Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

New York Senator Unveils Consumer Recall Notification Act

U.S. Senator Kirsten Gillibrand (D-N.Y.) has introduced legislation (S.B. 3114) that would require food distributors, retailers and health agencies to notify consumers and local officials in the event of a Class I food recall. Under the Consumer Recall Notification Act, the Food and Drug Administration (FDA) could ask grocery stores and other retailers to provide "on-site notification" where recalled foods are sold. In addition, purveyors that track data through customer card systems would need to alert, by phone and mail, the purchasers of recalled items or risk civil penalties of $100 per customer. Suppliers would also need to notify "applicable retail establishments and restaurants" within 24 hours of a Class I recall to avoid a $1,000 penalty per day, per notification of each level of distribution.

"In America, in 2010, it is unconscionable that we don't have an effective way to communicate food-borne illness outbreaks to consumers and health departments," Gillibrand said in a March 16, 2010, press release. Her legislation includes a provision tasking FDA and other federal agencies with improving communication among states, local health departments and frontline health professionals.

EPA Supports Draft EIS in GE Alfalfa Dustup

The U.S. Environmental Protection Agency (EPA) has submitted comments to USDA's Animal and Plant Health Inspection Service (APHIS) indicating that it "does not object" to APHIS's draft environmental impact statement (EIS) on genetically engineered (GE) alfalfa, prepared by court order after a successful court challenge to USDA's decision to deregulate the bioengineered seed. Environmentalists convinced the court that APHIS erred in allowing GE alfalfa to be grown without conducting a detailed environmental review; they claimed that it would have deleterious effects on the environment and affect the livelihood of farmers who grow conventional or organic alfalfa. An injunction has been in place preventing the sale of GE alfalfa seed or its cultivation until the EIS is finalized.

EPA did call for clarification to the EIS Surface Water discussion, which indicates that "glyphosate and its metabolite aminomethyphosphonate can be removed through standard water purification and disinfection processes such as ozonation and chlorination. EPA recommends that this discussion be expanded to include impacts

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glyphoste and aminomethyphosphonate may have on drinking water quality in areas where the level of treatment of drinking water does not include ozonation and chlorination." GE alfalfa is bioengineered to be tolerant to Roundup Ready®, a herbicide containing glyphosate; the herbicide can be applied to fields to kill weeds without harming the crop.

While the draft EIS finds little to no harmful environmental effects, a number of organizations have submitted comments raising concerns and criticizing APHIS for not considering a range of alternatives. According to a news source, the Union of Concerned Scientists urged the agency "to deny the [Monsanto] request for nonregulated status for [the Roundup Ready] alfalfa because the proposed stewardship plan is fundamentally flawed and will not ensure [non-GE] alfalfa seed purity." The Center for Food Safety reportedly commented, "APHIS gives the false impression throughout the EIS that alfalfa is an herbicide-intensive crop like corn or soybeans. This false impression sets up an equally false 'need' for a pesticide-based weed control technology like Roundup Ready alfalfa." *See InsideEPA.com* and *Federal Register*, March 12, 2010.

FDA Meets with Spice Industry to Examine Supply Safety

The Food and Drug Administration (FDA) has reportedly met with spice industry representatives to consider ways to make spices safer amid a nationwide *Salmonella* outbreak linked to black and red pepper. According to a news source, FDA wants companies to prevent contamination by using one of three methods to rid spices of bacteria: irradiation, steam heating or fumigation with the pesticide ethylene oxide. The American Spice Trade Association is expected to address the issue at its annual meeting to be held April 25-28, 2010, in Naples, Florida.

Although FDA does not possess authority to order manufacturers to treat their products, the agency recently reaffirmed its intention to take a closer look at spice handling "from farm to table" and to create a spice risk profile focusing on "microbiological contaminants and filth issues related to spices." As FDA stated in a March 17, 2010, press release, this risk profile will help determine the best way to mitigate foodborne illness issues associated with spices, including "how to allocate resources, whether guidance for industry or for FDA inspectors is appropriate, or even the need for new rulemaking."

