Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Federal Government Focuses Attention on Obesity; Childhood Obesity Articles Proliferate

The Senate Committee on Health, Education, Labor, and Pensions conducted a hearing March 4, 2010, to address childhood obesity. Among those testifying was U.S. Surgeon General Regina Benjamin, who provided an overview of the "epidemic," examples of successful individual and community interventions and recent federal initiatives to "help Americans achieve optimal health." She claimed that keeping pregnancy weight gain within recommended limits and breastfeeding exclusively for the first six months after birth have been shown to prevent childhood obesity.

Benjamin also called for changing social and physical environments to support families in making healthy choices. Among the changes she recommended were increasing exposure and access to healthy affordable foods and making physical activity opportunities more accessible. Others testifying during the hearing included a Pittsburgh Steelers running back and a representative of the Robert Woods Johnson (RWJ) Foundation Center to Prevent Childhood Obesity.

The foundation sponsored a *Health Affairs* briefing on childhood obesity on March 2 to introduce the journal's March 2010 issue, which is devoted to combating childhood obesity. Among the topics addressed during the briefing were current trends in childhood obesity; what contributes to the problem; what solutions can be implemented; and what roles government, schools, businesses and families can play in addressing the issue. A number of policy briefs made available discuss, among other matters, "The Role of Agriculture Policy in Reducing Childhood Obesity," "Speeding Up Progress in Fighting Obesity in Schools," "Lessons from States on Fighting Childhood Obesity," "The Pervasive Effects of Environments on Childhood Obesity," and "Food Marketing and Distribution's Role in the Fight Against Childhood Obesity." The latter cites research linking food marketing and distribution to "adding pounds to children"; it recommends "limiting advertising directed at children that tries to influence them to purchase unhealthy and high-calorie foods."

Health Affairs Editor-in-Chief Susan Dentzer introduces the March issue by calling childhood obesity "a form of child abuse with horrific consequences." Among the articles appearing in the journal is one co-authored by Rudd Center for Food Policy and Obesity Director Kelly Brownell titled "Personal Responsibility and Obesity:

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A Constructive Approach to a Controversial Issue"; another is titled "Childhood Obesity: The New Tobacco." Many were financially supported in part by the RWJ Foundation.

The Brownell article contends that the "centerpiece of food industry arguments against government action" is blaming obesity on the "irresponsibility of individuals." The article points to research purportedly showing instead that behaviors related to diet and activity are highly responsive to "access, pricing, portions, marketing, and other powerful [external] drivers." Claiming that "individualistic and public health views can be reconciled," the article calls for collective action to support personal responsibility, saying this is "central to public health." The actions recommended include restaurant menu labeling, healthy foods in schools, regulation of food marketing and food ingredients, and imposing taxes on sugar-sweetened beverages.

The article comparing childhood obesity to tobacco asserts that tobacco control was "a successful public health movement because of shifts in social norms and because cigarette companies came to be perceived by many as a common enemy." The authors contend that framing obesity the same way "can lead to consensus regarding the interventions needed to achieve healthier children and communities." They call for building a broad movement for obesity prevention that includes framing obesity as a threat, taxing high-calorie food and beverages, making changes to the existing "toxic food environment," and bringing about "true cooperation and change by the food industry . . . rather than delays and diversionary actions."

In a related development, the Food Marketing to Children Workgroup recently submitted **comments** to the Federal Communications Commission (FCC) in response to its notice of inquiry on "Empowering Parents and Protecting Children in an Evolving Media Landscape." The workgroup apparently represents numerous individuals and organizations "concerned about the proliferation of food and beverage marketing targeting children and adolescents." Among other matters addressed in the group's comments are the "risks of electronic and digital media to children and adolescents," First Amendment issues related to "regulating food marketing to children," and "effective coordination of government efforts to protect children and adolescents in an evolving digital media and marketing landscape."

The workgroup calls for improving industry's self-regulatory efforts, including an FCC rulemaking proceeding "to examine what more it can do to address food marketing to children within its current statutory authority," efforts to support the Federal Trade Commission's initiatives to address behavioral advertising and mobile marketing to children, and the elimination of advertising for high-calorie and low-nutrient food and beverage products.

