Shook, Hardy & Bacon L.L.P.

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# FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### Whole Foods Divestiture Continues

The Federal Trade Commission (FTC) recently took action on the divestiture of certain Whole Foods Market Inc.'s assets as part of the consent order that concluded antitrust litigation the agency brought to challenge Whole Foods' 2007 acquisition of Wild Oats Market, Inc. According to an FTC news release, the Whole Foods divestiture trustee sought approval to sell three Wild Oats stores and certain intellectual property. FTC commissioners approved the sale of Wild Oats stores in Kansas City, Missouri; Boulder, Colorado; and Portland, Maine. While allowing the sale of Wild Oats' and Alfalfa Markets' intellectual property to proceed as to Luberski, Inc., and A-M Holdings, LLC, the FTC denied a proposal to sell their intellectual property to Topco Associates LLC, apparently finding that this sale would not satisfy the purposes of intellectual property divestiture. *See FTC Press Release*, June 18, 2010; *Naturalproductsmarketplace.com*, June 21, 2010.

### FDA Announces Information Collections Related to Food Code, Food Contact Materials

The Food and Drug Administration (FDA) submitted two proposed information collections to the Office of Management and Budget (OMB) for review. The first collection pertains to the adoption of the model FDA Food Code by local, state and tribal governments, "an important step toward the agency's goal for consistent, scientifically sound, and risk-based food safety standards and practices." To facilitate the implementation of regulations based on the model Food Code, FDA in 2001 began surveying the rulemaking activities of these governments and has concluded that "an extension of OMB approval of the survey is needed in order to keep the current database accurate and up-to-date." Estimating that 75 respondents will provide four quarterly updates, FDA has requested written comments by July 26, 2010.

The agency has also announced an information collection involving the threshold of regulation for substances used in food-contact articles. To determine whether a substance used in a food-contact article requires regulation as a food additive, FDA has apparently established two thresholds: "The first exempts those substances used in food-contact articles where the resulting dietary concentration would be at or below 0.5 part per billion (ppb)"; and "The second exempts regulated direct food

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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additives for use in food-contact articles where the resulting dietary exposure is 1 percent or less of the acceptable daily intake for these substances."

To demonstrate that "the likelihood or extent of migration to food of a substance used in a food-contact article is so trivial that the use need not be the subject of a food additive listing regulation or an effective notification," manufacturers and suppliers must provide FDA with information about the substance's composition, intended use, toxicological profile, and potential environmental impact, as well as submit a clear statement detailing the basis for a regulatory exemption. FDA estimates that it will receive approximately seven such exemption requests per year. "Other manufacturers and suppliers may use exempted substances in food-contact articles as long as the conditions of use (e.g., use levels, temperature, type of food contacted, etc.) are those for which the exemption was issued," states the agency, which has extended the information collection and again requested written comments by July 26. *See Federal Register,* June 24, 2010.

### UK Health Agency Calls for Cuts in Salt, Fat in Food

The United Kingdom's (UK) public health watchdog has issued new **guidance** that claims salt and saturated fat reduction could prevent 40,000 unnecessary deaths a year from heart disease and stroke.

The National Institute for Health and Clinical Excellence (NICE) has called for a maximum daily intake of 6g of salt per adult by 2015 and 3g daily by 2025. In addition, it has recommended that manufacturers reduce the levels of saturated fats in all food products and eliminate the use of *trans* fats.

The guidance also urges the National Health Service and other policy makers to (i) ensure that low-salt and low-fat foods can be sold for less than their higher-content equivalents; (ii) extend restrictions on TV advertising "for foods high in saturated fats, salt and sugar to 9 p.m. to protect children"; (iii) encourage "local planning authorities to restrict planning permission for take-aways and other food retail outlets in specific areas, such as within walking distance of schools"; and (iv) adopt a "traffic light" color-coded food labeling system depicting levels of salt, fat or sugar. NICE stopped short, however, of supporting a tax on foods perceived as less healthy.

"We know that currently across the UK, people are consuming about 8.5g of salt every day, and that's two to three times higher than the level our bodies actually need," said Simon Capewell, vice chair of the guidance group, in a June 22, 2010, news release. "If salt levels in food are reduced by 5 to 10 percent a year, most consumers don't even notice any difference in taste—their taste buds simply adjust."

### Louisiana Approves "Farm of Origin" Strawberry Labeling Law

Louisiana Governor Bobby Jindal (R) has reportedly signed a bill (**H.B. 430**) that requires "farm of origin" labels on all strawberries sold in the state. According to the bill's sponsor, Representative Stephen Pugh (R – Ponchatoula), strawberry growers backed the measure "as a way to protect the integrity of their industry."

