Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Obama Rolls Out Regulatory Reforms, Urges Action on Existing Burdensome Rules

President Barack Obama (D) has signed an **executive order** establishing principles for agencies to follow in adopting regulations addressing such matters as food safety, toxic chemicals, labor, energy, and the environment. The order also requires a review of existing regulations to eliminate or revise those "that may be outmoded, ineffective, insufficient, or excessively burdensome."

A memorandum to agency heads accompanying the order affirms the administration's commitment "to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects." A second memorandum calls for federal agencies to develop plans to make their regulatory compliance and enforcement activities "accessible, downloadable, and searchable online." *See Office of White House Press Secretary News Release*, January 18, 2011.

Congressional Republicans Unhappy with GE Alfalfa EIS

Three congressional Republicans assert that the U.S. Department of Agriculture (USDA) has no authority to weigh economic factors in conducting an environmental review for genetically engineered (GE) alfalfa under the National Environmental Policy Act and the Plant Protection Act. In a January 19, 2011, **letter** submitted to USDA Secretary Tom Vilsack, they vilify him for including an option that would impose geographic restrictions and isolation distances on the crop. House Agriculture Committee Chair Frank Lucas (R-Okla.) and Senators Saxby Chambliss (R-Ga.) and Pat Roberts (R-Kan.) contend that the option was included in the final environmental impact statement (EIS) solely "to interfere in planting decisions based on the risk of economic harm due to pollen drift."

According to the congressmen, the option "is a poor substitute for existing options available to farmers to amicably resolve the concerns regarding

co-existence of agriculture biotechnology, conventional and organic crops." They also claim that "the implications of such decisions could potentially hinder the future development of varieties necessary to address the growing needs to produce more food, fiber and fuel on the same amount of land with fewer inputs." The letter criticizes litigants and the courts for "unwisely interfer[ing] in normal commerce," without otherwise discussing the cases that led to orders requiring USDA to conduct an EIS for GE crops several years after deregulating them. *See House Agriculture Committee Press Release*, January 19, 2011.

USDA Introduces "Biobased" Labels

The U.S. Department of Agriculture (USDA) has issued a **final rule** establishing a voluntary labeling program for "biobased" products made from renewable biological ingredients. Part of the USDA BioPreferred Program, which also administers procurement preferences for federal agencies, the labeling initiative applies to those products certified as containing a prescribed amount of renewable plant, animal, marine, or forestry material. According to a January 19, 2011, press release, "This **new label** will clearly identify biobased products made from renewable resources, and will promote the increased sale and use of these products in the commercial market and for consumers."

The BioPreferred Program has apparently designated "approximately 5,100 biobased products" in 50 categories, but estimates that "there are 20,000 biobased products currently being manufactured in the United States." As USDA Deputy Secretary Kathleen Merrigan stated, "Today's consumers are increasingly interested in making educated purchasing choices for their families. This label will make those decisions easier by identifying products as biobased. These products have enormous potential to create green jobs in rural communities, add value to agricultural commodities, decrease environmental impacts, and reduce our dependence on imported oil."

FTC Finalizes First Case Alleging Deceptive Ads for Probiotics

The Federal Trade Commission (FTC) has **announced** that final approval was given to a settlement reached with a Nestlé S.A. subsidiary over claims that its children's drink, BOOST Kid Essentials®, conferred specific health benefits, such as reducing the risk of colds and flu and reducing the duration of acute diarrhea. More information about the settlement appears in **Issue 356** of this *Update*. And the summary of a related lawsuit that the National Consumers League filed against the company can be found in **Issue 360** of this *Update*. The FTC said that this case was the agency's "first one challenging advertising for probiotics." *See FTC News Release*, January 18, 2011.

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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EFSA Seeks Public Input on Risk Assessment Guidance for Nanomaterials in Food and Feed

The European Food Safety Authority (EFSA) has **requested** public comments on its draft "Guidance on risk assessment concerning potential risks arising from applications of nanoscience and nanotechnologies to food and feed." The comment period closes February 25, 2011.

