Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

CDC Report Highlights Sugar Consumption of Kids and Adolescents

A recent **data brief** issued by the Centers for Disease Control and Prevention (CDC) has suggested that children and adolescents consume more added sugar calories from food as opposed to beverages. According to the National Center for Health Statistics (NCHS), which relied on data from the National Health and Examination Survey, "Boys consumed more calories per day from added sugars than girls," with caloric intake from added sugars increasing linearly with age for both boys and girls. In particular, NCHS reported that (i) pre-school aged boys and girls (2-5 years) consumed 13.5 percent and 13.1 percent of their calories from added sugars, respectively; (ii) school-age boys and girls (6-11 years) consumed 16.6 percent and 15.7 percent of their calories from added sugars, respectively; and (iii) adolescent boys and girls (12-19 years) consumed 17.5 percent and 16.6 percent of their calories from added sugars, respectively. NCHS also noted some differences in the percent of calories consumed from added sugars by race and ethnicity, but found "no significant difference in the percent of total calories from added sugars based on poverty income ratio either for boys or girls."

As NCHS explained, however, its findings evidently challenge previous research claiming "that sodas are the single leading food source of added sugars intakes among children, adolescents and adults." Instead, the survey data apparently indicated that not only were more added sugars consumed "at home rather than away from home for both beverages and foods," but that "[59] percent of added sugars calories came from foods compared with 41 [percent] that came from beverages."

"A substantial percentage of calories in the diets of children and adolescents between 2005 and 2008 came from added sugars," concludes the NCHS report, which ultimately backs the *2010 Dietary Guidelines* recommendation to reduce the consumption of added sugars regardless of their source. "This strategy could play an important role in reducing the high prevalence of obesity in the United States without compromising adequate nutrition."

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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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Danish Minister Calls for Improved EU Animal Welfare Standards

Danish Food and Agriculture Minister Mette Gjerskov has reportedly urged the European Union (EU) and its member states to support improved animal welfare standards. In January 2012, the European Commission released a new animal welfare strategy, details of which were covered in **Issue 425** of this *Update*.

Speaking to an international conference in Brussels, Belgium, Gjerskov asserted that the "increasing" transportation of animals for slaughter across Europe was "worrying," as evidenced by a petition signed by 1 million EU citizens who have challenged current regulations allowing such journeys to exceed 24 hours by calling for an eight-hour maximum. "The fact that so many people signed a petition is a signal to politicians that there is great concern about how we care for animals," Gjerskov said. "We need to raise standards beyond legal requirements." *See theparliament.com,* February 29, 2012.

California Legislation Would Limit Sale of Sports Drinks in Schools

California Assembly Member Das Williams (D-Santa Barbara) recently introduced a bill (**A.B. 1746**) that would restrict the sale of sports drinks from middle and high schools throughout the state. If enacted, the legislation would prohibit the sale of "electrolyte replacement beverages" during school hours as of July 1, 2013.

"Sports drinks are an inappropriate option for California students," said Harold Goldstein, executive director of the California Center for Public Health Advocacy. "They were designed for athletes who have been sweating for an hour or more, not for children as they walk across campus or eat their lunch." *See Press Release of Assembly Member Das Williams,* February 21, 2012.

LITIGATION

Organic Farmers Fail to Show Controversy, Patent Invalidation Suit Against Monsanto Dismissed

A federal court in New York has dismissed, for lack of jurisdiction, the claims filed by numerous organic farming interests seeking a declaration that they are not infringing Monsanto's genetically modified (GM) seed patents, the patents are invalid and unenforceable and the company would not be entitled to remedies against them. *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, No. 11-2163 (U.S. Dist. Ct., S.D.N.Y., decided February 24, 2012). According to the court, because Monsanto has an express policy not to bring infringement actions against a farmer whose fields have trace amounts of its seed or traits "as a result of inadvertent means," such as seed drift, cross-pollination or

commingling with tainted equipment, the plaintiffs are unable to establish a substantial controversy or an injury traceable to the defendant.

While Monsanto has brought 144 infringement actions against farmers over a 13-year period, the court found this insignificant given the 2 million farms currently operating in the United States. In addition, the company has apparently never brought an infringement action against an organic farming operation. The court also determined that the suits which had been filed did not involve similarly situated parties; rather, they involved farmers who had saved GM seeds in violation of their licenses or intentionally induced others to infringe Monsanto's patents.