New York Senator Urges EPA to Take Action on Bisphenol A; Controversy Brews over BPA Research

Senator Charles Schumer (D-N.Y.), who introduced legislation that would prohibit the use of bisphenol A (BPA) in children's products, has written to the U.S. Environmental Protection Agency's (EPA's) administrator seeking an explanation for the

agency's decision to omit BPA from its December 2009 chemical action plan. In the March 2, 2010, letter, Schumer refers to scientific research purportedly identifying BPA risks "particularly to infants and children," and the Food and Drug Administration's recent decision to reverse its conclusion that the chemical is safe for all uses.

Schumer also refers to a *Milwaukee Journal-Sentinel* article reporting that "the agency does not plan to formulate any new plan for regulating BPA for two years. If this is true, it is alarming. At a time when we should be speeding up steps to limit Americans' exposure to this potentially hazardous chemical, such a decision would apply the brakes." That article apparently took note of EPA's decision to leave BPA off its chemical action list occurring one week after administration officials met with chemical industry lobbyists.

According to a press release from Schumer's office, "While the newspaper provided no evidence that the EPA's [decision] happened as a direct result of the meeting, it did raise questions about why the agency would back off its previously tough approach on BPA." Schumer also observes that "BPA is the basic building block for polycarbonate plastic, which, in turn, is used to make various products including refillable food and beverage containers." He notes that the chemical "is found in 90 percent of infants when they are born, and studies have detected it in the urine of 93 percent of Americans. It has been linked to a range of immune and reproductive deficiencies and disorders." *See Press Release of Senator Charles Schumer*, March 2, 2010.

Meanwhile, *InsideEPA* has reported that EPA is "poised to unveil several new steps to address the risks posed by the ubiquitous plastic ingredient bisphenol-A (BPA) but industry and environmentalists are continuing their long-running debate over the chemical's potential developmental effects on fetuses, infants and children." During a House Energy and Commerce subcommittee meeting, an EPA assistant administrator reportedly suggested that the chemical could be added to the drinking water contaminant monitoring list. The White House Office of Management & Budget was said to have released an EPA action plan on BPA on March 2, but it has not been made publicly available.

The American Chemistry Council is now apparently claiming that its position on BPA's safety has been strengthened by a new study appearing in *Toxicological Sciences*. A council spokesperson was quoted as saying, "This new study, which exposed pregnant rodents to a range of BPA dietary doses from low to high concluded that BPA had no effects on brain development or behavior in their offspring that had been exposed to BPA in utero and throughout development." The chemical's critics, including BPA researcher Frederick vom Saal, wrote to the journal along with 23 other researchers, to point out flaws in the study. According to vom Saal, the study used lab animals that were not responsive to the chemical tested. Apparently, the rats had to be exposed to extremely high doses of another hormone to trigger the reproductive endpoints of interest, thus, they were essentially insensitive to estrogen and would have required exposure to even higher BPA doses for the research to be valid. *See InsideEPA.com* and *The Pump Handle*, March 2, 2010.

In a related development, a paper delivered at the annual meeting of the American Academy of Allergy, Asthma & Immunology has purportedly linked BPA exposure in female mice to the enhanced susceptibility of their pups to allergic asthma. Y.

Nkajima, et al., "Dose Response of Maternal Exposure to Bisphenol A on the Development of Experimental Asthma in Mouse Pups." According to the researchers, the findings are significant because the dosage mimicked the burden of chronic human BPA exposure. *See Foodproductiondaily.com*, March 2, 2010.

FDA Warns Food and Beverage Companies Their Products May Be Seized If Labeling Claims Continue to Violate the Law

Taking aim at companies that make (i) nutrient content claims on foods and beverages intended for children younger than age 2, (ii) 0 gram *trans* fat claims on products high in saturated fats, and (iii) health-related claims, such as the treatment or mitigation of disease, the Food and Drug Administration (FDA) has issued **warning letters** to 17 companies and an open letter to industry indicating that it will crack down on false or misleading labeling and marketing claims.

