Shook, Hardy & Bacon L.L.P.

ISSUE 447 | JULY 20, 2012

# FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS



## LEGISLATION, REGULATIONS AND STANDARDS

### FDA Bans BPA in Baby Bottles

The Food and Drug Administration (FDA) has issued a **final rule** amending the food additive regulations at 21 CFR part 177 "to no longer provide for the use of polycarbonate (PC) resins," including bisphenol A (BPA), in infant feeding bottles or spill-proof sippy cups. Effective July 17, 2012, the final rule apparently responds to a petition filed by the American Chemistry Council (ACC), which claimed that "that baby bottles and sippy cups manufactured from PC resins are no longer being introduced into the U.S. market and that manufacturers of baby bottles and sippy cups have abandoned the use of PC resins in making these products." After reviewing the submitted data and seven public comments addressing the petition, FDA concluded that the use of PC resins in these products has been "completely and permanently abandoned," and agreed to amend the regulations accordingly. The agency has requested objections to the final rule or requests for a public hearing by August 16, 2012.

In a related development, FDA has also **announced** a new petition filed by U.S. Representative Edward Markey (D-Mass.) proposing "that the food additive regulations be amended to no longer provide for the use of [BPA]-based epoxy resins as coatings in packaging for infant formula because these uses have been abandoned." Markey's petition reportedly contains "public information and information collected from a survey of U.S. registered manufacturers of infant formula to support [the claim] that all U.S. infant formula manufacturers have abandoned the use of BPA-based epoxy resins as coatings in all food contact packaging for infants." To verify these claims, FDA has requested comments by September 17, 2012, that address, among other things, (i) "whether these uses of BPA-based epoxy resins have been completely abandoned, such as information on whether infant formula packaging containing BPA-based epoxy resins as coatings is currently being introduced or delivered for introduction into the U.S. market," and (ii) "whether the uses that are the subject of the petition… have been adequately defined."

"With the FDA moving forward with my petition, and coupled with the American Chemistry Council petition to end the use of BPA in baby bottles

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.

and sippy cups, industry practice can follow consumer demand, and we will be able to end the use of BPA in infant formula forever," said Markey in a July 17, 2012, press release. "There are viable alternatives for BPA in food packaging, and I urge companies to stop poisoning our food supply with this dangerous chemical. FDA now must complete and make public their long overdue assessment of BPA's health impacts and make clear its next steps for ensuring our entire food supply is free from this damaging chemical."

### USDA Grants Produce Safety Program Temporary Reprieve

The U.S. Department of Agriculture (USDA) has reportedly agreed to fund produce safety inspections through the end of 2012 despite the government's failure to include the agency's Microbiological Data Program (MDP) in next year's budgets. According to media sources, neither the Obama administration nor Congress allocated resources for the 11-year-old program, which coordinates with local officials to screen alfalfa sprouts, cantaloupe, cilantro, hot peppers, lettuce, spinach, and tomatoes for pathogens such as *E. coli* (STEC), *E. coli* 0157:H7, *Listeria monocytogenes*, and *Salmonella*.

Responsible for 30 recalls since 2009, the MDP has garnered praise from consumer groups that have since decried its imminent demise while lambasting public officials for dispensing with the $5 million needed to keep the program running. "It's a small sum of money in the government sense," David Plunkett, senior staff attorney for the Center for Science in the Public Interest, told reporters. "For the government, it's not even a rounding error."

One USDA advisory board has apparently suggested, however, that the Food and Drug Administration (FDA) take responsibility for the MDP as part of its food safety mandate. In particular, the United Fresh Produce Association and the Produce Marketing Association (PMA) have questioned the efficacy of using late-stage inspections to initiate recalls that do little to determine where or when the contamination occurred. These industry groups have argued that FDA's approach to food safety inspections might yield better results for both producers and consumers. "In these economic times, it doesn't make sense to duplicate other efforts," one PMA spokesperson said. "FDA has strong programs in place and is on the verge of proposing many more as it works to implement the Food Safety Modernization Act." *See The Washington Post,* July 12, 2012; *Law360,* July 17, 2012.

