Shook, Hardy & Bacon L.L.P.

ISSUE 405 | AUGUST 12, 2011

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

USDA Proposes Plan to Improve Animal Disease Traceability

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has issued a **proposed rule** that would establish regulations to improve the traceability of livestock moving interstate when disease has been identified. According to APHIS, the proposal aims to provide a new "adoptable approach that will help us find animals associated with a disease quickly, focus our efforts on those animals, and minimize harm to producers."

Defining animal disease traceability as "knowing where diseased and at-risk animals are, where they've been, and when," the plan would require livestock moving interstate, unless exempted, to be (i) officially identified by approved forms for each species, such as metal eartags for cattle, and (ii) accompanied by an interstate certificate of veterinary inspection or other documentation, such as owner-shipper statements or brand certificates. Alternative forms of identification, such as brands or tattoos, would be permitted if agreed to by receiving states or tribes, which would administer the traceability framework to provide more flexibility. Producers who raise animals to feed themselves, their families and immediate neighbors would be exempt, and those animals would also be exempt if moved interstate to custom slaughter facilities.

Addressing the cattle industry, Agriculture Secretary Tom Vilsack asserted that current "low levels of official identification in the cattle sector require more cattle, often thousands of head, to be tested more than necessary." The proposed rule would require fewer cattle to be held and tested, thus affecting fewer producers and reducing economic impacts, he said. Noting that bovine tuberculosis investigations can frequently take several months, Vilsack said the plan could reduce trace-back investigations to weeks or days.

USDA requests comments on the proposal by November 9, 2011. *See USDA Press Release* and *Media Conference Transcript,* August 9, 2011; *Federal Register,* August 11, 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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LITIGATION

Campbell's Reaches Preliminary Settlement in Low-Sodium Soup Class Action

The Campbell Soup Co. will change its low-sodium tomato soup labels under a settlement with a class of consumers who sued the company in a New Jersey federal court in 2010, alleging that these products cost more while actually containing about the same level of sodium as the company's regular tomato soup. *Smajlaj v. Campbell Soup Co.*, No. 10-01332 (U.S. Dist. Ct., D.N.J., preliminary approval granted August 9, 2011). The company will also provide a cash fund of $1.05 million for consumers throughout the United States who purchased the products over a two-year period ending in August 2011. Maximum recovery, depending on which soup was purchased and whether receipts are available, is $10 or $.50 for each can that a class member can show she purchased.

The agreement would permit class counsel fees of $350,000; the court has scheduled a final settlement approval hearing for November 29. According to court documents, Campbell will "follow new labeling procedures that avoid comparisons between the same varieties of reduced sodium condensed and regular condensed soup." Details will be made available when the settlement Website goes live. The agreement covers the company's "25% Less Sodium Condensed Tomato Soup" and "Campbell's Healthy Request® Condensed Tomato Soup" with a "30% Less Sodium" banner on the label. Additional details about the litigation appear in Issue 342 and Issue 388 of this *Update*.

Facebook Seeks Dismissal of Class Claims over Use of Youth's "Likes" Without Consent

Seeking either clarification or dismissal of claims alleging that it has violated state law by republishing the product or service preferences ("Likes") of children younger than age 18 as accompaniments to paid advertisements without first obtaining parental consent, Facebook, Inc. argues that the claims are insufficiently pleaded, fail to state a claim or are preempted by federal law. *Dawes ex rel. E.K.D. v. Facebook, Inc.*, No. 11-00461 (U.S. Dist. Ct., S.D. Ill., motion filed August 1, 2011). Facebook explains that the plaintiffs are teenagers who shared their Internet "Likes" with their friends and that Facebook may then redisplay the preference to the same friends along with an advertisement for the relevant company's Website.

According to Facebook, the plaintiffs have failed to indicate how they have been injured because they failed to allege "that their personal information had any ascertainable 'value' or any facts supporting the claimed 'lessening' of that value." Facebook also contends that the plaintiffs are attempting to "create a parental consent requirement for teenagers' Internet use that lawmakers, for sound policy and First Amendment reasons, rejected." Because Facebook forbids children younger than age 13 from using its site, the

company states that "Plaintiffs seek to hold Facebook liable for not obtaining parental consent for *the very group of minors* that Congress determined *should not* be subject to a parental consent requirement."

The company also states, "By republishing a User's name or likeness along with the true statement—already shared with the User's friends—that he or she 'Likes' certain content being advertised on its website, Facebook provides a forum for authentic endorsements by persons who, without pecuniary motive, have expressed their approval of a particular product, service, or cause." Because state law exempts newsworthy speech from liability for misappropriation, and because the plaintiffs' "Likes" involve a matter of public interest, Facebook claims that it "has a right under [state law] to republish information that courts have explicitly recognized relates to matters of public interest."

