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LEGISLATION, REGULATIONS AND STANDARDS

FDA Bars Imports of GE Salmon

The U.S. Food and Drug Administration (FDA) has banned the import of genetically engineered (GE) salmon just two months after deeming AquaBounty Technologies, Inc.'s AquaAdvantage® salmon safe for human consumption. Issued in compliance with the Fiscal Year 2016 Omnibus Appropriations Act, the January 29, 2016, import alert directs that "any shipment of suspected or known GE salmon or product composed in whole or in part of GE salmon should be promptly forwarded to the District Compliance Branch."

Although AquaBounty Technologies produces GE salmon at fish farms based in Canada and Panama, the company has not yet sold its product in the United States. But after FDA ruled that the salmon posed no environmental or human health risks, U.S. Sen. Lisa Murkowski (R-Alaska) moved to block confirmation proceedings for the next FDA commissioner until the agency required labeling for all products containing GE salmon. "This is a huge step in our fight against 'Frankenfish.' I adamantly oppose the FDA's misguided decision to allow GE salmon to be placed in our kitchens and on our tables, and I firmly believe that mandatory labeling guidelines must be put in place as soon as possible so consumers know what it is they are purchasing," said Murkowski in a January 29 press release. "It seems that the FDA has begun to listen, and I hope this is a sign that the agency plans to develop these necessary guidelines." *See Sen. Murkowski Press Release*, January 12, 2016.

Additional details about FDA's approval of AquaBounty Technologies' AquaAdvantage salmon appear in Issue [585](#) of this *Update*.

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LITIGATION

ANA Files Amicus Brief in San Francisco Sugar-Sweetened Beverage Warning Litigation

The Association of National Advertisers, Inc. (ANA) has filed an amicus brief in a case challenging San Francisco's health code provisions requiring advertisements on sugar-sweetened beverages (SSBs) to notify the public of alleged health risks associated with SSB consumption. *Am. Beverage Ass'n v. City of San Francisco*, No. 15-3415 (N.D. Cal., San Francisco Div., amicus brief filed January 22, 2016). The brief focuses on First Amendment arguments against requiring private parties to include government speech on their product labels.

"The City of San Francisco's imposition of the Warning Mandate in reaction to potential over-consumption of sugar-sweetened beverages by its citizens, whatever the merits of that concern, takes regulatory Nannyism to new levels and is wholly incompatible with First Amendment protections afforded to commercial speech," the brief argues. "If this Court were to uphold the Board of Supervisors' conscription of sugar-sweetened beverage ads to convey government views on health issues there would be virtually no limit to similar efforts targeting other products, at any level of government. Every sugary, fatty, salty, processed, or other food disfavored by the science of the moment would be susceptible to having a significant portion of its advertising turned into a placard for government hectoring with which the advertiser not only disagrees, but for which there may be data controverting the government position."

Details about the American Beverage Association's lawsuit challenging the ordinance appear in Issue [573](#) of this *Update*, and information about the repealed ad ban on city property appears in Issue [586](#).

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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at mboyd@shb.com.

Cheese Company Pleads Guilty to Food Adulteration Charge

A Delaware cheese company and two individual defendants have pled guilty to a misdemeanor violation of the federal Food, Drug, and Cosmetic Act for distributing adulterated ricotta, queso fresco and fresh cheese curds in several neighboring states. *U.S. v. Roos Foods, Inc.*, No. 16-0013 (D. Del., information filed January 22, 2016). Roos' cheese was connected to a 2014 outbreak of *Listeria* that caused five adults and three newborns to contract listeriosis. The criminal information alleged the company produced the cheese in unsanitary conditions, including the "[f]ailure to clean food-contact surfaces as frequently as necessary to

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protect against contamination of food” and “failure to store raw materials or ingredients in a manner that protects against contamination.”

In their agreement with the U.S. Food and Drug Administration (FDA), the defendants agreed to an injunction preventing them from processing or distributing food products until they undergo an FDA inspection and facility testing by an independent laboratory. The defendants also must hire a sanitation expert to prepare a sanitation control program for employee training, environmental monitoring and remedial actions.

“The FDA will not tolerate food companies that fail to provide adequate safeguards and place the public health at risk by producing and shipping contaminated products,” FDA Deputy Commissioner for Global Regulatory Operations and Policy Howard Sklamberg said in a January 22, 2016, press release. “We will continue to work with the Department of Justice to use the full force of our justice system against those that place profits over the health and safety of American consumers.”

California Lawsuit Challenges Use of *Trans* Fat in Kellogg’s Mother’s Cookies®

A consumer has filed a putative class action against Kellogg Co. alleging the company produces Mother’s Cookies® with partially hydrogenated oil (PHO), which contains *trans* fat, in violation of the U.S. Food and Drug Administration’s (FDA’s) ban on the ingredient. *Hawkins v. Kellogg Co.*, No. 16-0147 (S.D. Cal., filed January 21, 2016). The plaintiff asserts FDA “determined that PHO is unsafe for use in food” in 2015 and alleges as a result that Kellogg is prohibited from using the food additive in its cookies. “Today there is no question about the scientific consensus on *trans* fat,” the complaint argues, describing several studies examining the effects of PHO on the human body. For alleged violations of California consumer-protection statutes, nuisance and breach of implied warranty, the plaintiff seeks class certification, restitution, an injunction, a corrective advertising campaign and attorney’s fees.

