Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

USDA Replaces Food Pyramid to Healthy Eating with MyPlate

The U.S. Department of Agriculture (USDA) has launched a new **food icon** aimed at helping consumers make healthier food choices. By replacing the pyramid guide to healthy eating with a plate divided into fruit, vegetable, grains, protein, and dairy food groups, USDA reportedly hopes the *MyPlate* icon will "prompt consumers to think about building a healthy plate at meal times."

New York University Professor Marion Nestle was among those who praised the icon as an easy-to-understand nutrition guide. "The new plate icon makes it clear that healthy eating means lots of vegetables, fruits, and whole grains, and for that alone it is a big step forward," she said. "You don't need a computer to use it. It lets you fill your plate with whatever foods you like without worrying about portion numbers. Best of all are the messages that come with it. Enjoy your food!" *See USDA Press Release,* June 2, 2011.

USDA Tests Find Unapproved Pesticides on Cilantro

The U.S. Department of Agriculture (USDA) has reportedly found at least 34 unapproved pesticides on cilantro samples during routine testing. According to the agency's recently issued 2009 Pesticide Data Program **report**, 94 percent of the 184 samples tested in a rotating selection of produce came up positive for at least one pesticide.

With no definite answers as to why the cilantro samples contained pesticide residues, government researchers have suggested that growers may have confused guidelines for cilantro with those for flat-leaf parsley, which is approved for more pesticides. Asserting that they will take follow-up action, some industry leaders are equally puzzled. "It's something we need to look into," Kathy Means of the Produce Marketing Association was quoted as saying. "We need to determine: Why this year, why this crop? What's going on?" *See Chicago Tribune,* May 31, 2011.

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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.

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German Authorities Eye Bean Sprouts in Deadly *E. Coli* Outbreak

German authorities have finally narrowed the field of suspects in an *E. Coli* outbreak affecting Europe, where a reported 31 people have died from a rare strain of the disease. Speaking at a June 10, 2011, press conference, Robert Koch Institute President Reinhard Burger confirmed that an organic bean sprout farm is the likely epicenter, putting to rest widespread public confusion as officials worked frantically—and sometimes erroneously—to pinpoint the source.

Although it lacked a set of definitive test results, the institute apparently based its conclusion on evidence showing that people who consumed the bean sprouts at one restaurant were nine times more likely to contract the illness, which has been linked to renal and neurological complications in approximately 700 out of 3,000 total cases. Authorities have since quarantined the Lower Saxony farm, but tomato, cucumber and lettuce farmers implicated at the outset are already seeking compensation for plummeting prices and a Russian ban on European agricultural imports. *See The Guardian, The New York Times* and *Time,* June 10, 2011.

Meanwhile, U.S. Department of Agriculture (USDA) Secretary Tom Vilsack told *USA Today* that although he was "reasonably confident" the outbreak would not affect the United States, the European episode "reinforces that we need to remain vigilant here about food safety." His concern was echoed by U.S. Senator Kirsten Gillibrand (D-N.Y.), who introduced new meat safety legislation that would purportedly target "all high-risk pathogens and all currently unregulated strains of *E. coli* found in the meat supply." Gillibrand has also issued a June 7, 2011, **letter** to USDA Undersecretary for Food Safety Elisabeth Hagen, urging the agency to list "all pathogenic forms of *E. coli,* not just 0157:H7, as an adulterant in our meat supply." *See USDA Today,* June 8, 2011.

Minnesota Governor Vetoes "Cheeseburger Bill"

Minnesota Governor Mark Dayton (D) has vetoed legislation (**House File 264/ Senate File 160**) aimed at giving fast-food chains civil immunity if consumers gain weight after consuming their products.

"Unfortunately, this bill provides to companies that manufacture, distribute, or sell food and nonalcoholic beverages civil immunity, except for: 'any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food, if the violation is knowing and willful,'" Dayton said in his May 27, 2011, **veto**. "That requirement of being 'knowing and willful' creates too broad an exemption from liability, according to legal experts with whom I consulted."

Hawaii Health Department Encourages Less Consumption of Sugary Beverages

The Hawaii State Department of Health (DOH) has launched a public awareness effort advocating consumption of beverages containing less sugar. The "Don't Drink Yourself Fat" campaign is reportedly part of a $3.4 million federal grant for Kauai and Maui District Health Offices' Communities Putting Prevention to Work initiative.

"Research points to the strong correlation between consumption of sugar-loaded beverages and obesity with its many associated health problems," said DOH Kauai District Health Officer Dileep Bal. "We know from our experience with anti-tobacco efforts that targeted media campaigns work and are a key component not only in raising awareness, but in changing social norms." *See DOH Press Release,* May 31, 2011.

