Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Obama Signs Child Nutrition Bill to Help Combat Obesity

President Barack Obama (D) has signed the Healthy, Hungry-Free Kids Act of 2010 into law, calling the bipartisan legislation "vitally important to the health and welfare of our kids and to our country." Details about the bill appear in Issue 374 of this *Update*.

"We're seeing this problem in every part of our country in kids from all different backgrounds and all walks of life," the president said in a statement. "As a result, doctors are now starting to see conditions like high blood pressure, high cholesterol and Type II diabetes in children—these are things that they only used to see in adults. And this bill is about reversing that trend and giving our kids the healthy futures that they deserve." *See White House Press Release,* December 13, 2010.

Commerce Department Releases Online Privacy Green Paper

The U.S. Department of Commerce's Internet Policy Task Force (IPTF) has issued a green paper titled *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, which sets forth initial policy recommendations for "promoting consumer privacy online while ensuring the Internet remains a platform that spurs innovation, job creation, and economic growth." To this end, the report "reviews the technological, legal, and policy contexts of current commercial data privacy challenges; describes the importance of developing a more dynamic approach to commercial privacy both in the United States and around the world; and discusses policy options (and poses additional questions) to meet today's privacy challenges in ways that enable continued innovation."

Designed to promote "privacy, transparency and informed choice," the IPTF framework reflects input from stakeholders in industry, academia and government. It specifically calls for (i) "establishing Fair Information Practice Principles comparable to a 'Privacy Bill of Rights' for online consumers," (ii) "developing enforceable privacy codes of conduct in specific sectors with stakeholders,"

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(iii) creating a Privacy Policy Office in the Department of Commerce, (iv) encouraging "global interoperability to spur innovation and trade," (v) harmonizing "disparate security breach notification rules," and (vi) reviewing the Electronic Communications Privacy Act "for the cloud computing environment." The task force will also continue to coordinate its efforts with the Federal Trade Commission and Office of Management and Budget.

"Today's report is a road map for considering a new framework that is good for consumers and businesses. And while our primary goal is to update the domestic approach to online privacy, we are optimistic that we can take steps to bridge the different privacy approaches among countries, which can help us increase the export of U.S. services and strengthen the American economy," stated Commerce Secretary Gary Locke in a December 16, 2010, press release, which also invites further public comment on these recommendations.

NRC Report Finds Little Benefit to Additional Meat Testing

A recent National Research Council (NRC) **report** has apparently found no scientific evidence to support "more stringent testing of meat purchased through the government's ground beef purchase program," which distributes products to the National School Lunch Program and other public outlets. According to a December 9, 2010, National Academies press release, the U.S. Department of Agriculture's Agricultural Marketing Service (AMS) purchases ground beef from suppliers "who must meet mandatory process, quality, traceback, and handling controls as well as comply with strict limitations on the amounts of bacteria in the meat, such as *E. coli* and *salmonella*." To assess this program, the National Academies established a committee to review the scientific basis of AMS's ground beef safety standards, evaluate how these standards compare to those used by large retail and commercial purchasers, and recommend possible improvements to the federal system.

The committee evidently found that AMS's "scientific basis for the current purchase specifications for ground beef is unclear," while those standards used by 24 different large corporate purchasers "vary considerably, likely because they depend on the intended use of the meat." It noted, however, that direct comparisons of federal and corporate purchasers were hindered by a lack of information "detailing the scientific (or any other basis) on which these corporate specifications were made."

Based on these findings, the NRC report has thus urged AMS (i) to strengthen its own purchase specifications with "scientifically sound resources, such as data, formal expert consultation," and (ii) to keep track of scientific developments "associated with current and emerging pathogens of concern." It also concluded that "validated cooking processes provide greater assurance of ground beef's safety than would additional testing for pathogens," in part because "testing alone cannot guarantee the complete absence of pathogens." *See National Academies Press Release,* December 9, 2010.

EPA Declares Saccharin No Longer a Potential Human Carcinogen

The U.S. Environmental Protection Agency (EPA) has issued a **final rule** announcing that it has removed saccharin from its lists of hazardous substances, wastes and constituents because it "is no longer considered a potential hazard to human health." EPA proposed on April 22, 2010, to remove the artificial sweetener from the lists, and apparently received no opposition to the plan.