The draft guidance outlines under what circumstances nanomaterials in food and animal feed should be tested for potential health risks and how the risk assessment process should be conducted. According to the guidance, the risk of an engineered nanomaterial "will be determined by its chemical composition, physico-chemical properties, its hazard characterization and potential exposure." At an initial stage for the proposed use of a nanomaterial in food or feed applications, where internal exposure, a high level of reactivity or mobility, and persistence of the nanomaterial exist, "in-depth testing" would be appropriate. While the guidance recognizes that characterization parameters "will depend on the nature, functionalities, and intended uses of the" engineered nanomaterial, certain parameters are essential and are set forth in a table.

The guidance also provides a number of decision trees and the types of testing that may be necessary or are required "by specific sector regulations or by EFSA guidance." EFSA recognizes "several uncertainties related to the identification, characterization and detection of [engineered nanomaterials] which are related to the lack of suitable and validated test methods to cover all [their] possible applications, aspects and properties." EFSA also recognizes "a number of uncertainties related to the applicability of current standard biological and toxicological testing methods," and anticipates that the guidance will be updated following "appropriate developments."

FSA Issues Draft Regulations for Food Additives

The U.K. Food Standards Agency (FSA) has issued **draft regulations** to implement two European directives setting specific purity criteria for four food additives and one sweetener. According to FSA, the new additives are E392 extracts of rosemary, E427 cassia gum, E961 neotame, E1203 polyvinyl alcohol, and E1521 polyethylene glycol. The draft regulations also amend "existing specifications to bring them in line with international safety standards and to take account of new technological developments."

Effective March 31, 2011, the new rules will not "impose any additional costs to manufacturers." FSA will accept comments on the draft until February 11, 2011. *See FSA Press Release,* January 17, 2011.

LITIGATION

Chewing Gum Class Action Dismissed for Failing to State a Cause of Action

A federal court in Florida has dismissed without prejudice a putative class action alleging that the Wm. Wrigley Jr. Co. misled consumers by claiming that its Eclipse® Breeze chewing gum contains "Cardamom to Neutralize the Toughest Breath Odors." *Nichols v. Wm. Wrigley Jr. Co.*, No. 10-80759 (U.S. Dist. Ct., S.D. Fla., decided January 19, 2011). A similar lawsuit, filed in August 2010 in California, is discussed in **Issue 360** of this *Update*.

According to the court, the plaintiff pleaded sufficient facts "to establish the falsity of the representation," but he did not plead sufficient facts as to each of his claims of fraudulent concealment, negligent misrepresentation, intentional misrepresentation, and breach of express warranty. The court dismissed the plaintiff's claim for unjust enrichment because "he does not lack an adequate legal remedy." The plaintiff was given five days to file an amended complaint.

U.S. Supreme Court Seeks Government Views on California Animal-Handling Law

Seeking additional input before ruling on a *certiorari* petition, the U.S. Supreme Court has asked the acting solicitor general to provide the U.S. government's view of a challenge to a California law that prohibits slaughterhouses from receiving, processing or selling nonambulatory animals and prohibits dragging or pushing downer animals. *Nat'l Meat Ass'n v. Harris*, No. 10-224 (U.S., request filed January 18, 2011). The Ninth Circuit Court of Appeals allowed the state to enforce the law, finding that it is not preempted by the Federal Meat Inspection Act. Additional details about the Ninth Circuit's ruling appear in **Issue 344** of this *Update*.

California adopted the law after The Humane Society's video of the mistreatment of downer cattle at a slaughterhouse became public and led to a massive beef recall in 2008.

Legal Advocacy Groups Support Kosher Meat Processing Executive

The American Civil Liberties Union (ACLU) and National Association of Criminal Defense Lawyers (NACDL) have reportedly filed *amicus* briefs with the Eighth Circuit Court of Appeals, supporting the efforts of counsel for Sholom Rubashkin to overturn his conviction and sentence for financial fraud at his Iowa meat processing facility. The kosher plant was raided in 2008, 389 undocumented workers were arrested, and Rubashkin was initially charged with violating immigration laws. These charges were ultimately dropped, and a jury acquitted him of hiring underage workers. Prosecutors then aggres-

sively pursued charges that he falsified bank records to inflate sales and diverted customer payments for personal use, and he was found guilty on 86 counts in November 2009.

