

FOOD & BEVERAGE LITIGATION UPDATE



CONTENTS

Legislation, Regulations and Standards

Senate Adopts Food Safety Crime Bill . . .	1
Senate Legislation Would Mandate COOL for Dairy Products	1
Cornucopia Institute Asks FTC to Investigate Dean Foods' Omega-3 Advertising	1
EPA Excludes Milk, Milk Products from Oil Spill Regulations	2
ENVI Recommends New Food Labeling Legislation	2
Sweden Moves Toward BPA Ban in Can Linings	3
State AGs Warn Pabst Brewing About Selling "Binge in a Can".	3

Litigation

McDonald's Seeks Dismissal of Happy Meal Lawsuit	4
Federal Prosecutors Settle Charges Against Beef Exporters.	5
Taco Bell® Calls on Law Firm to Apologize for Dropped Lawsuit	5
Florida Court Denies Motion to Dismiss Polluted Frozen Vegetable Suit.	5
Court Resolves Insurance Coverage Issues for Diacetyl Defendants	6
Reduced Fat Claims for Deli Meats Challenged in Class Complaint.	6
Dispute over "Mommy" on Wine Labels Goes to Court.	7
"One Smart Cookie"™ Goes Head-to-Head with "Original Smart Cookie".	7

Media Coverage

<i>New York Times</i> Discusses Online Food Marketing, Sugar's Side-Effects.	7
Media Focuses on Neurodevelopmental Disorders Linked to Pesticides, Mercury .	9

Other Developments

Second Olive Oil Study Presses for Stricter Standards.	10
--	----

Scientific/Technical Items

Study Examines Multidrug-Resistant Staph in Meat, Poultry	11
---	----

LEGISLATION, REGULATIONS AND STANDARDS

Senate Adopts Food Safety Crime Bill

The U.S. Senate has approved a [bill](#) (S. 216) designed to "strengthen criminal penalties for companies that knowingly violate food safety standards and place tainted food products on the market," according to the legislation's sponsor, Senator Patrick Leahy (D-Vt.). The proposal would increase offenses from a misdemeanor to a felony, establish fines and give law enforcement the ability to seek prison sentences of up to 10 years. *See Press Release of Senator Patrick Leahy*, April 15, 2011.

Senate Legislation Would Mandate COOL for Dairy Products

A [bill](#) (S. 831) spearheaded by Senator Al Franken (D-Minn.) would require country-of-origin labeling (COOL) on dairy products such as milk, cheese, yogurt, ice cream, and butter. Franken was quoted as saying that the legislation "isn't a silver bullet, but it does give family farms another tool that will help them compete in a crowded marketplace. And it gives consumers the option to purchase milk and cheese from our own family farms." *See Product Liability Law 360*, April 15, 2011.

Cornucopia Institute Asks FTC to Investigate Dean Foods' Omega-3 Advertising

An organization that promotes family-scale farming and organic foods has called on the Federal Trade Commission (FTC) to investigate Dean Foods, which purportedly claims that its Horizon "milk with Omega-3 DHA" products support brain and eye development in children and benefit pregnant and nursing women. In its April 21, 2011, [letter](#), the Cornucopia Institute details the company's allegedly false and misleading claims "targeted to pregnant women and children" and urges the agency to enjoin the company, if appropriate, to prevent further false and misleading marketing claims. According to the institute, the company is also promoting its Horizon milk as "natural nourishment . . . without the additives you'd rather avoid," despite using a DHA oil that is "an extract from mutated and fermented algae that have never been part of the human diet."

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

SHB 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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com



or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

The letter notes that in 2004 FTC questioned whether the company that makes the DHA supplements added to Dean Foods' milk had sufficient evidence to back its improved brain function claims. It also discusses other recent actions FTC has taken against companies making brain function claims for foods. The Cornucopia Institute seeks an investigation of the pediatrician who allegedly endorses Dean Foods' milk in online videos; according to the letter, he "gives consumers a false and misleading sense that the DHA oil has been medically proven to benefit health." The bulk of the letter focuses on the studies that Dean Foods has apparently cited to support its claims, criticizing them and pointing to other research reaching opposite conclusions. The institute also discusses research showing that adverse reactions have been linked to DHA algal oil, including nausea, gastrointestinal discomfort, diarrhea, and jaundice. The letter concludes with a call for "immediate and effective action."