With input from the Louisiana Strawberry Marketing Board, the Louisiana Department of Agriculture and Forestry's (LDAF) Food Quality Services staff will reportedly promulgate the rules and regulations for enforcement, a process estimated to take 120 days. LDAF Commissioner Mike Strain said the labeling "will let consumers know they are getting the freshest product possible. Consumers are concerned about food safety, and it's always good to know where the food we eat was grown, produced, processed, or prepared." *See LDAF Press Release,* June 15, 2010.

## LITIGATION

### Enjoining GM Alfalfa Deregulation Went Too Far According to U.S. Supreme Court

In a 7-1 ruling, the U.S. Supreme Court has determined that a district court erred in enjoining the Animal and Plant Health Inspection Service (APHIS) from even partially deregulating Monsanto's Roundup Ready® alfalfa while the agency takes steps to comply with the National Environmental Policy Act (NEPA). ***Monsanto Co. v. Geertson Seed Farms*, No. 09-475 (U.S., decided June 21, 2010)**.

The district court found that APHIS failed to prepare an environmental impact statement (EIS) as required under NEPA before granting Monsanto's petition to deregulate the seed, which has been genetically modified (GM) to resist glyphosate, a weed killer used on GM crop fields. The court then enjoined APHIS from deregulating GM alfalfa until an EIS could be completed and further enjoined the seeds' sale and planting beyond sales already made in March 2007. Farmers who had purchased the seed were allowed to plant it that year.

Writing for the majority, Justice Samuel Alito first determined that both Monsanto and the parties challenging the deregulation, i.e., conventional and organic alfalfa farmers and environmental groups, had standing to participate in the proceedings. The Court then explained that putting government action on hold pending compliance with NEPA is not appropriate unless "the traditional four-factor test" for the imposition of injunctive relief is satisfied. Applying that test, the Court ruled that an order forbidding APHIS from taking any action on Monsanto's deregulation petition while the EIS was pending constituted an abuse of discretion. According to the Court, APHIS might be justified in partially deregulating the GM seed and allowing limited planting to occur while it complies with NEPA. The Court speculated that partial deregulation could be sufficiently limited to avoid gene transfer to conventional and organic alfalfa or to the development of glyphosate-resistant weeds; the Court further assumed that APHIS could "vigorously" police compliance with a limited deregulation plan. Still, the Court did not express its view on whether such relief was available on the record.

Shook, Hardy & Bacon Tort Partner **Kevin Haroff** appeared as counsel of record for the Washington Legal Foundation as *amicus curiae* in support of the petition for review.

Meanwhile, six Democratic senators and 50 House members have reportedly signed a letter to U.S. Agriculture Secretary Tom Vilsack urging him not to approve the commercialization of Roundup Ready® alfalfa. Disputing APHIS's draft EIS,

which concludes that the GM crop is unlikely to harm the environment or human health, they claim that the crop will contaminate conventional crops and harm the organic dairy industry. Agriculture correspondent Phillip Brasher notes that alfalfa is "typically grown on about 23 million acres"; he cites Monsanto data showing that before the GM crop was banned, "5,550 growers planted the seed on 236,000 acres nationwide."

A spokesperson for the Center for Food Safety, which opposed GM alfalfa's deregulation, reportedly said that the U.S. Supreme Court's ruling was a victory, claiming that unlimited planting is still precluded until APHIS completes the EIS. A Monsanto spokesperson, who did not apparently see the ruling that way, was quoted as saying, "This is exceptionally good news. . . . We have Roundup Ready alfalfa seed ready to deliver and await USDA guidance on its release. Our goal is to have everything in place for growers to plant in fall 2010." *See Des Moines Register* and *FoodNavigator-USA.com*, June 23, 2010.

### Calling Use of Toys to Market Happy Meals® Illegal, CSPI Threatens Lawsuit

The Center for Science in the Public Interest (CSPI) has **notified** McDonald's Corp. that it intends to sue the company within 30 days if it does not immediately stop using toys to market its Happy Meals® to young children. The letter characterizes the practice as "illegal, because marketing to kids under eight is (1) inherently deceptive, because young kids are not developmentally advanced enough to understand the persuasive intent of marketing; and (2) unfair to parents, because marketing to children undermines parental authority and interferes with their ability to raise healthy children." The June 22, 2010, letter claims that McDonald's has violated the consumer protection laws of California, Massachusetts, New Jersey, Texas, and the District of Columbia.

According to CSPI, each of the 24 Happy Meals® food combinations is 26 percent higher on average in calories than a reasonable lunch and contains more saturated fat, sodium and sugar than a child should consume in a single meal. Offering toys, often related to popular movies and TV shows, to children, says CSPI, mobilizes "pester power" and "imprints on developing minds brand loyalty for McDonald's. Because most of the company's options (for young children and others) are of poor nutritional quality, eating Happy Meals promotes eating habits that are virtually assured to undermine children's health." The letter also states, "McDonald's marketing has the effect of conscripting America's children into an unpaid drone army of word-of-mouth marketers, causing them to nag their parents to bring them to McDonald's."