Jane Goodall Institute Sues Baby Food Maker for Failed "Janey Baby" Products Line

According to a news source, the Jane Goodall Institute for Wildlife Research, Education and Conservation has sued Sprout Foods, Inc., an Oregon-based organic vegetarian baby food manufacturer, for failing to carry out its obligations to produce an Institute-branded line of products (Janey Baby®) under a 2010 licensing agreement. *Jane Goodall Inst. for Wildlife Research, Educ. & Conservation v. Sprout Foods, Inc.*, No. 1:2011cv05554 (U.S. Dist. Ct., S.D.N.Y., filed August 10, 2011).

The plaintiff reportedly claims that it decided to license the Janey Baby® name to Sprout Foods after an "extensive search for a suitable licensee that could provide organic and vegetarian products in the infant food category." Allegedly signed by Sprout Foods CEO Max McKenzie, the August 2010 agreement gave Sprout an exclusive license to use the famous primatologist's brand and name in exchange for royalties generated by baby food sales.

The Institute reportedly alleges that the baby food producer has not sold or made any Janey Baby® products, despite the parties' expectations that they would generate net proceeds of $5.5 million in 2010 and $6 million in 2011. Seeking $720,000 for breach of contract, the Institute purportedly notified Sprout of the default in February 2011; the food producer's attorneys apparently responded by stating that McKenzie lacked the authority to bind Sprout Foods to the agreement. *See Courthouse News Service*, August 12, 2011.

Class Counsel Seek $90.8 Million in African-American Farmers Discrimination Case Settlement

Three lead class attorneys who, for five years or longer, have represented African-American farmers claiming discrimination in government farm loan programs, have filed their fee petition seeking 7.4 percent of the prelimi-

narily approved $1.25 billion settlement, or $90.8 million. *In re: Black Farmers Discrimination Litig.*, Misc. No. 08-0511 (U.S. Dist. Ct., D.D.C., filed August 8, 2011). The petition recites the efforts required to obtain redress for the farmers, who missed the deadline for filing claims under the first such settlement in 1999, including working for congressional approval of laws in 2008 and 2010 establishing a fund to compensate them. According to the petition, the fee award request, to be divided among all class counsel, is "expressly within the range authorized by the Settlement Agreement."

False Diet-Drink Claims Fail, Plaintiff Did Not Track Caloric Intake

A California consumer who alleged that he gained weight while using a diet drink has reportedly failed to demonstrate that he has standing to pursue putative class consumer-fraud claims against the manufacturer because he did not keep track of his caloric intake when he used the product. *Fletcher v. Celsius Holdings, Inc.*, No. BC439055 (Cal. Super. Ct., decided August 10, 2011). Granting the manufacturer's motion for summary judgment, the court apparently determined that, without the caloric intake data, it would be impossible for the plaintiff to prove that the product did not, as advertised, burn up to 100 calories when consumed.

According to a news source, the plaintiff alleged that he used the product while training to become a firefighter from October 2009 to January 2010, and gained 10 pounds. He also alleged that he maintained a healthy diet and a rigorous exercise regimen during this period. The court suggested that the weight gain could also be attributed to extra calories consumed during the holiday season, stating, "I've lived through more Thanksgivings than I care to remember. It's a struggle. It's easy to gain weight during Thanksgiving, but we all know this." Still, the court apparently recommended that plaintiff's counsel appeal the ruling because "[t]his case has some very novel issues, and there are all kinds of unanswered questions here." *See Law360*, August 10, 2011.

New Class Actions Deem Coconut Water's Health Claims Misleading

A California resident has filed a pair of putative class actions in state court against companies that market their coconut water with purportedly exaggerated nutrient claims and overstated hydrating benefits or as a miracle cure for a host of medical problems. *Shenkman v. All Mkt., Inc.*, No. BC 467166; *Shenkman v. One World Enters. LLC*, No. BC467165 (Cal. Super. Ct., Los Angeles County, filed August 8, 2011). Seeking to certify statewide consumer classes, the plaintiff alleges intentional and negligent misrepresentation, fraud, and violations of California's False Advertising Act and Unfair Business Practices Act. The plaintiff requests compensatory and punitive damages, disgorgement, restitution, payment to a cy pres fund, a corrective advertising campaign, and an apology.

Among other matters, the plaintiff claims that One World Enterprises sells "O.N.E. Coconut Water" throughout the United States in more than 18,000 retail outlets and promotes it "as a miracle product, curing various medical problems and illnesses." According to the complaint, the company claims its product can help with digestion, regulate sodium, support kidney function, reduce plaque formation, relieve dry skin, help those who have consumed too much alcohol, and provide benefits for children, seniors and pregnant women. The plaintiff claims that he relied on and believed these false and misleading representations and "suffered damages including, but not limited to, monetary loss and emotional distress" caused by being duped. *See Law360*, August 10, 2011.