The court sentenced Rubashkin to 27 years in prison, a term longer than recommended by prosecutors. While the ACLU and NACDL reportedly focus their briefs on accusations that the sentencing court improperly cooperated with prosecutors before Rubashkin's arrest, the Washington Legal Foundation, joined by a number of law professors and former federal judges, argues in its *amicus* brief that the sentence was unreasonably harsh and raises "important procedural and substantive issues that arise in many white-collar sentencings."

Rubashkin's counsel apparently discovered after he was sentenced that the court had undisclosed, ex parte discussions with prosecutors and immigration officials before the raid. Rubashkin and *amici* contend that U.S. Immigration and Customs Enforcement records show that the court, by discussing charging strategies and raid logistics with prosecutors, was not impartial and actively participated in Rubashkin's prosecution. They call for a new judge to hear his motion for a new trial, calling for Rubashkin to "get his day in court" with a tribunal that is not an arm of the prosecution. *See The National Law Journal*, January 29, 2011.

Dean Foods Dairy Price-Fixing Settlement Under Attack

According to a news source, a co-defendant in litigation alleging a price-fixing conspiracy in the northeastern U.S. milk market has filed objections to the tentative deal reached by Dean Foods Co. and the dairy farmers who filed the lawsuit. *Allen v. Dairy Farmers of Am.*, No. n/a (U.S. Dist. Ct., D. Vt., settlement reached December 24, 2010). More information about the settlement, which must be approved by a court, appears in **Issue 376** of this *Update*. Dairy Marketing Services, LLC and a number of individual dairy farmers have also apparently opposed the settlement. The objectors contend that the settlement will result in price erosion for all dairy farmers and creates "both winners and losers in the class of dairy farmers represented by a single law firm by taking market access from one group of dairy farmers at the expense of another within the same class." They also claim that the small settlement of about $1,500 per farmer will not make up for the "swift and substantial" impact on dairy farmers' wallets. *See PR Newswire*, January 19, 2011.

LEGAL LITERATURE

Food Activists Call for State AGs to Address Obesity

Jennifer Pomeranz and Kelly Brownell, who are with the Yale Rudd Center for Food Policy & Obesity, have authored an **article** titled "Advancing Public

Health Obesity Policy Through State Attorneys General." Referring to the role played by state attorneys general (AGs) in public health policy on tobacco, the authors contend that they "can be leaders in formulating and effectuating obesity and food policy solutions." The article also takes note of recent actions state AGs have taken regarding purported misleading labeling of food and beverage products.

Among other matters, the authors suggest that, using their *parens patriae* authority, state AGs "may seek declaratory relief or recover costs or damages incurred by behavior that threatens the health, safety, or welfare of the state's citizenry [and] can redress wrongs when other remedies are lacking and can act to protect public interests in areas where other parties cannot." They also suggest that the authority to enforce the states' civil laws gives AGs the opportunity to vindicate citizens' rights through consumer protection litigation. The authors further encourage state AGs to bring multistate actions to stop the sale of "addictive" foods and the marketing of "unhealthy" foods to children. They propose that state AGs issue formal written opinions on the legality of taxing "calorically sweetened beverages."

The article concludes, "Obesity may not be on the radar of every attorney general as a topic for their attention, so state and local advocates should contact and work with their attorneys general to support public health measures at every level. . . . Attorneys general should explore the boundaries of their authority to ensure that they play the most constructive role possible."