EPA Excludes Milk, Milk Products from Oil Spill Regulations

EPA has issued a [final rule](#) exempting milk, milk product containers and milk production equipment from Oil Spill Prevention, Control and Countermeasure (SPCC) regulations. Effective June 17, 2011, the rule could potentially save the milk and dairy industries more than \$140 million a year by eliminating "unnecessary burdens," according to EPA.

Implemented in the 1970s to protect U.S. inland waters and shorelines, SPCC regulations require facilities storing more than 1,320 gallons of oil to "create and implement plans to prepare, prevent and respond to oil spills." The exemption does not apply to "fuel oil and other applicable oils stored on farms, farms that store the regulatory threshold of fuel oil and other applicable oils covered under the SPCC." Because some facilities may still have oil storage subject to SPCC regulations, the rule also excludes milk storage capacity from a facility's total oil storage capacity calculation and removes compliance date requirements for exempted containers.

"After working closely with dairy farmers and other members of the agricultural community, we're taking commonsense steps to exempt them from a provision in this rule that simply shouldn't apply to them," EPA Administrator Lisa Jackson said. See *EPA Press Release*, April 12, 2011; *Federal Register*, April 18, 2011.

ENVI Recommends New Food Labeling Legislation

The European Parliament's Environment, Public Health and Food Safety Committee (ENVI) has reportedly [amended](#) draft legislation "to ensure that labels are legible, do not mislead, and provide the information that consumers need to make choices." According to an April 19, 2011, press release, ENVI members have passed draft legislation "that aims to modernize, simplify

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

and clarify” food labels by requiring them to include “mandatory nutritional information, inter alia on artificial *trans* fats and the country of provenance.”

Under the new rules, meat products would also bear additional labeling to indicate “where the animal was born, reared and slaughtered,” whether the animal was “slaughtered without stunning (in accordance with certain religious traditions),” and whether a product is “formed meat” containing various meat parts. The rules would also forbid labels from misleading consumers about replaced ingredients and require foods containing aspartame to be labeled “Contains aspartame (a source of phenylalanine; might be unsuitable for pregnant women).”

EVNI evidently approved these proposals “with 57 votes in favour, 4 against and 1 abstention, giving rapporteur Renate Sommer (EPP, DE) a strong mandate to enter into negotiations to achieve a second-reading agreement with Council ahead of Parliament’s plenary vote in July.” But the report has since drawn attention for its provisions dealing with “ritually slaughtered meat,” which one European diplomat has criticized as “too sensitive a social issue to be dealt with as an add on to food labeling rules.” As reported in an April 20, 2011, *Telegraph* article, religious freedom laws currently permit slaughter without stunning, although the practice is generally banned under European animal welfare rules—a tension that has raised questions among member states and other constituents about whether the proposed labeling apparatus is best suited to convey this information to the public. “We are very keen on clear labeling. But let’s label it all. Don’t pick on us,” said Shimon Cohen of Shechita UK, a group that seeks to educate consumers about Jewish food handling laws. “When you are in a supermarket, fine, let’s have a label saying the meat has been killed without stunning, but let’s also have a label saying this animal has been gassed or electrocuted before being killed.”

Sweden Moves Toward BPA Ban in Can Linings

Swedish government officials have reportedly asked food processors and packaging companies to submit alternatives to bisphenol A (BPA) in food and beverage can linings. The Swedish Chemicals Agency and the National Food Administration want the companies to submit plans by the end of 2011 and manufacturers to outline when BPA alternatives would be available to the food industry. See *CN Brewing*, April 20, 2011.

State AGs Warn Pabst Brewing About Selling “Binge in a Can”

Maryland’s attorney general (AG), joined by the AGs of 17 states and the territory of Guam, have [expressed](#) to Pabst Brewing Co. concerns over the company’s “new flavored malt beverage, Blast by Colt 45,” characterizing it as a “flavored ‘binge in a can.’” In his April 21, 2011, letter, Attorney General Douglas Gansler alleges that selling a fruit-flavored beverage with an alcohol

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

concentration of 12 percent in brightly colored 23.5 ounce cans, “poses a grave public safety threat and is irresponsible.” He contends that the target market includes underage consumers, “in violation of state law.”

