Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 514 | FEBRUARY 21, 2014

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

House Members Ask FDA to Relax Approach to Menu Labeling

A number of U.S. House of Representatives members have written to Food and Drug Administration (FDA) Commissioner Margaret Hamburg to express concern over proposed regulations that would implement the Affordable Care Act's requirements pertaining to the nutrition labeling of standard menu items at chain restaurants. In their February 14, 2014, letter, they claim that FDA's April 2011 proposal "goes well beyond [the law's] intent and unnecessarily captures small business owners who are already complying with the Nutrition Labeling and Education Act. Specifically, the proposed rule limits the ability of businesses to determine for themselves how best to provide nutritional information to its [sic] customers, particularly those establishments that offer made to order items or primarily service customers outside the restaurant, such as delivery operations." They urge Hamburg to incorporate instead the alternatives outlined in H.R. 1249, which has not been referred out of committee since its introduction in March 2013.

EFSA Issues Opinion on Formaldehyde in Animal Feed

The European Food Safety Authority's (EFSA's) Panel on Additives and Products or Substances used in Animal Feed (FEEDAP) has **issued** an opinion on formaldehyde, currently used as a feed additive and a preservative for skimmed milk intended for pigs.

Concluding that "although there is no health risk for consumers exposed to the substance through the food chain," FEEDAP cautions that inhalation of formaldehyde may cause cancer and appropriate measures should be taken to "ensure that the respiratory tract, skin and eyes of any person handling the product are not exposed to any dust, mist or vapour generated by the use of formaldehyde." The panel also notes that formaldehyde will not accumulate in the environment and its use in animal nutrition is not expected to pose a risk for the environment.

EFSA Rejects Caffeine and Sterol Claims

The European Food Safety Authority's (EFSA's) Panel on Dietetic Products, Nutrition and Allergies (NDA) has issued an **opinion** reiterating a previous conclusion that products with less than 75 mg of caffeine may not bear an

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increased alertness claim, because most studies found "no effect of caffeine doses of less than 75 mg on various cognitive tasks (simple reaction time, choice reaction time and reaction time on other vigilance tasks)."

EFSA has also issued an **opinion** regarding a request to broaden the approved cholesterol-lowering claim for plant sterol esters. In response to a request to extend conditions of plant sterol esters to an additional food matrix (powder supplements to be diluted in water), the panel reiterated its previous conclusion that, "while plant sterols added to foods such as margarine-type spreads, mayonnaise, salad dressings, and dairy products such as milk, yoghurts, including low-fat yoghurts, and cheese have been shown consistently to lower blood LDL-c concentrations in a large number of studies, the effective dose of plant sterols (as powder diluted in water) needed to achieve a given magnitude of effect in a given timeframe, cannot be established with the data provided."

FSA Seeks Comments on Two Novel Food Ingredients

The U.K. Food Standards Agency (FSA) has requested public comments on a novel foods **application** submitted by a Swiss company seeking permission to use algal oil in its food products.

The company suggests in its application that the oil, extracted from a newly isolated strain of microalgae, is a rich source of omega-3 fatty acid and proposes to use it as a source of the fatty acid in infant formula. The omega-3 fatty acid currently used in infant formula is derived from tuna fish oil or the microalgae, Crypthecodinium cohnii.

FSA has also requested public comments on a **second** application, submitted by Unilever, seeking permission to extend the use of phytosterol esters. Used in the food industry for their cholesterol-lowering properties, phytosterol esters are naturally present at low levels in vegetable oils. This is the third application made by the Unilever for this ingredient. An application for margarines with added phytosterol esters was approved in 2000, and an application to extend use to "milk type" and "yoghurt type" products was authorized in 2004. Unilever now seeks to extend phytosterol esters' use in margarines to include cooking, baking and liquid margarine products. FSA will accept comments on both applications until February 28, 2014.

ASA Deems Lactose-Free Product Claims "Sufficiently Clear"

The U.K. Advertising Standards Authority (ASA) has ruled that an advertisement for a range of lactose-free products made "sufficiently clear that the Lactofree products were not suitable for dairy allergy sufferers but were suitable for those intolerant to lactose." Responding to a complaint alleging that the ad failed to adequately differentiate between lactose intolerance and dairy

allergy, Arla Foods Ltd. reportedly noted that its TV commercial included an on-screen footnote stipulating that the products displayed were "Not suitable for milk allergy sufferers," and that consumers in doubt should consult their physician.

