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LEGISLATION, REGULATIONS AND STANDARDS

Canadian Senate Committee Advocates Soda Tax in "Groundbreaking" Obesity Report

The Canadian Standing Senate Committee on Social Affairs, Science and Technology has issued a "groundbreaking" report on obesity that calls for a tax on sugar- and artificially-sweetened beverages as well as a ban on advertising food and drink to children. Titled *Obesity in Canada: A Whole-of-Society Approach for a Healthier Canada*, the March 2016 report also recommends, among other things, (i) "a National Campaign to Combat Obesity," (ii) "a complete revision of Canada's food guide to better reflect scientific evidence," (iii) "a review of nutrition food labelling to make it easier to understand," and (iv) "a plan for making healthy food more affordable."

"Canada's dated food guide is no longer effective in providing nutritional guidance to Canadians. Fruit juice, for instance, is presented as a healthy item when it is little more than a soft drink without the bubbles," notes the report, which summarizes expert testimony given before the committee between October 2014 and June 2015. "From policy makers to parents, industry insiders to family doctors, all Canadians have a role to play to beat back this crisis."

In particular, the senate committee urges further study of Quebec's existing restrictions on food and beverage marketing to children younger than age 13. Although it highlights voluntary measures such as the Canadian Children's Food and Beverage Advertising Initiative (CAI), the report nevertheless cites testimony describing the CAI as allegedly ineffective. "With the exception of the food industry, witnesses unanimously supported strict controls on the advertising of unhealthy food and beverages to children, although the specifics of such an approach varied to some degree," states the committee's summary.

In addition to examining soda taxation measures that target all carbonated beverages as opposed to just sugary ones, the report singles out the overhauled Brazilian dietary guidelines, "which no longer focus on food groups and nutrients but rather on whole foods, meal preparation and

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avoidance of ultra-processed items.” To this end, the senate committee backs the formulation of an evidence- and meal-based nutritional guide by an advisory body that does not include food, beverage or agricultural industry representatives. It also asks the Minister of Health to consider labeling changes designed to address serving size and “require that the daily intake value for protein be included in the Nutrition Facts table.”

Meanwhile, the Office of the Prime Minister has already issued mandate letters directing the Minister of Health “to restrict the marketing of unhealthy food and beverages to children, to regulate *trans* fat and salt in processed foods and improve food labelling with respect to added sugars.” According to a concurrent press release, “An increase in consumption of prepackaged, highly processed foods, like instant noodles, prepackaged pizzas, candy, soft drinks, and salty snacks, the increase in use of personal computers, and lack of sufficient physical activity are listed as some of the key contributors to Canada’s ‘obesogenic culture’ – one that promotes poor eating and low levels of activity.”

#EFSA4Bees Takes Holistic Approach to Improving Bee Health

The European Food Safety Authority (EFSA) has launched a [website and blog](#) “dedicated to its work on bee health.” Dubbed the #EFSA-4Bees campaign, the new site is part of the agency’s MUST-B project, a collaborative venture among researchers, data analysts and regulators “with the ultimate goal of developing a software tool that can assess the combined threat posed to bee colonies in their natural environment by parasites, infectious agents, pesticides and other stressors.”

To start, the MUST-B project will hold a roundtable at an upcoming scientific workshop to identify research topics that could receive funding under the European Commission’s Horizon 2020 program. “Round the table will be representatives of the European Commission’s directorate-generals for Agriculture, Health and Food Safety, and Research and Innovation; members of bee research projects funded by the European Commission, such as Smartbees, Swarmonitor and Alarm; and colleagues from the U.S. Environmental Protection Agency, the Animal Health World Organization, and the Food and Agriculture Organization of the United Nations,” notes a March 3 blog entry.

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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LITIGATION

NYC Salt Labeling Regulation Stayed

The day before the rule was set to take effect on March 1, 2016, a New York state appeals court reportedly granted an emergency stay on enforcement of a municipal regulation requiring chain restaurants to feature salt-warning icons on menus next to items containing 2,300 milligrams or more of sodium. A justice in the Appellate Division of the New York Supreme Court granted the emergency measure, and a panel from that court will next decide whether to grant a preliminary injunction on enforcement followed by a full appeal of the case. *See Bloomberg Business*, February 29, 2016.