### Apple Growers in Minnesota Challenge Restrictive Licensing Agreement

A number of Minnesota-based apple growers have filed a complaint against the regents of the University of Minnesota and others claiming that exclusive and limited licensing agreements pertaining to the cultivation and sale of a new apple variety violate federal and state competition and restraint of trade laws. ***Aamodt Apple Farm, Inc. v. Regents, U. Minn.*, No. n/a (Hennepin County, Minnesota, filed June 16, 2010)**. According to the complaint, the SweeTango®, a cross between the

Honeycrisp™ and Zestar!™ varieties, was developed with the use of state funding through the university's apple-breeding program. One grower allegedly has an exclusive license to grow the apple and may license others to grow it on its behalf. The agreements allegedly limit the number of trees that can be planted and where and how the apples can be sold.

The plaintiffs allege unreasonable restraint of trade in commerce; establishment, maintenance and use of a monopoly power; prohibited contracts, combinations and conspiracies; tortious interference with business relations/prospective business relations; violations of the federal Agricultural Fair Practices Act; and violations of due process and equal protection rights. They seek declaratory and injunctive relief, damages in excess of $50,000, costs, and attorney's fees. According to the plaintiffs, the SweeTango® is "an early season apple variety [that] has been released to consumers in a limited fashion and has already generated overwhelming demand." They contend that the growing and sales restrictions make them unable to compete in the apple marketplace.

### Kosher Meatpacking Plant Manager Sentenced to 27 Years in Prison

The former manager of an Iowa-based kosher meatpacking plant that was raided by immigration authorities in 2008 has reportedly been sentenced to 27 years for financial fraud and ordered to pay $27 million in restitution. While the initial case against Sholom Rubashkin involved the hiring of hundreds of illegal immigrant workers, prosecutors apparently changed their focus to his alleged mishandling of loans that led to bank losses of $26 million. The presiding federal judge reportedly released a 52-page memorandum in advance of the sentencing hearing to explain her decision. The sentence, two years longer than requested by prosecutors, has generated controversy given the relatively lighter sentences meted out to corporate officials responsible for greater frauds in recent years. Six former U.S. attorneys general submitted a letter to the judge supporting a lighter prison term. Rubashkin's lawyers have indicated that they will appeal the sentence. *See The New York Times*, June 21, 2010; *The Kansas City Star*, June 22, 2010.

## OTHER DEVELOPMENTS

### Scientists Urge EFSA Action Regarding BPA Reduction

Several environmental, health and women's organizations have called on the European Food Safety Authority (EFSA) to consider "all relevant studies" on bisphenol A (BPA) as the safety watchdog prepares to present its opinion on the chemical next month. Signed by approximately 20 scientific experts and 40 non-governmental organizations, the June 23, 2010, **letter** states that "any objective and comprehensive review of the scientific literature will lead to the conclusion that action is necessary to reduce the levels of BPA exposure, particularly in groups at highest risk, namely young infants and pregnant mothers."

Drafted by Breast Cancer UK and University of Missouri-Columbia Biological Sciences Professor Frederick vom Saal, the letter claims that EFSA relied on a "few

flawed studies" to declare BPA safe in prior risk assessments. "Many scientific studies are now calling into question the safety of BPA," maintains the letter, which cites a body of recent research that includes bio-monitoring studies.

As vom Saal was later quoted as saying, "At the heart of the debate over BPA lies an outdated set of guidelines used by regulatory agencies that are based on approaches to evaluating the safety of chemicals established 50 years ago. Thus 21st century research approaches have provided overwhelming scientific evidence of harm in hundreds of published reports, but these findings are being rejected for consideration because they do not conform to the outdated testing guidelines." *See Women in Europe for a Common Future News Release,* June 23, 2010.

**National Pork Board Takes Umbrage at "The New White Meat"**

A Website that specializes in geek gear has reportedly drawn the ire of the National Pork Board (NPB), which apparently sent the company a cease-and-desist letter for marketing unicorn pâté as "the other white meat." ThinkGeek.com offered the fake product as an April Fool's prank, but later received a 12-page legal missive claiming that advertisements for "Radiant Farms Canned Unicorn Meat" infringed and diluted the board's trademark rights. "Laughs aside, the attorneys were doing their work that they do to protect the trademark," an NPB spokesperson was quoted as saying.