### FSIS Posts Report on 35th Codex Session, rBST Continues to Generate Controversy

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has **posted** on its Website a report from the 35th Session of the Codex Alimentarius Commission that convened in Rome earlier in July 2012. In addition to adopting a number of standards on food additives, food hygiene guidelines,

maximum levels of melamine for liquid infant formula, and maximum pesticide residue levels, the Commission agreed to update a scientific review of the use of recombinant bovine somatotropin (rBST) to stimulate milk production in dairy cows. Maximum residue levels have been stalled at Step 8 since 1995, and debate over the issue apparently continues. Those opposed to the use of rBST cited animal health, welfare and possible anti-microbial resistance, while the United States and others contend that these issues exceed the Codex's scope, the science is sufficient and no food safety issues remain.

**EFSA Issues Guidance for Demonstrating Food Additive Safety**

The European Food Safety Authority (EFSA) has issued new **guidance** for the submission of food additive applications that reflects recent scientific advances as well as "the latest risk assessment principles." Developed by EFSA's Panel on Food Additives and Nutrient Sources Added to Food, the new data submission guidelines aim to streamline the testing process while still generating "the data necessary to demonstrate the high level of consumer safety required." Food companies seeking market authorization from the European Commission must provide EFSA with "the necessary information and data supporting the safety of the food additive."

In particular, the guidance introduces "a new tiered approach for the risk assessment of food additives" that will assist applicants with their toxicological testing strategy. Under the new guidance, Tier 1 tests must meet "a minimal dataset applicable to all compounds," while Tier 2 testing "will be required for compounds which are absorbed, demonstrate toxicity or genotoxicity in Tier 1 tests, in order to generate more extensive data." According to EFSA, Tier 3 testing "should be performed on a case-by-case basis taking into consideration all the available data, to elucidate specific endpoints needing further investigation of findings in Tier 2 tests." To these ends, the new approach focuses on the following core areas: "toxicokinetics, genotoxicity, toxicity (encompassing subchronic toxicity, chronic toxicity and carcinogenicity), and reproductive and developmental toxicity."

"The intention is that in developing their dossier, applicants will be able to more readily identify relevant data needs, which will allow adequate assessment of risks to humans from the intended use, whilst strengthening the scientific basis for the assessment," states the new guidance. To assist with these efforts, EFSA has also announced a forthcoming exposure assessment tool that will support "the calculation by the applicant of estimates of exposure to the food additive and its by-products and harmonize the submission of the related data." After a public consultation, the agency plans to finalize the new guidance and post the exposure assessment tool on its Website by the end of September 2012. *See EFSA News Story,* July 18, 2012.

### EFSA Approves First Cocoa Health Claim

The European Food Safety Authority's (EFSA's) Panel on Dietetic Products, Nutrition and Allergies (NDA) has apparently **concluded** that scientific evidence supports an Article 13.5 health claim related to cocoa flavanols and normal blood flow. Submitted by chocolate manufacturer Barry Callebaut AG under Regulation (EC) No 1924/2006, the health claim application cited several human intervention studies that evidently showed "a cause and effect relationship" "between the consumption of cocoa flavanols and maintenance of normal endothelium-dependent vasodilation." In particular, NDA noted that a person in the general population could obtain the claimed effect by consuming 200 milligrams of cocoa flavanols daily through either 2.5 grams (g) of high-flavanol cocoa powder or 10 g of high-flavanol dark chocolate, "both of which can be consumed in the context of a balanced diet."

The panel has thus approved the following wording as reflective of the scientific evidence: "Cocoa flavanols help maintain endothelium-dependent vasodilation, which contributes to normal blood flow." If approved by the European Commission, the new health claim can be used by the chocolate maker in the European Union for the next five years. *See The Wall Street Journal,* July 17, 2012.

