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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Federal Agencies to Collaborate on Improving Traceability System

The Food and Drug Administration (FDA) and U.S. Department of Agriculture's Food Safety Inspection Service, (FSIS) will convene a joint meeting to address ways of enhancing current product tracing systems for food intended for humans and animals.

FDA and FSIS reportedly intend for the December 9-10, 2009, event to stimulate ideas on improving their ability to "increase the speed and accuracy of traceback investigations and traceforward operations." More specifically, the agencies want to "identify the source of contamination during outbreaks of foodborne illness and to improve the ability of all persons in the supply chain to more quickly indentify food that is (or potentially is) contaminated and remove it from market during traceforward operations." Public comments will be accepted until March 3, 2010. *See Federal Register*, November 3, 2009.

Health Care Legislation Would Require Chain Restaurants, Vending Machines to Post Calorie Counts

A provision in the U.S. House of Representatives' proposed 1,990-page health care legislation (H.R. 3962) requires fast-food chains with 20 or more locations and vending machine owners to conspicuously post calorie counts. Section 2572 apparently goes a step further than menu-labeling initiatives in New York City and elsewhere by also requiring information about how those calorie counts fit into recommended daily guidelines.

The provision requires that chain restaurants list the information "on the menu board including a drive-through board" and mandates that vending machine operators provide the data on "a sign in close proximity to each article of food or the selection button."

A spokesperson for the National Restaurant Association told a news source: "We're very pleased that the nutrition information provision continues to garner bipartisan support, and we're pleased that the agreement is now moving forward in the House of Representatives." *See Politico,* October 30, 2009; *Advertising Age,* November 2, 2009.

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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

Class Action Filed in California over Kellogg's Health Claims for Cocoa Krispies®

A California resident has filed putative class claims against the Kellogg Co., alleging that it falsely advertises its Cocoa Krispies® cereal as a boost to children's immunity. ***Kammula v. Kellogg Co.*, No. 09-08102 (U.S. Dist. Ct., C.D. Cal., filed November 5, 2009)**. According to the complaint, without the support of any "known clinical study," Kellogg claims that the cereal "has been improved to include antioxidants and nutrients that your family needs to help them stay healthy." The plaintiff alleges that this practice was intended "to profit from a growing trend in the manufacturing, advertising, and sales of 'functional' foods."

The complaint also alleges that "Defendants fail to adequately disclose that other ingredients, including but not limited to sugar, chocolate, high-fructose corn syrup and/or partially-hydrogenated oils, may not 'help support' a child's immunity." The named plaintiff seeks to certify a class of California residents who purchased Cocoa Krispies® since November 4, 2005, alleging false and misleading advertising in violation of the Business & Professions Code sections 17200 *et seq.* and 17500 *et seq.*, unjust enrichment, fraud, and deceptive misrepresentation in violation of the Civil Code.

The plaintiff seeks injunctive relief, an immediate recall of falsely advertised products, compensatory damages, pre-judgment interest, costs, and attorney's fees. The plaintiff also requests that "each senior citizen and disabled person who is a plaintiff be awarded $5,000 as authorized" by the Civil Code.

Meanwhile, Kellogg Co. has reportedly discontinued making immunity-related health claims on Cocoa Krispies® and Rice Krispies® cereals in response to the San Francisco city attorney's recent inquiry about such claims. According to a company statement, "While science shows that these antioxidants help support the immune system, given the public attention on H1N1, the Company decided to make this change." The company will continue to fortify its cereals with increased amounts of vitamins. *See Advertising Age* and *Kellogg Co. Press Release,* November 4, 2009.

Californians Sue Unilever for Marketing Margarine with *Trans* Fat as Healthy

California residents have filed a putative class action in federal court against the company that makes a number of margarine products, alleging that the products are falsely marketed "as healthful despite the fact its margarines have dangerous levels of artificial *trans* fat, a toxic food additive banned in many parts of the world." *Red v. Unilever U.S., Inc.*, No. 09-07855 (U.S. Dist. Ct., C.D. Cal., filed October 28, 2009).

According to the complaint, the defendant (i) "specifically markets its margarines as good for cardiovascular health," (ii) uses "non-standard and deceptive charts" when comparing the nutritional value of margarine to butter, (iii) "misleads consumers by marketing its margarines as 'cholesterol free,' implying its products are desirable for those with high blood cholesterol levels," and (iv) uses "words

such as 'natural' and 'nutritious' to describe products with artificial *trans* fat and adding images of hearts."