Among the targeted companies are Dreyer's Ice Cream, Inc. (ice cream—no *trans* fat), Beech-Nut Nutrition Corp. (baby food—nutrient claims for children younger than age 2), Nestle (Juicy Juice products—implied 100 percent juice for juice blends with added flavors), Pompeian, Inc. (olive oil—treat, prevent and cure diseases), Redco Foods (green tea—antioxidants effective in the prevention of cardiovascular disease), and Diamond Food, Inc. (shelled walnuts--omega-3 claims about treating, preventing or curing diseases). Some of the companies are currently defending litigation filed by plaintiffs who allege they are making misleading labeling claims.

According to FDA Commissioner Margaret Hamburg, the companies have been notified that "their labels are in violation of the law and subject to legal proceedings to remove misbranded products from the marketplace," including seizure or injunction. The action is part of Hamburg's goal to improve "the scientific accuracy and usefulness of food labeling." She notes that the examples provided by the targeted companies "are not indicative of the labeling practices of the food industry as a whole," which, she senses, has a "strong desire . . . for a level playing field and a commitment to producing safe, healthy products." The warning letters, sent at the end of February 2010 and made public on March 3, were intended to "give food manufacturers further clarification about what is expected of them as they review their current labeling." Hamburg indicates that the agency will "soon issue new draft guidance relating to front-of-pack calorie and nutrient labeling."

The Center for Science in the Public Interest (CSPI) called the agency's action "a loud and clear signal to industry that time is running out on misleading health-related claims on labels." While the consumer watchdog welcomed the initiative, it warned, "unless the FDA uses its authority to issue new, industry-wide regulations to prevent such abuses, the agency will forever be playing a game of Whac-A-Mole with companies that use deceptive labeling."

According to news sources, several of the targeted companies have indicated they will change their labels and Web sites promptly, while at least one company, POM Wonderful, contended that all of its product claims "are true and supported by unprecedented scientific research. Once FDA reviews and better understands the substantial science, we are confident that the agency will agree with our position." *See FDA Press Release*, *CSPI Statement, The New York Times,* March 3, 2010; *The Washington Post*, March 4, 2010.

In a potentially related development, *The Wall Street Journal* reports that FDA plans to increase prosecutions of food industry executives in an effort to revamp its criminal division. The article cites a Government Accountability Office (GAO) **report** that calls for the agency to strengthen oversight of its Office of Criminal Investigations (OCI) to improve its effectiveness as an enforcement tool. Also quoted is an FDA letter to Senator Chuck Grassley (R-Iowa) stating that an internal committee has recommended that FDA and its investigations arm "increase the appropriate use of misdemeanor prosecutions, which allows responsible corporate officials to be held accountable and is a valuable enforcement tool."

According to GAO's "Food and Drug Administration: Improved Monitoring and Development of Performance Measures Needed to Strengthen Oversight of Criminal and Misconduct Investigations," FDA funding and staffing of OCI has increased significantly since 1999, with a corresponding increase in investigations and workload, but communications between the investigations arm and senior-level agency officials is not ideal and has led to a lack of accountability. FDA has agreed with GAO's recommendations to (i) "regularly monitor OCI" and (ii) "establish performance measures for OCI to assess whether OCI is achieving its desired results." FDA's letter to Senator Grassley reportedly said that the agency is looking for the OCI to share information with FDA leaders on a regular basis and to pick better cases to prosecute.

The *WSJ* article notes that a federal appeals court judge "slammed the government" in 2009 for its investigation and prosecution of a salad-dressing wholesaler who changed the labels on 1.6 million bottles of salad dressing to extend their "best when purchased by" date. A lower court had convicted the wholesaler for misbranding, but the appeals court reversed, finding no applicable regulations, as well as "improper," "inadmissible" and "incoherent" testimony on the part of an FDA employee. Additional information about the case appears in issue 296 of this Update. *See The Wall Street Journal*, March 4, 2010.

FDA Survey Finds That Majority of Consumers Read the Full Food Label

With the recent uptick in consumer fraud class actions targeting food and beverage labels, and opinions like the Ninth Circuit's in *Williams v. Gerber*, 552 F.3d 934 (2009) (reinstating a proposed class action and finding that consumers should not be "expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box"), the **findings** of a recent Food and Drug Administration health and diet survey are good news to manufacturers of food and beverage products.

