustainability Territory

Dairy and meat industry interests have reportedly expressed concern that the federal advisory committee tasked with revising U.S. dietary guidelines, a project undertaken every five years, may be poised to prioritize production methods as a means of addressing sustainability issues. The Dietary Guidelines Advisory Committee apparently discussed in a recent round of public meetings whether eating more plants and fewer animals would provide environmental benefits. A subcommittee chair, identified as Tufts University Nutrition Professor Miriam Nelson, was quoted as saying, "Our hope within our subcommittee is that we'll at least provide some background. All of us want to maintain healthy eating and have that food supply for years to come." She also reportedly indicated that the subcommittee is looking into beef and dairy production methods, as well as organic versus conventional growing methods. The advisory committee is expected to present its report to the U.S. Department of Agriculture and Department of Health and Human Services in early 2015, and those agencies will use it to develop final guidelines. *See CQ Roll Call*, January 17, 2014.

### FDA Schedules Additional Meetings on Proposed FSMA Rule to Address Intentional Food Adulteration

The U.S. Food and Drug Administration (FDA) has **announced** two additional public meetings, February 27, 2014, in Chicago, Illinois, and March 13 in Anaheim, California, to discuss the Food Safety Modernization Act (FSMA) proposed rule for "Focused Mitigation Strategies to Protect Food Against Intentional Adulteration."

The meetings are the second and third in a series announced in the December 20, 2013, *Federal Register* and on FDA's FSMA website. The first meeting is slated for February 20 in College Park, Maryland.

### Upcoming Codex Meetings to Address Food Additives

The U.S. Department of Agriculture's Food Safety and Inspection Service and the Food and Drug Administration have **announced** a February 11, 2014, public meeting in Washington, D.C., to provide information and receive comments on agenda items and draft U.S. positions for discussion during the

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46th Session of the Codex Committee on Food Additives of the Codex Alimentarius Commission in Hong Kong, China, on March 17-21, 2014.

Agenda items include (i) endorsement and/or revision of maximum levels for food additives and processing aids in Codex standards; (ii) food additive provisions for grape wine and its sub-categories; (iii) descriptors and food additive provisions for milk and buttermilk and their sub-categories, and dairy-based drinks, flavored and/or fermented (e.g., chocolate milk, cocoa, eggnog, drinking yoghurt, whey-based drinks); (iv) proposals for provisions of nisin in meat and meat products, including poultry and game; and (v) proposed draft amendments to the International Numbering System for food additives. *See Federal Register*, January 17, 2014.

## EFSA Launches Consultation on Draft BPA Assessment

The European Food Safety Authority (EFSA) has **launched** a public consultation on its draft assessment of the human health risks posed by bisphenol A (BPA). According to a January 17, 2014, press release, the agency has recommended temporarily lowering the current tolerable daily intake (TDI) for BPA from its current level of 50 µg/kg bw/day to 5 µg/kg bw/day over concerns that exposure to the substance is likely to adversely affect the liver and kidney, in addition to affecting the mammary gland.

EFSA's Panel on Food Contact Materials, Enzymes, Flavorings and Processing Aids (CEF Panel) apparently arrived at the new TDI after reviewing more than 450 studies related to the potential health hazards associated with BPA. The draft scientific opinion also considers "the possible effects of BPA on the reproductive, nervous, immune, metabolic and cardiovascular systems, as well as the development of cancer," concluding that these effects—while not likely at present—are still "of potential concern to human health and they add to the overall uncertainty about the risks of the substance."

"The risk assessment of BPA has been hugely complex. EFSA concludes there is an estimated safe level of exposure to BPA—known as the TDI—but has reduced this and set it on a temporary basis because of continuing uncertainties over the risks posed by the chemical," said CEF Panel Chair Iona Pratt. "Our experts have identified health hazards associated with exposure to BPA. However, we say the risk to human health is low because consumer exposure to BPA is below the temporary TDI (t-TDI). While we have analyzed the best available evidence using state-of-science methods, we recognize that understanding in these areas is constantly advancing. Therefore our conclusions are as definitive as they can be in light of current data."

