Shook, Hardy & Bacon L.L.P.

ISSUE 425 | FEBRUARY 3, 2012

# FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS



## LEGISLATION, REGULATIONS AND STANDARDS

### Labor Department to Reconsider Parental Exemption to Child Labor in Agriculture

The U.S. Department of Labor (DOL), which had sought in 2011 to increase protections for children working in agriculture, has agreed to "re-propose the portion of its regulation on child labor in agriculture interpreting the 'parental exemption.'" The original proposal sought to update a 40-year-old rule in light of data showing that "children are significantly more likely to be killed while performing agricultural work than while working in all other industries combined." Agriculture Secretary Tom Vilsack applauded the action, saying, "The Labor Department listened to farmers and ranchers across the country. This announcement and the additional opportunity for comment represent a common-sense approach to strengthen our agricultural economy while keeping kids safe."

Critical responses from a number of lawmakers and the agricultural sector led DOL to reconsider its action. Under the revised rule, children of any age employed by their parent or a person standing in the place of the parent, including "a part owner of the farm, a partner in a partnership or an officer of a corporation that owns the farm if the ownership interest in the partnership or corporation is substantial," may perform any job on a farm "operated by their parent or such person standing in the place of a parent."

Still, the rule would reportedly prohibit children younger than 16 from using hazardous power-driven equipment and children younger than 18 from working in feed lots, grain bins and stockyards. Senator Jerry Moran (R-Kan.) called the proposed revisions "promising news" but contended that the child labor rule remains "a threat to the future of agriculture." According to Moran, the rules would prevent children from participating in common farm tasks such as rounding up cattle on horseback, operating a tractor or mucking out stalls with a shovel and wheelbarrow. The president of the American Farm Bureau Federation said, "The decision today by the Labor Department to re-propose the 'parental exemption' in the child labor rule is a positive step, but much more work is needed. . . . DOL's rule would have a detrimental effect

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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

**Mark Anstoetter**
816-474-6550
manstoetter@shb.com

or

**Madeleine McDonough**
816-474-6550
202-783-8400
mmcdonough@shb.com

If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

on family farms and would create an even tighter supply of farm labor when it's already in short supply." *See DOL News Release* and *The Voice of Agriculture*, February 1, 2012; *Tulsa World*, February 2, 2012.

### Federal Agencies to Share Non-Public Information About GE Plants

The Environmental Protection Agency (EPA) has **announced** that it will share with other federal agencies confidential business information relating to genetically engineered (GE) plants submitted under the Federal Insecticide, Fungicide, and Rodenticide Act. EPA has entered a memorandum of understanding (MOU) to this effect with the Department of Health and Human Services, U.S. Department of Agriculture (USDA), Centers for Disease Control and Prevention, and Food and Drug Administration (FDA).

According to the notice, the MOU "will support and encourage cooperation and communication between USDA, FDA, and EPA in the regulatory oversight over genetically engineered plants and foods derived from such plants. Under the MOU, USDA's Office of Animal and Plant Health Inspection Service/ Biotechnology Regulatory Services (APHIS/BRS) and EPA agree to share with each other information about genetically engineered plants and the foods derived from such plants, including non-public information exempt from public disclosure usually referred to as 'confidential business information' and/ or 'trade secrets.'" The information subject to the MOU may not be further disclosed and those authorized to see the material will be limited. *See Federal Register*, February 1, 2012.

### FDA Report Targets Compliance, Enforcement Data

The Food and Drug Administration (FDA) has **issued** a report outlining eight proposals to make its "publicly available compliance and enforcement data more accessible and user-friendly." Under the initiatives described in the **report**, FDA will explore different ways to (i) "improve data quality and facilitate more timely data disclosure"; (ii) expedite error reporting; (iii) "present its compliance and enforcement data graphically and better utilize mobile web applications"; (iv) "better integrate its compliance and enforcement data"; (v) improve the search capabilities of the inspections database; (vi) post additional data compilations or analysis; (vii) "better utilize social media"; and (viii) "provide appropriate context for the compliance and enforcement data that it discloses." *See Federal Register,* February 1, 2012.

