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LEGISLATION, REGULATIONS AND STANDARDS

Codex Delegates Schedule Food Hygiene Meeting

The U.S. Department of Agriculture’s Office of the Under Secretary for Food Safety and the U.S. Food and Drug Administration have **announced** an October 19, 2015, public meeting in Washington, D.C., to discuss draft U.S. positions for review at the 47th Session of the Codex Committee on Food Hygiene (CCFH) slated for November 9-13 in Boston, Mass. Among other things, CCFH is responsible for prioritizing topics related to microbiological risk assessments and drafting basic hygiene provisions applicable to all food. Agenda items for October 19 include proposed draft guidelines for controlling nontyphoidal *Salmonella* in beef and pork meat and a discussion paper about revising the Code of Hygienic Practice for Fresh Fruits and Vegetables. *See Federal Register*, August 25, 2015.

ASA Rules Against “Drink Doctor” Internet Ads

The U.K. Advertising Standards Authority (ASA) has **upheld** a complaint against Internet advertisements for Drink Doctor Ltd.’s alcohol delivery service, ruling that two banners on the company’s Facebook page “drew a link between provision of alcohol and the provision of medical assistance.” In its ruling, the agency contends that even though consumers were unlikely to confuse Drink Doctor with genuine medical assistance, the use of medical imagery “presented alcohol as a product to be used in the same manner” as medicine. ASA also takes issue with the “booze-balance” vehicle and emergency phone number featured in the ads, as these reportedly implied that alcohol beverages were “necessary and indispensable.”

“We also considered that the name ‘Drink Doctor’ in itself contained the same implication by conflating the role of a medical professional with the provision of alcohol,” concludes the ruling, which orders Drink Doctor to

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refrain from using medical imagery or terminology in its ads. “Marketing communications should not imply that alcohol has therapeutic qualities, and we considered that the use of medical imagery to market an alcohol delivery service carried such an implication.”

LITIGATION

PCA Executive Sentenced to 28 Years in Prison

Stewart Parnell, former chief executive of Peanut Corp. of America (PCA), has been sentenced to 28 years in prison following a conviction on federal conspiracy and fraud charges for his part in a *Salmonella* outbreak that killed nine people and sickened more than 700. *U.S. v. Parnell*, No. 13-cr-0012 (M.D. Ga., Albany Div., order entered September 21, 2015).

“Americans should be able to trust that the food we buy for ourselves and our families is safe,” said Acting Associate Attorney General Stuart Delery in a September 21, 2015, press release. “The sentences handed down today to officials associated with the Peanut Corporation of America demonstrate the consequences for those whose criminal actions threaten that trust by introducing contaminated food into the marketplace. Our prosecution is just one more example of the forceful actions that the Department of Justice, with its agency partners, takes against any individual or company who compromises the safety of America’s food supply for financial gain.”

Prosecutors sought a life sentence for the 61-year-old Parnell, who could have received more than 800 years under sentencing guidelines. Fellow executive Michael Parnell, Stewart’s brother, was previously sentenced to 20 years, while former quality assurance manager Mary Wilkerson received a sentence of five years in prison. Stewart Parnell’s attorney indicated he would appeal the sentence because the defense believes the jury used unadmitted evidence in reaching its conclusion, including information about the nine deaths. *See Reuters*, September 21, 2015.

New York City Ban on Polystyrene Invalidated

A New York state court has vacated a New York City prohibition on expanded polystyrene foam (EPS) after a challenge by several food

Shook 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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companies, supermarkets and food-service businesses that used EPS in their food packaging. *Dart Container Corp. v. De Blasio*, No. 100734/15 (N.Y. Super. Ct., order entered September 21, 2015).

The court provides a history of the municipal ban—more specifically, a statute dictating that EPS would be prohibited in favor of recyclable materials unless the commissioner of the Department of Sanitation of New York (DSNY) found it to be recyclable—which went into effect July 1, 2015, with penalties delayed until January 2016. Among the plaintiffs are Dart Container Corp., the largest EPS manufacturer, and Plastics Recycling Inc., an EPS recycler, which offered proposals that would designate EPS as recyclable and thereby permit it under the city statute.

“The mandate to the Commissioner was to determine whether EPS should be designated as recyclable,” the court noted. “The one undisputed short answer to whether EPS is recyclable is yes: single serve EPS is recyclable. The tougher question is whether dirty or post-consumer single service EPS can be recycled in a manner that is environmentally effective and economically feasible so to be designated as recyclable.” The court then considered the feasibility of the recycling companies’ proposals and found that the DSNY commissioner failed to consider, among other things, “Dart’s state-of-the-art optical sorting machine” that can recycle between 75 to 95 percent of EPS materials.

“The Commissioner, of course, has discretion to choose the evidence upon which she relies,” the court found. “However, in reaching the conclusion that there is no sustainable market for post-consumer EPS in both her environmentally efficient and economic feasibility analysis, the Commissioner did not clearly state the basis of her conclusions when the evidence contrary to her findings were clearly before her.” Accordingly, the court vacated the commissioner’s determination that EPS was not recyclable as arbitrary and capricious.