EFSA has requested input on the draft assessment from the public, stakeholders and "national risk assessment bodies that have previously evaluated BPA" by March 13, 2014. The European Chemicals Agency has also reportedly received a proposal from French authorities to restrict the use of BPA in cash register

receipts and other thermal paper applications under REACH (Regulation No. 1907/2006 on the registration, evaluation, and authorization of chemicals). Additional details about EFSA's draft assessment of consumer exposure to BPA appear in Issue 492 of this *Update*. *See Bloomberg BNA,* January 24, 2014.

**OEHHA Proposes Regulatory Provisions on Labor Code Listing Mechanism**

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has **proposed** adding a regulation to Title 27 of the California Code of Regulations to "clarify the procedure and criteria OEHHA uses to list and de-list chemicals via the 'Labor Code' listing mechanism of Proposition 65." A public hearing on the proposal has been slated for March 21, 2014, and comments are requested by April 4.

OEHHA maintains the list of chemicals known to the state to cause cancer or reproductive toxicity under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). Chemicals may be added to the list through one of four ways, including those that have been identified by reference to certain subsections of the California Labor Code. While OEHHA has established regulations setting forth general criteria for listing chemicals via the other listing mechanisms, it has not previously done so for the Labor Code mechanism.

The proposed regulation would require a chemical to be included on the Proposition 65 list "if it is identified by the International Agency for Research on Cancer in its IARC Monographs series on the Evaluation of Carcinogenic Risks to Humans (most recent edition), based on sufficient animal or human evidence as: a. Carcinogenic to humans (Group 1)[;] b. Probably carcinogenic to humans (Group 2A)[;] c. Possibly carcinogenic to humans (Group 2B)." A chemical would also be included "if it is within the scope of the Federal Hazard Communications Standard and is identified in the most recent version of Title 29 of the Code of Federal Regulations, part 1910.1200, adopted by the federal Occupational Safety and Health Administration, as causing cancer or reproductive toxicity based on sufficient animal or human evidence." *See OEHHA News Release*, January 27, 2014.

**Trichloroethylene Added to Prop. 65 List as Reproductive Toxicant**

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has **announced** that, effective January 31, 2014, trichloroethylene will be listed as known to the state to cause reproductive toxicity for purposes of Proposition 65 (Prop. 65). According to OEHHA, the listing is "based on formal identification by the U.S. Environmental Protection Agency (U.S. EPA), an authoritative body, that the chemical causes reproductive toxicity (developmental and male reproductive endpoints)." The chemical is used as a solvent for a variety of organic materials and was used historically in coffee decaffeination and the preparation of extracts from hops and spices. *See OEHHA News Release*, January 31, 2014.

### Hawaii Considers SSB Ban

The Hawaii Senate has introduced legislation (S.B. 2693) that would prohibit the sale of regular soft drinks and sugar-sweetened beverages (SSBs) in containers larger than 16 ounces.

Noting that obesity is an increasingly "common and costly problem for the state," and claiming that limiting the intake of sugar-sweetened beverages would "encourage healthier diets in the community, while offsetting economic costs associated with health care and obesity," the bill specifically seeks to ban food establishments from (i) selling, offering for sale or providing SSBs in unsealed containers larger than 16 ounces and (ii) selling children's meals that include such beverages.

### GM Labeling Bill Fails in N.H. House

New Hampshire lawmakers reportedly voted 185-162 against legislation (H.B. 660) that would have required food distributors to label foods that contain genetically modified (GM) ingredients. According to news sources, the vote not only puts a damper on the labeling fight in New Hampshire, but also sets back similar campaigns in Maine and Connecticut. Both states passed legislation requiring GM food labeling in 2013, but their laws cannot be enacted until at least four other Northeastern states enact similar statutes. Details about Maine's GM bill appear in Issue 504 of this *Update*. *See ConcordMonitor.com*, January 23, 2014.

## LITIGATION

### Parties Respond to FDA Letter on GM Ingredients and "Natural" Food Labeling

In response to a court order requiring the parties to respond to the U.S. Food and Drug Administration's (FDA's) refusal at the court's request to determine whether foods with genetically modified (GM) ingredients may be labeled "natural" or "all natural," the parties to litigation involving tortilla chips have filed their pleadings. *Cox v. Gruma Corp.*, No. 12-6502 (U.S. Dist. Ct., N.D. Cal., Oakland Div., filed January 24, 2014). Information about FDA's January 6 letter appears in Issue 509 of this *Update*.