LITIGATION

Judge Allows "All Natural" Ice Cream Actions to Continue

A federal judge in California has refused to dismiss proposed class actions alleging that Ben & Jerry's and Breyers ice cream products were falsely advertised as all natural. *Astiana v. Ben & Jerry's Homemade, Inc.,* No. 10-4387 PJH (U.S. Dist. Ct., N.D. Cal., decided May 26, 2011); *Thurston v. Conopco, Inc.*, No. 10-4937 PJH (U.S. Dist. Ct. N.D. Cal., decided May 26, 2011). Filed after the Center for Science in the Public Interest drew attention to the issue, the complaints argue that two units owned by Unilever PLC "misrepresented ice cream containing 'Dutch' or 'alkalized cocoa' as 'all-natural'" even though the ingredient is purportedly processed with synthetic potassium carbonate. The defendants had sought to dismiss both actions on the grounds that plaintiffs did not demonstrate an injury resulting from the "all natural" claim and could have easily applied for a refund if dissatisfied.

Noting that plaintiffs may very well "have no actionable claims," the court reasoned that, "If the plaintiffs did indeed purchase the ice cream based on the representation that it was 'all natural' and if that representation proves to be false, then they arguably have suffered an injury in fact." The court also found that the state law claims were not preempted by federal laws, which do not regulate "the use of an adjective such as 'natural' on a food label," and refused to strike the plaintiffs' class averments until formal class certification is filed.

Class Certification Granted in Walnut Health Claims Case

A federal judge in California has granted class certification in a suit alleging that Diamond Foods, Inc. misbranded its shelled walnut products and misled consumers by using "express and implied statements about the positive

effects of omega-3 fatty acid consumption on health." *Zeisel v. Diamond Foods, Inc.,* N0. 10-01192 (U.S. Dist. Ct., N.D. Cal., decided June 7, 2011). The labels at issue apparently featured a heart symbol banner with the phrase "Omega 3 2.5 g per serving" and a structural claim about the omega-3 in walnuts, as well as a qualified health claim approved by the Food and Drug Administration (FDA). After FDA issued a February 2010 warning letter about these so-called combination claims, a consumer filed a complaint alleging that Diamond used language not authorized by FDA and that its products "did not provide the health benefits that were claimed on the package labels." Plaintiff then moved to certify a class of all persons who purchased "Diamond of California Shelled Walnut products in 6 ounce, 10 ounce, 16 ounce and/or 3 pound bags from March 22, 2006, through the present bearing labels" with the heart symbol banner and structural claim.

Rejecting Diamond's argument that plaintiff lacked standing because he failed to provide physical proof of purchase, admitted to consuming the shelled walnuts "for reasons unrelated to the label" and continued to buy them even after filing suit, the court ruled that a plaintiff "'does not need to show that a defendant's misrepresentation was the only cause of the injury producing conduct; rather, the plaintiff need only show that the misrepresentation was a substantial factor in influencing his decision.' *Laster,* 2009 WL 4842801, at *5." The court also conducted "a rigorous analysis of Rule 23 requirements" to demonstrate that absent class members have standing, concluding that, contrary to defendant's contention, the proposed class is "'definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.' *O'Conner,* 184 F.R.D. at 319." To this end, the court specifically noted that the proposed class definition was neither "subjective [nor] imprecise," but included "objective characteristics that would permit a consumer to identify themselves as a member of the proposed class."

Banana Workers Sue over Pesticide Exposure

More than 200 farm workers from Ecuador, Panama and Costa Rica have reportedly filed seven lawsuits against commercial banana growers and pesticide manufacturers, seeking to recover damages and medical monitoring costs for health conditions allegedly related to dibromochloropropane (DBCP) exposure. *Aguilar v. Dole Food Co., Inc.,* No. _____ (U.S. Dist. Ct., E.D. La., filed June 1, 2011). The complaints argue that defendants used DBCP from approximately 1960 to 1985—"and possibly into the 1990s"—in banana growing regions outside the United States, which banned the nematocide in 1979 after the Environmental Protection Agency (EPA) listed it as a suspected carcinogen.

Plaintiffs claim that because they were not informed of the danger or provided with protective clothing, they injected DBCP into soil without the

use of gloves, protective covering or respiratory equipment to prevent skin absorption or inhalation. "Many workers absorbed so much DBCP each day that their urine would give off the smell of the chemical at night," state the complaints, which link DBCP to "serious and permanent injuries," including but not limited to sterility, eye and skin conditions, and increased cancer risk. In addition to compensatory and punitive damages, the suits seek to hold defendants accountable for negligence and/or gross negligence, conspiracy to cause plaintiffs' injuries, strict liability, and breach of implied warranty.