Class Action Stayed and Prop. 65 Action Settled in Pepsi 4-MEI Disputes

A California state court has approved the settlement agreement in a lawsuit brought by the Center for Environmental Health (CEH) alleging that PepsiCo Inc. products contain levels of 4-methylimidazole (4-MEI) that exceed the limits imposed by the state’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Ctr. for Envntl. Health v. Pepsi*

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Beverages Co., No. 14711020 (Cal. Super. Ct., order entered September 17, 2015). Under the settlement agreement, PepsiCo will pay \$385,000 and must ensure by January 1, 2016, that its soft drinks sold in California contain levels of 4-MEI within the safe harbor limits set by Prop. 65. CEH initially filed a notice of violation with the California Office of the Attorney General in January 2012; details appear in Issue [427](#) of this *Update*.

Meanwhile, the parties to a proposed class action alleging similar facts have agreed to stay the case until December 14, 2015, pending settlement discussions; the court has not yet granted approval for the stay. *Sciortino v. PepsiCo, Inc.*, No. 178953 (N.D. Cal., stipulation filed September 15, 2015). Additional information about the case appears in Issue [568](#) of this *Update*, and details of a similar lawsuit dismissed in March 2015 appear in Issue [557](#).

Lindt Prevails over Haribo in Gold Bear Battle

Germany's highest court has ruled that Swiss chocolatier Lindt & Sprüngli did not violate German confectioner Haribo's trademark "Gold Bear" when it began selling a chocolate bear wrapped in gold foil in 2011. Haribo has produced Gold-Bear® gummy bears for several decades, which are sold in gold packages featuring a yellow bear wearing a red ribbon and bow tied around its neck. Lindt's gold-clad chocolate bear also wears a red ribbon tied in a bow around its neck, styled after the company's chocolate Easter bunny products.

Haribo claimed in 2012 that consumers were likely to be confused by Lindt's packaging; a trial court agreed, but an intermediate appellate court overturned the ruling. The Federal Court of Justice has affirmed the appellate ruling, reportedly saying in a German-language statement that it wants to avoid the danger of "product design monopolisation." Information about Haribo's 2012 complaint appears in Issue [462](#) of this *Update*. See *BBC*, September 23, 2015.

Appellate Court Orders Chile to Release Data About Antibiotic Use in Salmon

A Chilean appellate court has ruled that the nation's National Fisheries and Agricultural Services must issue its data about antibiotics in Chilean salmon, which revealed that 50 salmon firms jointly used 450.7 metric

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tons of antibiotics in 2013. Chile's Council for Transparency previously refused to release the information to conservation organization Oceana, arguing that the disaggregated data could be used against individual companies. The court disagreed, reportedly ruling, "The reasons given by the claimed party to refuse the requested information are not consistent with what establish the applicable regulations." The report comes months after Costco Wholesale Corp. announced it would reduce the proportion of its salmon stock from 90 percent Chilean salmon to 40 percent in favor of salmon from Norway, whose fish-farming companies on average use lower amounts of antibiotics. *See Fish Information & Services*, September 11, 2015; *Undercurrent News*, September 21, 2015.

Alcohol Company Challenges Malibu Rum Version of "Dark 'N Stormy"

Gosling Brothers Ltd. has filed a complaint against Pernod Ricard USA, maker of Malibu Island Spiced Rum[®], alleging that a recipe on the Malibu website violates Gosling's "Dark 'N Stormy" trademarks. *Gosling Bros. Ltd. v. Pernod Ricard USA*, No. 15-13360 (D. Mass., filed September 15, 2015). Gosling holds five trademarks for "Dark 'N Stormy" in the categories of wine and spirits, bar services and clothing to protect a cocktail recipe and a premixed cocktail drink composed of Gosling's Black Seal Rum and ginger beer. The Malibu website, the complaint alleges, offers a recipe for a "Dark N' Stormy" drink composed of Malibu Island Spiced Rum[®], ginger beer, bitters and a lime wedge along with a video instructing how to make the cocktail. The complaint further alleges that a similar recipe for a "Black Stormy" cocktail uses similar ingredients but replaces the Malibu Island Spiced Rum[®] with Malibu Black Rum[®]. Gosling seeks injunctions and treble damages for allegations of trademark infringement and unfair competition.

Whole Foods Targeted by PETA, Consumer Class Action for Humane Meat "Sham"

People for the Ethical Treatment of Animals Inc. (PETA) has filed a lawsuit against Whole Foods Market claiming the grocery chain's "5-Step[®] Animal Welfare Rating System" is a "sham" because Whole Foods fails to enforce the program against its chicken, turkey, pork and beef suppliers. *PETA v. Whole Foods Mkt., Inc.*, No. 15-4301 (N.D. Cal., filed September 21, 2015).