Gruma argues that the case continues to meet "all the factors for invoking primary jurisdiction. . . . The FDA's response is simply that for its own procedural and budgetary reasons it does not intend to consider the referred issue at the current time in this particular posture. The FDA response, if anything, reinforces why the FDA should be the one to resolve this issue. This is particularly true because the same issue of whether products which include food derived from bioengineered seeds may be labeled 'natural' has been raised

in more than 50 other cases and resolution of the issue by the courts will be subject to inconsistent determinations and disruptions of interstate commerce."

Gruma asks the court to set a date to re-file a motion to dismiss. Among other matters, Gruma notes that the Grocery Manufacturers Association has indicated its intent to file a citizen petition in early 2014, which would give FDA the opportunity to address the issue through its preferred process—notice-and-comment rulemaking.

The plaintiff, on the other hand, urges the court to order Gruma to answer her first amended complaint, arguing that FDA's response letter proves that her state-law causes of action are not subject to the primary jurisdiction doctrine. Citing a number of similar lawsuits in which the courts have refused to apply the doctrine, the plaintiff asserts that her complaint "presents a garden variety consumer protection case that this Court is well-equipped to handle."

**Court Dismisses Bulk of Consumer-Fraud Action Against Mott's**

A federal court in California has dismissed putative class claims relating to any product other than Mott's 100% Apple Juice because the plaintiff failed to properly allege that the company's numerous sauce products are mislabeled under state and federal law. *Rahman v. Mott's LLP*, No. 13-3482 (U.S. Dist. Ct., N.D. Cal., order entered January 29, 2014). The court also dismissed claims under the state's False Advertising Law, the fraud prong of the Unfair Competition Law (UCL) and the Consumers Legal Remedies Act because they were not sufficiently pleaded, and further dismissed the plaintiff's claim for negligent misrepresentation for failure to plead justifiable reliance.

The court disagreed that the action should be dismissed under the primary jurisdiction doctrine or that the UCL claim should be dismissed for failure to allege facts that would satisfy the reasonable consumer test. As to the latter, the court reiterated that this test "does not apply to claims brought under the unlawful prong of the UCL."

Disavowing its previous analysis of the issue in *Larsen v. Trader Joe's Co.*, 2012 U.S. Dist. LEXIS 162402 (N.D. Cal. June 14, 2012), the court agreed to dismiss the plaintiff's request for injunctive relief on Article III standing grounds. In this regard, the court stated, "Defendant argues that plaintiff lacks standing for injunctive relief because plaintiff is now fully aware of the alleged misrepresentations. This Court has previously rejected this argument. . . . However, the Court agrees with defendant that to establish standing, plaintiff must allege that he intends to purchase the products at issue in the future." To support its new position, the court cited *Jou v. Kimberly-Clark Corp.*, 2013 U.S. Dist. LEXIS 173216 (N.D. Cal. Dec. 10, 2013), and *Delarosa v. Boiron, Inc.*, 2012 U.S. Dist. LEXIS 188828 (N.D. Cal. 2012). The court granted the plaintiff leave to amend the complaint by February 24, 2014.

### Claims Dismissed with Prejudice in Baby Food Lawsuit

A federal court in California has dismissed with prejudice a number of claims in a putative nationwide class action alleging that Gerber Products Co. misleads consumers and violates state and federal labeling laws by making certain nutrient-content and sugar-related claims on its baby food product labels. *Bruton v. Gerber Prods. Co.*, No. 12-2412 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered January 15, 2014). Among the claims dismissed with prejudice were those relating to (i) products that the named plaintiff had not purchased and had failed, in her second amended complaint, to adequately allege how they are substantially similar to any of the purchased products; (ii) company Website statements that the named plaintiff did not view, but that supported some of her claims; and (iii) the theory that Gerber breached a duty to disclose that its products were misbranded under federal and California law.