Olive Garden Settles "Never-Ending" Trademark Dispute

A federal judge in Florida has reportedly granted a motion for permanent injunction in a trademark infringement case involving two "never-ending" restaurant promotions. According to media sources, Darden Concepts Inc., which owns Olive Garden and Red Lobster, filed an October 2010 complaint alleging that a TGI Friday Inc. franchisee with outlets in seven states had infringed on its "never-ending pasta" and "all you can eat" shrimp slogans by advertising a "never-ending shrimp" deal. Under terms of the settlement, TGI Friday's must halt its "never-ending" promotion, which evidently ran as 630 TV spots in anticipation of a national campaign. *See Law360,* June 6, 2011.

OTHER DEVELOPMENTS

Pediatricians Take Stand Against Energy Drinks

The American Academy of Pediatrics (AAP) has issued a **report** warning that children and adolescents should not consume energy drinks because the beverages "pose potential health risks." Titled "Sports Drinks and Energy Drinks for Children and Adolescents: Are They Appropriate?", the report appears in the June 2011 issue of *Pediatrics*.

Sports drinks and energy drinks are not the same, the report says, noting that sports drinks contain carbohydrates, minerals, electrolytes, and flavoring intended to replace water and electrolytes lost through sweating during exercise. "Sports drinks can be helpful for young athletes engages in prolonged, vigorous physical activities, but in most cases they are unnecessary on the sports field or the school lunchroom," according to the report.

Energy drinks, however, "are never appropriate for children or adolescents," and should be avoided because they contain stimulants, such as caffeine, guarana and taurine, the report says. "Caffeine—by far the most popular stimulant—has been linked to a number of harmful health effects in children, including effects on the developing neurologic and cardiovascular systems," according to the report. "In general, caffeine-containing beverages, including soda, should be avoided."

AAP also recommends that (i) "pediatricians should highlight the difference between sports drinks and energy drinks with patients and their parents, and talk about the potential health risks"; (ii) "routine ingestion of carbohydrate-containing sports drinks by children and adolescents should be avoided or restricted, because they can increase the risk of overweight and obesity, as well as dental erosion"; and (iii) "water, not sports drinks, should be the principal source of hydration for children and adolescents." *See AAP Press Release,* May 30, 2011.

Advocacy Group Urges Government Action on Food Exports from China

Food & Water Watch has issued a **report** cautioning that potentially unsafe food from China may likely provide the next food-safety scare in the United States. Titled "A Decade of Dangerous Food Imports from China," the report describes "where [Chinese] food manufacturers are legendary for cutting corners, substituting dangerous ingredients, and compromising safety in order to boost sales."

Noting that U.S. food-safety oversight has "not remotely" kept pace with China's food exports that have tripled over the past decade, the report recommends (i) "revisiting the current trade agenda to make public health, environmental standards and consumer safety the highest priorities"; (ii) "removing agriculture from the WTO" (World Trade Organization), which "has been a failure for U.S. farmers and has encouraged companies to offshore food manufacturing to places like China with low wages and weak regulatory standards, putting consumers around the world at risk"; (iii) "restarting the assessment of China's poultry inspection system before considering allowing Chinese poultry products to be exported to the United States"; (iv) "significantly increasing FDA and USDA funding to increase inspections of the growing volume of food imports from China and other countries," and allowing FDA "the resources to conduct inspections in food facilities in China"; and (v) "closing the loopholes in the current country-of-origin labeling rules on meats, seafood, fruits and vegetables, and expanding the labeling requirements to cover processed food." *See Food & Water Press Release,* June 8, 2011.

SCIENTIFIC/TECHNICAL ITEMS

Animal Study Mimics Dietary BPA Exposure in Humans

University of Missouri scientists have reportedly published the first **study** to examine "serum BPA [bisphenol A] concentrations in an animal model exposed to this chemical via the diet," as opposed to oral bolus exposure. Paizlee Sieli, et al., "Comparison of Serum Bisphenol A Concentrations in Mice Exposed to Bisphenol A through the Diet Versus Oral Bolus Exposure," *Environmental Health Perspectives,* June 6, 2011. After comparing BPA serum

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concentrations in adult female mice after oral bolus administration or *ad libitum* feeding, researchers concluded that bolus administration "underestimates bioavailable serum BPA concentrations in animals and therefore, presumably humans than would result from dietary exposure." According to the study, these results suggest that "exposure via diet is a more natural continuous exposure route than oral bolus exposure, and thus, a better predictor of BPA concentrations in chronically exposed animals and humans."

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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.