Commonly found in diet soft drinks, chewing gum and juice, saccharin had been labeled a potential cancer-causing substance in the 1980s. According to an EPA press release, however, the National Toxicology Program and the International Agency for Research on Cancer reevaluated scientific data on saccharin and its salts, concluding that they are not a potential human carcinogen. EPA removed the artificial sweetener from the hazardous lists because "the scientific basis for remaining" no longer applies. The final rule, which is in response to a Calorie Control Council petition to remove saccharin and its salts from the lists, is effective January 18, 2011. *See EPA Press Release,* December 14, 2010; *Federal Register*, December 17, 2010.

Massachusetts Bans BPA in Baby Bottles, Sippy Cups

The Massachusetts Public Health Council has approved a ban on the production and sale of reusable plastic products containing bisphenol A (BPA) that are intended for children younger than age 3. Targeted mainly at baby bottles and sippy cups, the ban will reportedly take effect on January 1, 2011, for manufacturers and July 1 for retailers.

"We are taking this action as a precautionary measure," Department of Public Health Commissioner John Auerbach said in a statement. "Our goal is to protect our most vulnerable residents—our children—in the light of mounting scientific evidence about the potential dangers of BPA." *See Massachusetts Office of Health and Human Services Press Release*, December 15, 2010.

LITIGATION

Court Tosses *Trans* Fat Lawsuit Against Hostess, Claims Preempted

In a ruling left unchallenged when the appeal period expired, a federal court in California has determined that a plaintiff bringing state-law claims about alleged misleading food labels involving *trans* fat were preempted by federal law and that he lacked standing as a consumer to bring a claim under the Lanham Act, which protects competitors' interests. ***Peviani v. Hostess Brands, Inc.*, No. 10-2302 (U.S. Dist. Ct., C.D. Cal., decided November 3, 2010)**.

The plaintiff alleged on behalf of two nationwide classes that the marketing for six 100-calorie pack Hostess Brands products violated various California consumer-fraud laws because the company represented that the products contain "0 Grams of Trans Fat" when they actually contain partially hydrogenated oils, or artificial *trans* fat. According to the court, federal food-labeling laws allow the use of the phrase "0 Grams of Trans Fat" for those products containing less than 0.5 gram per serving and forbid states from establishing any requirement not identical to federal nutritional labeling requirements.

With the plaintiff seeking to enjoin the use of federally permitted terminology, the court ruled that his "claims must therefore fail because they would necessarily impose a state-law obligation for trans fat disclosure that is not required by federal law." The court dismissed the plaintiff's state-law claims without leave to amend and dismissed the Lanham Act claim with prejudice. Shook, Hardy & Bacon Agribusiness & Food Safety Partners **Frank Rothrock** and **Kevin Underhill** represented the defendant.

Third Circuit Remands Pet Food MDL Settlement

The Third Circuit Court of Appeals has agreed, for the most part, with the resolution of multidistrict litigation claims against pet food manufacturers involving the melamine contamination and recall of their products in 2007. ***In re: Pet Food Prods. Liab. Litig.*, Nos. 08-4741 & 08-4779 (3d Cir., decided December 16, 2010)**. Further details about the settlement agreement appear in **Issue 283** of this *Update*. The court determined that certification of a settlement class was appropriate and that most of the settlement's terms were fair and reasonable.

Because the district court agreed with the settlement's cap of "purchase claims," that is, "claims solely for reimbursement of the costs associated with the purchase of a Recalled Pet Food Product by a Settlement Class Member who has not been reimbursed for such costs to date," without "the information necessary to evaluate the value and allocation of the Purchase Claims," the appeals court vacated and remanded on this issue only. Apparently, the settling parties simply assumed that "the 'vast majority' of people who wanted refunds for the purchase of recalled pet food had already returned the food to retailers or called the toll-free numbers of manufacturers and received a refund." They also apparently "believed that the 'vast majority' of the 60 million units of recalled pet food was never sold to consumers."

According to the Third Circuit, these beliefs, without more, such as sales information and data about the amount of refunds already paid to consumers, rendered the court "unable to determine whether the $250,000 allocation was a fair and adequate settlement of the Purchase Claims given the risks of establishing liability and damages and the likely return to the class of continued litigation." On remand, "the settling parties should either produce the relevant

information or demonstrate that it is unavailable or that producing it would be unfeasible."