Because the court found that Gerber's remaining challenges in its motion to dismiss either addressed factual matters not suitable for disposition at the motion-to-dismiss stage or were premature, it will allow the remaining claims to proceed. The court also denied Gerber's request that it take judicial notice of the many images of product labels the company provided to establish that its labels changed during the putative class period. According to the court, the images were not sufficiently authenticated, and the company did not "confirm that products with these labels were actually sold during the class period." They also pertained to questions of fact that are subject to reasonable dispute.

### Court Denies Class Cert. Request in Pet Treat Litigation

Finding significant differences among the state laws applicable to a putative nationwide class action alleging injury to pets and economic damages from the purchase of dog treats containing chicken jerky from China, a federal court in California has denied the plaintiff's request for class certification. *Holt v. Globalinx Pet LLC*, No. 13-0041 (U.S. Dist. Ct., C.D. Cal., S. Div., order entered January 30, 2014). According to the court, "[w]hile the Plaintiff maintains that the laws of California should apply to the proposed nationwide classes, the Defendants have catalogued a series of material differences between the consumer protection laws of several states and those of California, and crucially, this Court has already performed a case-specific conflict of law analysis and determined that Texas law would govern four of the named Plaintiff's causes of action." Agreeing that these differences were material, the court concluded that the proposed classes "do not meet the predominance and superiority requirements of Rule 23 (b)(3)."

### Cantaloupe Farmers Sentenced, No Jail Time

A federal magistrate in Denver, Colorado, has sentenced Eric and Ryan Jensen, who owned the cantaloupe farm linked to a deadly *Listeria* outbreak in 2011, to five years of probation, with the first six months in home detention, 100 hours of community service each, and the payment of restitution—$150,000 each—with the money awarded to their victims. According to U.S. Attorney John Walsh, "No sentence of incarceration, restitution or financial penalty can undo the tragic damage done as a result of the contamination at Jensen Farms. Today's sentence serves as a powerful reminder of farmers' legal and moral responsibility for ensuring their product is safe." Details about the charges to which the brothers pleaded guilty appear in Issue 498 of this *Update*. *See U.S. Department of Justice News Release*, January 28, 2014.

### Pet Food Plaintiff Seeks Class Settlement Approval

An unopposed motion for preliminary approval of a class-action settlement has been filed in a federal court in New York to resolve the claims of those who allegedly purchased *Salmonella*-contaminated pet food that was subject to a nationwide recall and purportedly linked to infections in people and animals. *Marciano v. Schell & Kampeter, Inc.*, No. 12-2708 (U.S. Dist. Ct., E.D.N.Y., motion filed January 28, 2014. If approved, the settlement would provide $2 million cash to three subclasses of claimants: those who purchased but never used the recalled products, those who purchased and used the products and "sustained economic damages as a result of injury or death to animals from their consumption of recalled products," and those who purchased the products subject to recall and fully used them "with no resultant ill effects." Under the agreement, the defendants would also continue to use improved quality control procedures for three years.

### Putative Class Claims Decaffeinated Coffee Labels Mislead

A California resident has filed a putative statewide class action against Ralphs Grocery Co., alleging that it misleads consumers by labeling its decaffeinated coffee products as "without caffeine" when they are actually, according to labeling fine print, "99.7% caffeine free." *Kopalian v. Ralphs Grocery Co.*, No. BC533846 (Cal. Super. Ct., Los Angeles Cnty., filed January 22, 2014). The plaintiff invokes no state or federal law labeling violations, but instead claims that the labeling and packaging are "likely to confuse and mislead consumers." He contends that he relied on the "without caffeine" labeling to make his purchase, believing that the product was 100-percent caffeine free, and chose it over other brands for this reason.

Alleging breach of express warranty and violations of the state's Unfair Competition Law, False Advertising Law and Consumers Legal Remedies

Act, the plaintiff seeks injunctive relief, including a corrective advertising campaign, actual and punitive damages, restitution, attorney's fees, and costs.