### European Parliament Vetoes Food Labeling Changes

The European Parliament has reportedly vetoed a European Commission (EC) proposal that would have permitted reformulated food products to display "percent less" claims pertaining to their fat, salt and sugar contents. According to a February 2, 2012, press release, the rejected changes to Annex of EC

Regulation 1924/2006 "would have allowed, for example, a '15% less sugar' claim, which would be based on a previous formulation of the same product," as well as a "No added salt/sodium" claim.

The 393 members of Parliament (MEPs) who voted against the proposal apparently argued that products with such claims "could misleadingly appear healthier" than those with labels indicating a reduced level of sugar, salt or fat. Under current EU legislation, a reduced nutrient claim "may only be made where the reduction in content is at least 30% compared to a similar product, except… for sodium, or the equivalent value for salt, where a 25 % difference shall be acceptable."

Meanwhile, the veto has already drawn criticism from industry groups such as the U.K. Food and Drink Federation, which described Parliament's decision as a "missed opportunity" to encourage product reformulation. As the federation's director of food safety and science, Barbara Gallani, elaborated, "Today's result is a blow for consumers and industry alike. 'X% less' and 'no added salt' claims would have supported the food industry's drive to gradually reformulate products, even where technically challenging, by making consumers readily aware of health improvements in their favorite products." *See UK Food and Drink Federal Press Release,* February 2, 2012.

**European Commission Issues Animal Welfare Strategy**

The European Commission recently released a new **animal welfare strategy** designed to close gaps in the current laws and remedy a lack of uniform enforcement. According to a January 20, 2012, press release, the strategy ultimately aims to (i) provide consumers with more information about "what animal-welfare claims made on product labels really mean," (ii) ensure that existing rules "really do benefit animals," and (iii) improve training for animal handlers. In addition, the Commission has pledged to address the transportation of animals to slaughter, as well as introduce a general animal welfare bill and bills pertaining specifically to pig welfare over the next four years.

The announcement apparently followed a citizen petition covered in **Issue 422** of this *Update* and initiated by World Horse Welfare (WHW), which called for an eight-hour limit on the transportation of livestock to slaughter. Nevertheless, the group has since criticized the new strategy's failure to recommend maximum journey limits and tackle horsemeat labeling. "This is the second time in two months that the European Commission has chosen to ignore the calls of its citizens and MEPs to rectify the terrible conditions and needlessly long journeys of horses transported to slaughter across Europe," said WHW Chief Executive Roly Owers. "In November the Commission had the opportunity to improve animal welfare by proposing changes to existing legislation; however, despite acknowledging that 'severe animal welfare problems persist' and that the long journey times endured by horses do not conform to the

recommendations of their own scientific advisors, they proposed no changes." *See WHW Press Release,* January 27, 2012.

### Massachusetts Governor Calls for Soft Drink, Candy Tax

Massachusetts Governor Deval Patrick (D) has proposed eliminating the state's sales tax exemption on soft drinks and candy to combat obesity and control rising health care costs. Included in his fiscal year 2013 budget recommendation, Deval's plan would reportedly raise $61.5 million targeted in large part to preserving public health programs and preventative care services.

"In the past 10 years, the percentage of Massachusetts adults with diabetes has almost doubled, and obesity will soon pass smoking as the leading cause of preventable death," according to a recent **budget issue brief** released by the governor. "Consumption of candy and soda is on the rise. Per capita candy consumption has increased steadily since the mid-1980s. Candy and soda add significant non-nutritional calories to the diets of Americans and are directly linked to obesity, especially among children." *See News Release of Governor Deval Patrick*, January 25, 2012.

## LITIGATION

### D.C. District Court Refuses to Certify Class in Antitrust Suit Against Whole Foods

A federal court in the District of Columbia has denied a motion to certify a class of Los Angeles County Whole Foods shoppers alleging that the company's 2007 merger with Wild Oats "substantially lessened competition" in violation of the Clayton Act, "created an unlawful monopoly" under the Sherman Act, and "constituted an unlawful agreement in restraint of trade" in violation of both acts. *Kottaras v. Whole Foods Mkt., Inc.*, No. 08-1832 (U.S. Dist. Ct., D.D.C., decided January 30, 2012). The plaintiff, a California resident and patron of both stores, claims that the merger unlawfully raised prices on certain products by foreclosing competition in the premium, natural and organic supermarket sector.