The court agreed with a concurring judge who also dissented that, although it could consider the reasonableness of the attorney's fees without formal objections or briefing, the district court "discharged adequately its responsibility to assess" their reasonableness. The concurring judge opined that the record did not support a 31 percent fee ($7.44 million) and would have remanded for reconsideration of this issue as well.

Court Approves Discovery and Motions Schedule in *Pelman v. McDonald's*

A federal court in New York has entered an order approving the pre-trial discovery and motions scheduling order agreed to by the individual plaintiffs remaining in the litigation alleging that fast-food marketing caused adverse health effects related to obesity. *Pelman v. McDonald's Corp.*, No. 02-7821 (U.S. Dist. Ct., S.D.N.Y., order filed December 15, 2010). Under the terms of the agreement, fact discovery will close November 30, 2011; expert discovery will close April 30, 2012; and briefing on motions for summary judgment will end August 30, 2012. The court denied the plaintiff's motion for class certification in October; additional details about the ruling appear in **Issue 370** of this *Update*.

Dannon Agrees to Pay States $21 Million to Resolve Advertising Issues

The Federal Trade Commission has **announced** the settlement of allegations that The Dannon Co. exaggerated the health benefits of its Activia® yogurt and DanActive® dairy beverage. Under the terms of the settlement, Dannon does not admit any law violations, but agrees to stop promoting its yogurt as a product that relieves temporary irregularity or its dairy beverage as a product that reduces the likelihood of getting a cold or the flu, unless certain conditions are met. These include that the immunity claims are specifically permitted by the Food and Drug Administration and the irregularity claims are substantiated by competent and reliable scientific evidence.

The company also agreed to pay $21 million to the 39 states whose attorneys general were also investigating its advertising claims. According to a news source, Dannon has indicated that it will in the future clarify that Activia's benefits require three servings of the product daily. The company reportedly said in a statement, "Millions of people firmly believe in, benefit from and enjoy these products, and Dannon will continue to research, educate and communicate about the benefits of probiotics on the digestive and immune systems." A $35 million fund the company established earlier in the year to resolve a class-action lawsuit involving similar allegations has apparently paid out less than $1 million to date. *See msnbc.com,* December 15, 2010.

Ohio AG Brings Consumer Sales Practices Action Against Dannon

The same day that the Federal Trade Commission announced a settlement over alleged deceptive advertising claims for DanActive® beverage and Activia® yogurt, Ohio's attorney general filed a lawsuit alleging that The Dannon Co. has violated the state's Consumer Sales Practices Act (CSPA) by failing to substantiate the health-related claims it makes for the products. *Ohio v. Dannon Co., Inc.*, No. 10-12-18225 (Ct. Com. Pl., Franklin County, filed December 15, 2010). The complaint takes issue with marketing claims that the products either promote digestive health or boost immunity.

Under the authority of the CSPA, Attorney General Richard Cordray (D) brings the action "in the public interest" and seeks declaratory and injunctive relief, liability for "the reasonable costs and expenses of the investigation and prosecution of the Defendant's actions, including attorneys' fees," as well as $25,000 "for each unfair or deceptive act or practice alleged herein." According to the complaint, Activia® has been deceptively marketed since 2006, while DanActive® has been deceptively marketed since 2007.

"Happy Meals" Lawsuit Filed in California

Seeking to represent a class of California children younger than age 8 and their parents, the mother of a 6-year-old girl has reportedly filed a putative class action against McDonald's Corp., alleging that it baits children by advertising its "unhealthy Happy Meals" with toys and thus "has helped create, and continues to exacerbate, a super-sized health crisis in California." ***Parham v. McDonald's Corp.*, No. n/a (Cal. Super. Ct., San Francisco County, filed December 15, 2010)**. Counsel for the plaintiff includes Stephen Gardner with the Center for Science in the Public Interest (CSPI), which announced several months ago that it would be filing such a lawsuit.