## LITIGATION

### Maine High Court Adopts Strict Liability Standard for Defective Food Products

The Maine Supreme Judicial Court has adopted the "reasonable consumer expectation" test to determine whether a boneless turkey product allegedly containing a bone was defective. ***Pinkham v. Cargill, Inc.*, No. 11-340 (Me., decided July 3, 2012)**. So ruling, the court vacated the lower court's grant of summary judgment and remanded for further proceedings.

Plaintiff Stanley Pinkham allegedly consumed a hot turkey sandwich during his break. The defendant allegedly manufactured the boneless turkey product in the sandwich. In the middle of or immediately after eating the sandwich, Pinkham allegedly experienced severe and sudden pain in his upper abdominal area and thought that he might be having a heart attack. His physicians later determined that in their opinion he most likely had an "esophageal tear or perforation." Pinkham sued, alleging that this was a result of bone in the boneless turkey.

The defendant moved for summary judgment, which the trial court granted while noting that Maine had not yet established which test to use when evaluating a strict liability claim for an allegedly defective food product under the state's strict liability statute, 14 M.R.S. § 221. According to the court, before the statute was enacted, courts used a test similar to the "foreign-natural"

doctrine when addressing an injury caused by a food product in an implied warranty of merchantability case. Under this doctrine, a food producer is generally not liable for anything found in the food product that naturally exists in the ingredients. An alternative test more recently applied by other courts is the "reasonable expectation" test, which provides that regardless of whether a substance in a food product is natural to an ingredient thereof, liability will lie for injuries caused by the substance where the consumer of the product would not reasonably have expected to find the substance in the product.

Evaluating the summary-judgment motion under both the traditional "foreign-natural" doctrine and the more recent "reasonable expectation" test, the trial court concluded that, because bone is naturally found in turkey and because the average consumer would reasonably expect to find bone fragments up to two millimeters in size in processed "boneless" turkey product (which the physician had), the contents of the food bolus discovered in plaintiff's esophagus did not demonstrate that the product was defective, as a matter of law.

Noting that the state's strict liability approach was rooted in the *Restatement (Second) of Torts*, the supreme court observed that the *Restatement* comments define "[d]efective condition" in part as a product that is "in a condition not contemplated by the ultimate consumer." The comments also define "[u]nreasonably dangerous": "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." According to the court, the reasonable expectation test is consistent with the *Restatement* comments.

Applying that standard, the supreme court ruled that the plaintiff had provided sufficient evidence that an alleged defect in the boneless turkey product he consumed might have caused his surgery-requiring injury, thus creating a genuine issue of material fact as to whether the turkey product caused the injury. One physician testified that he believed the injury was a "perforation secondary to a foreign body," and there was direct evidence of the presence of the smaller pieces of bone or cartilage. While direct evidence of a larger piece of bone had not been presented, the court thought a jury could conclude that a larger piece of bone could have been in the turkey product Pinkham consumed, but may have passed, undetected, from Pinkham's throat.

Whether a consumer would reasonably expect to find a particular item in a food product is normally a question of fact left to a jury. The court concluded that the trial court could not find as a matter of law that a food bolus containing one-to-two-millimeter bone fragments is not defective. "[W]hether a consumer would reasonably expect to find a turkey bone or a

bone fragment large and/or sharp enough to cause an esophageal perforation in a 'boneless' turkey product is one best left to the fact-finder," said the court.

SHB Partner **Sean Wajert**, a Philadelphia-based member of the firm's Agribusiness & Food Safety Practice, posted a more-detailed version of this summary on his **Mass Tort Defense Blog**. For more information about this issue, contact him at **swajert@shb.com** or (267) 207-3464.