According to the court, injury to individual class members "cannot be proven through classwide evidence" and thus the action fails to "satisfy Rule 23(b)(3)'s requirement that common questions predominate over individual ones." The court also found that the methodology of the plaintiff's expert "is too vague for the Court to rigorously analyze," and that the alternative request for certification under Rule 23(b)(2) must be rejected because the equitable relief in the case was "merely incidental to monetary damages."

Apparently, plaintiff's expert planned to prove classwide damages with regressive analyses that would include only products that increased in price due to the merger. Because the defendant's expert contended that Whole Foods shoppers buy "highly differentiated baskets of products" and that "the *majority* of the

products sold at Whole Foods have *decreased* in price" since the merger, the court agreed that common evidence could not show that a substantial majority of proposed class members were injured. The court also noted that the plaintiff's expert had "not yet performed a single regression," nor could he "tell the court the precise analyses he intended to undertake." Given variable factors with a potential impact on price for which this expert would have to account, such as "wholesale cost, advertising or sales promotional activities, seasonality, competition from other stores, average or median disposable income of the customer base," the court agreed with Whole Foods that his methodology was too vague.

### Another Putative Class Action Filed Against Tropicana for "Natural" Juice Claims

A Pennsylvania resident has filed a putative class action in a Florida federal court seeking to represent Florida and multistate classes of consumers allegedly misled by claims that Tropicana orange juice products are "pure" and "natural." *Pederson v. PepsiCo*, No. 12-00104 (U.S. Dist. Ct., M.D. Fla., Tampa Div., filed January 18, 2012). Similar to lawsuits already filed in New Jersey and California, this complaint alleges that Tropicana branded fruit juices are extensively processed and flavored for mass-marketing purposes. Additional information about the other lawsuits appears in **Issue 422** of this *Update*.

According to the complaint, "Defendants heavily process Tropicana Orange Juice by pasteurizing, de-aerating, and storing it for long periods of time at a 'tank farm' and under a nitrogen blanket, which strips the juice of its flavor and aroma. Defendants then re-flavor the product with chemical 'flavor packets' before it is packaged into a carton and sold to the consumer." Alleging violations of the Florida Deceptive and Unfair Trade Practices Act, misleading advertising, breach of express warranty, and unjust enrichment, the plaintiff seeks compensatory and punitive damages, restitution and disgorgement, declaratory and injunctive relief, corrective advertising, interest, attorney's fees, and costs.

### New Lawsuit Claims Tostitos® and SunChips® Are Not "All Natural," Contain GE Ingredients

A New York resident has reportedly filed a putative class action in federal court, alleging that Frito-Lay misleads consumers by promoting its snack products as "all natural" when they actually contain corn and oils made from genetically engineered (GE) plants. *Shake v. Frito-Lay N. Am., Inc.*, No. 12-408 (U.S. Dist. Ct., E.D.N.Y., filed January 30, 2012). Similar litigation was filed in December 2011 in California. Details about that case appear in **Issue 421** of this *Update*.

According to a news source, plaintiff Chris Shake alleges that he paid an additional 10 cents per ounce of Tostitos® and SunChips® over other comparable products and would not have done so had he known that the defendant's products are not made with "all-natural ingredients." A company spokesperson was quoted as saying that the product labeling "complies with all regulatory

requirements." Shake reportedly alleges damages in excess of $5 million. *See Reuters*, January 30, 2012.

## LEGAL LITERATURE

**Tobias Teufer, "GMO-Regulation (EC) No. 1829/2003 and Honey: How to Proceed," *European Food & Feed Law Review*, 2011**

This article considers how those marketing honey in the European Union (EU) may proceed after the European Court of Justice in September 2011 determined that honey with trace amounts of pollen from genetically modified (GM) corn must undergo a full safety authorization before it can be sold to consumers. Highly critical of the court's opinion, the author suggests that because it is based on a faulty factual premise involving how honey is produced and harvested, other courts would not necessarily be bound by its interpretation of Regulation (EC) No. 1829/2003, because a proper factual background would present a different case. He calls for amendments to the relevant regulations that would exempt honey from their requirements or establish an upper limit for pollen from GM crops in honey.