According to the complaint, "Most Happy Meals are too high in calories, saturated fat, and sodium to be healthful for very young children," and the company "is engaged in a highly sophisticated scheme to use the bait of toys to exploit children's developmental immaturity and subvert parental authority." The plaintiff claims that her daughter "continually clamors to be taken to McDonald's 'for the toys.'" Alleging that the damages do not exceed $5 million, the plaintiff brings counts for deceptive and unfair marketing and business practices, as well as unfair and unlawful methods of competition and unfair or deceptive acts or practices. She seeks a declaration that McDonald's advertising violates state law, an injunction to stop the company from "continuing to advertise Happy Meals to California children featuring toys," costs, and attorney's fees. *See AOL.com*, October 6, 2010; *CSPI Press Release*, December 15, 2010.

Meanwhile, McDonald's CEO Jim Skinner, responding to the San Francisco Board of Supervisors ban on toys in children's meals with too much fat, salt or

sugar or too many calories, reportedly called those attempting to blame the nation's obesity epidemic on Happy Meals "food police." "We'll continue to sell Happy Meals," he apparently said. The city's regulation "really takes personal choice away from families who are more than capable of making their own decisions." *See NACSOnline.com*, December 15, 2010.

Class Action Challenges Nestlé's Immunity Claims for Breakfast Drink

A Colorado resident has filed a putative class action in a California federal court, alleging that the maker of Carnation® Instant Breakfast® misleads consumers by claiming that the product contains "Antioxidants to help support the immune system." *Francis v. Nestlé USA, Inc.*, No. 10-09544 (U.S. Dist. Ct., C.D. Cal., filed December 13, 2010). Represented by Howard Rubinstein, who has filed a number of similar deceptive-advertising claims against an array of food manufacturers in recent years, the plaintiff contends that "unscrupulous companies routinely toss a small amount of a particular substance into a product and advertise the product as though it could provide results beyond any reasonable expectation."

She alleges that Nestlé's immunity claims are deceptive and that she and the class have lost money as a result of the misrepresentations because the company charged "a price premium for the Product compared with similar drink mixes that did not make such claims." According to the complaint, "Plaintiff would not have purchased the Product, but for Nestlé's representations that consuming the Product would boost her immunity and good health." Seeking to certify a nationwide class of consumers who have purchased the product since 2006, the plaintiff alleges violations of various California consumer-fraud laws and the Consumer Legal Remedies Act, as well as breach of express warranty. She requests restitution, disgorgement, damages in excess of $5 million, attorney's fees, and costs.

Carrot Producer Sues over Failure of Sanitizer Product

Alleging damages in excess of $50 million, a company that processes and sells baby carrots, along with its liability insurers, has sued the maker of a product that was promised to increase vegetable shelf-life, alleging that carrots treated with the sanitizer "suffered elevated yeast growth and severely premature spoilage as compared to [plaintiff's] historical experience and carrots processed using chlorine dioxide at the same time." *Wm. Bolthouse Farms, Inc. v. Ecolab, Inc.*, No. 10-01005 (U.S. Dist. Ct., E.D. Cal., Fresno Div., filed December 9, 2010).

The product at issue is "Tsunami 100," which the defendant apparently began marketing to the plaintiff in 2007 as a replacement sanitizer, claiming that its higher price was justified by superior performance. According to the complaint, the defendant "never warned Bolthouse that there was any risk

that Tsunami 100 would actually decrease the shelf life of the carrots being processed."

Claiming that the scientific literature made it clear that the product's peroxyacetic acid did not work as promoted, the plaintiff alleges that it used Tsunami 100 in one of its processing lines beginning in 2009, according to the defendant's specifications and instructions and quickly received customer complaints about abnormal decomposition and unpleasant "perfume" or "chemical" odors. Conventionally processed carrots allegedly had a 28-day shelf life, while Tsunami 100 treated carrots "spoiled after 12 days." Alleging breach of express warranty and implied warranty of fitness for a particular purpose, actual fraud, negligent misrepresentation, negligent performance of services, strict liability, and negligent design, the plaintiffs seek damages of not less than $20 million, lost profits of not less than $30 million, punitive damages, interest, costs, and attorney's fees.