Discussing a letter the plaintiffs sent to Monsanto demanding an express waiver of any claim for patent infringement the company may ever have against the plaintiffs and to memorialize that waiver with a written covenant not to sue, the court suggested that it seemed "to have been nothing more than an attempt to create a controversy where none exists. This effort to convert a statement that defendants have no intention of bringing suit into grounds for maintaining a case, if accepted, would disincentivize patentees from ever attempting to provide comfort to those whom they do not intend to sue, behavior which should be countenanced and encouraged. In contrast, plaintiffs' argument is baseless and their tactics not to be tolerated."

Court Affirms $2 Million Supply Chain Damages Award from 2008 Contaminated Beef Recall

A federal court in Minnesota has determined that General Mills Operations, LLC was entitled to an award of prejudgment interest of 10 percent per year from the date it provided a written notice of claim to the company that supplied it with contaminated beef products subject to a recall in 2008. *Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, No. 10-15 (U.S. Dist. Ct., D. Minn., decided February 24, 2012). According to the court, the only matters in dispute in this contract action were whether General Mills' May 27, 2008, letter informing the defendant that it had incurred losses of at least $1.4 million constituted a "written notice of claim" under Minnesota's prejudgment interest statute and the appropriate interest rate to apply.

While the letter indicated that costs could continue to accrue and did not include evidentiary support, it did demand prompt payment of $1.4 million "in full settlement of this issue." The court found this sufficient as a written notice of claim, citing cases in which "courts repeatedly have held that prejudgment interest under Section 549.09 is available 'irrespective of a defendant's ability to ascertain the amount of damages for which he might be liable.'"

Regarding the interest rate, the statute was apparently amended in August 2009 to provide a rate of 10 percent per year for all judgments in excess of

$50,000, with an effective date of August 1, 2009, applicable "to judgments and awards finally entered on or after that date." Before amendment, the interest rate was the "secondary market yield of one year United States treasury bills." The court found a split of authority in the state on its application.

The defendant urged the court to calculate interest on the judgment at the U.S. Treasury rate for the time period before August 1, 2009, and at 10 percent thereafter. At least one Minnesota court of appeals had applied the law this way. Several others, however, used the prejudgment interest rate of 10 percent to periods both before and after August 1, 2009, for judgments entered after that date. The court predicted that the state's high court would adopt the latter interpretation and entered an order awarding $552,000 in prejudgment interest. Added to the stipulated damages and attorney's fees, the final award was nearly $2.2 million.

Class Action Challenges "All Natural" Claims for 0 Calories Lifewater® Beverages

A California resident has filed a putative class action in a California federal court against the companies that make a line of SoBe® beverages known as 0 Calories Lifewater®, alleging that the product labels and promotions are misleading. *Hairston v. S. Beach Beverage Co., Inc.*, No. 12-1429 (U.S. Dist. Ct., C.D. Cal., filed February 21, 2012). According to the plaintiff, the companies label the product as "all natural" despite purported non-natural and synthetic ingredients, such as ascorbic acid, cyanocobalamin, calcium pantothenate, niacinamide, and pyridoxine hydrochloride, which are apparently listed on product labels as Vitamins C, B12, B5, B3, and B6, respectively. He claims that reasonable consumers "do not have the specialized knowledge necessary to identify ingredients in SoBe Beverages as being inconsistent with the 'All Natural' claims."

The plaintiff also alleges that the companies deceive consumers by using the names of fruits on the labels. For example, the "B-Energy Strawberry Apricot, does not contain any strawberries or apricots; instead, it contains purple sweet potato juice (color). Similarly, the Macintosh Apple Cherry does not have any Macintosh apples or cherries, but it does contain Black Carrot Juice Concentrate (color)." While the plaintiff acknowledges that this information is available on the nutrition facts panels "in tiny font," he alleges that such references are hidden "in an inconspicuous location on the label." He claims that he relied on the "all natural" and fruit representations to purchase the products and did not receive the benefit of his bargain.

Alleging violations of the California Consumers Legal Remedies Act, False Advertising Law and Unfair Competition Law, the plaintiff seeks to certify a state-wide class and an order for injunctive relief, refunds, attorney's fees, costs, and interest.

Migrant Workers Bring Cannery Employment Row Against Owner in Federal Court

Sixty-five legal migrant workers from Mexico have filed a putative class action against GLK Foods, LLC in a federal court in Wisconsin, seeking to recover wages and damages for breach of contract, including the cost of transportation if the workers were terminated before the end of their certified period of employment. *Jiminez v. GLK Foods LLC*, No. 12-209 (U.S. Dist. Ct., E.D. Wis., Green Bay Div., filed February 29, 2012). The action was brought under the Migrant and Seasonal Agricultural Worker Protection Act, Fair Labor Standards Act, Wisconsin Migrant Labor Act, and Wisconsin Wage Payments, Claims and Collections Act.