Wisconsin Supreme Court Rules for Workers in Hormel Don-Doff Class Action

The Wisconsin Supreme Court has ruled that a class of manufacturing-plant workers at Hormel Food Corp. should be paid for the time they need to change into and out of their required clothes and equipment. *United Food & Commercial Workers Union, Local 1473 v. Hormel Food Corp.*, No. 2014-AP-1880 (Wis., order entered March 1, 2016). The court found that under Wisconsin regulations, Hormel must compensate its employees for 5.7 minutes per day.

The ruling affirms a circuit court decision finding that “the employees’ donning and doffing clothing and equipment at the beginning and end of the day brought Hormel into compliance with federal food and safety regulations and was integral and indispensable to sanitation and safety in the employees’ principal work activities, namely food production.”

New York Federal Court Dismisses Proposed Class Action Against Whole Foods

A New York federal court has dismissed a putative class action alleging Whole Foods Market Group overcharged its customers for some pre-packaged foods, finding that the plaintiffs failed to specify any particular transactions in which the grocer overcharged them. *In re Whole Foods Mkt. Grp., Inc. Overcharging Litig.*, No. 15-5838 (S.D.N.Y., order entered March 1, 2016). The complaint was filed after the New York City Department of Consumer Affairs (DCA) announced the results of its investigation into “systemic overcharging” at Whole Foods stores across the city.

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The plaintiffs alleged that they “regularly purchased”—“one or two times per month”—pre-packaged products from Whole Foods that the DCA identified in its press release, including cheese, cupcakes and chicken fingers. The court took issue with the plaintiffs’ reliance on the DCA press release, finding that its “statements fall very far short of reporting an investigative finding of ubiquitous, systematic over-weighting at Whole Foods’ New York City stores. Rather, the Press Release’s self-described ‘snapshot’ [], fairly read, reports multiple but not invariable incidents of this deceptive labeling practice. It does not provide any basis on which to infer across-the-board overcharging so as to embrace, other than by conjecture, the cheese and cupcakes, or the chicken fingers, that [the plaintiffs] occasionally bought in 2014 and 2015.” The court found the plaintiffs did not have standing to sue based on their allegations and dismissed the case with prejudice.

European High Court Affirms Preservative Labeling on Citrus Fruits

The European Court of Justice (ECJ) has reportedly affirmed a ruling that Spanish citrus growers must label their fruits when they have used chemicals or preservatives in post-harvest processing. Spain challenged the European Commission’s (EC’s) power to enact the rule, arguing the U.N. Economic Commission for Europe had set voluntary standards only. The lower court noted that even though the EC must consider U.N. standards, it is not required to adopt those guidelines, reasoning that the ECJ reportedly echoed in its ruling.

Spain also argued that the rule created an unconstitutional distinction between citrus growers and growers of other fruit, but the lower court found that citrus fruit is often subjected to higher levels of chemical processing and that citrus peels are used differently than the peels of other fruits and vegetables because they are often added to food for additional flavor. *See Wall Street Journal*, March 3, 2016.

Cheese Cos. Plead Guilty to Adulterating Parmesan

Two cheese companies and an executive from a third company have pleaded guilty to charges relating to the manufacture and sale of adulterated and misbranded Parmesan cheese products. The companies, Universal Cheese & Drying, Inc. and International Packing, LLC, were charged with conspiracy to introduce misbranded cheese products into interstate commerce and to commit money laundering, while Michelle Myrter, an executive at Castle Cheese Co., pleaded guilty to a misdemeanor count of aiding and abetting the introduction of misbranded cheese.

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“The Department of Justice prosecutes people and companies who introduce adulterated or misbranded food into interstate commerce,” U.S. Attorney David Hickton said in a February 26, 2016, press release. “In this case, the fraud was perpetrated on consumers who purchased Parmesan and Romano cheeses that were inferior to what they believed they were buying.” Additional details about the Castle case and the ensuing media attention about the cellulose content in grated cheese appear in Issue [595](#) of this *Update*. See *Department of Justice Press Release*, February 26, 2016.