Tropicana Sued over Pomegranate/Blueberry Juice Product

A Florida resident has filed a putative class action against Tropicana Products, Inc. and a retailer, alleging that promotions for Trop50 Pomegranate Blueberry Juice Beverage® are deceptive because the product consists primarily of "a mixture of cheap apple juice and grape juice concentrates." *Cruz v. Tropicana Prods., Inc.*, No. 10-62926CA08 (Fla. Cir. Ct., Miami-Dade County, filed December 14, 2010). Seeking to certify a statewide class of consumers, the plaintiff claims that Tropicana hoped to tap into the "enormous new market" of those seeking to benefit from the antioxidants in blueberries and pomegranates by creating a "deceptive and misleading label with many elements not required by state or federal regulations."

The complaint refers to a September 2010 jury verdict in California finding that Welch Foods, Inc. marketed its 100% Welch's White Grape Pomegranate® beverage deceptively with labeling that was "literally true" but "had a tendency to deceive a substantial number of consumers." The complaint also notes that other companies actually make products containing primarily pomegranate and/or blueberry juice, including R.W. Knudsen, POM Wonderful and Odwalla, thus making consumer confusion about Tropicana's product reasonable. Alleging violation of the state's unfair competition law, breach of express warranty and implied warranty of fitness for a particular purpose, and unjust enrichment, the plaintiff seeks declaratory relief, damages, equitable monetary relief, and interest. According to the complaint, the damages do not exceed $5 million.

California Egg Producer Seeks Clarification of Prop. 2 Humane Animal Husbandry Standards

A California egg producer has filed a lawsuit against the state and the Humane Society of the United States (HSUS) seeking a declaration that the improvements it has already made to its facilities, referred to as "the enriched colony housing system," comply with the requirements of Proposition 2 (Prop. 2). *JS West Milling Co., Inc. v. California*, No. 10-04225 (Cal. Super. Ct., Fresno County, filed December 8, 2010). Prop. 2, approved in 2008, prohibits agricultural operations from confining farm animals, for all or the majority of any day, in a way that prevents the animal from "lying down, standing up, and fully extending his or her limbs; and turning around freely."

The plaintiff emphasizes that it does not seek to challenge the voter-approved proposition. Rather, because its requirements are "vague, and there is substantial disagreement among the agricultural community, animal rights groups, and other interested parties as to what they require," the plaintiff seeks clarification on the law's requirements from the court. The plaintiff has apparently spent more than $3 million on a new facility designed to comply with Prop. 2 and claims that it will soon begin spending millions more to bring existing facilities into compliance. The company alleges that, "Despite this substantial outlay of time, engineering, and capital to comply with Proposition 2, the chief economist and California Senior State Director of HSUS states that [plaintiff's] new facility would 'be obviously illegal in a few years' when Proposition 2 will be enforced."

According to the complaint, HSUS now contends that Prop. 2 requires "cage free" operations, "which, if true, will drive the retail price of eggs to unaffordable levels for consumers of this low-cost protein source." Claiming that its new "enriched colony housing system" has been used in the European Union for more than 10 years and is superior to "cage free" conditions, the plaintiff alleges that hens raised in these systems "suffer less disease, have lower mortality, and enjoy healthier air quality than many organic and 'cage free' hens. Hens in so-called 'cage free' systems are often grouped together by the hundreds or thousands in an open barn, where both birds and eggs often come into contact with fecal matter resulting in disease, and higher instances of salmonella."

The plaintiff seeks "a judicial determination of its rights and duties, and a declaration whether the enriched colony housing system with 60 birds to the EU Standards, installed at its facility in Livingston, meets the requirements of Proposition 2." The company also seeks the costs of suit and attorney's fees.

MEDIA COVERAGE

Tim and Nina Zagat, "Adding Fairness to the Tip," *The New York Times,* December 13, 2010

Authored by the co-founders of the Zagat Survey, this *New York Times* op-ed examines a recent spate of class action lawsuits arguing that many prominent restaurateurs, including Lidia Bastianich and Mario Batali, "are routinely cheating their workers by confiscating waiters' and busboys' tips to share with managers and other ineligible employees." Tim and Nina Zagat, however, question whether these culinary giants would continue to intentionally cheat employees while facing costly lawsuits and "draconian penalties" under the state's new Wage Theft Protection Act.