**Chobani Prohibited from Using "Greek" Yogurt Designation in U.K.**

The England and Wales Court of Appeal has dismissed the appeal filed by Chobani from a lower court's grant of permanent injunction barring the company from selling "Greek yogurt" in the United Kingdom, finding that the court did not err in ruling that "FAGE was entitled to restrain Chobani from passing off its American made yoghurt as and for yoghurt made in Greece by the use of the description Greek yoghurt." ***FAGE UK Ltd. v. Chobani UK Ltd., [2014] EWCA (Civ) 5 (decided January 29, 2014)***. Details about the lower court ruling appear in Issue **477** of this *Update*.

Chobani has reportedly indicated that it intends to appeal the ruling to the Supreme Court, saying "We remain of the view that the population of the U.K. know and understand Greek yogurt to be a product description regardless of where it is made. We remain committed to the U.K. market and to breaking the monopoly on the use of the term Greek yogurt enjoyed by Fage." *See The Charlotte Observer,* January 29, 2014.

**Russian Supreme Court Deems Challenge to GM Registration Rule Premature**

According to a news source, the Russian Supreme Court has denied a challenge filed by environmental groups to government Decree No. 839, which will allow the registration of genetically modified (GM) crops and products containing GM ingredients beginning July 1, 2014. Prime Minister Dmitry Medvedev signed the decree in late September 2013, and the groups filed their court challenge in December. They also wrote to President Vladimir Putin, asking for him to prohibit the cultivation of GM crops in the country. The Russian Supreme Court press service reportedly indicated that under the Code of Civil Procedure government actions "can only be contested if they are in effect and . . . give some rights and duties to citizens and legal entities at the time they are contested."

National Association of Genetic Safety Director Yelena Sharoikina reportedly said, "It turns out that the Supreme Court suggests that we should wait for the moment when Russians' rights to health and safe environment are violated before contesting Decree No. 839. However, I believe that we still have a chance to stop the cultivation of GM[] in Russia until reliable information proving that these technologies are safe to humans are obtained." The groups are also apparently concerned that foreign products that protect GM cereal crops will take over the domestic market. *See SustainablePulse.com*, December 19, 2013; *Russia & India Report*, January 16, 2014; *Interfax.com*, January 21, 2014.

### Parties Served in Challenge to Canada's Approval of GE Salmon

According to a coalition of environmental organizations, service has been effected on the defendants to their court application challenging the legality of the Canadian government's decision to allow AquaBounty Technologies to commercially produce genetically engineered (GE) salmon. ***Ecology Action Centre v. Minister of the Env't*, No. T-2114-13 (Fed. Ct., filed December 23, 2014)**. They contend that Minister of the Environment Leona Aglukkaq and Minister of Health Rona Ambrose failed to assess under the Canadian Environmental Protection Act whether GE salmon "could become invasive, potentially putting ecosystems and species such as wild salmon at risk." Alleging several statutory and regulatory violations, the organizations seek a declaration that the ministers acted unlawfully and without jurisdiction, their toxicity assessment is invalid and unlawful, or they unlawfully or unreasonably failed to conduct a lawful and complete toxicity assessment. AquaBounty CEO Ron Stotish has reportedly indicated that the legal action is without merit. *See Ecology Action Centre Press Release*, January 21, 2014; *eCanadaNow*, January 22, 2014.

## OTHER DEVELOPMENTS

### Litigation Documents Reveal Debate over HFCS "Natural" Campaign

Among the tens of thousands of documents reportedly made public in advance of a hearing in litigation pitting the sugar industry against companies that make high-fructose corn syrup (HFCS) are emails that purportedly show some HFCS company executives were concerned about rebranding and advertising the substance as "natural" and "nutritionally the same as sugar." Some apparently suggested that it made the industry appear disingenuous and could invite litigation.

According to an attorney representing the HFCS manufacturers, the emails simply reflect a healthy debate. He reportedly said, "What the emails clearly show is the corn refiners engaged in a rigorous internal discussion about the public relations aspects of what HFCS is called, while never wavering in their core belief that high fructose corn syrup is both natural and nutritionally equivalent to sugar."

Another email authored in April 2009 by the then-president of the Corn Refiners Association reportedly defended the campaign but said that the trade association's "sponsorship of this campaign (should) remain confidential." *See NBCNews.com*, January 24, 2014.