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The complaint asserts that “the entire audit process for Whole Foods’ animal welfare standards is a sham because it occurs infrequently and violations of the standards do not cause loss of certification. Indeed, a supplier can be out of compliance *for multiple years* without losing its certification.” Further, the certification standards “barely exceed common industry practices, if at all.” The complaint coincides with an investigative report from PETA that purportedly exposes several program violations at a Pennsylvania pig farm that supplies to Whole Foods.

“‘Humane meat’ is a myth that dupes well-intentioned shoppers into paying higher prices for the very products of crowding, lingering death, and suffering that they were trying to avoid,” PETA Foundation Director of Animal Law Jared Goodman said in a September 21, 2015, blog post about the lawsuit. The organization and its co-plaintiff, a woman who has shopped at Whole Foods, seek class certification, declaratory judgment, an injunction and damages for allegations of California’s consumer-protection statutes.

OTHER DEVELOPMENTS

Former NYC Health Commissioner Pens Viewpoint on Media’s Role in Altering Consumer Behaviors

Former New York City Health Commissioner Thomas Farley, who now leads The Public Good Projects, has authored a [viewpoint](#) in *JAMA Internal Medicine* that encourages the use of mass media advertising to promote healthy behaviors. Titled “Mass Diseases, Mass Exposures, and Mass Media,” the article highlights the success of mass media campaigns aimed at smoking cessation, noting that some of these advertisements were more valuable and cost-effective than routine one-on-one counseling, and calls for further research into the dose-response curve for advertising. As Farley explains, “[S]tudies suggest that smoking cessation or smoking prevalence rates can be changed populationwide by television ads shown at a dose of approximately 10,000 Gross Ratings Points (GRPs) per year,” meaning that “the average person is exposed to 100 ads.”

The editorial also suggests that similar large-scale campaigns can be used to effectively counter sugar-sweetened beverage marketing. “Mass media messages, seen repeatedly by high percentages of entire populations, have a potentially greater benefit over the long term by shifting general

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attitudes,” concludes Farley, who argues that hospital systems, health insurers and government agencies have the budget to wage mass media campaigns. “When everyone in a population sees persuasive messages about the risks of smoking, they are more likely to support organizational and government policy changes such as smoke-free air rules or cigarette taxes. Such policy changes can alter the social norms of behavior, helping even those people not directly touched by media messages.”

NYC Food Policy Center to Target Industry Messaging in Breakfast Seminar

The New York City Food Policy Center at Hunter College has organized an October 7, 2015, **program** featuring Jim Kreiger, executive director of Seattle’s Action for Healthy Food, and Marlene Schwartz, director of the University of Connecticut’s Rudd Center for Food Policy & Obesity, in a conversation about ways to challenge the “harmful effects of the food and beverage industry’s business and political practices.” The discussion will be moderated by Nicholas Freudenberg, director of the food policy center.

SCIENTIFIC/TECHNICAL ITEMS

School Meals Allegedly Linked to Chronic BPA Exposure

School meals may contain enough bisphenol A (BPA) to exceed low-dose toxicity thresholds, according to Stanford and Johns Hopkins researchers. Jennifer Hartle, et al., “Probabilistic modeling of school meals for potential bisphenol A (BPA) exposure,” *Journal of Exposure Science and Environmental Epidemiology*, September 2015. Using federal school nutrition guidelines as well as information obtained from San Francisco Bay Area schools, the researchers modeled BPA exposure scenarios for elementary and middle schoolers consuming a mix of fresh and packaged foods at school lunch. The results evidently showed exposures ranging from 0.00049 µg/kg-BW/day for a middle-school student with a low-exposure breakfast, to 1.19 µg/kg-BW/day for an elementary-school student eating a high-exposure lunch.

“During school site visits, I was shocked to see that virtually everything in school meals came from a can or plastic packaging,” Stanford Prevention Research Center Postdoctoral Fellow Jennifer Hartle is quoted as saying.

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



“Meat came frozen, pre-packaged, pre-cooked and pre-seasoned. Salads were pre-cut and pre-bagged. Corn, peaches and green beans came in cans. The only items not packaged in plastic were oranges, apples and bananas.”

In particular, the study claims that, even though the BPA contained in a single meal did not exceed the Environmental Protection Agency’s oral reference dose (RfD) of 50 µg/kg-BW/day, some of the doses were “at the same order of magnitude” as the low-dose toxicity threshold—2 µg/kg-BW/day—indicated by animal studies. To this end, the authors warn of “the potential for school meals to expose children to chronic toxic levels of BPA.”

“Even a dose of one extra microgram per day could be a big deal. If this is an avoidable exposure, do we need to risk it? If we can easily cut it out, why wouldn’t we?,” opines Hartle. “The bottom line is more fresh fruits and vegetables. There is a movement for more fresh veggies to be included in school meals, and I think this paper supports that.” See *Stanford News*, September 24, 2015.