"The biggest worry for restaurateurs, though, is that one error — for example, just one ineligible employee found sharing in tips — could cost a restaurant its 'tip credit,' which permits restaurants to pay their waiters less than the full minimum wage because the state assumes that they get $2.60 an hour in tips," write the Zagats. "If a restaurant's tip credit is yanked, it has to repay that much for every hour worked by every tipped employee for up to three years."

The Zagats instead suggest that noncompliance stems from "a confusing hodgepodge of outdated wage and hour laws and opinion letters from the State Department of Labor," in addition to a 2008 New York State Court of Appeals decision that "unleashed a new wave of lawsuits" related to service charges for banquets and private parties. They credit the labor department with proposing a new hospitality wage order to help clarify regulations, but ultimately view the order as "only the first step in a much-needed overhaul of the current system of laws and regulation."

According to the Zagats, the New York Legislature should also (i) "grant the industry amnesty from the retroactive application of the 2008 State Court of Appeals decision," (ii) "reduce from six years to three the statute of limitations for which restaurants might be liable for back wages," and (iii) appoint a special judicial board "to hear all pending and future cases, on an expedited basis." Additional details about pending lawsuits in the restaurant industry appear in issues 361 and 368 of this *Update.*

OTHER DEVELOPMENTS

Food & Water Watch Critical of Seafood Eco-Labels

Food & Water Watch (FWW) has published a report critical of seafood eco-labels that certify products as "environmentally friendly" or "sustainably produced." Titled *De-Coding Seafood Eco-Labels: Why We Need Public Standards,* the report examines several seafood certification programs created

"in response to a range of controversial issues related to the production and consumption of fish."

According to FWW, these privately operated programs have capitalized on the U.S. Department of Agriculture's failure to implement an "organic" seafood label. Moreover, FWW argues, "some of these certification programs have additional interests beyond providing consumer guidance. Whether it's an interest in establishing a relationship with a fishery in order to work toward improvement, or getting more eco-certified product on the market, these other interests compete with label neutrality."

The FWW report finds that the six labeling programs under review "demonstrate inadequacies with regard to some or all of the following: environmental standards, social responsibility and community relations, labor regulations, international law, and/or transparency." It also claims that (i) "eco-labeling programs may cause increased public acceptance of products from controversial farming operations," (ii) "eco-labeling programs fail to promote local seafood options or account for the miles that imported seafood travels," (iii) "existing eco-labels have the potential to override the authority of governments, particularly in developing countries," (iv) "each of the examined eco-labels that certify wild fisheries fails to meet Food and Agriculture Organization criteria for eco-labeling and certification programs for wild fisheries," (v) "financial constraints have affected the ability of some otherwise eligible fisheries to attain certification, and (vi) "eco-labels should not be permitted for forage fish," or prey fish that form the basis of aquatic food chains.

The report particularly notes a purported conflict "between the intent to promote change within a certain fishery and the product labeling program, which can place a seal of approval on a product from a certified fishery before it has made conditional improvements in ecological performance to actually meet the standards for the label." As FWW concludes, "In order to provide consumers with much-needed, unbiased and well-regulated information, the federal government should introduce and oversee standards for eco-labeled seafood."

SCIENTIFIC/TECHNICAL ITEMS

Study Purportedly Links Diacetyl to Bronchiolitis Obliterans

A recent study has proposed a model linking the butter flavoring known as diacetyl to bronchiolitis obliterans syndrome, a lung disease diagnosed in microwave popcorn plant workers. James Mathews, et al., "Reaction of the Butter Flavorant Diacetyl (2,3-Butanedione) with N-α-Acetylarginine: A Model for Epitope Formation with Pulmonary Proteins in the Etiology of Obliterative Bronchiolitis," *Journal of Agriculture and Food Chemistry,* November 2010. Researchers with RTI International and the National Institute of Environmental

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Health Sciences evidently analyzed the effects of diacetyl on N-R-acetylarginine in an effort to understand how the chemical reacts with cell membranes containing the amino acid arginine. According to the study abstract, "Because diacetyl modifies arginine residues, an immunological basis for its toxicity is under investigation."

"Currently, the mechanism(s) of diacetyl toxicity (are) unknown; however, the results of this study suggest that injury to the airway epithelium may involve alteration of cellular proteins containing arginine, including those on cell membranes," wrote the authors.

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