Warning that the ad's voice-over—"Listen up hedgehogs, you're not intolerant to dairy, you're just intolerant to lactose, the sugars in dairy"—could be misunderstood as a stand-alone statement, ASA nevertheless agreed with Arla's position, dismissing the complaint on the ground that the on-screen text not only provided a clear reference to milk allergy, but also instructed consumers to "Search Lactofree" for more information. "Furthermore, we considered that consumers suffering from dairy allergies, and those connected to them, were more inclined to be cautious when selecting products to purchase and would likely pay attention to the on-screen text in the ad or the recommendation to seek additional information," stated ASA. "We therefore concluded that the ad was neither misleading nor did it encourage or condone behavior that prejudiced health or safety."

California Introduces Warning Label Legislation for Soft Drinks

California State Senator Bill Monning (D-Carmel) has introduced legislation (**SB 1000**) that would require all sugar-sweetened beverages (SSBs) containing more than 75 calories per 12-ounce serving to carry safety warnings. Co-sponsored by the California Center for Public Health Advocacy, the Sugar-Sweetened Beverage Safety Warning Act would direct manufacturers, distributors and retailers to place the following notice on sealed containers, multipacks and vending machines, as well as any premises where SSBs are sold in unsealed containers: "STATE OF CALIFORNIA SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." The bill would also mandate the two-year retention of business records pertaining to the distribution, purchase or sale of SSBs as part of a statewide effort "to determine the quantity and type of sugar-sweetened beverages distributed, purchased or sold."

"When the science is this conclusive, the State of California has a responsibility to take steps to protect consumers," said Monning in a February 13, 2014, press release. "As with tobacco and alcohol warnings, this legislation will give Californians essential information they need to make healthier beverage choices."

Meanwhile, a recent poll commissioned by the California Endowment **reported** that 74 percent of California voters support health warnings labels on sugary drink products similar to those found on cigarettes. Conducted November 14 through December 5, 2013, the Field-TCE Obesity and Diabetes Prevention Survey contacted 1,002 registered voters in California via telephone to solicit their opinions on SSB warning labels, SSB taxation and other topics. In addition to bipartisan support for SSB warning labels, the poll

allegedly found that 67 percent of voters favor proposals to use the revenue from SSB taxation to fund school nutrition and physical activity programs for children.

"Consumers will benefit by having warning labels on soda packaging just as they did when warning labels were placed on tobacco products," said California Endowment Senior Vice President Daniel Zingale. "With obesity as a very real threat to the health of their children, parents need this information in order to make decisions about what's best for their families." *See Field Research Corp.*, February 20, 2014.

Prop. 65 60-Day Notices Cite Arsenic in Rice

The Consumer Advocacy Group, Inc. has filed a series of Proposition 65 (Prop. 65) 60-day notices since December 2013 against supermarkets and rice companies in California, Texas and Taiwan, alleging violations of the law for failure to warn consumers that their rice products contain arsenic (inorganic arsenic compounds), known to the state to "cause both cancer and reproductive toxicity." The most recent notice was **filed** February 17, 2014. Under Prop. 65, private citizen enforcers must notify the alleged violator and local prosecuting authorities of their intent to sue so that the alleged violator has the opportunity to correct any alleged violation and local district attorneys have the opportunity to bring government action. The first in this series of notices, brought against Far West Rice, Inc., also alleged that the company's rice contained lead.

LITIGATION

ECJ and "All Natural" Claims Against Chobani Dismissed

A federal court in California has dismissed with prejudice the third amended complaint filed by named plaintiffs on behalf of a putative class of purchasers of Chobani Greek Yogurt products, alleging violations of state consumer protection laws because the products were mislabeled under federal law by listing evaporated cane juice (ECJ), instead of sugar, as an ingredient and stating that the yogurts contain only natural ingredients, when they actually contain fruit and vegetable juice—purportedly "highly processed unnatural substances"—as well as turmeric for color. *Kane v. Chobani, Inc.*, No. 12-2425 (U.S. Dist. Ct., N.D. Cal., San Jose Div., decided February 20, 2014).