According to Gansler, each can contains 4.7 servings of alcohol and, if consumed quickly as intended, an individual “will have engaged in binge drinking, putting himself or herself at risk of serious injury and other health and safety problems.” The AGs call on Pabst’s CEO to “take immediate steps to significantly reduce the number of servings of alcohol presented to consumers in a single serving container . . . [and] take steps to ensure that the marketing of this product does not expressly or impliedly target an audience that is under the legal drinking age.” The company is reportedly promoting the new product with a popular hip-hop celebrity. See *Maryland Attorney General Press Release*, April 21, 2011.

LITIGATION

McDonald’s Seeks Dismissal of Happy Meal Lawsuit

McDonald’s Corp. has filed a motion to dismiss a putative class action seeking to stop the company from advertising and selling to children its allegedly “unhealthy Happy Meals” with toys. *Parham v. McDonald’s Corp.*, No. 11-00511 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., motion filed April 18, 2011). Details about the lawsuit appear in [Issue 375](#) of this *Update*. The company contends that the plaintiff lacks standing to sue under the unfair competition law, Consumer Legal Remedies Act or false advertising law and argues that the complaint is the Center for Science in the Public Interest’s “attempt to distort state consumer protection law beyond recognition” to stop McDonald’s from selling Happy Meals containing toys in California.

According to the motion, the plaintiff does not allege physical harm, reliance on the company’s advertising (that is, “Plaintiff does not allege that her own children saw any particular advertisement or made a single purchase from McDonald’s”), or identify any advertisement that was allegedly false or misleading. McDonald’s summarizes the lawsuit as one in which the plaintiff alleges violation of consumer protection statutes based on advertising that causes children to pester their parents. “The scope of the conduct that would qualify as a violation of California’s consumer protection statutes under Plaintiff’s novel theory is vast to say the least. In short, advertising to children any product that a child asks for but the parent does not want to buy would constitute an unfair trade practice.”

The company also argues that the plaintiff failed to sufficiently allege the causal connection between her “loss” and the company’s practice of advertising Happy Meals with toys and failed to include any factual allegations that could support her claims. It seeks dismissal of the claims in their entirety.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

Federal Prosecutors Settle Charges Against Beef Exporters

U.S. attorneys in New York have reportedly [secured](#) court approval of a consent decree with three companies that allegedly exported meat containing vertebral column to Japan in violation of U.S. trade requirements. The settlement resolves an action filed in March 2011 alleging that the companies exported veal containing ineligible bone and tissue fragments, which action resulted in Japan closing its borders to all U.S. beef products for six months, purportedly costing the industry \$500 million in losses. Details about the case appear in [Issue 385](#) of this *Update*.

Under the agreement, the companies neither admit nor deny the allegations, but they agree to “permanently provide additional access, record-keeping, and reporting in order to ensure ongoing compliance.” The decree also entitles the United States “to substantial and escalating monetary relief in the event of future violations for the next three years—\$10,000 for the first violation, \$25,000 for the second, and \$50,000 for each violation thereafter.” The decree allows the U.S. Department of Agriculture to halt future exports and perform onsite inspections. See *U.S. Attorney Press Release*, April 19, 2011.

Taco Bell® Calls on Law Firm to Apologize for Dropped Lawsuit

Taco Bell® has launched a nationwide public relations campaign calling for an apology from the law firm that voluntarily dismissed a lawsuit alleging that the company misrepresented the beef filling in its taco and burrito products. *Obney v. Taco Bell Corp.*, No. 11-00101 (U.S. Dist. Ct., C.D. Cal., S. Div., notice of dismissal filed April 18, 2011). Additional information about the putative class action appears in [Issue 379](#) of this *Update*.

The company apparently launched the campaign “to make sure consumers know that it has not changed products, ingredients or advertising despite what the Beasley Allen law firm has claimed.” According to a news source, the firm said, “From the inception of this case, we stated that if Taco Bell would make certain changes regarding disclosure and marketing of its ‘seasoned beef’ product, the case would be dismissed.” Taco Bell® asks the attorneys, “Would it kill you to say you’re sorry?” See *Taco Bell® News Release*, *The Wall Street Journal*, April 19, 2011; *Bloomberg Businessweek*, April 20, 2011.