Philippine Banana Workers Seek Damages for DBCP Exposure

Hundreds of individually named Philippine banana plantation workers alleging physical and mental injury from exposure to pesticides have filed suit against a number of agricultural and chemical companies in a California state court seeking compensatory and punitive damages. *Macasa v. Dole Food Co.*, No. BC467134 (Cal. Super. Ct., Los Angeles County, filed August 8, 2011). The plaintiffs allege that 1,2-Dibromo-3-chloropropane (DBCP), sold under the brand names Nemagon® and Fumazone®, is a "highly toxic and poisonous pesticide" that purportedly causes "sterility, testicular atrophy, miscarriages, congenital reproductive outcome, liver damage, asthma and various forms of cancer in humans when absorbed by the skin or inhaled." They claim that DBCP continued to be used in the Philippines despite being banned in the United States by the Environmental Protection Agency in 1979.

The complaint alleges that the U.S. Department of Agriculture advised the chemical company defendants as early as 1961 "to place precautionary warning labels" on DBCP pesticide barrels and requested the health records of workers who had manufactured or formulated products containing the chemical. Claiming that the companies "dismissed such advice," the plaintiffs further contend that a 1977 Occupational Safety and Health Administration warning letter finally brought about a suspension in DBCP's production, although the companies "continued to allow the marketing, distribution and sale of the DBCP in question to Davao, Philippines," where the banana farm defendants continued to use it. The plaintiffs allege products liability—negligence, strict products liability, products liability—defect in design and manufacture and chemical composition, products liability—breach of warranty, fraudulent management, fraudulent concealment, general negligence, conspiracy, and intentional misrepresentation.

OTHER DEVELOPMENTS

IOM Report Targets Legal Strategies for Addressing Childhood Obesity Prevention

The Institute of Medicine (IOM) recently issued a **summary** of an October 21, 2010, workshop titled "Legal Strategies in Childhood Obesity Prevention," where public policy experts and stakeholders discussed national, state and local health initiatives that employ legal strategies "to bring about change as well as the challenges in implementing these changes." The workshop summary reflects attendees' views on various topics, including (i) the potential of legal strategies to address childhood obesity; (ii) how legal strategies have been used in other public health areas, such as firearm injury prevention; (iii) actions by the Federal Trade Commission, Food and Drug Administration (FDA) and other federal agencies; (iv) food industry perspectives; (v) whether regulations and taxes can prevent obesity; (vi) legal approaches to increase physical activity in communities; (vii) the use of litigation to effect policy changes; and (viii) the role of attorneys general and local public health agencies.

More specifically, workshop chair Kelly Brownell, director of Yale University's Rudd Center for Food Policy & Obesity, reviewed legal approaches that could "hold great promise for greatly accelerating progress," citing FDA's decision to end the Smart Choices food labeling program developed by industry and lawsuits disputing the immunity health claims for certain breakfast cereals. As Public Health Advocacy Institute Executive Director Mark Gottlieb noted, however, "litigation is a blunt tool for policy change," whereas regulation and legislation offer "much more direct and conventional means of achieving specific public health policy goals." According to Gottlieb, the use of litigation to reduce smoking became a "last resort" in the absence of effective policies. "But the situation is somewhat different with food," he said. "Progress is being made on various fronts, although perhaps not as rapidly as people would like. In the case of food, litigation may be a valuable complement to rather than a replacement for legislation, regulation, and industry change."

Presenters at the workshop also concluded that "reauthorization of several critical bills… will provide unparalleled opportunities to change policies that affect food consumption and obesity in the United States," especially as federal agencies ramp up efforts to address youth marketing and standardize front-of-package labeling. "From the national legislative perspective, there are some very important opportunities in front of us," reiterated William Dietz, director of the Division of Nutrition, Physical Activity and Obesity at the Centers for Disease Control and Prevention, in the workshop's closing remarks. "Because obesity prevention is a new field, funds are needed for evaluation, not just for action. Only through evaluation can we learn what works."

Rudd Center Announces Fall 2011 Seminar Series

Yale University's **Rudd Center for Food Policy & Obesity** has announced its fall 2011 Seminar Series featuring the interdisciplinary work of public policy and health advocates, as well as legal and industry insights.