**Montana High Court Rules Obesity May Be a Protected Disability**

Responding to a question certified by a federal district court, a divided Montana Supreme Court has said that obesity which is not the symptom of a physiological condition may be a "physical or mental impairment" as the terms are used in the Montana Human Rights Act. ***BNSF Ry. Co. v. Feit*, No. OP 11-0463 (Mont., decided July 6, 2012)**. The issue arose after an extremely obese applicant for a conductor-trainee position was told he would not be considered for the position unless he lost 10 percent of his body weight or completed certain medical examinations, including a $1,800 sleep study, at his own expense.

The applicant successfully pursued an administrative remedy through the state department of labor and industry alleging that the railway defendant had illegally discriminated against him because of perceived disability. He was awarded damages for lost wages and benefits, prejudgment interest and emotional distress. On appeal, the Montana Human Rights Commission affirmed, and the defendant petitioned a federal court to review whether it had violated the Montana Human Rights Act by refusing to hire the applicant because of his obesity. Both parties filed motions for summary judgment, and the court certified its question to the state supreme court as that court had not previously interpreted the meaning of the term "impairment."

Because the legislature had indicated its intent that the state law be interpreted consistently with federal civil rights laws, the court majority examined the history of the Americans with Disabilities Act (ADA) and its recent amendments, cases applying the federal law and Equal Employment Opportunity Commission implementing regulations and guidance. Taken together, this authority led the court to answer the certified questions as follows: "Obesity that is not the symptom of a physiological disorder or condition may constitute a 'physical or mental impairment' within the meaning of Montana Code Annotated § 49-2-101(19)(a) if the individual's weight is outside 'normal range' and affects 'one or more body systems' as defined in 29 C.F.R. § 1630.2(h)(1) (2011)."

Two dissenting justices concluded that under their interpretation of the law, obesity "cannot fall within this definition [of physical or mental impairment] when it does not occur secondarily to a physiological condition or disorder."

A third dissenting justice found the majority's analysis flawed because "it is premised upon post-event congressional amendments to the ADA that have not been incorporated by the Montana Legislature into the Montana Human Rights Act, rather than the federal court precedent that should guide our decision." The events giving rise to the applicant's complaint took place in 2008, and the ADA amendments did not take effect until January 2009. Accordingly, this justice did not believe the amendments should be given retroactive effect.

### Ninth Circuit Nixes Settlement of Frosted Mini-Wheats® False Ad Claims

The Ninth Circuit Court of Appeals has found the proposed *cy pres* distribution inappropriate and unacceptably vague and the attorney's fees unreasonable in a settlement of class claims that the Kellogg Co. violated consumer protection laws by advertising its Frosted Mini-Wheats® cereal as a product that was clinically shown to improve children's attentiveness by nearly 20 percent. ***Dennis v. Kellogg Co.*, Nos. 11-55674, -55706 (9th Cir., decided July 13, 2012)**. Additional information about the case appears in Issues **368** and **392** of this *Update*. The company's settlement of related false-advertising charges filed by the Federal Trade Commission is discussed in **Issue 301** of this *Update*.

Under the agreement, class members could recover up to a maximum of $15, and any remaining funds would be donated to "charities chosen by the parties and approved by the Court pursuant to the *cy pres* doctrine." According to the court, about $800,000 had been requested by class members who submitted claims before the claims period closed. Kellogg agreed to distribute, also under the *cy pres* doctrine, $5.5 million "worth" of specific company food items "to charities that feed the indigent." The agreement also required that the company refrain from making the offending assertions for three years, although it would be allowed to claim that "[c]linical studies have shown that kids who eat a filling breakfast like Frosted Mini-Wheats have an 11% better attentiveness in school than kids who skip breakfast." The settlement provided class counsel with $2 million in fees and costs.