Florida Court Denies Motion to Dismiss Polluted Frozen Vegetable Suit

A Florida court has reportedly denied the motion to dismiss filed by organic and natural foods grocery chain Whole Foods Market in a case alleging that the company sold frozen vegetables harvested in a polluted area by the forced labor of Chinese prisoners. See *Consumer Alliance Inc. v. Whole Foods Market Group Inc.*, No. 2009-92727-CA-01 (11th Jud. Cir. Ct., Fla., decided April 20, 2011). The company purportedly certifies and sells the vegetables

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

as organic. The plaintiffs, who are apparently seeking a declaration that the company violated deceptive marketing law, have twice amended their complaint to bring new claims, including deceptive trade practices and false advertising. Plaintiffs' counsel Bruce Baldwin was quoted as saying, "They're the biggest organic retailer in America with the biggest certifier in China working for them. They knew, but they kept selling the Chinese frozen vegetables as if there was no problem at all." See *Law360*, April 21, 2011.

Court Resolves Insurance Coverage Issues for Diacetyl Defendants

A New York state court has determined that a company which made the butter flavoring chemical at issue in workplace exposure lawsuits succeeded to a predecessor's insurance coverage rights. *Int'l Flavors & Fragrances, Inc. v. St. Paul Prot. Ins. Co.*, No. 601723/08 (N.Y. Sup. Ct., Commercial Div., decided April 11, 2011). Finding that a de facto merger had taken place, the court also determined that the company inherited its predecessor's liabilities in the underlying diacetyl-exposure actions. A \$30.4 million jury award involving one of the plaintiffs in an underlying action is discussed in [Issue 361](#) of this *Update*.

Reduced Fat Claims for Deli Meats Challenged in Class Complaint

A Florida resident has alleged in a putative class action that Kraft Foods and Hormel Foods deceive the public by selling their prepackaged retail sandwich meat products in a way that suggests they contain far less fat than they actually do. *Kuenzig v. Kraft Foods, Inc.*, No. 11-00838 (U.S. Dist. Ct., M.D. Fla., Tampa Div., filed April 18, 2011).

The companies allegedly state on their product labels that the sliced ham, turkey and other deli-style meats are 95, 96, 97, or 98 percent fat-free and juxtapose this information with a calorie count per serving. According to the plaintiff, this leads consumers to believe that of the 50 calories in a serving, for example, less than 5 percent comes from fat. Because the products could actually derive one-half of their calories from fat, the plaintiff contends that health-conscious consumers "will continue to be surprised to learn that Products they've purchased—and perhaps have repurchased for years—are about **ten times** the amounts of fat claimed."

Seeking to certify a nationwide class of consumers who purchased these products since April 2006, the plaintiff alleges breach of express warranty, breach of the Uniform Commercial Code, violation of state unfair or deceptive practices laws, fraudulent and intentional misrepresentation, negligent misrepresentation, unjust enrichment, quantum meruit, false pretenses and fraudulent conversion, trespass to chattels, and replevin. He seeks an injunction to stop the defendants "from continuing to misrepresent the true fat content of their Products, and requiring them to state the percentage of fat by calories"; exemplary, treble or punitive damages; attorney's fees; and costs.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

A Kraft spokesperson reportedly called the lawsuit “unfounded. We stand behind the statements on our labels, which are true and clear. What’s more, these labels are regulated and approved by the USDA prior to use.” See *WCSC TV*, April 19, 2011.

Dispute over “Mommy” on Wine Labels Goes to Court

Clos LaChance Wines has filed a complaint in a California federal court seeking a declaration that “Mommy” is not a protected trademark when used on a wine label and that the company’s domestic wine products, “MommyJuice White Wine” and “MommyJuice Red Wine,” do not infringe defendant’s “Mommy’s Time Out®” imported wines. *Clos LaChance Wines, LLC v. Selective Wine Estates, Inc.*, No. 11-1848 (U.S. Dist. Ct., N.D. Cal., filed April 18, 2011). Clos LaChance apparently began using its label in August 2010; it includes an image of a woman with four arms juggling a computer, house, cell phone, and teddy bear. Selective Wines, whose label contains an image of an empty chair facing a corner alongside a small table with a bottle and wine glass, purportedly sent a demand letter to Clos LaChance accusing it of infringing Selective’s trademark and demanding that Clos LaChance cease and desist from using the name “MommyJuice” in connection with its business. Clos LaChance claims that its label “does not create a likelihood of confusion as to source, sponsorship or affiliation with wines” bearing Selective’s label.