On March 2, 2010, FDA released the results of a nationwide **survey** conducted in 2008 on consumer behaviors, knowledge, attitudes, and beliefs about health and diet. Specifically included were questions about consumer use of packaging labels. Fifty-four percent of consumers "often" read the food label the first time they buy a product. Of these, two-thirds do so to determine how high or low a food is in terms of calories, salt, fat, etc., and more than one-half do so to get a general idea of the food's nutritional content. More than one-half of those surveyed (56 percent) believe that "only some" or "none" of nutrient claims such as "low fat" or "high fiber"

are accurate. Only about one-third (31 percent) "often" use front-of-the-package descriptors in making their purchasing decisions.

The survey findings are particularly noteworthy in the class action context. Not only does the survey show that most consumers approach front-of-the-package food labels with skepticism, it also provides statistical evidence supporting the varied reactions consumers have when it comes to food labels. This variety supports an argument that no "typical" label-interpretation claim exists, as well as an argument that individualized fact finding regarding how each putative class member responds to a food label would "predominate." That the survey contrasts the 2008 results to similar surveys conducted in 2004 and 2002 (with the passage of time, consumers are more likely to read the full label) also provides a basis for arguing against certification of proposed classes defined to span these various years.

Analysis prepared by SHB Global Product Liability Partner **Holly Pauling Smith** who focuses her practice on class actions and complex litigation.

FDA Commissioner Outlines Agency Priorities During Food Summit in D.C.

FDA Commissioner Margaret Hamburg offered her views on how the agency will move forward on food safety and labeling issues during a "Food Summit" sponsored by *The Atlantic* magazine at the Newseum in Washington, D.C., March 4, 2010. Hamburg stated that she plans to focus on two critical aspects of food policy: safety and how to make it easier for consumers to make more nutritious choices and reduce the risk of disease.

She pointed to three converging factors that affect food safety. First, she stated that both consumers and the industry support reform measures and want a system focused on prevention, where everyone in the supply chain is held accountable and imports are required to meet U.S. standards. Second, she noted that current U.S. food safety legislation (H.R. 2749—passed by the House in July 2009 and expected to be taken up by the Senate this spring) would mandate a shift from reaction to prevention and would give FDA important tools, such as mandatory recall authority, as well as new powers to regulate food imports. Third, she referenced the White House's actions to make food safety a priority, e.g., through establishment of the Food Safety Working Group.

Hamburg's food safety action plan includes a prevention-oriented system; a farm-to-table approach that addresses the areas of highest risk and vulnerability, government partnerships with other federal, state and local agencies; collaboration with trading partners to harmonize food safety standards and help to strengthen regulatory schemes in developing countries exporting to the United States; and a strengthened and unified FDA food safety system.

Regarding nutrition, Hamburg took note of Michelle Obama's "Let's Move" initiative and said that part of this effort must empower consumers to choose more healthy foods. She also discussed updating the food labeling system and noted that the emergence of certain claims on food labels may not always accurately reflect the properties of the food. Hamburg referred to the recently released report indicating that consumers are paying attention to the information on food labels. She also indi-

cated that improving the accuracy of food labels must be a priority and mentioned FDA's issuance of the warning letters reported elsewhere in this Update.

As for food labeling, Hamburg discussed modifying the Nutrition Facts Panel, particularly by making the calorie declarations more prominent and updating serving sizes. She also mentioned front-of-pack labels and actions the agency is taking to devise a forthcoming proposed rule and guidance useful to all stakeholders. Finally, Hamburg indicated that she is monitoring current legislation that would require national restaurant chains to provide nutrition labeling and efforts to reduce sodium consumption such as the recent initiative in New York City.

Sarah Sunday, a D.C.-based member of SHB's Agribusiness & Food Safety Practice, prepared this summary and attended the summit, which featured panel discussions about "Feeding the World," "The Next Era of Food Safety" and "The Way We Eat."