Founder of Halal Co. Sentenced to Two Years in Federal Prison

The founder of Midamar, an export company charged with fraud for sending “halal” meat to Malaysia that failed to meet halal slaughtering standards, has reportedly been sentenced to two years in federal prison and ordered to pay \$60,000 in fines and \$184,983 in disgorgement. Midamar was fined \$20,000 and ordered to forfeit \$600,000.

A U.S. Department of Agriculture investigation revealed that William Aossey, Jr. instructed his employees at Midamar to change the application forms to indicate the meat had been produced at a Malaysia-approved facility instead of Midamar’s unapproved supplier. Aossey was convicted of making false statements on export applications, selling misbranded meat and committing wire and mail fraud in July 2015. The court cited Aossey’s advanced age and lack of criminal history to lower his sentence from the guideline sentencing range of 87-108 months. Aossey’s sons, Jalel and Yahya, have also been convicted of similar charges and will be sentenced on March 11, 2016. Details about Aossey’s conviction appear in Issue [572](#) of this *Update*.

“IRS Criminal Investigation is committed to unraveling complex financial transactions and schemes of this nature to assist our law enforcement partners,” an IRS agent said in a February 25, 2016, press release. “The proceeds of illegal activity are used as fuel to continue their criminal conduct.” See *Department of Justice Press Release*, February 25, 2016.

Jimi Hendrix Estate Sues Distillery for “Purple Haze Liqueur”

Experience Hendrix has filed a trademark infringement lawsuit against Tiger Paw Distributors, Private Label Distillery and Leon Hendrix, Jimi’s brother, for selling an alcohol product called “Purple Haze Liqueur.” *Experience Hendrix v. Tiger Paw Distrib.*, No. 16-0642 (N.D. Ga., Atlanta Div., filed February 29, 2016).

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Experience Hendrix, established by Jimi's father and now owned by Jimi's sister and cousin, alleges that Leon and his company are selling Purple Haze Liqueur and promoting it with Jimi's image, which Experience Hendrix owns. According to the complaint, Leon was previously enjoined from selling Jimi Hendrix Electric Vodka, sold in a purple bottle, after 2007 trademark litigation. The company argues that it holds copyright protection for several of Jimi's songs, including "Purple Haze" and "Voodoo Child (Slight Return)." In addition, the U.S. Patent and Trademark Office previously refused to grant trademark rights to Tiger Paw for marks related to Jimi Hendrix because they suggested a false connection to Jimi's estate. Experience Hendrix seeks an injunction, destruction of the allegedly infringing products and damages.

Consumers Challenge Maple Sugar Content in Quaker Oats' Oatmeal

A California resident has filed a putative class action alleging Quaker Oats Co. mislabels its instant oatmeal as containing maple syrup despite containing no syrup or maple sugar. *Eisenlord v. Quaker Oats Co.*, No. 16-1442 (C.D. Cal., filed March 1, 2016).

Citing a letter from the Vermont Maple Sugar Makers' Association to the U.S. Food and Drug Administration, the complaint asserts that adding maple sugar to a product can allow a company to charge a premium price. The plaintiff argues that he relied on the name of the product and a prominent image of maple syrup on the packaging to believe that the oatmeal contained maple syrup, and had he known "that the product did not contain maple syrup or maple sugar as an ingredient, he would not have purchased it." For allegations of fraudulent inducement and violations of California's consumer-protection statute, the plaintiff seeks class certification, damages, an injunction and attorney's fees.

OTHER DEVELOPMENTS

Roles of Individual Choice and Regulation in Public Health Debates Target of Northeastern University Event

"Conflicts between individual choice and collective action underlie many of the most contested and challenging debates relating to health and health care, from the very existence of Obamacare to government responses to the obesity and tobacco epidemics," according to promotional materials for an April 15, 2016, conference on the campus of Northeastern University in Boston.

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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.

The event will include sessions titled “The Politics of Public Health”; “Commercial Speech, Individual Responsibility & Health”; and “Addiction.” The “Obesity and Chronic Diseases” roundtable will be moderated by Northeastern Law Professor Richard Daynard, founder of the Public Health Advocacy Institute’s Center for Public Health Litigation, which “uses the civil justice system to improve public health by focusing on litigation targeting tobacco industry products, unhealthy foods, deceptive health marketing, and deceptive gambling practices.”