"The bottom line is, if there are readily available validated processes out there to reduce the risk of contamination, our expectation is that they will use them," Jeff Farrar, FDA's associate commissioner for food safety, was quoted as saying. *See The Washington Post,* March 14, 2010.

FDA Task Force Seeks Public Input on Ways of Increasing Transparency with Industry

The Food and Drug Administration (FDA) has **requested** public comments on how the agency can increase transparency in its interactions with regulated industry. According to a March 12, 2010, FDA press release, the agency regulates products responsible for approximately 25 percent of the U.S. gross national product, as

well as overseeing the industries that manufacture these items, which include foods, veterinary medicines, human drugs, and medical devices. FDA's Internal Transparency Task Force, which already held public meetings in 2009, is developing "recommendations for making information about FDA activities and decisions more useful, understandable, and readily available, while protecting confidential information."

Representing FDA's third and final phase of its transparency initiative, the latest request particularly seeks ideas on how the agency can (i) improve training and education for regulated industry about its regulatory process in general and about specific new requirements, (ii) strengthen the guidance development process, (iii) maintain open channels of communication with industry routinely and during crises; and (iv) provide useful and timely answers to industry questions about specific regulatory issues. FDA has requested public comments by April 12, 2010. *See Federal Register,* March 12, 2010.

FDA Seeks Comments on Information Collection Under Security and Bioterrorism Law

The Food and Drug Administration (FDA) has issued two requests for public comments regarding proposed collections of information under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. One **notice** involves the registration of domestic and foreign food facilities. FDA is calling on owners, operators or agents "in charge of domestic or foreign facilities that manufacture/process, pack, or hold food for human or animal consumption in the United States," to provide comments on (i) whether FDA's proposed information collection is necessary for the agency's performance and the information has practical utility, (ii) the accuracy of the agency's information-collection burden estimates, (iii) ways of improving the "quality, utility, and clarity of the information to be collected," and (iv) ways to minimize collection burdens.

The second **notice** concerns the collection of information pertaining to prior notice of imported food. Under the Act, FDA must "receive prior notice for food, including food for animals, that is imported or offered for import into the United States." FDA regulations implementing the law set forth the requirements for submitting prior notice and the procedure for requesting FDA review after a food has been refused admission or placed on hold. According to the notice, the law "allows FDA, with the support of the U.S. Customs and Border Protection (CBP), to target import inspections more effectively and help protect the nation's food supply against terrorist acts and other public health emergencies."

FDA seeks comments on the same topics outlined in the food-facility registration notice. The deadline for comments on both notices is May 17, 2010. *See Federal Register*, March 16, 2010.

Task Force on Childhood Obesity Requests Public Help

The U.S. Departments of Agriculture, Education and Health and Human Services have **requested** public input to assist the Task Force on Childhood Obesity. President Barack Obama (D) created the task force in February 2010 to enhance coordination

among private sector companies, nonprofits, government agencies, and other organizations to address the critical health issue. The task force was directed to review objectives that include (i) ensuring access to healthy, affordable food; (ii) increasing physical activity in schools and communities; (iii) providing healthier foods in schools; and (iv) empowering parents with information and tools to make good choices for themselves and their families. With these four goals in mind, the task force is seeking recommendations on the most important actions that both the public and private sectors can take, as well as strategies capable of reaching "across geographic areas and to diverse racial, ethnic, socioeconomic, and geographic groups." In addition, comments might identify (i) discrete and measurable benchmarks within each objective; (ii) key unanswered research questions; (iii) explanations of why particular children do *not* become obese; (iv) the biggest challenges to enhancing access to healthy and affordable food; and (v) steps that can be taken to improve quality physical education and expand opportunities for physical activity during the school day. Comments should be submitted by March 26, 2010. *See Federal Register,* March 16, 2010.