### NRDC Report Claims FDA Allowed Harmful Antibiotics in Feed Additives

A recently released Natural Resources Defense Council (NRDC) **report** suggests that the U.S. Food and Drug Administration (FDA) has allowed 30 potentially harmful antibiotic additives to remain approved for use in food animals (cows, pigs and chickens), even though the agency's own scientists found that "none of these products would likely be approvable as new additives for nontherapeutic livestock use if submitted today, under current FDA guidelines."

Titled "Playing With Chicken," and based on a review of previously undisclosed FDA documents, the report notes that (i) 18 of the 30 antibiotic feed additives reviewed were assessed as posing a "high risk" to human health; (ii) drug manufacturers did not submit sufficient information on 12 of the additives to establish safety; (iii) despite the fact that 29 of the additives are not proven to be safe, no action has been taken to withdraw approval; and (iv) 26 of the additives have never met the safety criteria established by FDA in 1973. *See NRDC News Release*, January 27, 2014.

## MEDIA COVERAGE

### *Wired* Magazine Highlights Monsanto's "Quest for the Perfect Veggie"

A recent article published in *Wired* magazine has highlighted how Monsanto Co. is using its experience with transgenic crops "to create vegetables that have all the advantages of genetically modified organisms [GMOs] without any of the Frankenfoods ick factor." According to author Ben Paynter, the agribusiness company has started investing in its own "novel strains of familiar food crops, invented at Monsanto and endowed by their creators with powers and abilities far beyond what you usually see in the produce section." To this end, Paynter recounts how Monsanto scientists have extended the shelf-life of lettuce, created sweeter melons and endowed broccoli with three times the usual amount of glucoraphanin using techniques such as genetic marking as well as powerful computer models to accelerate the "good old-fashioned crossbreeding" process.

"Monsanto computer models can actually predict inheritance patterns, meaning they can tell which desired traits will successfully be passed on," explains Paynter. "It's breeding without breeding, plant sex in silico. In the real world, the odds of stacking 20 different characteristics into a single plant are one in 2 trillion. In nature, it can take a millennium. Monsanto can do it in just a few years."

At the same time, however, Monsanto has apparently drawn criticism from some scientists who question "whether these new fruits and vegetables will be as healthy as their untweaked counterparts." As pediatric endocrinologist Robert Lustig reportedly told Paynter, "Nobody has ever tinkered with sugar

levels the way Monsanto is attempting; it's essentially an experiment." *See Wired.com,* January 21, 2014.

## SCIENTIFIC/TECHNICAL ITEMS

### Food Coupons for Processed Snack Foods Focus of New Study

Researchers with the University of California, San Francisco, have reported that 25 percent of 1,056 online coupons surveyed during a four-week period "were for processed snack foods, candies and desserts," raising questions about the impact of retailer discounts on dietary patterns. Andrea López & Hilary Seligman, "Online Grocery Store Coupons and Unhealthy Foods, United States," *Preventing Chronic Disease,* January 2014. According to the study, which reviewed all online coupons weekly from six retail grocery chains across the United States, the largest percentage of available coupons was for processed snack foods (25 percent), followed by prepared meals (14 percent), beverages (12 percent) and cereals (11 percent). While less than 1 percent of coupons were for fruits or beverages, more than 50 percent of the total beverage coupons were for sodas, juices and sports/energy drinks.

"Our data are consistent with previous research showing that grocery stores infrequently promote foods that support a healthy weight," conclude the study's authors. "Coupons influence consumer purchases both by discounting price and by acting as an 'informational stimulant,' reminding consumers of the product. Coupons are used to influence consumers to try new products or brands, to purchase additional items, and to purchase items with greater frequency, and coupon programs can increase demand for specific foods… Grocery retailers may be uniquely positioned to positively influence Americans' dietary patterns."

### Study Documents Food Addiction in NHS Participants

A recent study has reportedly documented "for the first time in a large, US-based population of women" the prevalence of food addiction in middle-aged and older women. Alan Flint, et al., "Food addiction scale measurement in 2 cohorts of middle-aged and older women," *American Journal of Clinical Nutrition,* January 2014. Authored by Harvard School of Public Health research scientist Alan Flint and Duke University Sanford School of Public Policy Dean Kelly Brownell, as well as researchers from the University of Michigan, Arizona State University, Children's Hospital Boston, Brigham and Women's Hospital, Boston, and Harvard Medical School, the study analyzed dietary data from 134,175 women enrolled in the Nurses' Health Study (NHS) and the Nurses' Health Study II (NHS II) in light of a modified Yale Food Addiction Scale.