The court agreed with Chobani that the plaintiffs failed to sufficiently allege reliance or to plead fraud with sufficient particularity and thus lacked standing to pursue their claims under California's Unfair Competition Law (UCL), False Advertising Law and Consumers Legal Remedies Act. Apparently annoyed that the plaintiffs had been given numerous opportunities to cure

pleading deficiencies and had been informed by the court exactly how to cure the deficiencies, the court rejected their effort to convince the court to change a previous holding "that Proposition 64, as interpreted by *Kwikset*, requires actual reliance when a claim brought under the UCL's 'unlawful prong' is grounded in fraud."

According to the court, the third amended complaint alleges two theories of reliance, neither of which is plausible or sufficiently pleaded: the plaintiffs had no idea that ECJ was a sweetener, and the plaintiffs had no idea that ECJ was a sweetener but believed it was "some type of ingredient that was healthier than sugar." In the court's view, the allegations, amended to claim that the plaintiffs did not recognize that ECJ was a form of "added sugar," fail to answer the question "of what Plaintiffs believed evaporated cane juice was when they purchased Defendant's products." The court further states, "it is simply implausible that Plaintiffs actually thought that the term 'cane' in 'evaporated cane juice' referred to other forms of cane when Plaintiffs read the term 'evaporated cane juice' on Defendant's products." The court found additional support for its conclusion in the third amended complaint's repeated acknowledgement that "fruit juice concentrate" is a well-known added sugar; this rendered implausible their "belief that Defendant's yogurt products contained no 'added sugars,' given that Plaintiffs allege that they read the ingredient 'fruit and vegetable juice concentrate' on the Defendant's product labels."

The court also observes that the plaintiffs disavowed the only theory that the court had previously found adequately pleaded—that they were unaware that the products contained any sweeteners beyond "natural sugars from milk and fruit" by alleging that "the term ECJ plausibly suggested to Plaintiffs that ECJ was a form of sugar that is healthier than refined sugars and syrups."

The court rejected as insufficiently pleaded the "all natural" claims, finding the amended allegations conclusory. In this regard, the plaintiffs had alleged that the fruit and vegetable juices added to the yogurt for coloring "were not merely artificial because they were 'color additives' and 'artificial colors' and forms of 'artificial coloring' and thus artificial ingredients but also because these juices were highly processed unnatural substances far removed from the fruits or vegetables they were supposedly derived from and in fact were more akin to synthetic dyes like coal tar dyes." The court found nothing in the third amended complaint to explain how or why the juices were "far removed from the fruits or vegetables they were supposedly derived from" and also found that "[a] reasonable consumer could plausibly believe that 'turmeric' and 'fruit and vegetable juice' are, in fact, 'natural ingredients,' and Plaintiffs have failed to allege facts that persuade the Court to conclude it was plausible that Plaintiffs believed otherwise."

FDA Enters Consent Decree on FSMA Rulemaking Timeline

The U.S. Food and Drug Administration (FDA) has **entered** a consent decree with the Center for Food Safety, which sued the agency over its alleged failure to comply with implementation rulemaking deadlines in the Food Safety Modernization Act (FSMA). *Ctr. for Food Safety v. Hamburg*, No. 12-4529 (U.S. Dist. Ct., N.D. Cal., Oakland Div., decree filed February 20, 2014). Under the agreement, FDA will withdraw its Ninth Circuit appeal and will comply with the following timeline for the adoption of final rules: (i) Preventive Controls for Human Food and Preventive Controls for Animal Food—August 30, 2015; (ii) Foreign Supplier Verification Program, Produce Safety Standards, and Accreditation of Third Party Auditors—October 31, 2015; (iii) Sanitary Transport of Food and Feed—March 31, 2016; and (iv) Intentional Contamination—May 31, 2016.

The deadlines may be extended by written agreement of the parties and court approval if "FDA believes good cause exists to seek an extension." If agreement is impossible, the consent decree sets forth a procedure for FDA to seek modification. The court will retain jurisdiction to oversee compliance with the decree. Center for Food Safety senior attorney George Kimbrell said of the agreement, "This is a major victory for the health and safety of the American people. The first major update to our food safety laws since 1938 must now be implemented in a close-ended, timely fashion. That means safer food for American families."