“One Smart Cookie™” Goes Head-to-Head with “Original Smart Cookie”

The company that makes gourmet cookies sold as “One Smart Cookie™” has filed a trademark infringement and unfair competition lawsuit against a company that makes organic cookies sold as the “Original Smart Cookie.” *Jimmy’s Chocolate Chip Cookies, LLC v. Nature’s Select Food Group, LLC*, No. 2:33-av-00001 (U.S. Dist. Ct., D.N.J., filed April 15, 2011). According to the plaintiff, the defendant sought to register its mark, which the plaintiff opposed, and registration was refused. Still, the defendant allegedly continues to use the name “Original Smart Cookie.” The plaintiff alleges infringement of federal trademark registration, false designation of origin and unfair competition under state and federal statutes, and common-law unfair competition. Jimmy’s Chocolate Chip Cookies seeks injunctive relief, an accounting of profits, compensatory and punitive damages, and attorney’s fees and costs.

MEDIA COVERAGE

New York Times Discusses Online Food Marketing, Sugar’s Side-Effects

An April 21, 2011, *New York Times* article targets the online marketing techniques allegedly used by food companies “to build deep ties with young consumers,” claiming that “multimedia games, online quizzes and cellphone

**FOOD & BEVERAGE
LITIGATION UPDATE**

ISSUE 391 | APRIL 22, 2011

apps” have become “part of children’s daily digital journeys, often flying under the radar of parents and policy makers.” The *Times* highlights the efforts of the Campaign for a Commercial-Free Childhood (CCFC) and Yale University’s Rudd Center for Food Policy and Childhood Obesity, which have backed strict regulation in lieu of the current voluntary measures. “Food marketers have tried to reach children since the age of the carnival barker, but they’ve never had so much access to them and never been able to bypass parents so successfully,” said CCFC Director Susan Linn.

According to the article, the groups have called for rules similar to those governing children’s TV that require “a buffer between ads and programs so that children can tell the difference.” In particular, they have argued that Internet-based marketing has eroded the traditional boundaries between content advertising. As Rudd Center Director Kelly Brownell told the *Times*, online games, puzzles and other multimedia presentations are supposedly “more cost-effective than TV spots because they were cheaper to produce and disseminate and were promoted by the children themselves” through word of mouth or social sites like Facebook. “The kids are not only recipients of marketing, they are the tools of marketing,” he was quoted as saying.

In a related development, the newspaper’s April 17, 2011, Sunday Magazine section featured an article, titled “Is Sugar Toxic?,” that explores the research of Robert Lustig, a specialist on pediatric hormone disorders and childhood obesity with the University of California, San Francisco, School of Medicine. Lustig evidently catapulted into public prominence after his lecture, “Sugar: The Bitter Truth,” received more than 800,000 views on YouTube at a rate of approximately 50,000 per month. “The viral success of his lecture, though, has little to do with Lustig’s impressive credentials and far more with the persuasive case he makes that sugar is a ‘toxin’ or a ‘poison,’ terms he uses together more than 13 times through the course of the lecture, in addition to the five references to sugar as merely ‘evil,’” reports *Times* writer Gary Taubes, noting that Lustig has linked excessive sugar consumption not just to diabetes and obesity, but “several other chronic ailments widely considered to be diseases of Western lifestyles—heart disease, hypertension and many common cancers among them.”

Taubes goes on to ask “the salient question: Can sugar be as bad as Lustig says it is?,” tracing the convoluted history of sugar research from the introduction of high-fructose corn syrup in the 1980s as a panacea for refined sugar, then considered “a generally noxious ingredient.” He adds that, according to conventional wisdom, “the worst that can be said about sugars of any kind is that they cause tooth decay and represent ‘empty calories’ that we eat in excess because they taste so good... Whether the empty-calories argument is true, it’s certainly convenient. It allows everyone to assign blame for obesity and, by extension, diabetes... to overeating of all foods, or underexercising, because a calorie is a calorie.”