FSIS Issues Temporary Labeling Guidance for Products Containing Recalled HVP

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has issued temporary labeling **guidance** for products that contain hydrolyzed vegetable protein (HVP) recently recalled for *Salmonella* contamination. As companies reformulate their products due to the recall, existing labels are likely to be out of compliance and may require temporary approval for continued use. To obtain temporary approval, companies are asked to follow the **instructions** highlighted on the FSIS Web site and submit a request to the FSIS Labeling and Program Delivery Division, which will expedite the requests marked clearly with a justification such as "HVP temporary label submission."

FSIS will grant temporary approval for any product if the HVP is removed and any replacement ingredients do not represent an allergen concern. "In situations where negative claims or nutrient content claims appear on labeling, it is critical to stipulate that all claims will continue to be met, or provide information to support that claims remain correct," according to FSIS. *See FSIS Constituent Update,* March 12, 2010.

Meanwhile, the HVP manufacturer at the center of the recall has publicly objected to suggestions that it knowingly shipped tainted products to consumers. Basic Food Flavors, Inc., has apparently criticized Food and Drug Administration (FDA) officials for mischaracterizing the actions taken by the company, which initially believed that the contamination affected only one lot and had notified the customer accordingly. "While it is unclear whether FDA is suggesting in the Form 483 that Basic Foods knowingly shipped adulterated product, the language used by the agency and reported by the press has created that implication. We, therefore, consider it important to clarify that Basic Foods has not knowingly shipped into commerce any product the Company believed had the potential to contain *Salmonella,*" a Basic Foods spokesperson was quoted as saying. *See FoodNavigator-USA.com,* March 17, 2010.

NOSB Meeting to Review Substances Allowed in Organic Production and Handling

The U.S. Department of Agriculture (USDA) has **announced** an April 26-29, 2010, meeting of the National Organic Standards Board (NOSB), which makes recommendations about whether a substances should be allowed or prohibited in organic production or handling; assists in the development of organic production standards; and advises USDA on implementation of the Organic Foods Production Act. The meeting will provide an opportunity for the board to receive updates from USDA's National Organic Program and to hear progress reports from six NOSB committees on Compliance, Accreditation and Certification; Crops; Handling; Livestock; Materials; and Policy Development.

NOSB will also continue its assessment of substances on the National List of Allowed and Prohibited Substances, which identifies synthetic substances that may be used, and the nonsynthetic substances that cannot be used, in organic production and handling operations. In particular, NOSB will review (i) "the continued exemption (use) of 37 agricultural products not commercially available as organic that are scheduled to expire after June 27, 2012"; (ii) "the continued exemption (use) and prohibition of 182 substances used in organic production and handling that are set to sunset on October 7, 2012"; (iii) "the continued uses (2) for one substance in organic crop and livestock production that is due to sunset on December 11, 2012"; and (iv) "10 exempted substances for use in organic livestock production that are due to sunset in December 13, 2012." Under consideration for sunset review are (i) synthetic substances allowed in organic crop production, including ethanol, soap-based herbicides, plastic mulch, recycled paper without glossy or colored inks, lime sulfur, insecticidal soaps, sulfates, and liquid fish products; (ii) nonsynthetic substances prohibited in organic crop production, including ash from manure burning, arsenic, lead salts, strychnine, and tobacco dust; (iii) synthetic substances allowed in organic livestock production and handling, including several feed additives, aspirin, vaccines, electrolytes, and vitamins; (iv) the prohibition on the use of strychnine, a nonsynthetic substance, in organic livestock production and handling; (v) several nonorganic agricultural products allowed as coloring agents, processing ingredients or processing aids in organic food products when alternatives are not commercially available; (vi) several nonagricultural products allowed in organic food products, including acids, dairy cultures, enzymes, nutrient vitamins and minerals, and xanthan gum. In addition, the Compliance, Accreditation, and Certification Committee "will present their recommendations … regarding the use of inert atmospheric gases in processed products labeled 100% organic." *See Federal Register,* March 17. 2010.