Wisconsin and Maryland Take Action on BPA in Baby Bottles, Sippy Cups

Wisconsin Governor Jim Doyle (D) has signed a bill (S.B. 271) that bans bisphenol A (BPA) in baby bottles and sippy cups for children younger than age 3, joining Minnesota and Connecticut in prohibiting this use of a packaging chemical purportedly linked to developmental problems in young children. The Wisconsin bill, effective June 2010, prohibits the manufacture and sale at wholesale of baby bottles and sippy cups with BPA and requires such bottles and cups to be labeled free of BPA. Massachusetts, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Vermont, Washington, and Washington, D.C., are also considering BPA legislation.

Meanwhile, the Maryland Senate recently approved a similar bill (S.B. 213), which Governor Martin O'Malley (D) is reportedly expected to sign this spring. The bill, which would take effect in January 2012, would apply to "an empty bottle or cup to be filled with food or liquid that is designed or intended by a manufacturer to be used by a child under the age of 4 years." It also requires "a person to use the least toxic alternative" when manufacturing bottles or cups for children younger than 4 and forbids manufacturers from replacing BPA with substances rated by the Environmental Protection Agency as Group A, B or C carcinogens or reproductive toxicants. *See Product Liability Report 360,* February 26, 2010; *Milwaukee Journal Sentinel,* March 3, 2010.

EU Approves GM Potato for Cultivation; Some Members Criticize Move

The European Commission (EC) has reportedly approved for the first time in 12 years a genetically modified (GM) crop to be grown solely for industrial or animal feed purposes in the European Union. EU Commissioner for Health and Consumer Policy John Dalli told reporters that the GM Amflora potato produced by the German company BASF could be planted in Europe as soon as April 2010. The potato is purportedly engineered to be unusually rich in a starch suitable for making glossy paper and other products as well as for feeding animals.

Some EU member states, however, reportedly oppose the certification, claiming that the biotech potato could pose health risks to humans if its antibiotic-resistant gene enters the food chain when livestock is fed its industrial pulp or harm the

environment if its seeds accidentally spread. "Not only are we against this decision, but we want to underscore that we will not allow the questioning of member states' sovereignty on this matter," Italy's agriculture minister was quoted as saying.

Dalli reportedly stated that he planned to present a proposal this summer that would give member states more authority to decide whether to allow GM crop cultivation within their borders. "Responsible innovation will be my guiding principle when dealing with innovative technologies," he said in a March 2, 2010, EC press release, adding that the decision to clear the Amflora variety was based on a "series of favorable safety assessments carried out over the years by the European Food Safety Authority." *See The New York Times, guardian.co.uk*, March 3, 2010; *The Independent*, March 4, 2010.

Australia Implements New BSE Policy for Imported Beef

Food Standards Australia and New Zealand (FSANZ) has lifted a nine-year ban on imported beef and beef products, implementing a new policy that requires export countries to undergo a risk assessment for bovine spongiform encephalopathy (BSE). According to FSANZ, "certain beef and beef products may be imported from countries that apply and are assessed by Australian authorities as being able to demonstrate they have in place, and appropriately monitor, controls necessary to ensure that beef and beef products exported to Australia are derived from animals free of BSE." Australian regulators will also conduct in-country inspections when warranted.

The policy uses the BSE risk assessment methodology developed by the World Organization for Animal Health to determine the BSE risk status of a cattle population and to assess whether the beef and beef products from a country represent a health risk. These restrictions currently cover meat, bone and offal from cattle, bison and buffalo but exclude milk, dairy products, gelatin and collagen derived from bovine skins and hides, edible bovine fats, and bovine tallows included as a minor ingredient of a processed product. "In addition," notes FSANZ, "the importation of beef and beef products for human consumption into Australia from a country is subject to a market access request and quarantine requirements determined by Biosecurity Australia."

LITIGATION

Court Rules Packaging Co. Breached KFC Contract by Supplying Flaming Chicken Containers

A federal court in Kentucky has determined as a matter of law that a company which tested, developed and approved paper packaging for customers buying KFC Popcorn chicken breached its contract because the containers caught fire while being microwaved. *KFC U.S. Props., Inc. v. Paris Packaging, Inc.*, No. 09-00249 (U.S. Dist. Ct., W.D. Ky. at Louisville, decided February 25, 2010). So ruling, the court granted KFC's motion for partial summary judgment. Additional details about the lawsuit appear in issue 299 of this Update.