The workers were allegedly recruited from Mexico and employed in the United States in the defendant's sauerkraut cannery under the H-2B temporary foreign worker visa program over a period of five years beginning in 2006. They claim that employers seeking to hire H-2B workers, where sufficient domestic workers are unavailable to perform the job, must file an application for temporary employment certification that specifies wages and other terms and conditions of employment offered to the workers. These applications and certifications allegedly included an affirmation by a GLK agent that the company would pay at least minimum wage, provide at least 40 hours of work per week for each worker, provide work for the entire certified period, comply with all applicable employment-related laws, and pay for return transportation from the job sites to the workers' home if they were terminated prematurely.

The complaint outlines the expenses the workers incurred to work in the United States, including costs for securing passports, paying recruitment fees and traveling to the job sites. They allege that these costs were never reimbursed and thus, they were paid less than the prevailing wage rate for their first weeks of work. In 2010 and 2011, the defendant allegedly fired the workers "well short of the certified employment end date." The plaintiffs also allege that the defendant failed to (i) provide their return transportation expenses, (ii) pay for all hours worked, (iii) pay for overtime, and (iv) employ the plaintiffs and class members for 40 hour per week during the entire certified period.

Alleging violations of state and federal law, as well as breach of contract, the plaintiffs ask the court to permit the action to proceed as a collective action; certify the case as a class action; declare that the defendant violated the law; and award them actual, statutory or consequential damages, costs, and attorney's fees.

Industry Interests Appeal Court's Dismissal of Challenge to 4-MEI Prop. 65 Listing

According to a news source, the industry interests that lost their challenge to the listing of 4-MEI as a chemical known to California to cause cancer have filed an appeal in the Third District Court of Appeals. *Cal. League of Food Processors v. OEHHA*, No. C070406 (Cal. Ct. App., 3rd Dist., appeal filed February 10, 2012). The chemical is commonly found in foods such as soy sauce, roasted coffee and the caramel coloring added to colas and beer.

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) added the chemical to the Proposition 65 (Prop. 65) list in January 2011, and a California Superior Court rejected the challenge filed by the California League of Food Processors, American Beverage Association, Grocery Manufacturers Association, and National Coffee Association in November. Additional information about the court's ruling appears in **Issue 420** of this *Update*.

The plaintiffs reportedly argue that appellate intervention is needed "before California consumers are misled about the scientific data concerning 4-MEI, [and] before food and beverage producers must commit enormous resources to place cancer warnings on the many food and beverage products containing 4-MEI." They contend that the report on which OEHHA based its listing decision did not provide sufficient evidence of carcinogenicity to support the action. *See InsideEPA*, February 23, 2012.

Consumer Advocate Files Antitrust Complaint in Israel over Chocolate Prices

The consumer group Emun Hazibur has reportedly filed a complaint with Israel's antitrust authority alleging that The Strauss Group, ranked second among food manufacturers in the country, is exploiting its 63 percent share of the chocolate market by overcharging customers. The group and several others apparently compared the company's prices to leading brands in other markets and found some Strauss products about one-third more expensive. According to a news source, Strauss called some of the data inaccurate and indicated that it had recently reduced prices on 50 of its core products. It also apparently claimed that final customer prices are set by retailers. Israel's antitrust authority reportedly determined several years ago that Strauss-Elite illegally manipulated the market to hinder the sale of imported chocolate from Britain. *See Haaretz.com*, February 27, 2012; *Confectionarynews.com*, February 29, 2012.

McDonald's and Franchisee Not Liable for Cashier's Spatula Attack on Customer

A Mississippi appeals court has determined that neither McDonald's Corp. nor one of its franchisees could be held liable for injuries allegedly resulting from a spatula-wielding cashier's response to a dispute with a customer. *Parmenter*

v. J&B Enters., Inc. No. 2010-CA-01251 (Miss. Ct. App., decided February 21, 2012). Affirming the trial court's grant of summary judgment and directed verdict in favor of the defendants, the court determined that McDonald's did not exercise the requisite level of control over the employee to be liable under the doctrine of *respondeat superior* and that the employee was not acting within the scope of her employment when she engaged in the altercation, thus rendering the franchisee not liable under the same doctrine.

The plaintiff also brought claims of negligent hiring and training, and the appeals court found insufficient evidence to support either claim. The court further ruled that the trial court properly disqualified the plaintiff's witness as an expert witness regarding proposed testimony about post traumatic stress disorder.