The court found that the *cy pres* distribution to charities had no relation to the class or "the concerns embodied in consumer protection laws. . . . At oral argument, Kellogg's counsel frequently asserted that donating food to charities who feed the indigent relates to the underlying class claims because this case is about 'the nutritional value of food.' With respect, that is simply not true, and saying it repeatedly does not make it so. . . . The gravamen of this lawsuit is that Kellogg *advertised* that its cereal *did* improve attentiveness. Those alleged misrepresentations are what provided the plaintiffs with a cause of action. . . . Thus, appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising."

Thus, the court was compelled to vacate the judgment approving the settlement and remand for further proceedings. While noting that the parties will be free to negotiate a new settlement or proceed with litigation, the court indicated that other parts of the settlement are also unacceptably vague. The court questioned the value of $5.5 million "worth" of food, asking how it will be valued. "Is it valued at Kellogg's cost? At wholesale value? At retail?" The court also noted that the settlement does not specify how Kellogg will account for the *cy pres* distributions. "Can Kellogg use the value of the distributions as tax deductions because they will go to charity? . . . [W]ill the *cy pres* distributions be in addition to that which Kellogg has already obligated itself to donate, or can Kellogg use previously budgeted funds or surplus production to offset its settlement obligations."

The court further said that it would have vacated the settlement because the $2-million fee award was unreasonable. In this regard, the court stated, "The settlement yields little for the plaintiff class. As discussed above, there is no reasonable certainty that the *cy pres* distributions as currently structured will benefit the class. The injunctive relief, prohibiting Kellogg from using the 20% attentiveness advertisements, lasts only three years. And class members, assuming they were aware of the litigation and submitted claims, will each receive the paltry sum of $5, $10, or $15." The court calculated under the lodestar method that the award is about 4.3 times the lodestar amount, which the court characterized as "quite high, particularly in a case that was not heavily litigated." And if the *cy pres* distribution is removed from the equation, the fee award becomes 38.9 percent of the remaining fund value, "well above our presumptive benchmark."

As to the attorney's fees, the court also observed, "let us not forget that the $2 million fee award breaks out to just over $2,100 per hour. Not even the most highly sought after attorneys charge such rates to their clients. Class counsel contends that the requested fees are reasonable because counsel have continued to represent the class on appeal and will do so throughout the administration of the settlement. But one reason why those counsel had to defend this appeal is because they negotiated a deficient settlement agreement. We do not believe it appropriate to reward counsel for failing to follow our *cy pres* precedent."

### Court Denies Temporary Relief Sought in Challenge to Foie Gras Ban, Sets Briefing Schedule

A federal court in California has denied the *ex parte* request of foie gras producers to temporarily halt California's enforcement of a ban on the sale of any product that is the result of force-feeding a bird for the purpose of enlarging its liver beyond normal size. *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 12-5735 (U.S. Dist. Ct., C.D. Cal., W. Div., order entered July 18, 2012). Additional information about the challenge

to California's foie gras ban appears in Issue 446 of this *Update*. The court also established a briefing schedule on the plaintiffs' motion for preliminary injunction that will culminate in an August 29, 2012, hearing.

Meanwhile, California restaurateurs have reportedly found ways around the state's ban. A restaurant on a former military base in San Francisco, now owned by the National Park Service, apparently began offering the dish on its menu, claiming that its location on federal land makes it exempt from state regulation. Other restaurants are offering free foie gras with other orders, and some chefs are apparently preparing it for customers who bring their own. According to a press report, the law does not ban the distribution or possession of foie gras. *See Associated Press*, July 17, 2012.

**Trade Groups Challenge DOL's New Tip Pool Rule for Restaurant Employees**

Restaurant trade organizations, an Oregon restaurant and one of its employees, a server, have filed a complaint for declaratory and injunctive relief against the U.S. Department of Labor (DOL), alleging that its interpretation of the Fair Labor Standards Act, forbidding restaurants from distributing a share of tips to non-tipped employees, regardless of whether the restaurants use the tips as a credit toward paying their employees minimum wage, conflicts with a Ninth Circuit decision and will force the restaurants to incur significant costs or subject them to litigation. *Or. Restaurant & Lodging Ass'n v. Solis*, No. 3:12-cv-01261 (U.S. Dist. Ct., D. Or., Portland Div., filed July 12, 2012).