The author also suggests that honey will be subject to authorization and labeling requirements only if GM-pollen is present and detected. But he further explains that under existing laws honey with pollen from authorized GM crops is marketable in the EU, while pollen originating from GM crops without authorization "must not be further marketed in the EU." The article concludes by claiming that "the Court's reasoning has resulted in chaos. In practice, beekeepers and businesses trading honey all over the world must commission thousands of expensive laboratory analyses in order to determine whether they can lawfully market their honey in the EU. And because of the inhomogeneous character of honey they do not even know whether they can rely on the results of these analyses."

## OTHER DEVELOPMENTS

**UCSF Researchers Continue Crusade Likening Sugar to Alcohol and Tobacco**

Anti-sugar crusader Robert Lustig has **joined** University of California, San Francisco, (UCSF) colleagues Laura Schmidt and Claire Brindis to co-author commentary in the February 2, 2012, edition of *Nature* that advocates regulating fructose like alcohol and tobacco. A specialist in neuroendocrinology at the UCSF School of Medicine, Lustig has garnered attention in national venues such as *The New York Times* for comparing sugar to a poison and linking it to metabolic dysfunction, cardiovascular disease, diabetes, liver cancer, and other non-communicable diseases. Details about his previous work appear in **Issue 391** of this *Update*.

Titled "The Toxic Truth About Sugar," the latest article in Lustig's arsenal maintains that because people in the developed world consume "an average of more than 500 calories per day from added sugar alone," fructose now meets the four criteria used by public health advocates to justify regulation; that is, "unavoidability (or pervasiveness throughout society), toxicity, potential for abuse and negative impact on society." With this framework in mind, the authors not only cite evidence of sugar's alleged health effects and "dependence-producing properties" but highlight "the long-term economic, health-care and human costs of metabolic syndrome," including the $150 billion that the United States purportedly spends on related resources each year.

"Ultimately, food producers and distributors must reduce the amount of sugar added to foods," contend Lustig, Schmidt and Brindis, who also urge policymakers to curb the availability of sugar by co-opting strategies from the fight to reduce alcohol and tobacco use. In particular, they propose (i) "adding taxes to processed foods that contain any form of added sugars"; (ii) restricting the sale of sugary products in workplaces, near schools or to minors; (iii) banning TV ads and other forms of marketing for added-sugar products; and (iv) revoking sugar's Generally Recognized as Safe (GRAS) status with the Food and Drug Administration.

"Regulating sugar will not be easy—particularly in the 'emerging markets' of developing countries where soft drinks are often cheaper than potable water or milk," concludes the commentary, noting how once divisive policies like smoking bans are now widely accepted. "These simple measures—which have all been on the battleground of American politics—are now taken for granted as essential tools for our public health and well-being. It's time to turn our attention to sugar."

Meanwhile, the opinion piece has already drawn kudos from health advocates such as the director of Yale University's Rudd Center for Food Policy & Obesity, Kelly Brownell, who told *Time* magazine that despite the food industry's insistence on "a calorie is a calorie," "this and other research suggests there is something different about sugar." As Schmidt herself reportedly elaborated on *CNN*, "When you think about it, this actually makes a lot of sense. Alcohol, after all, is simply the distillation of sugar. Where does vodka come from? Sugar." *See Time Magazine*, February 2, 2012.

**Advocacy Group Publishes BPA Action Plan for Federal Agencies**

The Center for Progressive Reform has issued a **paper** titled "Protecting the Public from BPA: An Action Plan for Federal Agencies." Contending that the chemical bisphenol A (BPA), which is used extensively in food contact materials, has negative health effects in low doses and that federal agencies have failed, to date, to regulate it, the center outlines short-term and long-term actions they should take.

Among other matters, the paper suggests that the Food and Drug Administration use its new mandatory recall authority under the Food Safety Modernization Act to "recall certain foods containing toxins such as BPA, if the health hazard concerns

become too great and traditional regulatory methods ineffective at protecting the public."