According to the court, the parties' contract specified that the packaging company would be responsible for ensuring the product was safe regardless of any standards, specifications or other information KFC provided. Because it was reasonably foreseeable that customers would microwave their KFC chicken in the paper box in which they took it home, the court held that the defendant breached its contract by providing unsafe packaging that was unfit for its intended and reasonably foreseeable uses.

Advocacy Groups Ask Court to Stop Planting of GE Crops in Wildlife Refuge

Three advocacy organizations have sued Department of the Interior Secretary Ken Salazar and the U.S. Fish & Wildlife Service (FWS), charging them with violations of the National Environmental Policy Act (NEPA) for failing to prepare an environmental impact statement (EIS) before entering into contracts that allow farmers to cultivate genetically engineered (GE) crops at the Bombay Hook refuge in Delaware. *Delaware Audubon Soc'y v. Salazar*, No. 1:99-mc-09999 (U.S. Dist. Ct., D. Del., filed March 1, 2010). The refuge reportedly spans 16,000 acres of mainly tidal marshes that provide habitat for many waterfowl species that attract bird-watchers.

Claiming that GE crops harm the environment by increasing the use of herbicides with adverse effects on soil, water, amphibians, and birds, and with the development of "superweeds" resistant to certain herbicide ingredients, the plaintiffs allege that defendants have repeatedly ignored legal obligations under NEPA to provide an environmental assessment or an EIS. The refuge has leased some 800 acres on which GE corn and soybeans have been planted.

The complaint alleges violations of NEPA and the Administrative Procedures Act and seeks declarations to that effect as well as "preliminary and injunctive relief barring Defendants from allowing any cultivation of GE crops at the Bombay Hook Refuge until compliance with NEPA is achieved." Plaintiffs, whose members allegedly "live in, adjacent to or near, and/or enjoy the use of the Bombay Hook Refuge," also seek costs and attorney's fees. According to a news source, the groups decided to challenge GE cultivation at this refuge because in 2009 they won a similar suit involving the nearby Prime Hook refuge. The Widener Environmental & Natural Resources Law Clinic filed the complaint on behalf of the Delaware Audubon Society, Center for Food Safety and Public Employees for Environmental Responsibility. *See Philadelphia Inquirer*, March 2, 2010.

Agency Action on Omega 3 Followed by Litigation Against Gummy Fish Maker

A putative class action has been filed in a Washington state court by plaintiffs claiming that L'il Critters Omega-3 Gummy Fish® are deceptively marketed as products that will "Promote Healthy Brain Function" in children. ***Aust v. NW Natural Prods., Inc.*, No. 10-2-07949-1 (Wash. Super. Ct., King County, filed February 23, 2010**). In fall 2009, the Federal Trade Commission (FTC) warned the defendant that its claims may violate federal false advertising laws, and the company modified its marketing materials. Additional information about the FTC's actions on products with omega-3 related claims appears in issue 338 of this Update.

Seeking to represent a class of all Washington residents who have purchased the company's omega-3 gummy fish products, the plaintiffs allege violations of Washington's consumer protection act, breach of warranties, conversion and unjust enrichment. They seek a class certification order, a declaration that the company's conduct was unlawful, actual damages, statutory damages including treble damages, punitive damages, attorney's fees, and costs.

OTHER DEVELOPMENTS

Rudd Center Publishes Study on Point-of-Sale Marketing

Yale University's Rudd Center for Food Policy and Obesity has published a **study** alleging that the "number of products with youth-oriented cross-promotions increased by 78%" between 2006 and 2008. Jennifer Harris, et al., "Marketing foods to children and adolescents: licensed characters and other promotions on packaged foods in the supermarket," *Public Health Nutrition,* March 2010. After examining 397 products gathered on three separate occasions from one large U.S. supermarket, researchers reported that (i) "71% of cross-promotions involved third-party licensed characters"; (ii) "57% appealed primarily to children under 12 years of age"; (iii) "the use of other forms of promotion increased from 5% of the total in 2006 to 53% in 2008"; and (iv) "promotions targeting pre-school and general audiences increased from 23% to 54% of the total." In addition, they wrote, "Only 18% of products met accepted nutrition standards for foods sold to youth, and nutritional quality declined during the period examined."

