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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

New York Senator Introduces Bill to Prohibit Powdered Alcohol

U.S. Sen. Charles Schumer (D-N.Y.) has introduced legislation that would ban the production, sale, distribution or possession of powdered alcohol. Schumer sponsored a similar initiative in 2014, and introduction of the new bill comes on the heels of the Alcohol and Tobacco Tax and Trade Bureau's March 10, 2015, approval of four labels for flavored Palcohol® products manufactured by Lipsmark LLC.

"I am in total disbelief that our federal government has approved such an obviously dangerous product, and so Congress must take matters into its own hands and make powdered alcohol illegal," Schumer said. "Underage alcohol abuse is a growing epidemic with tragic consequences and powdered alcohol could exacerbate this. We simply can't sit back and wait for powdered alcohol to hit store shelves across the country, potentially causing more alcohol-related hospitalizations and God forbid, deaths." *See Press Release of Sen. Charles Schumer*, March 12, 2015; *The Hill*, March 13, 2015.

Palcohol's "Beverage Formulation" would **reportedly** have "outdoor activity," "travel" and "hospitality" applications whereas the "Industrial Formulation" could be used in medical, manufacturing and military settings.

NOSB to Tackle Robust Agenda at April 2015 Meeting

The U.S. Department of Agriculture's Agricultural Marketing Service is **hosting** an April 27-30, 2015, public meeting of the National Organic Standards Board (NOSB) in La Jolla, California. The event will serve as NOSB's final review of substances with sunset dates in 2016, and sessions will include those covering reports from the Materials, Livestock, Crops and Handling subcommittees. The tentative agenda, relevant proposals and information about the comment submission and meeting registration process are available **here**; the deadline for submitting written comments or registering to make oral comments at the meeting is April 7. *See Federal Register*, March 12, 2015.

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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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com).

OEHHA Extends Comment Period on Hazard ID Materials Related to BPA Listing Under Prop. 65

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) has extended the deadline for public comments on **hazard identification materials on BPA and female reproductive toxicity** from April 6 to April 20, 2015, in response to a request from the American Chemistry Council.

OEHHA has also announced that the May 7 **meeting** of its Developmental and Reproductive Toxicant Identification Committee (DARTIC) to consider the addition of bisphenol A (BPA) to its list of chemicals known to the state to cause reproductive toxicity will be continued on May 21 in the same location if the committee is unable to finish its deliberations on May 7.

Citing the availability of new epidemiological and toxicological data, DARTIC will assess "whether BPA has been clearly shown by scientifically valid testing according to generally accepted principles to cause female reproductive toxicity." After adding BPA to the list of reproductive toxicants under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) in April 2013, OEHHA delisted the substance following a court injunction. In January 2015, the court ruled that the agency could list BPA even if DARTIC did not include the substance on its own list, finding that "OEHHA is mandated by law to list a chemical even after the state's qualified experts have declined to do so if the chemical meets one of the other listing requirements." Additional details about the matter appear in Issue **550** of this *Update*. *See OEHHA News Release*, March 13, 2015.

WHO Sets Daily Recommended Guidelines for Added Sugars

The World Health Organization (WHO) has **recommended** that adults and children reduce their daily intake of added sugars to less than 10 percent of their total daily energy intake. In addition, WHO calls for consumers to limit their consumption of added sugars to less than 25 grams (6 teaspoons) for further health benefits.

The new advice follows the release of the U.S. Department of Health and Department of Agriculture's proposed Dietary Guidelines for Americans, which would set similar limits for glucose, fructose and sucrose added to food and drink by manufacturers, retailers or consumers.

"We have solid evidence that keeping intake of free sugars to less than 10% of total energy intake reduces the risk of overweight, obesity and tooth decay," said Francesco Branca, director of WHO's Department of Nutrition for Health and Development, in a March 4, 2015, press release. "Making policy changes to support this will be key if countries are to live up to their commitments to reduce the burden of noncommunicable diseases."