U.N. Members Vote to Continue Trade in Bluefin Tuna

The United Nations (U.N.) has reportedly balked at a proposal to ban the international trade of Eastern Atlantic and Mediterranean bluefin tuna, an endangered species prized by sushi aficionados. Gathered in Doha, Qatar, for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), U.N. member states voted 20-68 to reject the measure, which was supported

by environmentalists but opposed by the Japanese and Canadian governments. The latter had apparently argued that regulation of the bluefin trade should fall under the jurisdiction of the International Commission for the Conservation of Atlantic Tunas (Iccat). In addition, the European nations with bluefin fishing fleets for the most part abstained from voting.

Meanwhile, the United Nations and other environmental regulators have expressed disappointment with the result and questioned Iccat's ability to effectively manage the vulnerable fisheries. EU Environment Commissioner Janez Potocnik and Commissioner for Maritime Affairs and Fisheries Maria Damanaki have since called on Iccat to "take its responsibility to ensure that stocks are managed in a sustainable way," warning that without prompt action, "there is a very serious danger that the bluefin tuna will no longer exist." *See CITES Press Release* and *The New York Times,* March 18, 2010.

MEPs Put the Brakes on Traffic-Light Labeling

The European Parliament's Committee on Environment, Public Health and Food Safety (ENVI) has apparently issued a legislative report that recommends several changes to EU food labeling laws, but stops short of proposing a uniform "traffic-light" system. After considering more than 800 amendments to draft legislation, ENVI approved "minor changes to existing rules on information that is compulsory on all labels, such as name, list of ingredients, 'best before' or 'use by' date, [and] specific conditions of use." The committee agreed that all EU foodstuffs should list "key nutritional information" pertaining to energy and fat content, saturated fat, carbohydrates, sugar, salt, protein, fiber, and natural and artificial *trans* fats. It also favored country-of-origin labeling for "meat, poultry, dairy products, fresh fruit, vegetables, and other single-ingredient products as well as for meat, poultry and fish when used as an ingredient in processed food." Other provisions backed by ENVI would require (i) "imitated food" to be clearly labeled as such; (ii) all products containing nanomaterials to include "the epithet 'nano' in the ingredient list'"; (iii) food labels to use a legible, minimum font at least 3mm in height; and (iv) energy and nutrient information to be given "in relation to 100g or per 100ml and possibly also per portion."

Notably, ENVI voted against mandatory "traffic light" labels like the ones used in the United Kingdom. According to some Members of the European Parliament (MEPs), the schemes were more likely to mislead consumers and did not ensure a well-rounded diet. "There was insufficient scientific evidence that it was necessary or useful. It could also have led to confusion for consumers and presented a big problem for industry," stated German MEP Renate Sommer (EPP – North Rhine-Westphalia), who drafted the ENVI report. "The more you label, the less people read. The U.S. has more and more food labeling but obesity rates keep rising. We should learn from their mistakes," she was quoted as saying.

The European Parliament is reportedly slated to discuss the recommendations in May, after which time the European Council will adopt its position and again submit the proposal to ENVI. If passed, the rules would take effect 20 days after publication

in the *EU Official Journal,* with a three-year compliance deadline for nutrition labeling changes. Food business operators with fewer than 100 employees and an annual turnover and/or annual balance sheet total under €5 million would have five years to comply. *See European Parliament Press Release* and *The Parliament,* March 16, 2010; *FoodProductDesign.com,* March 17, 2010; *Newsweek* and *Just-Food,* March 18, 2010.

FSA to Create Nanotechnology Research Registry

The U.K. Food Standards Agency (FSA) Board has reportedly agreed to maintain a confidential database of food industry research into nanotechnology, as well as a public registry of food and food packaging products that contain both approved nanomaterials and materials appearing to have nanoscale elements. "The way that we respond in terms of nanotechnology is a test case for the way we, as a regulator respond, to emerging and new technologies," FSA Chief Scientist Andrew Wadge was quoted as saying.