Speakers in the series will include (i) Legacy President and CEO Cheryl Healton (*Lessons Learned from the Tobacco Wars for Products Which Adversely Impact Health*); (ii) Johns Hopkins Bloomberg School of Public Health Assistant Professor Lainie Rutkow (*Can the Food Industry Legally Choose to Do No Harm?*); (iii) Columbia Mailman School of Public Health Assistant Professor Y. Claire Wang (*Excess Intake and Taxes on Sugar-Sweetened Beverages: Potential Implications on Healthcare Costs*); (iv) Center for Science in the Public Interest Director Michael Jacobson (*Nutrition and the Politics of Food*); and (v) American University School of Communication Professor Kathryn Montgomery (*Emerging Issues in Digital Food Marketing*). Hosted at the Rudd Center in New Haven, Connecticut, the seminars are open to the public and run from September 7 through December 7.

Food Policy Issues to Be Focus of October 2011 Conference

The Consumer Federation of America will hold its **34th Annual National Food Policy Conference** on October 3-4, 2011, in Washington, D.C. Topics will include imported food safety, federal legislative priorities, food marketing and social media, and the global food system.

MEDIA COVERAGE

Insects Touted as Sustainable Protein Source

"Insects—part delicacy, part gag—are chic again," contends *New Yorker* staff writer Dana Goodyear in an August 15, 2011, article examining the rise of entomophagy, or insect-eating, among U.S. gourmands, sustainability proponents and more adventurous diners. According to Goodyear, "The current vogue reflects not only the American obsession with novelty and the upper-middle-class hunger for authenticity but also deep anxiety about the meat we already eat—which is its own kind of fashion."

She traces the efforts of enthusiasts like Montana State University entomologist Florence Dunkel and James Beard Foundation Outstanding Chef Award winner José Andrés, both of whom want to acclimate local palates to the insects enjoyed by 80 percent of the world's population. "We need to feed humanity in a sustainable way," Andrés tells Goodyear. "Those who know how to produce protein will have an edge over everyone else. World War Three will be over control of food and water, and insects may be the answer."

Known in some circles as "mini livestock," insects as a food source have also apparently attracted the attention of some Wageningen University scientists, who in December 2010 published a study touting the many benefits of bug consumption. As Goodyear enumerates, insects "are renowned for their small 'footprint'; being cold-blooded, they are about four times as efficient at converting feed to meat as are cattle, which waste energy keeping themselves warm. Ounce for ounce, many have the same amount of protein as beef… and are rich in micronutrients like iron and zinc." Moreover, because bugs are genetically distinct from humans, "there is little likelihood of diseases jumping species," and they can be humanely farmed in bulk.

Still, as Goodyear concedes, enterprises such as Entom Foods, a startup attempting to de-shell and process insects in cutlet form, have a lot of work to overcome America's cultural aversion to entomophagy. "The problem is the *ick* factor—the eyes, the wings, the legs," Entom Foods founder and University of Chicago freshman Matthew Krisiloff was quoted as saying. "It's not as simple as hiding it in a bug nugget. People won't accept it beyond the novelty. When you think of a chicken you think of a chicken breast, not the eyes, wings, and beak. We're trying to do the same thing with insects, create a stepping-stone, so that when you get a bug nugget you think of the bug steak, not the whole animal."

SCIENTIFIC/TECHNICAL ITEMS

Processed Red Meat Consumption Allegedly Linked to Type 2 Diabetes

A recent Harvard School of Public Health study has allegedly identified a "strong association" between red meat consumption, especially processed red meat consumption, and type 2 diabetes. An Pan, et al., "Red meat consumption and risk of type 2 diabetes: 3 cohorts of US adults and an updated meta-analysis," *American Journal of Clinical Nutrition,* August 2011. Researchers apparently analyzed data from three cohort studies: 37,083 men followed for 20 years in the Health Professionals Follow-Up Study; 79,570 women followed for 28 years in the Nurses' Health Study I; and 87,504 women followed for 14 years in the Nurses' Health Study II. The study's authors also apparently conducted "an updated meta-analysis, combining data from their new study with data from existing studies that included a total of 442,101 participants, 28,228 of whom developed type 2 diabetes during the study."

According to an August 10, 2011, Harvard School of Public Health press release, the findings reportedly indicated that "a daily 100-gram serving of unprocessed red meat (about the size of a deck of cards) was associated with a 19% increased risk of type 2 diabetes," while "one daily serving of half that quantity of processed meat—50 grams (for example, one hot dog or sausage or two slices of bacon)—was associated with a 51% increased risk." In addi-

tion, the authors purportedly found that, "for an individual who eats one daily serving of red meat, substituting one serving of nuts per day was associated with a 21% lower risk of type 2 diabetes; substituting low-fat dairy, a 17% lower risk; and substituting whole grains, a 23% lower risk."

"Clearly, the results from this study have huge public health implications given the rising type 2 diabetes epidemic and increasing consumption of red meats worldwide," a study co-author was quoted as saying. "The good news is that such troubling risk factors can be offset by swapping red meat for a healthier protein."

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