The paper also recommends that the Environmental Protection Agency (EPA) update its Integrated Risk Information System, which contains toxicological profiles on industrial chemicals, "to include current data to reflect the risks that have recently come to light, especially concerning low-dose effects." As an alternative, the paper calls on EPA to list BPA on its "chemicals of concern" list "to further educate the public about the chemical's risks." And, "[a]s a short-term option, NIOSH [National Institute for Occupational Safety and Health] and OSHA [Occupational Safety and Health Administration] should perform more workplace studies and develop a more comprehensive database of workplace exposures and risks." The paper also suggests that the Consumer Product Safety Commission be authorized to regulate BPA much as it was authorized to regulate phthalates in children's toys and products when Congress enacted the Consumer Product Safety Improvement Act of 2008.

Recognizing that research gaps persist, the paper "urges a two-phase approach to BPA regulation. The first phase should produce immediate information collection and dissemination, including early warnings for the public and stricter guidance for industry. The second phase should include long-term regulatory controls, standards, and protections, to be promulgated as soon as missing information becomes available."

Meanwhile, the *Columbia Missourian* newspaper recently profiled University of Missouri Biology Professor Frederick vom Saal, who has made BPA the focus of several decades of research and has repeatedly campaigned against its use. He reportedly attended a September 2011 meeting of scientists concerned that federal agencies have failed to act in the face of "mountainous evidence" of its purported low-dose health effects and is nearly done collaborating with colleagues on a new paper that will reflect the conference's conclusions. They plan to disseminate all or parts of the paper to Congress, regulatory agencies and the public through the news media, as well as abroad, where vom Saal believes it will have an impact on regulatory systems more protective of public health than the United States. *See Columbia Missourian*, January 31, 2012.

**ANA Advertising Law & Public Policy Conference Slated for March in D.C.**

The Association of National Advertisers' **2012 Advertising Law & Public Policy Conference** will reportedly target how best "to navigate today's complex marketing landscape and remain on the cutting edge in an ever-challenging legal and regulatory environment." Slated for March 28-29, 2012, in Washington, D.C., the conference will include sessions on (i) global views of online behavioral advertising and self-regulation, (ii) coping with changes in class-action law, (iii) expectations from the U.S. Supreme Court, (iv) "how the long arm of criminal law is increasingly reaching into marketers' boardrooms and impacting in-house counsel," and (v) key issues facing federal agencies.

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## SCIENTIFIC/TECHNICAL ITEMS

### Study Advocates Penny-Per-Ounce Soft Drink Tax

A recent study funded by the Robert Wood Johnson Foundation and American Heart Association claims that a penny-per-ounce tax on sugar-sweetened beverages would reduce consumption by 15 percent among adults ages 25 to 64 years. Y. Claire Wang, et al., "A Penny-Per-Ounce Tax on Sugar-Sweetened Beverages Would Cut Health and Cost Burdens of Diabetes," *Health Affairs,* January 2012. Researchers apparently used data from the National Health and Nutritional Examination Survey (2003-06) to estimate that, between 2010 and 2020, the tax would "prevent 2.4 million diabetes person-years, 95,000 coronary heart events, 8,000 strokes, and 26,000 premature deaths, while avoiding $17 billion in medical costs." In addition, the scheme would purportedly raise $13 billion in annual tax revenue.

In particular, the study notes that the "low price of these beverages, along with their mass marketing, has undoubtedly fueled their widespread overconsumption by both adults and children," who allegedly drink as much as 13 billion gallons per year. "If the tobacco tax history is any parallel, the current discussion of taxes on sugar-sweetened beverages could represent an early development in the broadened use of taxes to promote health and decrease health costs," conclude the authors. *See Columbia University Mailman School of Public Health Press Release,* January 10, 2012.

OFFICE LOCATIONS

**Geneva, Switzerland**
+41-22-787-2000
**Houston, Texas**
+1-713-227-8008
**Irvine, California**
+1-949-475-1500
**Kansas City, Missouri**
+1-816-474-6550
**London, England**
+44-207-332-4500
**Miami, Florida**
+1-305-358-5171
**San Francisco, California**
+1-415-544-1900
**Tampa, Florida**
+1-813-202-7100
**Washington, D.C.**
+1-202-783-8400

## 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.