Meanwhile, the center has filed a new lawsuit against the Department of Health and Human Services and FDA, seeking a declaration that FDA has failed to follow legal rulemaking requirements as to food additives. ***Ctr. for Food Safety v. Sebelius*, No. 14-0267 (U.S. Dist. Ct., D.D.C., filed February 20, 2014)**. Filed under the Administrative Procedure Act (APA), the complaint alleges that FDA has, for 15 years, relied on a proposed rule to exempt substances that are generally recognized as safe (GRAS) from regulation as food additives. "FDA's implementation of the proposed rule without considering and responding to public comments, and its failure to promulgate a final GRAS rule, violates the rulemaking requirements of the APA," the center claims. The proposed rule purportedly eliminated a petition process, established in the 1970s, which required proof that a substance was GRAS, involved FDA analysis of the data and allowed public comment.

According to the Center for Food Safety, FDA now allows "food manufacturers to decide whether a food additive requires FDA review. Under the proposed rule, which has never been finalized, FDA created a fast-track for manufacturers who believe a substance should be 'generally recognized as safe' (GRAS). In its lawsuit, [the center] identifies several substances allowed under the fast-track process that may pose health risks and asks the court to

order FDA to fulfill its responsibility to protect public health." The substances identified are volatile oil of mustard, olestra and mycoprotein (or Quorn). *See Center for Food Safety News Releases*, February 20, 2014.

NLRB Judge Rules Grocery Chain's Arb. Agreements Violate Labor Law

A National Labor Relations Board (NLRB) judge has determined that Sprouts Farmers Market violated federal labor law by requiring employees to sign mutual binding arbitration agreements (MAAs) that preclude class or collective-action claims in arbitration or otherwise as a condition of hiring and continued employment. *SF Mkts, LLC d/b/a Sprouts Farmers Mkt.*, Nos. 21-CA-099065, -104677 (NLRB Div. of Judges, Atlanta Branch Ofc., decided February 18, 2014).

The issue arose from two cases: in the first, Jana Mestanek filed wage-and-hour claims against the employer in court, and it sought to compel arbitration under the MAA to which she had agreed; in the second, Laura Christensen was fired for refusing to sign an acknowledgement of an employee handbook supplement agreeing to the terms of a revised MAA.

At issue was whether *D.R. Horton, Inc. (Horton)*, 357 NLRB No. 184 (2012), enfd. in part, denied in part, 737 F.3d 344 (5th Cir. 2013), remains good law and should be applied. In *Horton*, the NLRB held that "an employer violates Section 8(a)(1) of the [National Labor Relations] Act [NLRA] by 'requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial,' because 'The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.'" The Fifth Circuit denied enforcement of the NLRB's order invalidating the MAA at issue in that case, finding it in conflict with the Federal Arbitration Act.

Here, the NLRB judge explained that he was "constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself," and that "the Board generally applies a 'nonacquiescence policy' to appellate decisions that conflict with Board law," further explaining that the board "is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case." Because the U.S. Supreme Court has not specifically addressed the "issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the [NLRA], it follows that the Court has not overruled *Horton*, which remains controlling law."

Under *Horton*, the judge determined that the employer had violated the NLRA and ordered reinstatement, back pay, the costs of litigation, and rescission of the MAA. So ruling, the judge did not address, but acknowledged, the employer's argument that the complaint was barred, in whole or in part,

because "(a) the Board lacked a quorum at the time it issued its decision in *Horton*; (b) the consolidated complaint was issued on the authority of a regional director appointed to that position by a Board that lacked a quorum at the time of her appointment; and/or (c) the complaint was issued pursuant to a delegation of authority from the Acting General Counsel who was appointed to that position in violation of the Vacancies Reform Act, 5 U.S.C. § 3345 et seq., and who therefore lacked authority to so delegate."

Nutrition Bar Class Cannot Be Ascertained, Court Refuses to Certify It

A federal court in California has denied the plaintiff's request to certify a class of those who purchased ZonePerfect Nutrition bars relying on allegedly deceptive labels representing the products as "All Natural." *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907 (U.S. Dist. Ct., N.D. Cal., order entered February 13, 2014). The court found that the plaintiff set forth sufficient evidence to establish that she had standing for the purpose of class certification, despite paying more for other nutrition bars and sometimes purchasing non-natural products.

Because the defendant "overwhelmingly sells to retailers, not directly to consumers, and . . . there are no records identifying any but a small fraction of consumers who have purchased ZonePerfect bars in the last several years," the court, however, agreed with the defendant that neither the class nor the quantity of nutrition bars each member purchased were ascertainable other than by affidavit. As to ascertainability, the court noted a circuit split on the issue, but found the reasoning of *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), persuasive. The court in that case "found that the class was not ascertainable because there was insufficient evidence to show that retailer records could be used to identify class members. The court also rejected the plaintiff's contention that class membership could be determined based on affidavits by putative class members, reasoning that this process deprived the defendant of the opportunity to challenge class membership. Additionally, the court held that fraudulent or inaccurate claims could dilute the recovery of absent class members, and, as a result, absent class members could argue that they were not bound by a judgment because the named plaintiff did not adequately represent them."