The authors specifically criticized cross-promotions from "seven food manufacturers who had publicly pledged to reduce food marketing to children at the launch of the CBBB [Council of Better Business Bureau] initiative," which asked companies to "shift the mix of advertising messages directed to children under 12 to encourage healthier dietary choices and healthier lifestyles." Although the use of the third-party licensed characters and promotions targeting children did decline from 2006 to 2008, the study purportedly registered "an increase in most other types of promotional partners and promotions targeting pre-schoolers and a broader youth audience." Moreover, according to the report, "the overall use of youth-oriented promotions on packaging by food companies that have signed CBBB pledges did not decline significantly in proportion to the total, and the nutritional value of the products promoted did not improve."

The Rudd Center is calling on the Federal Trade Commission and food manufacturers to use these results to improve the scope and content of self-regulatory efforts. In particular, the study authors recommend that "food industry pledges should extend to marketing that targets all youth to avoid simply shifting advertising efforts to a broader audience that continues to include significant numbers of children of adolescents." As they ultimately concluded, "A continued absence of real progress in the marketing environment is likely to reinforce support for more direct interventions, including government regulations to enforce reductions in unhealthy food marketing to youth."

Report Estimates Foodborne Illness Costs $152 Billion Annually

The Pew Charitable Trusts' Produce Safety Project (PSP) recently published a cost analysis claiming that health-related expenditures for foodborne illness far exceed the U.S. Department of Agriculture's estimate of $6.9 billion annually.

Authored by former Food and Drug Administration (FDA) economist Robert Scharff, the report concludes that the United States spends $152 billion per year on foodborne illnesses from all sources. The study also notes that these numbers cover health-related costs only and thus represent "a lower bound estimate of the total societal costs," including costs to industry and government. "Even when pain and suffering losses from acute illnesses are not included, the cost to society is $103 billion," maintains the report, which used FDA methods to determine the costs of physician services, pharmaceuticals, and hospital visits related to food-borne illnesses, as well as quality of life losses such as lost life expectancy, pain and suffering, and functional disability.

Intended as a tool for legislators, program officers and regulatory economists, the report further suggests that foodborne illnesses traced to fresh, canned and processed produce are "responsible for $39 billion of health-related losses." In addition, it names California, Texas, New York, Florida, Illinois, and Pennsylvania as the states most affected by these particular outbreaks. "This report makes it clear that the gaps in our food-safety system are causing significant health and economic impacts," a Pew spokesperson was quoted as saying. "Especially in challenging economic times we cannot afford to waste billions of dollars fighting preventable diseases after it is too late. The Senate needs to act on this now and pass legislation that will improve protections for public health." *See Business Week, MSNBC.com, Los Angeles Times, Pew Charitable Trusts Press Release, PSP Press Release,* and *USA Today,* March 3, 2010.

SCIENTIFIC/TECHNICAL ITEMS

Study Compares Strategies to Decrease Dietary Sodium Intake

A recent study has apparently concluded that industry efforts to reduce mean sodium intake by 9.5 percent could avert "513,885 strokes and 480,358 MIs [myocardial infarctions] over the lifetime of adults aged 40 to 85 years who are alive today compared with the status quo, increasing QALYs [quality-adjusted life-years] by 2.1 million and saving $32.1 billion in medical costs." Crystal Smith-Spangler, et al., "Population Strategies to Decrease Sodium Intake and the Burden of Cardiovascular Disease: A Cost-Effectiveness Analysis," *Annals of Internal Medicine,* March 1, 2010. By comparison, a sodium tax of 40 percent would achieve only a 6 percent reduction in salt intake, averting 327,892 strokes and 306,173 MIs, increasing QALYs by 1.3 million and saving $22.4 billion over the same period.