OTHER DEVELOPMENTS

Prevention Institute Criticizes Children's Food Labeling

The Oakland-based Prevention Institute has issued a **report** claiming that front-of-package (FOP) labeling for children's food is "misleading." Authors of the study used the Children's Food and Beverage Advertising Initiative's product list to identify 58 prepared foods, snacks, cereals, and beverages with FOP labeling. The researchers then defined a product as "unhealthful" if it met one or more of the following criteria: (i) greater than 35 percent calories from fat; (ii) greater than 10 percent calories from saturated fat; (iii) greater than 25 percent calories from total sugars; (iv) greater than 480 mg sodium per serving for non-meal items or greater than 600 mg per serving for meal items; and (v) less than 1.25g fiber per serving.

Of the products sampled, 84 percent were allegedly "unhealthful and did not meet one or more nutrient criteria" derived from the U.S. Dietary Guidelines and the National Academies of Science. The report also supplies statistics on caloric sweeteners such as high-fructose corn syrup, whole food ingredients and artificial food dyes. In particular, the results purportedly indicate that (i) 57 percent of the study products contained high levels of sugar and 95

percent contained added sugar; (ii) 53 percent were low in fiber; (iii) 53 percent did not contain any fruits or vegetables; (iv) 24 percent of prepared foods were high in saturated fat; (v) 36 percent of prepared foods and meals contained high levels of sodium; and (vi) 21 percent contained artificial coloring.

The Prevention Institute has since claimed that these findings underscore flaws in the current FOP labeling system for children's foods. "Without FDA regulation, instead of giving more information to parents struggling to make the best decisions for their kids, the system is deceiving them," states a January 2011 press release. "The food industry can—and should—do better." *See Food Politics* and *Los Angeles Times,* January 19, 2011.

Consumer Group Issues Seafood Mercury Report

GotMercury.org recently released a **report** claiming that "nearly one-third of the fish purchased at [California] grocery stores contains levels of mercury the United States has deemed unsafe for consumption and more than half of the retailers did not post mercury advisory signs." The authors based their findings on 98 samples of swordfish, halibut, salmon, and tuna from 41 grocery stores and sushi restaurants across the state, alleging that all samples "contained measurable levels of mercury, most above 0.5 parts per million (ppm) methyl-mercury – the upper threshold set by the state of California as acceptable for human consumption in non-commercial fish caught in inland waters."

GotMercury.org also reported that mercury levels (i) averaged 1.47 ppm in swordfish, "well above the U.S. Food and Drug Administration's (FDA's) mercury action level of 1 ppm"; (ii) averaged 0.407 ppm in yellowfin tuna; and (iii) averaged 0.721 ppm in sushi tuna, "a level that could be harmful to pregnant women and children." The organization is urging FDA to revise its mercury action level to 0.5 ppm, adding that California should pursue stricter mercury disclosure laws. "Failure to initiate a state wide requirement to post mercury advisory signs at places where fish is sold is keeping the public, especially women and children, at risk for dire health consequences resulting from mercury exposure," concluded the report.

Meanwhile, the National Fisheries Institute has emphasized the group's connection to the Turtle Island Restoration Network, an environmental organization. "They want to cut down on seafood consumption so the sea turtles don't end up as bycatch," an institute spokesperson said. "It's detrimental to public health and it's cloaked as helping the public." *See The San Francisco Chronicle,* January 18, 2011.

Food & Water Watch Petitions to Remove China from Eligible Poultry-Exporters List

Food & Water Watch recently submitted a citizen petition to the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) to remove China from the list of eligible processed-poultry exporters to the United States. Using a Freedom of Information Act request, the consumer watchdog claims to have found "serious mistakes" in the USDA approval process that allows the imported chicken.

The watchdog asserts that (i) "[i]n its haste to get a final rule announced in time for a visit to the United States by the Chinese President in 2006, USDA missed required steps in the approval process and failed to send the rule to the USDA Office of Civil Rights for review"; (ii) "USDA staff made incorrect public statements that consumers would be able to avoid Chinese poultry imports, despite the fact that country of origin labeling requirements would not apply to processed poultry products"; (iii) "[p]ressure on the USDA to approve the rule was based in part on U.S. efforts to reopen the U.S. beef trade with China, which was banned after mad cow disease was discovered in a cow in Washington State in 2003"; and (iv) "FSIS provided different sets of data for the potential economic impact of processed poultry imports from China on the domestic poultry industry."