Among the products subject to the litigation are I Can't Believe It's Not Butter!®, Shedd's Spread Country Crock® and Imperial Margarine®. The plaintiffs seek to certify a class of all those who purchased Unilever margarine products since January 1, 2000, and allege false advertising under the Lanham Act, and violations of California unfair competition, false advertising and consumer legal remedies laws. They request injunctive relief to stop the company from making false marketing claims, an order requiring corrective advertising, disgorgement of profits, destruction of misleading and deceptive advertising materials, restitution, costs, and attorney's fees. Damages in excess of $5 million are alleged to invoke the court's jurisdiction under the Class Action Fairness Act.

First Lawsuits Filed in Latest *E. Coli* Outbreaks Involving Ground Beef

Plaintiffs' lawyer William Marler has reportedly begun filing lawsuits on behalf of families allegedly sickened in an *E. coli* outbreak linked to fresh ground beef processed by Fairbank Farms, which has recalled nearly 546,000 pounds of the product, mostly from retail outlets on the Atlantic coast and in the Northeast. According to news sources, two deaths and 28 illnesses may be linked to the outbreak. The U.S. Department of Agriculture's Food Safety and Inspection Service identified the recalled products on its Web site; they were sold under the labels of Trader Joe's, Price Chopper, Lancaster and Wild Harvest, Shaw's, and Giant food stores.

The Ashville, New York-based company has previously recalled ground beef products on two occasions, once for possible *E. coli* contamination and most recently for contamination with pieces of plastic. The November 2009 recall reportedly involves ground beef produced between September 14 and 16 and was directed to distribution centers in eight states, although the company acknowledged that some customers may have shipped the product to other states. *See FSIS News Release*, November 1, 2009; *Food Poison Journal, Reuters. MSNBC.com, CNNMoney.com, The Wall Street Journal*, November 2, 2009.

Chinese Honey Maker Pleads Guilty in Conspiracy to Illegally Smuggle Goods

U.S. Attorney Patrick Fitzgerald has brought conspiracy charges against the president of a honey manufacturer from China in an alleged scheme to illegally dump adulterated honey on the U.S. market, and recently **announced** that the defendant pleaded guilty.

The product was apparently shipped through the Philippines and Thailand between 2005 and 2008 to avoid steep anti-dumping duties. While defendant Yong Xiang Yan entered a plea to one count of conspiracy involving the avoidance of more than $625,000 in anti-dumping duties, he acknowledged during the plea hearing that he authorized many other shipments that avoided an additional $3.3 million in duties.

Some of the honey imported into the United States was allegedly adulterated with antibiotics, but "[n]either the charges [n]or the plea agreement indicate any instances of illness or other public health consequences attributed to consumption of the honey, nor does it identify any store brands or domestic supply chain of any honey that was illegally imported or adulterated." Additional details about the alleged illegal trade in honey and its contamination with antibiotics appear in issue 287 of this Update. Yan will be sentenced on April 22, 2010, and faces a maximum penalty of five years in prison and a $250,000 fine.

OTHER DEVELOPMENTS

Consumer Reports Publishes Results of BPA Testing

Consumers Union (CU) has issued the results of bisphenol A (BPA) testing on 19 name-brand canned foods such as soups, juice, tuna, green beans, and infant formula. According to a December 2009 *Consumer Reports* article titled "Concern Over Canned Foods," the tests revealed that both organic and conventional foods contained detectable BPA levels, including "some products in cans that were labeled 'BPA-free.'" The average amount of BPA purportedly "varied widely," ranging from trace amounts to 32 parts per billion (ppb), for both epoxy-lined metal cans and alternative packaging. "Nevertheless, our findings are notable because they indicate the extent of potential exposure," concludes the article. "Consumers eating just one serving of the canned vegetable soup we tested would get about double what the FDA now considers typical average dietary daily exposure."

While noting that these results "convey a snapshot of the marketplace and do not provide a general conclusion about the levels of BPA in any particular brand or type of product [tested]," CU has continued to criticize the Food and Drug Administration (FDA) for failing to restrict BPA use. The organization maintains that by setting a daily upper limit of safe exposure to 50 micrograms of BPA per kilogram of body weight, FDA is relying on "experiments done in the 1980s rather than hundreds of more recent animal and laboratory studies indicating that serious health risks could result from much lower doses of BPA." In a November 2, 2009, letter to FDA Commissioner Margaret Hamburg, CU food-safety scientists recommended restricting daily BPA exposure to "0.0024 micrograms per kilogram of body weight, significantly lower than FDA's current safety limit." *See CU Press Release,* November 2, 2009; *FoodProductionDaily.com,* November 3, 2009.