According to the Ninth Circuit ruling, restaurants can require that tips be shared with back-of-house and other non-tipped restaurant employees where the wait staff are paid at least full minimum wage and the restaurants do not take a tip credit. *Cumby v. Woody Woo, Inc.*, No. 08-35718 (9th Cir. 2010). The complaint alleges that DOL has made clear that its interpretation will be applied nation-wide, including in the Ninth Circuit. The restaurant and server plaintiff allege that the restaurant's mandatory tip pool was expanded to back-of-house employees at the server's request and that no reductions in wages occurred to offset this change. They claim that the change has resulted in greater camaraderie among employees and a higher level of guest service and satisfaction.

Alleging that DOL exceeded its authority in issuing the regulations interpreting the tip credit provisions of the fair labor law, violated the Administrative Procedure Act by failing to "put the public on notice that DOL was going to declare an absolute property right in tips," and adopted regulations that are arbitrary, capricious and an abuse of discretion, the plaintiffs ask the court to declare the 2011 regulations unlawful, void and unenforceable and to set them aside. They also request an injunction to stop DOL from enforcing the rule, as well as costs and attorney's fees.

### Advocacy Groups Challenge Constitutionality of California Shark Fin Ban

Organizations representing the interests of Asian Americans have filed suit in a federal court in California against the governor and agency officials seeking a declaration that legislation enacted in October 2011 banning the "possession, sale, offer for sale, distribution, or trade of shark fins" violates their members' equal protection rights, unlawfully interferes with interstate commerce and preempts federal law, and deprives them of rights, privileges and immunities under the U.S. Constitution. *Chinatown Neighborhood Assn. v. Brown*, No. 12-3759 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed July 18, 2012).

According to the complaint, "Shark fins are used within the Chinese American community to make the traditional dish, shark fin soup. Shark fin soup is a cultural delicacy with origins dating back to the Ming Dynasty (1368-1644 A.D.). It is a ceremonial centerpiece of traditional Chinese banquets as well as celebrations of weddings and birthdays of one's elders. Shark fin soup serves as a traditional symbol of respect, honor, and appreciation in Chinese culture. Shark fin soup is also served at Chinese festivals such as Chinese New Year, Mid Autumn Festival and Winter Festival." The plaintiffs allege that the state law's sponsors argued that the ban would stop the practice of shark finning, "where a shark is caught, its fins cut off, and the carcass dumped back into the water," a practice that the sponsors claimed was ongoing and current despite a federal law that already makes the practice illegal.

Alleging that the state ban, which allows other parts of a legally fished shark to be used, discriminates against people of Chinese national origin, interferes with the power of the U.S. Congress to regulate interstate commerce, unlawfully preempts federal law, and violates 42 U.S.C. § 1983, the plaintiffs seek a declaration that the law is unenforceable and void. They claim that absent the declaration, plaintiffs' members "face potential criminal sanctions for the ancient traditional use of shark fin soup in cultural ceremonies and celebrations. Plaintiffs' members also face potential criminal sanctions for ongoing business activities which they have legitimately pursued for years and in which they have invested substantially."

### California Judge Says Product Claims Were Preempted or Non-Actionable Puffery

According to a news source, a Los Angeles Superior Court has dismissed a putative class action seeking damages against One World Enterprises LLC for allegedly misleading consumers about the nutritional value and hydrating properties of its coconut water product. *Shenkman v. One World Enters. LLC*, No. BC467165 (Cal. Super. Ct., Los Angeles Cnty., dismissed on July 18, 2012). The court apparently agreed with the defendant that part of the plaintiff's case involved a product representation that was simply "puffery" and stated

that marketing a product's "superior" hydrating power "is not actionable because consumers are used to hearing advertisers make general boasts and were not born yesterday."