Researchers specifically assessed the cost-effectiveness of two population strategies to reduce sodium intake: "government collaboration with food manufacturers to voluntarily cut sodium in processed foods, modeled on the United Kingdom experience, and a sodium tax." They concluded that "[c]ollaboration with industry to

establish voluntary sodium targets in processed foods is likely to be more effective than a sodium tax and seems to be an appropriate first step toward reducing population sodium intake and the burden of CVD [cardiovascular disease]."

Meanwhile, the director of the Centers for Disease Control and Prevention (CDC), Thomas Frieden, co-authored an **editorial** that praises the study for providing "compelling evidence that a policy-driven approach can reduce sodium intake, save money, and save lives." Concurring that "sodium reduction will rely on action by the food industry," the editorial highlights the U.S. National Salt Reduction Initiative's voluntary targets for restaurant and packaged foods, as well as strategies that include "product development and reformulation by food manufacturers, public health and health education interventions, and regulatory or legislative options." It notes, however, that "the very low unit cost of salt and the complexity of taxing a component of multiple products make it likely that taxation would not be either sufficiently high, or practically implementable, or both." *See Bloomberg.co* and *Reuters,* March 2, 2010.

Snacking Reportedly on the Rise Among U.S. Children

A recent study has reportedly claimed that "nationally representative surveys of food intake in U.S. children show large increases in snacking between the 1989-91 to 1994-98 and 1994-98 to 2003-06 periods." Carmen Piernas and Barry Popkin, "Trends in Snacking Among U.S. Children," *Health Affairs,* March 2010. Researchers apparently examined the responses of 31,337 children ages 2 to 18 who participated in four federal food surveys, concluding that this population's average dietary intake has risen by 113 calories per day. In addition, the study reports, "Childhood snacking trends are moving toward three snacks per day, and more than 27 percent of children's daily calories are coming from snacks.

The researchers further noted that while "desserts and sweetened beverages remain the major sources of calories from snacks," calories from salty snack foods more than doubled between 1977 and 2006. "Our findings suggest that children ages 2–18 are experiencing important increases in snacking behavior and are moving toward a consumption pattern of three meals plus three snacks per day," wrote the authors. "This raises the question of whether the physiological basis for eating is becoming dysregulated [sic], as our children are moving toward constant eating." *See Reuters* and *The New York Times,* March 2, 2010.

Antimony Allegedly Detected in EU Commercial Fruit Juices

According to researchers from Denmark and Greece, some juice drinks obtained from markets in the European Union (EU) contain levels of antimony, a suspected carcinogen related to arsenic, above EU drinking water limits. Claus Hansen, et al., "Elevated antimony concentrations in commercial juices," *Journal of Environmental Monitoring*, February 17, 2010. According to the article, "Antimony concentrations up to a factor of 2.7 above the EU limit for drinking water were found in commercial juices and may either be leached from the packaging material or introduced during manufacturing, pointing out the need for further research." The researchers reportedly tested antimony levels in 42 different beverages, primarily red fruit juices,

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produced in the United Kingdom and sold in polyethylene terephthalate (PET) bottles or Tetra Pak® cartons. They apparently found antimony above established safe levels in eight of them.

Lead researcher Claus Hansen noted that while the levels exceeded drinking water limits, because "no antimony limits exist for foodstuffs . . . no legislation has been broken." A spokesperson for the British Soft Drinks Association defended the industry and was quoted as saying, "Fruit juices and juice drinks are safe. There is no read across between the levels of antimony permitted in drinking water and those that might be acceptable in a fruit juice or a juice drink." *See Express.co.uk*, March 1, 2010.

CONFERENCES AND SEMINARS

SHB Lawyer to Address Food Class Action Trends at Conference in Italy

SHB Associate Marc Shelley will participate in the "Food Law Seminar" of the International Association of Young Lawyers, scheduled to take place in Parma, Italy, May 6-8, 2010. Shelley, who practices from Shook's Geneva office, will join a panel of speakers addressing the topic "Concise worldwide survey about the class action regime particularly with respect to food legislation." He will focus his remarks on class action trends in Europe and the United States and their impact on the new Italian class action law.

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FOOD & BEVERAGE LITIGATION UPDATE

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.