Meanwhile, the North American Metal Packaging Alliance (NAMPA), the American Chemistry Council (ACC) and other industry groups have emphasized the safety findings of FDA, the European Food Safety Authority and the UK Food Standards Agency. "BPA-based epoxy coatings in metal packaging provide real, important and measurable health benefits by reducing the potential for serious and often deadly effects from food-borne illnesses," a NAMPA spokesperson was quoted as saying. "The packaging enables the high-temperature sterilization of

food products when initially packaged and continuously protect [sic] against microbial contaminants. According to FDA records, there has not been an incidence of food-borne illness resulting from a failure of metal packaging in the U.S. for more than 30 years." *See FoodProductionDaily.com,* November 4, 2009.

CSPI Reports Noncompliance with *Bt* Corn Regulations

The Center for Science in the Public Interest (CSPI) recently published a report titled "**Complacency on the Farm: Significant Noncompliance With EPA's Refuge Requirements Threatens the Future Effectiveness of Genetically Engineered Pest-Protected Corn**," which maintains that "one out of every four farmers who plants genetically engineered (GE) corn is failing to comply with at least one important insect-resistance management requirement." The Environmental Protection Agency (EPA) apparently requires farmers to plant a conventional corn refuge in or adjacent to corn crops engineered with *Bacillus thuringeiensis* (*Bt*), a toxin fatal to rootworms and corn borers. The refuge reduces the risk that pests which survive the *Bt* corn will breed only with their own kind, thus producing *Bt*-resistant pest variants. "Resistant offspring would not only reduce crop yields of the *Bt* crops, but could also threaten organic or conventional farmers who use natural *Bt*-based pesticides on non-GE crops," stated a November 5, 2009, CSPI press release.

The CSPI report allegedly found that, according to 2008 EPA data, (i) "only 78 percent of growers planting corn-borer-protected crops met the size requirement, and only 88 percent the distance requirement" for refuge corn crops; (ii) "only 74 percent of growers planting rootworm-protected crops met the size requirement, and 63 percent met the distance requirement"; and (iii) "only 72 percent of farmers growing stacked varieties of GE corn—corn protected against both corn borer and rootworm—met the size requirement and 66 percent met the distance requirement."

The consumer group has since released a **letter** to EPA Administrator Lisa Jackson, requesting that EPA "not reregister the existing *Bt* corn varieties in the fall of 2010 until the registrants demonstrate higher levels of compliance." CSPI has also asked the agency, if it decides to reregister *Bt* corn, (i) "to impose monetary penalties on the registrant and/or restrict seed sales by the registrant and its wholly owned subsidiaries if national or regional noncompliance remains high"; (ii) "to require the registrants to provide farmers incentives to meet their obligations and impose severe penalties for farmers found to be noncompliant"; and (iii) "to require the registrants to obtain annual certifications of compliance from growers and pay for independent third-party assessments of farmer compliance." In addition, CSPI has recommended that the agency "use its rulemaking authority to promulgate a rule that would require labels on the *Bt* seed bags specifying the IRM [insect resistance management] obligations."

Meanwhile, Testbiotech e.V. recently issued a report titled "**Risk Reloaded—Risk Analysis of Genetically Engineered Plants Within the European Union**," purportedly revealing "substantial flaws and loopholes" in the risk assessment procedure for GE plants in the European Union. An institute for independent impact

assessment in biotechnology, Testbiotech criticizes EU risk assessment practices for assuming that "the risks posed by [GE] plants are basically the same as those posed by conventional plants."

Citing advancements in genome research, the report authors recommend "more extensive testing on the compounds and genetic stability of GE plants before they are released into the field and companies can apply for market authorization." They also urge EU regulators (i) to subject GE crops to specific "crash tests" designed to gauge reactions to "changing and extreme environmental condition"; (ii) to collect more data on potential risk by testing GE plants with different microorganisms in a contained system; (iii) to introduce "improved step by step, case by case tests which have clearly defined test criteria for [GE] plants"; and (iv) to strengthen collaboration between the authorities of member states and EU authorities.

"Society, politics and approval boards should no longer close their eyes to the facts that agro-gene technology uses methods that are largely outdated and whose risk potential is higher than originally thought," conclude the authors. "It is not the fear of new products that make a critical appraisal of agro-gene technology necessary, but rather the fact that its scientific principles have been called more and more into question by new findings."