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

Lustig, however, has apparently argued that “sugar has unique characteristics, specifically in the way the human body metabolizes the fructose in it, that may make it singularly harmful, at least if consumed in sufficient quantities.” Admitting that he finds this argument persuasive, Taubes notes that large increases in added sugar consumption—from 75 pounds per person per year in 1986 to more than 90 pounds per person per year in the early 2000s—have “happened to coincide with the current epidemics of obesity and diabetes.” He further explains how research dating from the 1920s has grappled with sugar’s complex relationship to health and metabolism, with experts only recently accepting the idea that “metabolic syndrome is a major, if not *the* major, risk factor for heart disease and diabetes.”

Caused by fatty liver disease, metabolic syndrome and insulin resistance have purportedly been linked to high fructose consumption in animals, with some scientists suggesting a similar effect in humans that requires additional scrutiny. In addition, Taubes examines newer studies that attempt to illuminate the impact of obesity and diabetes on cancer. Citing two researchers in this field, he warns that, “If it’s sugar that causes insulin resistance...then the conclusion is hard to avoid that sugar causes cancer—some cancers at least—radical as this may seem and despite the fact that this suggestion has rarely if ever been voiced before publicly... Officially I’m not supposed to worry because the evidence isn’t conclusive, but I do.”

Media Focuses on Neurodevelopmental Disorders Linked to Pesticides, Mercury

“Forty years before it was removed from paint, pediatricians had enough evidence of lead’s ability to maim children’s brains—catastrophically and irreversibly—to warrant discussion in a medical textbook,” opines Sandra Steingraber in the March/April 2011 edition of *Orion Magazine*, where she posits that not only is the developing brain more vulnerable than the adult brain to social and nutritional environments, but “that neurotoxins can act in concert with each other” and “that the chemicals designed to act as neurobiological poisons—the organophosphate pesticides—truly do so.” In addition to summarizing studies on the effect of lead, arsenic, mercury, and other substances on developmental health, Steingraber highlights the latest research suggesting that organophosphate pesticides created to attack “the nervous systems of insect pests...have the same effect in humans,” interfering with “the recycling of the neurotransmitter acetylcholine, one of the messaging signals that flow between neurons.”

In particular, she cites studies purportedly showing that “organophosphate exposure effects cognition” and compares the current “public health approach—surround kids with brain poisons and enlist mothers and fathers to serve as security detail” as comparable to the 1936 recommendations for lead paint. “So don’t give me any more shopping tips or lists of products to

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

avoid," she concludes. "Don't put neurotoxins in my furniture and my food and then instruct me to keep my children from breathing or eating them. Instead, give me federal regulations that assess chemicals for the ability to alter brain development and function *before* they are allowed access to the marketplace."

Meanwhile, a second article published April 21, 2011, in *My Health News Daily* focuses on three new studies allegedly linking prenatal pesticide exposure to lower IQ scores by age 7. Published in *Environmental Health Perspectives*, the research reportedly centered on two urban areas in New York and one Northern California agricultural town. "One study found children with the highest levels of exposure in the womb scored 7 points lower on an IQ test than those who had the lowest exposure," reports journalist Rachel Rettner, who compared the drop "to a 7-year-old performing as if they were 6 ½ years old."

According to Rettner, however, the three studies showed only "an association, and not a direct cause-effect link," and found no link between pesticide exposure after birth and the child's IQ score. She nevertheless reiterates that "In addition to exposure from foods, people can be exposed to pesticides from around their homes, schools, and buildings," recommending that consumers and pregnant women thoroughly wash fruits and vegetables, as well as "lower their use of pesticides at home." See *MSNBC.com*, April 21, 2011.

OTHER DEVELOPMENTS

Second Olive Oil Study Presses for Stricter Standards

The University of California, Davis, Olive Center and Australian Oils Research Laboratory have issued an April 2011 [report](#) on olive oils sold in California, concluding that 73 percent of sampled oils allegedly fell short of International Olive Council (IOC) standards for extra-virgin oil. Building on a July 2010 report, the latest results were based on two IOC-accredited sensory panels, which analyzed 134 samples from eight brands sold in three different California regions.