According to media sources, FSA accepted the recommendations put forth in a House of Lords Science and Technology Committee report, which called on regulators to develop risk assessment procedures and prioritize research into the safety of nanotechnology. In making its assessment, the committee had apparently favored mandatory industry participation, claiming that a lack of transparency had previously led to public distrust of genetically modified crops. Additional details about this report appear in issue 332 of this Update. *See FoodNavigator.com,* March 15, 2010; *Meridian Nanotechnology and Development News,* March 17, 2010.

NYC Lifts Prohibition on Urban Beekeeping

The New York City Department of Health and Mental Hygiene has reportedly revised Health Code Article 16 to allow residents to keep *Apis mellifera* hives within the city limits. Previously outlawed as too dangerous or venomous for urban life, the common honeybee is currently cultivated by hundreds of clandestine city beekeepers, many of whom quietly flaunted the prohibition. "People fear that if there's a beehive on their rooftop, they'll be stung," one spokesperson for the New York City Beekeepers Association told the media. "Honeybees are interested in water, pollen and nectar. The real danger is the skewed public perception of the danger of honeybees."

In light of this evidence, the health board revisited the ban, which once imposed fines of up to $2,000 per citation and reinforced fears of sting-related litigation. The new regulations require beekeepers to register their hives with the city, but do not compel them to carry a license. *See The New York Times,* March 14, 2010; *The Associated Press,* March 17, 2010.

LITIGATION

Court Refuses to Stop Current Planting of GE Sugar Beets

A federal court in California has denied a request for preliminary injunction to halt the cultivation of genetically engineered (GE) sugar beets while the USDA's Animal and Plant Health Inspection Service (APHIS) completes its court-ordered environmental impact statement (EIS) for the crop under the National Environmental Policy Act (NEPA). ***Ctr. for Food Safety v. Schafer,* No. 08-00484 (U.S. Dist. Ct., N.D. Cal., decided March 16, 2010)**.

Because the court already determined that APHIS improperly deregulated Monsanto's Roundup Ready® sugar-beet seed without preparing an EIS, the judge noted that the plaintiffs have established the initial element for obtaining injunctive relief, that is, a likelihood of succeeding on the merits. The judge also found that they have demonstrated the likelihood of irreparable harm, given evidence that the GE crop is capable of contaminating conventional and organic corps.

Still, he refused to issue a preliminary injunction to immediately halt the sale, planting, cultivation, and harvesting of the crop because plaintiffs had delayed seeking the relief and such an order would have devastating economic effects. According to the court, 95 percent of the sugar beets grown on more than 1 million acres in the United States, representing half the nation's sugar supply, are genetically engineered, and 99.9 percent of the GE seed "that has been or will be planted this spring has already been purchased and almost all of the seed has been or will be delivered by the end of March." Prohibiting the planting or processing of the GE sugar-beet crop could cause a shortage, said the court, that would force the closure of more than half the sugar-beet processing plants in the United States and cause the loss of some 5,800 full-time and seasonal jobs, $283.6 million in gross profits for sugar-beet growers and $180 million for seed growers and technology companies. With multiplier effects, the losses could reach $1.469 billion.

The judge cautioned, however, "[t]he parties should not assume that the Court's decision to deny a preliminary injunction is indicative of its views on a permanent injunction pending the full environmental review that APHIS is required to conduct. Rather, while the environmental review is pending, the Court is inclined to order the Intervenor-Defendants [sugar-beet farmers and associations and biotechnology companies] to take all efforts, going forward, to use conventional seed. In light of Plaintiffs' showing of irreparable harm to the environment, the Court is troubled by maintaining the status quo that consists of ninety-five percent of sugar beets being genetically engineered while APHIS conducts the environmental review that should have occurred before the sugar beets were deregulated." According to the court, the plaintiffs' delay in seeking injunctive relief will have "less weight in consideration of a permanent injunction."