The court dismissed the case without prejudice to give the plaintiff an opportunity to re-plead state-based fraud and false advertising claims about the product's allegedly false nutritional label. According to the court, the plaintiff "correctly notes federal law will not preempt his claim if the label violated federal labeling requirements. But the complaint does not offer a 'clear and precise' allegation of how One World broke federal law, as necessary in this context." The plaintiff was given until September 18, 2012, to file an amended complaint. *See Law360*, July 18, 2012.

## OTHER DEVELOPMENTS

### Health Advocacy Coalition Joins ACS Call for Surgeon General Report on Soft Drinks

Suggesting that soft drinks are associated with "addictive mechanisms," a coalition of nearly 100 federal, state and local public health organizations and individuals have added their voices to the American Cancer Society Cancer Action Network's, **urging** the U.S. Surgeon General to "prepare a Report on the health effects of sugary drinks and to issue a Call to Action so spur national efforts to reduce sugary drink consumption." Further details on the Network's letter to U.S. Department of Health and Human Services Secretary Kathleen Sebelius appear in **Issue 446** of this *Update*.

Citing risks to young people's health and national security interests, the latest correspondence claims that sugary drinks "have become a routine, daily beverage for tens of millions of Americans" and they are "aggressively marketed, especially to young consumers and minorities, in both traditional and digital media, and in event sponsorships." The July 19, 2012, letter suggests that a Surgeon General report "could address the specific ingredients of sugary drinks: the biology, pharmacology, and physiological effects of sugars; addictive mechanisms associated with sugar use or other ingredients contained in sugary drinks; epidemiological data on consumption of these products and their health-damaging effects including obesity; trends in consumption for all age groups; and the gender, racial, and ethnic disparities in the effects of sugary drink consumption on health."

Signatories to the letter include the American Diabetes Association, American Heart Association, Center for Food Safety, Center for Science in the Public Interest, Colorado Springs School District 11, Consumer Federation of America, National Congress of Black Women, Inc., National Hispanic Medical Association, New York City Department of Health and Mental Hygiene, Prevention Institute, Tennessee Obesity Taskforce, The Praxis Project, Yale

Rudd Center for Food Policy and Obesity, Former U.S. Assistant Surgeon General Andrew Bremer, Robert Lustig, Marion Nestle, and Walter Willett.

### CSPI Criticizes DreamWorks, Food Companies for Licensing Deals

The Center for Science in the Public Interest (CSPI) has sent a July 18, 2012, **letter** to the chief executive officer of DreamWorks Animation SKG, criticizing the studio's decision to license its popular film characters to food companies. Focusing on the recent film *Madagascar 3: Europe's Most Wanted,* the consumer group cited tie-ins "with multiple companies and retailers" that allegedly market food products to children, but singled out DreamWorks' partnership with Snyder's-Lance, Inc. as particularly problematic because the snack manufacturer is not currently a member of the Council of Better Business Bureaus' Children's Food and Beverage Advertising Initiative (CFBAI).

"DreamWorks characters from *Madagascar 3* are depicted on the packages of Nekot Cookies and Sandwich Crackers, which are of poor nutritional value," alleges CSPI, which has also **called on** Snyder's-Lance to apply nutrition standards "to 100% of the company's marketing, not only via television, print, radio, Internet, and mobile devices, but also through packaging, in-store signage, in K through 12 schools, and all other forms of marketing directed at children."

CSPI has urged both DreamWorks and Snyder's-Lance to join CFBAI and "establish nutrition standards for your marketing to children." As the consumer group's letter to DreamWorks concludes, "We hope that characters from upcoming DreamWorks films… will only be used to market foods that meet nutrition standards. We also hope that you will ensure that unhealthy foods are not marketed in the theme park you are developing with Triple Five and that a wide variety of reasonably priced healthy options will be offered in the park."