Ads Implied Quorn® Is a Mushroom, Proposed Class Action Alleges

A consumer has filed a putative class action against Quorn Foods, Inc. alleging the term “mycoprotein,” which the company uses in its advertising, implies the product is “the same or substantially similar to a mushroom, truffle or morel” but Quorn products “are actually made of mold.” *Birbrower v. Quorn Foods, Inc.*, No. 608107 (Cal. Super. Ct., Los Angeles Cnty., C. Dist., complaint filed January 22, 2016).

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The complaint argues that Quorn labels misrepresent “mycoprotein,” specifically citing the packaging claim that “Quorn [products] are made with mycoprotein (‘myco’ is Greek for ‘fungi’) and are completely meatless and soy-free. There are believed to be over 600,000 varieties of fungi in the world, many of which are among the most sought after foods like varieties of mushroom, truffles, and morels.” The plaintiff alleges violations of California consumer-protection statutes and fraud, and she seeks an injunction, implementation of product labels that state that “this product contains mold,” a disclosure on the company’s web site to explain that “the ‘mycoprotein’ ingredient in Quorn products is fermented soil mold; it is not a mushroom, truffle or morel,” restitution, and attorney’s fees. Additional information about a wrongful death lawsuit against Quorn appears in Issue [560](#) of this *Update*.

LEGAL LITERATURE

Manhattan Institute Issues 2016 *Trial Lawyers Inc.* Report

The Manhattan Institute, a conservative think tank based in Washington, D.C., has published its annual [survey](#) of plaintiffs’ bar activities.

Focusing on class action and mass tort litigation, the survey addresses consumer fraud allegations, labor and employment claims, and securities actions, among others, reporting that 29 percent of corporate counsel expect data privacy lawsuits “to grow more than any other class-action line of business.”

OTHER DEVELOPMENTS

WHO Report Advocates “Life-Course Approach” to End Childhood Obesity

The World Health Organization’s (WHO’s) Commission on Ending Childhood Obesity (ECHO) has issued a January 25, 2016, [report](#) that recommends, among other things, a tax on sugar-sweetened beverages (SSBs), context-specific dietary guidelines, and “interpretive” front-of-pack labeling. Taking “a life-course approach” that focuses on what it describes as an obesogenic environment, the report urges WHO, member governments and non-state actors to implement specific action items designed to (i) promote intake of healthy foods and reduce intake of unhealthy foods and SSBs among children; (ii) promote physical activity and reduce sedentary behaviors; (iii) provide guidance on preconception



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and antenatal care to reduce the risk of childhood obesity; (iv) support healthy diet, sleep and physical activity during childhood; (v) promote healthy school environments, health and nutrition literacy; and (vi) provide family-based lifestyle weight management services.

In particular, ECHO singles out food and beverage marketing as “a major issue demanding change that will protect all children equally.” To this end, the commission asks member states to implement WHO’s “Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children,” in addition to developing their own regulations on the marketing of complementary foods and beverages “to limit the consumption of foods and beverages high in fat, sugar and salt by infants and young children.”

The report also urges consumers to demand that “the food and non-alcoholic beverage industry provide healthy products,” at the same time that it asks government to work closely with the private sector. “Countries need to engage constructively with the private sector to encourage implementation of policies and interventions,” state the report. “Cooperative relationships with industry have already led to some encouraging outcomes related to diet and physical activity. Initiatives by the food manufacturing industry to reduce fat, sugar and salt content, and portion sizes of processed foods, and to increase the production of innovative, healthy and nutritious choices, could accelerate health gains worldwide.” See *The Lancet*, January 26, 2016.

Consumers Union Campaign Hopes to Elicit FDA Action on “Natural”

An online campaign launched by Consumers Union asks, “Have you ever quickly selected one box of crackers over another because the box said it was ‘natural’? Food companies know you probably have. They also know they can slap the word ‘natural’ on just about anything.” The advocacy group urges consumers to sign its [petition](#) urging the U.S. Food and Drug Administration (FDA) to prohibit use of the term “natural” or take action to define it.

Findings of a December 2015 *Consumer Reports* [survey](#) reportedly indicate respondents want stricter standards for natural and organic labeling on meat, poultry and packaged and processed foods.

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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.



SCIENTIFIC/TECHNICAL ITEMS

Food Addiction Beliefs Drive Support for Obesity-Related Initiatives

New research reportedly suggests that belief in food addiction translates into support for obesity-related policies, “even when accounting for the significant associations of age, gender and political party.” Erica Schulte, et al., “Belief in Food Addiction and Obesity-Related Policy Support,” *PLoS One*, January 2016. Relying on the responses of 200 individuals recruited through Amazon Mechanical Turk to answer questions about belief in food addiction and support for 13 obesity-related initiatives, researchers reported that “belief in food addiction and political party both had moderate effect sizes for predicting support for obesity-related policy.”

“Historically, the identification of a substance as addictive shifts public perceptions in a manner that increases support for public policies that aim to reduce the negative impact of the substance (e.g., restrictions on marketing, taxation),” the study’s authors noted. “For example, the identification of nicotine as addictive, rather than habit forming, was one of the defining moments that shifted public attitudes about cigarettes and led to the development of new tobacco-focused policies.”

The study thus speculates that when presented with evidence supporting a food addiction model, the public will increasingly adopt a more favorable stance toward obesity-related initiatives. As it concludes, “Participants who agreed that certain foods can be addictive were more likely to endorse support for policies that aim to reduce obesity (e.g., fruit/vegetable subsidies, limiting the size of sugar-sweetened beverages... Though applying an addiction, or ‘brain disease’ framework to drugs and behaviors has yielded mixed results on stigma, the current findings suggest that belief in an addiction model of obesity is associated with support for public policies that aim to reduce obesity.”