According to news sources, the next hearing is scheduled for July 9, 2010, at which time plaintiffs will argue their case for a permanent injunction. An attorney for plaintiff Earthjustice was quoted as saying, "Based on today's ruling, we are encouraged

that Judge White will order permanent injunction relief." The executive director for another plaintiff, the Center for Food Safety, reportedly said, "Monsanto's gene-altered sugar beets were illegally approved by the Bush Administration's USDA. The profound economic impacts on organic and conventional farmers, as well as the environment, were not assessed. As a result, the planting of these crops should be halted to avoid further harm."

A Monsanto spokesperson reportedly said, "This ruling provides clarity that farmers can plant Roundup Ready sugar beets in 2010." The Sugar Industry Biotech Council reportedly said in a statement, "We are pleased that the court denied the request and recognized the significant negative impact that an immediate ban on planting would have caused to growers, processors, rural communities and the U.S. sugar supply. We look forward to the next phase of the court proceedings where we can present evidence about potential choices for our growers and processors."

The U.S. Supreme Court has agreed to review a decision that stopped the sale and planting of GE alfalfa, again because of the government's failure to conduct an EIS. Details about that case and the sugar-beet litigation can be found in issues 202, 205, 206, 208, 229, 274, 320, 325, and 334 of this Update. *See Earthjustice Press Release, St. Louis Business Journal, PR Newswire, The New York Times, Center for Food Safety Press Release*, March 16, 2010.

Colombians Sue Chiquita in U.S. Court for Alleged Terror Campaign

Nearly 1,000 unnamed plaintiffs, who claim to be family members of individuals purportedly killed by terrorist organizations in Colombia's Urabá region, have sued Chiquita Brands International, Inc., alleging that throughout the 1990s and at least until 2004, the company "funded, armed, and otherwise supported" these organizations "to produce bananas in an environment free from labor opposition and social disturbances." *Does 1 Through 976 v. Chiquita Brands Int'l, Inc.*, No. 1:10-cv-00404 (U.S. Dist. Ct., D.D.C., filed March 9, 2010). The plaintiffs allege that "[t]he deaths of Plaintiffs' relatives were a direct, foreseeable, and intended result of Chiquita's illegal and tortuous support of terrorist organizations."

According to the complaint, the plaintiffs bring their claims anonymously for fear of "violent reprisals, intimidation and death at the hands of the paramilitaries still operating in Colombia." Their counsel "or his employees have interviewed each of the Doe Plaintiffs and summarized the details of each incident." The complaint indicates that these plaintiffs are not involved in similar litigation filed by this law firm in 2007 or in other related cases. Apparently, not all of the victims' bodies found in common graves have been identified, but in a large number of the cases, the paramilitary organization member who killed the individual "has confessed the crime in the Colombian Commission of Justice and Peace." The claims are brought under the Alien Tort Claims Act and the Racketeer Influenced and Corrupt Organizations Act.

The complaint provides a detailed history of Colombian paramilitary organizations, which purportedly grew out of the country's drug trade. The plaintiffs allege that the organizations' targets were primarily rural workers, trade unionists, community

activists, human rights defenders, leftist politicians, judicial investigators, indigenous persons, and the socially undesirable, all of whom, according to the complaint, were also viewed as problem groups by the banana companies. The government allegedly used the organizations to oppose anti-government guerilla groups, and the complaint contends that many of the victims were not guerilla combatants. While the government eventually outlawed the paramilitary organizations, citizens were allowed to organize as special private security services, which allegedly received payments from Chiquita and passed the money on to a paramilitary organization active in the banana region.

Citing Chiquita's admission to the U.S. Department of Justice that it had made payments to a Colombian terrorist organization and the company's 2007 guilty plea to one count of engaging in transactions with a specially designated global terrorist, the complaint also alleges that the company facilitated paramilitary arms shipments by allowing illegal arms transfers to occur at one of its Colombian ports. The plaintiffs further contend that the company allowed a paramilitary organization to use one of its private ports to illegally export large amounts of illegal drugs and to hide cocaine in banana shipments. According to the plaintiffs, this conduct aided and abetted killings and other conduct, "which constitute war crimes; crimes against humanity; torture, cruel, inhuman and degrading treatment; violations of the rights to life, liberty and security of person and peaceful assembly and association; and terrorism."