### Extremely Obese Children Removed from Parents' Care in Australia

According to news sources, human-services authorities in Victoria have sought protection for extremely obese children on at least two occasions in 2012, arguing to children's court magistrates that they would be unable to lose weight in their parents' care. One case reportedly involved a pre-teen boy who weighed more than 240 pounds and a teenage girl with a 66½-inch waist that was greater than her height; she had apparently gained 66 pounds over 18 months.

The public is divided about whether weight management is an appropriate reason for removing children from their homes, and at least one obesity expert, Baker IDI Heart and Diabetes Institute Associate Professor John Dixon, suggested that more cases like this can be expected. Dixon said that removal

can be the best option in some cases, although he acknowledged that obesity "can be the result of a whole range of environmental issues, the food, the lack of transport, all sorts of things." He also opined that obesity "also can be symptomatic of dysfunctional circumstances . . . where there's problems; mental illness, siblings with disabilities, that really make family life for some of these children very complex indeed, and produce that rare circumstance where they may be better off out of home for a while."

A spokesperson for the Victorian Department of Human Services reportedly indicated that obesity alone was not grounds for child protection workers to become involved with a family, agreeing that "obesity may be a symptom of other issues that could place a child at risk or harm that would warrant child-protection environment." Area weight-management clinics reportedly lack sufficient resources, and referrals can remain on waiting lists for a year or longer. Dixon claimed that parental neglect is not usually a determinant of obesity in children, and he called for improvements to health services to address the problem. "We have very few services to manage children who are very big," he said, and "[p]arents are often reluctant to go to the doctor or pediatrician . . . for fear they will be classified as being negligent or not looking after their children very well at all." *See The Age* and *ABC.net.au*, July 12, 2012.

### ABA Sponsors Program on California's Proposed GM Food Labeling Law

The American Bar Association's Section of Environment, Energy, and Resources will hold a **teleconference** on July 31, 2012, titled "California's Proposed GM Food Labeling Law: Pros, Cons, and Legal Issues." A panel of speakers, including the Center for Food Safety's George Kimbrell and the Global Environmental Ethics Counsel's Thomas Redick, will consider the latest information on this ballot proposal, the current status of genetically modified (GM) food labeling laws elsewhere and information about pending federal initiatives relating to the labeling of biotech food products. *See The U.S. Agricultural & Food Law & Policy Blog*, July 12, 2012.

## SCIENTIFIC/TECHNICAL ITEMS

### Researchers Allegedly Link New Poultry Viruses to Live-Attenuated Vaccines

University of Melbourne researchers have reportedly demonstrated that viruses from two live-attenuated poultry vaccines have combined in the field to produce new infectious viruses "responsible for widespread disease in Australian commercial poultry flocks." Sang-Won Lee, et al., "Attenuated Vaccines Can Recombine to Form Virulent Field Viruses," *Science,* July 2012. According to a July 13, 2012, press release, two vaccines used simultaneously in chickens to control laryngotracheitis (ILT), an acute respiratory disease,

apparently produced two new recombinant viruses that scientists then identified using whole-genome sequencing. Previous studies had apparently suggested that such recombination could happen under laboratory conditions but was unlikely in field settings.

"We alerted the Australian Pesticide and Veterinary Medicines Authority (APVMA) to our findings and they are now working closely with our research team, vaccine registrants and the poultry industry to determine both short and long term regulatory actions," a study co-author was quoted as saying. "Short-term measures include risk assessment of all live virus vaccines currently registered by the APVMA in regard to the risk of recombination and could include changes to product labels, which may result in restrictions on the use of two vaccines of different origins in the one animal population."

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
**Philadelphia, Pennsylvania**
+1-267-207-3464
**San Francisco, California**
+1-415-544-1900
**Tampa, Florida**
+1-813-202-7100
**Washington, D.C.**
+1-202-783-8400