According to the report, the two panels concluded that: (i) "Of the five top-selling imported 'extra virgin' olive oil brands in the United States, 73 percent of the samples failed the IOC sensory standards"; (ii) "All of the oil samples passed the IOC chemistry standards for free fatty acids (FFA), fatty acid profile (FAP) and peroxide value (PV), but several of the imported samples failed the IOC's ultraviolet absorption (UV) tests"; (iii) "70 percent of the samples from the five top-selling imported brands failed the German/Australian 1,2-diaclyglycerol content (DAGs) test and 50 percent failed the German/Australian pyropheophytin (PPP) test"; and (iv) "The strongest relationship between chemical analysis and negative sensory results was found in the DAGs test

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

(65 percent), followed by the PPP test (49 percent), UV K268 for conjugated trienes (34 percent), UV K232 for conjugated dienes (12 percent) and UV Δ K (6 percent)."

The report also apparently indicated that samples failed to meet extra virgin olive oil standards due to "one or more of the following: (a) oxidation by exposure to elevated temperatures, light, and/or aging; (b) adulteration with cheaper refined olive oil; and (c) poor quality oil made from damaged and overripe olives, processing flaws, and/or improper oil storage." It has therefore recommended further research to establish "chemical markers for sensory defects," as well as profiles for California olive oils.

Meanwhile, the IOC has publicly rebutted the study, calling it an "aggressive, inexplicable criticism of imported olive oil quality" that could cause "irreparable damage to the reputation of olive oil." Joining in this censure, the North American Olive Oil Association (NAOOA) has also lambasted the report for allegedly relying on "rejected chemical tests and subjective taste analyses organized and conducted by organizations aligned with Australian and California agricultural interests to try to discredit importers of products with proven track records of consistent quality." See *IOC Statement*, April 13, 2011; *NAOOA News Release*, April 16, 2011.

SCIENTIFIC/TECHNICAL ITEMS

Study Examines Multidrug-Resistant Staph in Meat, Poultry

A recent [study](#) by the Arizona-based Translational Genomics Research Institute (TGRI) has reportedly identified *Staphylococcus aureus* in 47 percent of meat and poultry samples obtained from retail stores, with 52 percent of the contaminated samples testing positive for multidrug-resistant *S. aureus*. Andrew Waters, et al., "Multidrug-Resistant *Staphylococcus aureus* in U.S. Meat and Poultry," *Clinical Infectious Diseases*, April 2011. According to a summary of the study, which received funding from the Pew Charitable Trusts, researchers collected 136 samples of ground beef, chicken breasts and thighs, ground pork and pork chops, and ground turkey and turkey cutlets from 26 retail stores in Chicago, Washington, D.C., Fort Lauderdale, Los Angeles, and Flagstaff.

The results purportedly indicated that *S. aureus* contaminated "a substantial portion of samples from all meat and poultry types (37-77%), with a notable 52% of isolates being multidrug resistant" to antimicrobials such as tetracycline, ampicillin, penicillin, and erythromycin, among others. "The distinct *S. aureus* populations on each product type suggest that food animals are the predominant source of contamination," concluded the researchers, who have recommended adding multidrug-resistant *S. aureus* to "the list of antimicro-

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 391 | APRIL 22, 2011

bial-resistant pathogens that routinely contaminate our food supply." See *TGRI Press Release*, April 15, 2011.

Although the study authors also noted that "the public health relevance of this finding is unclear," their work has attracted attention from federal regulators, infectious disease experts and the media. As one Food and Drug Administration (FDA) spokesperson told the press, "FDA has been monitoring the situation... [and] continues to work with [the Centers for Disease Control and Prevention] and [U.S. Department of Agriculture] to better understand this issue." See *MSNBC.com*, *Reuters* and *Law360*, April 15, 2011.

The American Meat Institute, however, has since called the study misleading. "Despite the claims of this small study, consumers can feel confident that meat and poultry is safe," AMI President James Hodges said in an April 18, 2011, statement. "Federal data show that *S. aureus* infections in people that are caused by food are uncommon. CDC data also show that foodborne illnesses as a whole are declining due to our growing scientific knowledge about how to target and destroy bacteria on meat and poultry."

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
San Francisco, California
+1-415-544-1900
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

FOOD & BEVERAGE LITIGATION UPDATE

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.

SHB 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.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