Each plaintiff seeks judgment in excess of $75,000 for compensatory and punitive damages. They also seek injunctive and declaratory relief and costs. More information about the criminal charges filed against Chiquita in 2007 appears in issues 208, 225 and 230 of this Update.

Class Action Filed Against FDA-Targeted Companies over "0 g *Trans* Fat" Claim

A New York resident has filed a false-advertising class action in a California federal court against the companies that make certain ice cream products labeled with the statement "0 g *trans* fat." *Carrea v. Dreyer's Grand Ice Cream*, No. 10-1044 (U.S. Dist. Ct., N.D. Cal., Oakland Div., filed March 11, 2010). Seeking to certify a nationwide class of ice cream purchasers, the plaintiff alleges false advertising under the Lanham Act and violations of the California Consumers Legal Remedy Act and the misleading and deceptive advertising provisions of the state Business and Professions Code. The plaintiff seeks a declaration that the defendants have committed the alleged violations, restitution, disgorgement, compensatory and punitive damages, interest, and costs. He also asks the court to order defendants to destroy all misleading and deceptive advertising materials and products.

According to the complaint, the plaintiff relied on the alleged misrepresentations to conclude "that the Products were in fact healthy and relied upon these representations in making his decision to purchase the Products." He contends that the products contain "dangerous, unhealthy, non-nutritious partially hydrogenated oil and high levels of fat," but does not allege any personal injury purportedly linked to the products' consumption. The complaint refers to the Food and Drug Administration (FDA) warning letters that characterized as "misbranded" defendants' Nestlé

Drumstick® Classic Vanilla Fudge Product and "Dreyer's Dibs Bite Sized Ice Cream Snacks Vanilla Ice Cream with Nestle Crunch Coating"™. More details about the FDA warning letters appear in issue 340 of this Update.

Soup Maker Sued for Salt and Fat Content

A New York resident has sued Campbell Soup Co. alleging that its "Less Sodium" and "Healthy Request" tomato soups are falsely advertised because they contain the same levels of salt and fat as the company's "regular" tomato soup. *Smajlaj v. Campbell Soup Co.*, No. 1:33-av-00001 (U.S. Dist. Ct., D.N.J., filed March 12, 2010).

Seeking to certify a nationwide class of soup purchasers, the plaintiff alleges that while the company's "25% Less Sodium" tomato soup contains 480 mg of sodium per serving, so does the company's "regular" tomato soup. She also alleges that "Healthy Request" soup, advertised as "low in fat and cholesterol," contains 1.5 grams of fat per serving, while the "regular" tomato soup has 0 grams of fat per serving. According to the complaint, the company sells the "Less Sodium" and "Healthy Request" soups "for a substantially higher price—up to at least 50% higher," than the "regular" soup.

The plaintiff alleges violation of the New Jersey Consumer Fraud Act, breach of express warranty, unjust enrichment, and injunctive relief. Claiming that the amount in controversy exceeds $5 million, she seeks treble damages, restitution, disgorgement, preliminary and permanent injunctive relief restraining the alleged unlawful practices, attorney's fees, and costs.

Class Action Filed Against Canadian Meat Processors in *Listeriosis* Outbreak

According to a news source, a putative class action has been filed against retailer Loblaw and meat processor Siena Foods Ltd. following a *listeriosis* outbreak that sickened a number of Canadian consumers and led to a nationwide recall of salami and prosciutto products. While one press outlet has indicated that the bacterium which sickened two individuals has been matched genetically to the Siena meat, another reports that none of the recent five *listeriosis*-related deaths has been linked to Siena products. The lawsuit apparently alleges that Siena was aware of its products' "potential toxicity" but failed to inform consumers, deciding instead to advise its distributors. Siena Foods is apparently closing its facility the weekend of March 20-21, 2010, to sanitize the plant.