Litigation Could Foster Weight-Based Discrimination by Employers

According to a news source, employers may have more reason to avoid hiring overweight employees after a workers' compensation board in Indiana and the Oregon Supreme Court ruled that employers must pay for weight-loss surgery if their obese employees suffer weight-related injuries on the job. With no laws banning employment discrimination against the obese, beyond limited areas to which the Americans with Disabilities Act applies, human resource consultants are apparently speculating that fears about the costs of providing weight-loss treatment could increase an existing bias against hiring overweight job applicants. At the very least, some employers have begun requiring that their overweight employees either pay more for health-insurance premiums or enroll in weight-loss programs.

While the obese "might call it a gross invasion of privacy and personal choice to have employers so involved in their weight . . . it's come down to a case where this personal 'freedom' is outweighed by employers' pocketbook choices," according to a *Kansas City Star* employment columnist. "Nowadays, when employers talk about cutting the fat, they may mean it literally," she concludes. *See The Kansas City Star*, November 4, 2009.

MEDIA COVERAGE

Paul Voosen, "Trade Chaos Looms as GM Crops Proliferate," *Greenwire*, November 2, 2009

The third in a five-part series about genetically modified (GM) crops, this article focuses on the frustrations of importers and exporters over stringent European rules about even trace amounts of GM material in conventional crops. Apparently, European regulators have stopped more than 10 soybean or soy meal shipments from the United States this year because they contained GM corn dust, which had not been cleared for import in Europe. The cross-contamination apparently occurs when silos, trains and ships are not cleaned after GM crops are stored or transported in them. With pressure from European farmers who need the soy products to feed their cattle and pigs, the EU reportedly approved the GM corn on November 2, 2009.

Agricultural trade will apparently face new strains as GM traits used worldwide quadruple in the next five years. According to European Agriculture Minister Mariann Fischer Boel, "The result is that a growing number of GM products are widely used in other parts of the world but are not yet authorized in the European Union. Not because we've found evidence of risk but because the political decision is being knocked around like a ball in a slow-motion tennis match." Liability can be significant if, for example, a shipment tests GM-negative at a U.S. port and GM-positive when it reaches Germany. Shippers are uncertain about who should bear the loss. False positive test results and a lack of harmonization of standards evidently exacerbate the problems.

Krista Mahr, "The Hunt for Tuna: A Tough Catch," *Time*, November 9, 2009

Describing the world's tuna trade as "an awesome 21st century hunt," Mahr's article explores how "for some species of tuna, the chase is becoming unsustainable." In 1950, she reports, about 600,000 tons of tuna were caught worldwide while in 2008, that number hit nearly 6 million tons.

Particularly worrisome are the dwindling numbers of Atlantic bluefin tuna, which the World Wildlife Fund estimates could disappear in the Mediterranean as early as 2012, Mahr writes. She quotes a spokesperson for the Center for the Future of the Oceans at the Monterey Bay Aquarium in California as saying that Atlantic bluefin tuna has become "the poster child of overfishing worldwide" and that "the hunt is relentless. These are the wolves, grizzly bears, lions and tigers of the ocean. If you take the top predators out, the ecosystem begins to get out of balance.

Elizabeth Kolbert, "Flesh Of Yo ur Flesh: Should You Eat Meat?," *The New Yorker*, November 9, 2009

"How is it that Americans, so solicitous of the animals they keep as pets, are so indifferent toward the ones they cook for dinner?," asks Elizabeth Kolbert in this review of Jonathan Safran Foer's latest nonfiction work, *Eating Animals*.

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According to Kolbert, Foer attempts to tackle this inconsistency through a series of vignettes exploring the human relationship to food animal production and criticizing the impact of so-called factory farms on "inter-species alliances." The novelist also takes issue with food writer and activist Michael Pollan's support for non-industrial livestock practices, describing the argument in favor of responsible meat consumption as "unpersuasive." Foer maintains that an emphasis on organic or humane animal husbandry serves only to obfuscate the moral issues at stake. "Although he never specifically equates 'concentrated animal feeding operations' with the Final Solution, the German model of at once seeing and not seeing clearly informs Foer's thinking," notes Kolbert. "The book is framed by tales of his grandmother, a Holocaust survivor whose culinary repertoire consists of a single dish: roast chicken with carrots."

While Kolbert ultimately lauds the strength of Foer's conviction, she also finds that when taken to its logical conclusion, his argument becomes untenable in practice. "But is even veganism enough?," she wonders. "The cost that consumer society imposes on the planet's fifteen or so million non-human species goes way beyond either meat or eggs. Bananas, bluejeans, soy lattes, the paper used to print this magazine, the computer screen you may be reading it on—death and destruction are embedded in them all."

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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.