LITIGATION

Challenge to Restaurant's "Gift" of Foie Gras Survives Anti-SLAPP Analysis

A California appeals court has rejected a Napa restaurant's attempt to circumvent the state's foie gras ban by describing it as a gift for ordering another dish then arguing that a resulting suit brought by the Animal Legal Defense Fund (ALDF) seeking an injunction was merely a strategic lawsuit against public participation (SLAPP) in violation of the state anti-SLAPP statute. *Animal Legal Def. Fund v. LT Napa Partners LLC*, No. A139615 (Cal. Ct. App., order entered March 5, 2015). Additional information on the foie gras ban, which a California federal court struck down in January 2015, appears in Issue **550** of this *Update*.

Kenneth Frank, the head chef at Napa's La Toque restaurant, was a vocal opponent of California's foie gras ban; he testified at state senate hearings, participated in public debates and authored a newspaper opinion piece on the subject. On three occasions, ALDF sent an investigator to La Toque after the prohibition took effect and asked for foie gras, and the investigator was apparently told twice that he could receive foie gras as a gift from the chef if he ordered an expensive tasting menu. After ALDF reported its findings to law enforcement and the city attorney declined to pursue legal action, the organization brought a lawsuit alleging unfair competition. Frank and LT Napa Partners, owner of La Toque, moved to strike the action as a SLAPP, and the trial court denied the motion; they appealed that denial, arguing that serving the foie gras constituted actions protected by the First Amendment because it furthered the chef's public opposition of the ban—his "way of dumping tea in the harbor," according to a declaration.

The appeals court first assessed whether ALDF had standing to pursue the unfair competition claim. Its standing, ALDF argued, comes from the diversion of resources that La Toque's distribution of foie gras caused the organization. The restaurant argued that ALDF manufactured its standing by initiating the investigation, but the court found that the organization could prove that it had "a genuine and longstanding interest in the effective enforcement of the statute and in exposing those who violate it," and the restaurant's actions impeded ALDF's ability to focus its efforts on advocating for similar bans in other states or at the federal level.

The court then looked at whether the "gift" of foie gras constituted a sale. Arguing that the foie gras was not listed on the menu and the restaurant did not charge a separate price for it, Frank and LT Napa asserted that it was not provided for a price. The court likened the "gift" to promotions at other establishments that provide "complimentary" alcohol with another purchase, noting that California viewed such pairings as sales subject to liquor licensing laws despite no separate charge for the alcohol beverage. Because the foie gras "gift" was a sale, ALDF could show that it had a prima facie case, the court found, and it could not be disposed of via an anti-SLAPP challenge.

Several Contaminated-Cantaloupe Cases Settled

A Colorado state court has approved the settlements of several wrongful death and personal injury suits against 14 defendants—including Jensen Farms—stemming from the sale of cantaloupe tainted with *Listeria* that killed 33 people in 2011. *Exley v. Jensen Farms*, No. 2011-1891 (Colo. D.C., Arapahoe Cnty., order entered March 5, 2015). The court dismissed 24 of 26 cases pursuant to the settlement agreement reached in February 2015, remanded one case to a Texas court and left the dismissal of the last case to a probate court because it regards a minor. The settlement terms are confidential, but according to plaintiffs' attorney Bill Marler, the medical expenses total more than $12 million. Details about the criminal charges against the brothers who own Jensen Farms appear in Issue **500** of this *Update*. *See Minneapolis Star Tribune*, March 11, 2015.

Teen's Family Sues Amazon for Wrongful Death After Caffeine Overdose

The estate of Logan Stiner, an Ohio teenager who died in May 2014 after ingesting pure caffeine powder purchased from Amazon, has filed a lawsuit against the online retailer and the companies that manufacture and market the powder. *Stiner v. Amazon.com Inc.*, No. 15CV185837 (C.P. Lorain Cnty., filed March 6, 2015).