Rather than oppose the cease-and-desist warning, ThinkGeek.com has since issued a public apology to NPB on the company blog. "It was never our intention to cause a national crisis and misguide American citizens regarding the differences between the pig and the unicorn," stated Geeknet, Inc., CEO Scott Kaufman in a June 21, 2010, press release. "In fact, ThinkGeek's canned unicorn meet is sparkly, a bit red, and not approved by any government entity." *See Meatingplace.com,* June 22, 2010.

## MEDIA COVERAGE

**Dan Mitchell, "Pollan's New Rule to Ding Big Food," *The Big Money,* June 21, 2010**

This recent blog entry claims that author and activist Michael Pollan has publicly renounced his five-ingredient rule—"to eat only foods that list five or fewer ingredients"—because of "the 'jiu-jitsu' employed by the food industry whenever someone offers sound advice." According to *Big Money* contributor Dan Mitchell, some marketers have capitalized on this widely disseminated "food rule" by explicitly advertising their products as containing five or fewer pronounceable components. As Pollan apparently says of one popular ice cream maker, "You know how many [ingredients] they had before they went to five? Five!"

Mitchell likewise decries these tactics as indicative of a greater marketing trend, one which implies, for example, that "real cane sugar" is healthier than high-fructose corn syrup. "Pollan says that in the face of the food industry's superior fighting skills, he decided it was 'hopeless' to try to communicate simple rules for avoiding the terrible foods the industry foists upon us, because it would always find a way to corrupt them," concludes Mitchell. "That is, until he thought of a new one: 'Don't eat any foods you've ever seen advertised on television.'"

## SCIENTIFIC/TECHNICAL ITEMS

### Rudd Center Claims Children Choose and Prefer Branded Snacks

Yale University's Rudd Center for Food Policy and Obesity has published a **study** purportedly showing that children "significantly preferred" snack foods branded with popular cartoon characters. Christina Roberto, et al., "Influence of Licensed Characters on Children's Taste and Snack Preferences," *Pediatrics,* June 2010. Researchers apparently asked 40 children between 4 and 6 years old to sample three identical pairs of graham crackers, gummy fruit snacks and carrots "presented either with or without popular cartoon characters on the package." The children described whether the two items in each pair tasted the same or whether one tasted better, and then selected "which of the food items they would prefer to eat for a snack."

The results purportedly indicated that participants not only preferred the taste of the branded foods, but that the majority "selected the food item with a licensed character on it for their snack." The influence of cartoon characters also appeared "weaker for carrots than for gummy fruit snacks and graham crackers." As the study concludes, "Branding food packages with licensed characters substantially influences young children's taste preferences and snack selection, and does so most strongly for energy-dense, nutrient-poor foods."

Casting doubt on the effectiveness of branding healthy foods with cartoons, the study authors have interpreted their findings as proof "that licensed characters can influence children's eating habits negatively by increasing positive taste perceptions and preferences for junk food." The authors have thus suggested "that the use of licensed characters to advertise junk food to children should be restricted," and that these restrictions should extend to older youth as well.

### Harvard Study Claims to Demonstrate Effectiveness of Soda Tax

A recent study has reportedly linked a 35-percent tax on sugar-sweetened beverages to a 26-percent reduction in sales over a four-week period. Jason Block, et al., "Point-of-Purchase and Education Intervention to Reduce Consumption of Sugary Soft Drinks," *American Journal of Public Health,* June 2010. Harvard University researchers apparently imposed the equivalent of a penny-per-ounce tax on all sodas and sweetened beverages sold in the Brigham and Women's Hospital cafeteria. They also examined the effects of a stand-alone health education campaign and one implemented in conjunction with the 45-cent tax.

Their findings allegedly demonstrated that as the cost for sugar-sweetened beverages rose, (i) demand for these beverages declined; (ii) sales of coffee and diet soda increased; and (iii) consumers did not replace sugar-sweetened beverages with juices or other sugary snacks, "such as cakes and cookies." When combined with the educational program, the tax resulted in an extra "18 percent decline in purchases of regular soda."

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As the lead author stated in a June 17, 2010, Harvard University press release, "Soft drinks have been increasingly recognized as a major contributor to the country's growing obesity epidemic. A very aggressive response—such as a notable increase in the price of soda—may be needed to steer people toward healthier options."

### Study Claims Consumers Underestimate Calories of "Organic" Foods

A forthcoming *Judgment and Decision Making* study has reportedly suggested that consumers underestimate the calorie content of foods deemed "organic." According to media reports, University of Michigan researchers found that students presented with identical food choices were more likely to describe the option labeled "organic" as having fewer calories than the "conventional" product. Participants also expressed greater leniency toward a fictional dieter if she selected an organic dessert over a non-organic one. "These findings suggest that 'organic' claims may not only foster lower calorie estimates and higher consumption intentions, but they may also convey that one has already made great progress toward one's weight loss goal," one researcher was quoted as saying. *See LiveScience.com,* June 24, 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.