Preliminary Approval Given to Quaker Oats "Trans Fat" Settlement

A federal court in California has preliminarily approved the settlement of class claims that Quaker Oats violated consumer protection laws by labeling its snack bars and instant cereal products as "wholesome" with "0g Trans Fat" when they actually contain "unhealthy" ingredients, such as partially hydrogenated vegetable oils (PHOs). *In re Quaker Oats Labeling Litig.*, No. 10-0502 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., order entered February 12, 2014).

Under the proposed settlement, Quaker Oats, which admits no wrongdoing, has agreed to remove PHOs from products that contain them by December 31, 2015, and will not reintroduce PHOs into these products for 10 years. The company has also agreed to not introduce PHOs into products such as Quaker Chewy bars or Instant Quaker Oatmeal products that do not contain them for 10 years, and, by December 31, 2014, will cease stating on product labels "contains a dietarily insignificant amount of trans fat" for any product containing 0.2 grams or more of artificial *trans* fat per serving. The company will pay up to $120,000 for class notice, and any additional costs will be split equally with the class. The court has scheduled a fairness hearing for May 8, 2014.

LEGAL LITERATURE

Law Prof Urges Partial Repeal of NLEA

Associate Law Professor Diana Winters argues in "The Magical Thinking of Food Labeling: The NLEA as a Failed Statute" that those parts of the Nutrition Labeling and Education Act of 1990 (NLEA) regulating "health claims" and "nutrient content claims" have been ineffective at addressing obesity and should be repealed. While Winters acknowledges that leaving this aspect of food labeling to the states will result in an increase in litigation, because the current litigation environment is dominated by time-consuming, complex arguments over non-substantive issues, such as preemption and the primary jurisdiction doctrine, the best way to improve front-of-package labeling is to allow state courts to focus on the substance of deceptive claims.

Among other matters, the author notes that attitudes about food consumption "vary wildly from state to state," thus justifying differing state and local laws in the field of food labeling. She also observes, "By crafting laws tailored to targeted industry, states may also be able to compete with each other economically." Winters further contends that "the availability of state law remedies for injured consumers provides a force to monitor products after they have reached the market. Because food labels are not subject to a rigorous pre-approval process like that for new drugs, the usefulness of citizen surveillance cannot be overstated." Without the NLEA in play, "state Attorneys General could take an expanded role in monitoring health and nutrient content claims through litigation and education."

OTHER DEVELOPMENTS

Advocate Calls for Add-Ons to Sugary Beverage Taxes

Drawing on lessons from tobacco regulation, Temple University Associate Professor Jennifer Pomeranz has authored an article recommending that state and local governments which opt to impose taxes on sugary beverages consider also adopting measures such as minimum price laws and prohibitions on price discounting and coupons to effectively deter consumption. Titled "Sugary Tax Policy: Lessons Learned from Tobacco," the article claims that sugary beverage manufacturers can distribute the cost of a tax throughout their product lines, including diet beverages, bottled water and juice, thus making the imposition of minimum prices along with sufficiently high taxes a way to deter manufacturers from circumventing the price increase associated with a sugary beverage tax. Formerly with the Yale Rudd Center for Food Policy and Obesity, Pomeranz also calls for additional research on whether it would be feasible to condition retail licensing on compliance with measures adopted to reduce sugary beverage consumption. *See American Journal of Public Health*, March 2014.

CSPI to Host Food Labeling Discussion

Public health watchdog the Center for Science in the Public Interest (CSPI) has announced a February 26, 2014, meeting at the National Press Club in Washington, D.C., to discuss ways of improving the next generation of nutrition facts labels. NPR News correspondent **Allison Aubrey** is slated to moderate the panel with participants CSPI Executive Director Michael Jacobson; Wegmans Food Market Corporate Nutrition Manager Jane Andrews; The NPD Group's Food & Beverage Industry Analyst Darren Seifer; Greenfield-Belser Principal Burkey Belser; and Share our Strength Director of National Partnerships Chef Gregory Silverman. *See CSPI News Release*, February 18, 2014.