The incident giving rise to the dispute was described by the trial court as follows:

> Apparently, [p]laintiff, Kerri Parmenter, became upset over her victuals order and made inquiry about its condition. It is unclear to the [c]ourt the exact cause for [p]laintiff's displeasure, whether the Big Mac was soggy, the fries limp, or the coffee cold, but in any event, [p]laintiff was unhappy and apparently voiced her annoyance to an employee who was engaged as a cashier. Apparently[,] harsh words were exchanged, the exact nature of which are unknown to the [c]ourt at this time. It appears the employee took serious exception to [p]laintiff's inquiry, retreated to the recesses of the restaurant, retrieved a long cooking utensil which was referred to as a metal spatula[,] and used this instrument in a fashion contrary to its intended use or for which it was designed, but a use with which all mothers of young children are acquainted.

OTHER DEVELOPMENTS

Health Group Coalition Urges "Added Sugar" Labeling

The American Heart Association, Center for Science in the Public Interest and Environmental Working Group (EWG) have issued a February 23, 2012, **letter** to the Food and Drug Administration, requesting that the agency compel food labels to denote "added sugars" separately on ingredient lists. Signed by 11 additional organizations, the letter cites national survey data suggesting "that the usual intake of added sugars for Americans is 22.2 teaspoons per day, which is the equivalent of 355 calories, despite the recommended daily limit that women get only 100 daily calories and men only 150 from added sugars." It therefore claims that breaking out added sugars "like high fructose corn syrup, sucrose and corn sweetener" on food labels will help consumers better evaluate their purchases.

Under the coalition's proposal, food labels would consider the term "added sugars" "as a single food ingredient with a parenthetical list [by descending weight] of the specific ingredients that account for those sugars." The combined weight of these ingredients would also determine "where added sugars rank on the food ingredients label."

"Many in the sugar and food industry like to encourage personal responsibility over government regulation of food and ingredients," concludes the coalition's letter. "Without specific information on the amount of 'added sugars' on the labels of food products, consumers can hardly exercise that responsibility and make smarter choices in the grocery aisle." *See EWG Press Release,* February 23, 2012.

White House Urged to Appeal WTO Ruling on COOL Regulations

Several consumer organizations have called on President Barack Obama (D) to appeal a World Trade Organization (WTO) ruling that favored Canada and Mexico in a dispute over U.S. country-of-origin-labeling (COOL) requirements for beef and pork products. In their February 24, 2012, **letter**, Consumers Union, Food & Water Watch, Public Citizen, and the Consumer Federation of America contend that the WTO panel issued a "conflicted ruling" by affirming this country's right to require COOL for meat products, but finding that specific requirements were less favorable to Canada and Mexico. Details about the WTO ruling appear in **Issue 419** of this *Update.* According to the letter, COOL "is wildly popular in the U.S., as poll after poll show overwhelming support for labeling. Indeed, nations around the world are implementing variants of such laws."

SCIENTIFIC/TECHNICAL ITEMS

New Study Allegedly Links Food Animals to Human UTIs

A recent study has reportedly suggested that some food animals, and chickens in particular, are "likely" reservoirs for the extraintestinal pathogenic *E. coli* (ExPEC) implicated in community-acquired urinary tract infections (UTIs) among humans. Catherine Racicot Bergeron, et al., "Chicken Reservoirs for Extraintestinal Pathogenic *Escherichia coli* in Humans, Canada," *Emerging Infectious Diseases,* March 2012. According to the study, Canadian researchers compared ExPEC isolates from slaughtered chicken, pork and beef "with the preexisting geographically and temporally matched collection of isolates from humans with UTIs," in order to determine "whether transmission was human to human through food or whether an animal source was involved."

"In the case of human-to-human transmission through food, *E. coli* strains from humans would be introduced during the meat preparation process by

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food handlers. In the case of an animal source, *E. coli* would derive from the cecal content of the animal itself, and contamination would occur during the slaughtering process," stated the study authors, who tested both retail meat and food animals in abattoirs. Their results evidently revealed that ExPEC isolates taken from slaughtered animals "can belong to the same clonal groups" as those taken from humans with UTIs. They also found that, in the case of retail meats, "beef and pork isolates are much less likely than chicken isolates to be clonally related to isolates from humans with UTIs."

While noting that "epidemiological data, such as diet or other exposures, were not available for the humans with UTIs," the authors have interpreted the close genetic similarities between some isolates as confirmation of their hypothesis "that potential ExPEC transmission from food animal sources is likely to be implicated in human infections and that chicken is a major reservoir. The possibility that ExPEC causing UTIs and other extraintestinal infections in humans could originate from a food animal reservoir raises public health concern. New interventions may be needed to reduce the level of contamination and risk for transmission," they concluded.

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