"In the long[-]running saga of whether or not the U.S. should allow poultry processed in China to enter the United States, we now have evidence of instances where the USDA broke its own rules," Food & Water Watch Executive Director Wenonah Hauter said in a statement. "The USDA's first responsibility is to protect U.S. consumers from unnecessary safety risks—not rush through the process to help trade negotiators open the Chinese market to U.S. beef." *See Food & Water Watch Press Release,* January 19, 2011.

Walmart Launches Effort to Provide Healthier Food Choices

Walmart has unveiled a plan to provide healthier food choices at reduced prices, setting specific targets for lowering sodium, *trans* fats and added sugars in thousands of packaged foods by 2015. Joined by first lady Michelle Obama at an event in Washington, D.C., the major grocer outlined key elements of the initiative that built on her "Let's Move" campaign to make healthy choices more convenient and affordable.

The initiative includes (i) reducing sodium by 25 percent in grain products, luncheon meats, salad dressings, and frozen entrees; (ii) reducing added sugars by 10 percent in dairy items, sauces and fruit drinks; (iii) removing "all remaining industrially produced *trans* fats" in packaged foods; (iv) making healthier choices more affordable through a "variety of sourcing, pricing and transportation and logistics initiatives"; (v) developing "strong criteria for a simple front-of-package seal" to identify "truly healthier food options";

(vi) "providing solutions to address food deserts by building stores in underserved communities"; and (vii) "increasing charitable support through nutrition programs."

"With more than 140 million customer visits each week, Walmart is uniquely positioned to make a difference by making food healthier and more affordable to everyone," Walmart U.S. President and Chief Executive Officer Bill Simon said in a statement. "We are committed to working with suppliers, government and non-governmental organizations to provide solutions that help Americans eat healthier and live a better life." *See Walmart Press Release,* January 20, 2011.

MEDIA COVERAGE

Jennifer Medina, "In South Los Angeles, New Fast-Food Spots Get a 'No, Thanks,'" *The New York Times,* January 15, 2011

This article focuses on the Los Angeles City Council's unanimous decision last month to permanently extend a moratorium on new stand-alone fast-food restaurants in South Los Angeles, where the city Department of Health estimates that 30 percent of the residents are obese. Although the ban allows exceptions for "mom-and-pop" businesses and shopping center eateries, it ultimately seeks to prevent additions to the 1,000 preexisting fast-food joints "in the 30 or square miles of South Los Angles covered by the regulations." According to *Times* writer Jennifer Medina, these rules "are meant to encourage healthier neighborhood dining options," such as "sit-down restaurants, produce-filled grocery stores and takeout meals that center on salad rather than fries."

But the move also represents the first time a city has prohibited new fast-food restaurants "as part of a public health effort," raising questions about whether the approach will actually lower obesity, heart disease and diabetes rates within the district. While the Physicians Committee for Responsible Medicine has already urged Detroit and other cities to take similar approaches, researchers like those at the RAND Corporation have issued more cautious responses addressing the prevalence of gas stations and convenience stores in these communities. "People get a lot more of their discretionary and unnecessary food from there than from a fast-food restaurant," one RAND senior economist told Medina. "A lot of this is driven by sound bites overlooking what is actually going to have an impact. People talk about this area being a food desert, but it is more like swamp—you are literally drowning in food, but none of it is really a good option."

Medina notes, however, that these reservations have met resistance from health advocates, who warn that finding the "perfect policy is futile" and who compare "the fight against junk food to the early efforts of antismoking

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activities." As Rudd Center Director Kelly Brownell is quoted as saying, "There is something inevitable here—you get different things going in different places and it will just be a matter of time before it starts to have a cumulative effect. To intervene in any one part of the system and expect a significant result is just not possible."

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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.