MEDIA COVERAGE

Katy Steinmetz, "Soda Wars Bubble Up Across the Country," *Time*, Feb. 20, 2014

"Soda and other sugary drinks are popping up on city and state dockets across the nation, as lawmakers attempt to curb America's consumption of certain beverages," writes *Time* reporter Katy Steinmetz in this February 20, 2014, article summarizing recent campaigns to limit sales of sugar-sweetened beverages (SSBs) and energy drinks while raising revenue for government-backed health initiatives. In addition to San Francisco's efforts to impose a SSB tax, Steinmetz notes similar proposals under consideration in Illinois and Berkeley, California, as well as attempts by Maryland and Los Angeles legislators to impose age restrictions on energy drink purchases.

According to the article, San Francisco's latest measure has garnered broad support from the city's board of supervisors, "effectively guaranteeing that it will be on the ballot," where it will need to gain approval from two-thirds of voters. But opponents of SSB taxation and the age restrictions on energy drinks have claimed that such measures promote government overreach, unfairly single out a certain class of products, constrain consumer choice, and cause job losses among beverage manufacturing and other industries.

"A big question is whether proposals like San Francisco's, which would levy a two-cent-per-ounce tax on distributors, will succeed and become an example for other cities to follow or whether—as the beverage industry claims—that proposal is part of a dying breed," concludes Steinmetz, who points to conflicting poll results measuring consumer support for these initiatives. "The Golden State looks poised to be a battleground over sugar this year. In 2012, two sugary-beverage taxes on the ballot in the cities of El Monte and Richmond failed by wide margins. A related state bill died in committee. San Francisco has a proud reputation of making progressive sacrifices—being the first in the nation to ban plastic bags, for example—that may help yield a different result for public health advocates."

SCIENTIFIC/TECHNICAL ITEMS

Impact of SSB Taxes on Employment Disputed in New Study

Researchers with the University of Illinois, Chicago, Institute for Health Research and Policy have published a study allegedly concluding that, contrary to industry claims, sugar-sweetened beverage (SSB) taxes "do not have a negative impact on state-level employment." Lisa Powell, et al., "Employment Impact of Sugar-Sweetened Beverage Taxes," *American Journal of Public Health,* February 2014. Using a macroeconomic simulation model to assess the employment impact of a 20-percent state-level SSB tax in California and Illinois, the study's authors also factored "changes in SSB demand, substitution to non-SSBs, income effects, and government expenditures of tax revenues" into their final calculations.

Based on this analysis, the study estimates that SSB sales would decline by $678.8 million in Illinois and $1.2 billion in California as the result of a 20-percent tax. At the same time, however, SSB taxes would increase government revenue by $554.3 million in Illinois and $940.4 million in California while sales revenue from substitution with non-SSBs would reach $81.8 million in Illinois and $318.5 million in California, "on the basis of cross-price elasticity estimates," and $365.3 million in Illinois and $613.8 million in California, "on the basis of full-volume beverage replacement." Taking into account increased government revenue and non-SSB sales, these findings suggest that "the imposition of a 20 [percent] tax on SSBs would result in a

net employment increase of 4,406 jobs in Illinois and 6,654 jobs in California, which is close to a zero net change."

The study's authors also criticize employment studies that focus only on "the industry effect of reduced spending on SSB," arguing that "job losses in the private sector are almost completely reversed when we model all effects from the tax." In particular, they denounce a recent American Beverage Association (ABA) study linking a proposed federal SSB tax to the loss of 210,000 jobs in the beverage industry and another 150,000 jobs in related fields. "A key distinction of [our] study is that we report the net employment effect rather than the gross employment effect that industry highlights," note the researchers. "The industry claims of regional employment losses related to proposed SSB taxes are overstated and such claims may mislead lawmakers and constituents."

Meanwhile, ABA has publicly rebutted these critiques, countering that soda taxes will negatively affect middle-class jobs and small businesses. "No matter how you look at it, soda taxes mean fewer jobs. Americans have made it clear they don't support taxes and other restrictions on common grocery items, like soft drinks," states a February 13, 2014, ABA news release. "For these and other reasons, tax proposals continue to fail wherever they are introduced. Change happens when everyone works together—government, academia, healthcare, and businesses like ours. It's time we collaborate to find real solutions. We hope serious thought leaders will agree."

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