"Overall, 7,839 (5.8%) of the women surveyed met the criteria for food addiction measured by the modified Yale Food Addiction Scale," stated the study's authors, who also noted that the prevalence of food addiction was 8.4 percent in the younger cohort (women ages 45 to 64 years) and 2.7 percent in the older cohort (women ages 62 to 88 years). "We showed that food addiction is associated with several demographic characteristics and strongly associated with overweight and obesity," they concluded. "Additional research is needed to better understand potential causal relations between food addiction and chronic disease risk as well as to investigate relations between dietary intake and food addiction. These findings and additional research may yield insight into behavioral factors that contribute to the development of overweight and obesity."

**Researchers Examine Impulsive Behavior and Food Addiction**

A recent report published in the journal *Appetite* has allegedly concluded that "the same kinds of impulsive behavior that lead some people to abuse alcohol and other drugs may also be an important contributor to an unhealthy relationship with food." Cara Murphy, et al., "Interrelationships among impulsive personality traits, food addiction, and Body Mass Index," *Appetite,* January 2014. According to a January 24, 2014, press release, University of Georgia researchers apparently "used two different scales, the Yale Food Addiction Scale and the UPPS-P Impulsive Behavior Scale, to determine levels of food addiction and impulsivity among the 223 participants," and "then compared these results with each participant's body mass index."

Their findings evidently showed that individuals "who reported acting more rashly when experiencing strong levels of positive (Positive Urgency) and negative (Negative Urgency) emotions, endorsed more symptoms of addictive eating," while those "who reported more food addiction symptoms indicated that they often did things without thinking (lack of Premeditation) and that they had difficulty following through with boring and/or challenging tasks (lack of Perseverance)." The study's authors also identified an indirect association between impulsivity and BMI, noting that both Negative Urgency and lack of Perseverance were indirectly associated with having a higher BMI, "as a function of food addiction symptoms."

"The notion of food addiction is a very new one, and one that has generated a lot of interest," one of the study's authors was quoted as saying. "My lab generally studies alcohol, nicotine and other forms of drug addiction, but we think it's possible to think about impulsivity, food addiction and obesity using some of the same techniques… Our study shows that impulsive behavior was not necessarily associated with obesity, but impulsive behaviors can lead to food addiction."

Shook, Hardy & Bacon L.L.P.

# FOOD & BEVERAGE LITIGATION UPDATE

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## Foodborne Illness Toxin Allegedly Linked to MS

Weill Cornell Medical College scientists have reportedly presented an abstract at the 2014 American Society for Microbiology (AMS) Biodefense and Emerging Diseases Research Meeting, positing that "multiple sclerosis [MS] may be triggered by a toxin produced by common foodborne bacteria." According to a January 28, 2014, AMS press release, "MS is an inflammatory disease of the central nervous system characterized by blood brain (BBB) permeability and demyelination, a process in which the insulating myelin sheaths of neurons are damaged," although the environmental factors that activate the disease in genetically susceptible individuals is not yet known. Now researchers have purportedly found evidence that the epsilon toxin produced by certain strains of *Clostridium perfringens* not only causes BBB permeability but kills "the brain's myelin producing cells, oligodendrocytes; the same cells that die in MS lesions."

"We also show that epsilon toxin targets other cells types associated with MS inflammation such as the retinal vascular and meningeal cells. Epsilon toxin may be responsible for triggering MS," explained one of the researchers, who further reported that 13.5 percent of local food samples tested positive for *C. perfringens* and 2.7 percent contained the epsilon toxin gene. "Originally, we only thought that epsilon toxin would target the brain endothelium cells and oligodendrocytes; we just happened to notice that it also bound to and killed meningeal cells. This was exciting because it provides a possible explanation for meningeal inflammation and subpial cortical lesions exclusively observed in MS patients, but not fully understood."

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