According to the complaint, "pure caffeine is a drug" under Ohio law, but the powder manufacturers have "successfully avoided meaningful regulation of [the] product by the U.S. Food and Drug Administration (FDA) by classifying their product as a 'dietary supplement,'" which leaves them "responsible for determining that pure caffeine powder is safe." The companies "failed to alert users of the known risks and side effects of ingesting caffeine powder, including the risk of cardiac arrhythmia and cardiac arrest," the reaction that killed Stiner, the complaint says. The estate also alleges that the companies did not conduct adequate testing of the product's effects before selling it, including Amazon, which is "responsible for evaluating the safety of [its] products, including caffeine powder prior to promoting, advertising and marketing it."

In addition to negligence, the estate alleges violations of the Ohio Food & Drug Safety Act and argues for strict liability for a design defect, inadequate warnings and nonconformance with representations of the caffeine powder.

Hall & Oates Allege Trademark Infringement by "Haulin' Oats" Granola

Whole Oats Enterprises, a partnership of musicians Daryl Hall and John Oates, has filed a lawsuit against Early Bird Foods & Co. alleging that the name of the company's "Haulin' Oats" granola product infringes on their trademarks. *Whole Oats Enters. v. Early Bird Foods & Co.*, No. 15-1124 (U.S. Dist. Ct., E.D.N.Y., filed March 4, 2015). The musicians own the registered trademark in "Daryl Hall

and John Oates" and assert common law trademark rights to "Hall & Oates," which the group often calls itself. Early Bird's "Haulin' Oats," a granola product containing rolled oats and maple syrup, is an "obvious" "phonetic play" on the band name, the complaint alleges.

The complaint also details a 2014 attempt at the use of "Haulin' Oats" by a Tennessee company selling oatmeal and food-delivery services. The company assigned its rights to "Haulin' Oats" to Whole Oats, which then licensed the name back to the company in exchange for royalties. Because of this assignment, the complaint asserts, Whole Oats owns the mark in connection with oatmeal and delivery services. The musicians allege statutory and common law trademark infringement as well as unfair competition, and they seek an injunction, compensatory damages and payment of gains resulting from the use of the name.

OTHER DEVELOPMENTS

Study Claims Sugar Industry Influenced Anti-Caries Program

Citing internal cane and beet sugar documents dating back to 1959, an **article** published in *PLOS Medicine* claims that the sugar industry made a concerted effort to alter the priorities of the National Institute of Dental Research's (NIDR's) 1971 National Caries Program (NCP). Cristin Kearns, Stanton A. Glantz, et al., "Sugar Industry Influence on the Scientific Agenda of the National Institute of Dental Research's 1971 National Caries Program: A Historical Analysis of Internal Documents," *PLOS Medicine,* March 2015.

University of California, San Francisco, researchers apparently relied on World Sugar Research Organization documents obtained from the University of Illinois Archives, which housed the correspondence of a university professor who also served on the Sugar Research Foundation and International Sugar Research Foundation Advisory Board. They also acquired documents related to NPC via PubMed and WorldCat, as well as by contacting NIDR directly.

"The sugar industry could not deny the role of sucrose in dental caries given the scientific evidence," opines the article. "They therefore adopted a strategy to deflect attention to public health interventions that would reduce the harms of sugar consumption rather than restricting intake."

In particular, the authors suggest that sugar manufacturers sponsored scientific studies and cultivated ties with program leadership at a time when NIDR sought to eliminate dental caries by reducing sugar consumption. They also allege that sugar companies partnered with the food industry to investigate cures for dental decay, including food enzymes and vaccines, instead of researching sugar-reduction methods. As a result of these efforts, NCP purportedly eliminated research applications that conflicted with industry priorities.

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"Most importantly, these findings illustrate how the sugar industry has protected itself from potentially damaging research in the past; a similar approach has also been taken by the tobacco industry," concludes the article. "These findings highlight the need to carefully scrutinize industry opposition to the proposed [World Health Organization] and [Food and Drug Administration] guidelines on sugar intake and labeling, respectively, to ensure that industry interests do not interfere with current efforts to improve dental public health."

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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.