Meanwhile, the Canadian Food Inspection Agency is reportedly trying to hire new meat inspectors to increase its inspections of some 80 meat-processing plants. The United States requires inspections every 12 hours, and imports are at risk unless the inspections meet U.S. standards. The Canadian agency apparently ramped up its inspections after the Siena Foods outbreak, but its current staffing levels have put a strain on inspectors. A union official was quoted as saying, "Our members have had it. They need some relief here." The Canadian agency has indicated that it may be able to hire 100 new meat and poultry inspectors in 2010. *See The Canadian Press*, March 15, 2010; *Edmonton Journal*, March 16, 2010.

MEDIA COVERAGE

Claudia Kalb, "Culture of Corpulence," *Newsweek*, March 22, 2010

This article invokes public-health campaigns of the past, including measures taken to increase seat belt use and stop drunk driving, to call for "big-think solutions" to the nation's obesity problems. The author outlines the factors that have led to a tripling of obesity rates among teenagers, such as a decrease in physical activity; ubiquitous high-calorie, low-nutrient foods; "rampant" food advertising to children; and food "deserts" in urban areas where the nearest convenience store sells candy and white bread. She quotes Yale's Rudd Center for Food Policy and Obesity head Kelly Brownell as saying, "The country defaults to giving industry the benefit of the doubt. Industry says you don't need to regulate us; we'll police ourselves. The tobacco industry abused that with God knows how many lives as a consequence. To expect the food industry to be different may be wishful thinking."

Among the measures the author recommends to address the problem are sugary-beverage taxes, workplace and school incentives, better nutrition education, youth-advertising restrictions or prohibitions, better food labeling, improved school lunch offerings, and doctor prescriptions for exercise and healthful eating. The efforts of first lady Michelle Obama and the president's new Task Force on Childhood Obesity are cited, and the article concludes by quoting Robert Wood Johnson Foundation CEO Risa Lavizzo-Mourey: "When we come together as a nation and really commit ourselves, we can do it. If we can get that kind of resolve, we'll be able to create a legacy of healthy children and a healthier nation." The author contends, "[o]ur future depends on it."

Sarah Newman, "Is Goat the New Cow? Why American Foodies and Environmentalists Are Reviving the Old-World Staple," *AlterNet*, March 16, 2010

"Goats were the first animals raised for food that were domesticated by humans 9,000 years ago," writes Participant Media researcher Sarah Newman in this article examining the impact of goats on the world's food supply. "Currently, two-thirds of all red meat eaten worldwide is goat meat," common fare for a few billion people currently inhabiting or with roots in Africa, the Middle East and South America, she notes.

According to Newman, culinary interest in goat dishes in the United States is on the rise by consumers who "are responding well" to the taste or nutrition benefits of goat meat and dairy products. Dairy goat industry sources assert that goat's milk contains more calcium and vitamin B6 and vitamin A than cow's milk, and is lower in calories and more digestible for those prone to lactose intolerance. But the challenge to farmers is keeping up with the demand. "As more chefs incorporate luscious goat dairy on their menu and others add goat meats to dishes and sandwiches, demand for these products will increase," Newman writes. "While some might be wondering what the fuss is all about, this is not the latest nouveau cuisine: goat is here to stay."

In a related development, the increasing demand for goats was chronicled in a recent newspaper article titled "No kidding: Goats are in short supply as demand for

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meat rises." *Kansas City Star* reporter Rick Montgomery points out that "the sad truth is the United States, despite its agricultural riches, must import 750,000 goats yearly from places like Australia." He writes that "as the nation's ethnic population rises, so does demand for what some call chevon—that's goat meat. Many immigrants like it, especially on holy days." *See The Kansas City Star*, March 14, 2010. ■

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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.