Shook, Hardy & Bacon L.L.P.

ISSUE 438 | MAY 4, 2012

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

California Senator Requests Federal "Meat Glue" Investigation

California Senator Ted Lieu (D-Torrance) has sent a May 3, 2012, **letter** to the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service, asking the agency to investigate the restaurant industry's use of transglutaminase or "meat glue" to allegedly bind together "disparate parts of meat products to form a larger piece of meat." Citing unnamed media reports, Lieu claims that caterers and other facilities sometimes use transglutaminase to combine meat scraps into whole steaks, which are then sold as more expensive cuts like filet mignon. According to the letter, this practice not only deceives customers who believe they have purchased a higher quality product, but purportedly poses a health risk insofar as "reformed" steak may contain contaminated meat that is not thoroughly cooked or served rare.

"I respectfully request the USDA's Food Safety and Inspection Service to thoroughly investigate the industry's use of meat glue, the possible dangers posed by meat glue, and how consumers can be warned that they are eating glued meat," wrote Lieu, who also noted that meat glue could make it more difficult for authorities to trace the sources of foodborne illness outbreaks. "[A]s a matter of honesty and the consumer's right to know[,] food suppliers, restaurants, and banquet facilities should not be deceiving the public into thinking they are eating a whole steak if in fact the steak was glued together from various meat parts." *See MSNBC.com,* April 27, 2012; *Los Angeles Times,* May 2, 2012.

CDC Links Human *Salmonella* Outbreak to Tainted Dog Food

According to the Centers for Disease Control and Prevention (CDC), 14 people in nine states have purportedly been stricken with a *Salmonella* strain identical to that found in "multiple brands of dry pet food produced by Diamond Pet Foods at a single manufacturing facility in South Carolina." CDC's May 3, 2012, **announcement** indicates that the strain, *Salmonella* Infantis, is rare and could have infected humans after contact with dry pet food or with an animal

that has eaten it. Five of those afflicted have apparently been hospitalized. The *Salmonella* was first detected by the Michigan Department of Agriculture and Rural Development during a routine retail testing of dry pet food, and the company has voluntarily recalled three of its dry dog food products since then.

TTB Proposes Designating Cachaça as Type of Rum

The Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued a **proposed rule** that would amend the standards of identity for distilled spirits to include Cachaça as a type within the class designation for rum. Responding to two petitions from the Brazilian Embassy, TTB has concluded that it is appropriate to recognize Cachaça, which derives from cane sugar, "as a distinctive product of Brazil" provided it is manufactured "in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country."

The proposed rule would apparently allow the distilled spirit to be marketed as "Cachaça" without the term "rum" on the label, "just as a product labeled with the type designation of 'Cognac' is not required to also bear the class designation 'brandy.'" In keeping with Brazilian regulations, TTB would also refuse the Cachaça designation to distilled spirits that use any corn or corn syrup in the fermentation process.

The bureau has specifically solicited public feedback addressing whether the proposed amendment would adversely affect U.S. trademark owners as well as "the extent to which distilled spirits labeled as 'Cachaça' are produced outside Brazil." It will accept comments until June 29, 2012.

Labor Department Withdraws Child Agricultural Labor Proposal

In response to "thousands of comments expressing concerns about the effect of the proposed rules on small family-owned farms," the U.S. Department of Labor (DOL) has withdrawn a proposal intended to reduce injuries among children working on farms by, among other matters, prohibiting them from using certain equipment. Instead, the Departments of Labor and Agriculture "will work with rural stakeholders—such as the American Farm Bureau Federation, the National Farmers Union, the Future Farmers of America, and 4-H—to develop an educational program to reduce accidents to young workers and promote safer agricultural working practices." Information about the proposed rule and a proposed "parental exemption," that did not apparently satisfy critics, appears in **Issue 425** of this *Update*. *See DOL News Release*, April 26, 2012.

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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Environment Action Program to Address Nanomaterials and Endocrine Disruptors

The European Parliament recently adopted a **resolution** setting priorities for the Seventh Environmental Action Program (7EAP) and urging the Commission to present a 7EAP proposal "without delay." Set to expire July 22, 2012, the Sixth EAP (6EAP) aimed to provide "an overarching framework for environment policy" and substantially consolidated environmental regulations, although it failed to fulfill several of its objectives and did not account for new challenges such as those concerning mixed chemicals, pesticides and water.

The latest resolution calls for 7EAP to improve implementation, enforcement and integration of the policies laid out in 6EAP and to address additional goals in the following areas: (i) climate change; (ii) sustainability; (iii) biodiversity and forestry; and (iv) environmental quality and human health. In particular, the European Parliament has asked the next program to develop measures to counter "emerging human and animal health threats" as well as "examine the effects of new developments on human and animal health, such as nanomaterials, endocrine disruptors and the combination effects of chemicals."

Meanwhile, the European Commission will accept comments on 7EAP until June 1, 2012. Slated for release in November 2012, the new program will remain in effect through 2020. *See Bloomberg BNA: Daily Environment Report,* May 2, 2012.

California Group Plans GMO-Labeling Ballot Initiative

A California organization has reportedly gathered enough signatures to put a genetically modified organism (GMO) labeling initiative on the state ballot during the November 6, 2012, general election. According to a May 2, 2012, press release, the Committee for the Right to Know has registered 971,126 signatures, of which 555,236 must prove valid for the initiative to be included on the ballot.

Submitted to the state attorney general as an initiative measure, the proposed **California Right to Know Genetically Modified Food Act** would require (i) raw agricultural commodities produced with genetic engineering to bear "clear and conspicuous" labels conveying this information, and (ii) all processed retail foods to display labels stating "Partially Produced with Genetic Engineering" or "May be Partially Produced with Genetic Engineering." The act would also prohibit such foods from being marketed as "natural," but would not apply to prepared meals sold in restaurants and intended for immediate human consumption.

"Because the FDA has failed to require labeling of GMO food, this initiative closes a critical loophole in food labeling law. It will allow Californians to choose what they buy and eat and will allow health professionals to track any

potential adverse health impacts of these foods," said Center for Food Safety Director Andy Kimbrell in a November 9, 2011, press release first announcing the initiative.

Meanwhile, an opposition group known as Californians Against the Costly Food Labeling Proposition has apparently described the ballot measure as little more than a ploy to expose food producers to additional lawsuits. "This measure isn't about the 'right to know', it's about the right to sue," California Retailers Association President and CEO Bill Dombrowski was quoted as saying. "It creates a whole new category of lawsuits that will allow lawyers to get rich by suing small family farmers, grocers, retailers and other businesses. We'll all pay for these frivolous lawsuits through higher costs at the checkout stand." *See Stop the Costly Food Labeling Proposition Press Release,* April 26, 2012.

LITIGATION

Federal Court Returns "CVS Honey" Class Action to State Court

Determining that it lacks jurisdiction under the Class Action Fairness Act (CAFA) to hear state-law claims alleging consumer fraud in the sale of honey, a federal court in California has remanded to state court a putative class action filed against CVS Caremark Corp. ***Overton v. CVS Caremark Corp.*, No. 12-0121 (U.S. Dist. Ct., C.D. Cal., decided April 24, 2012)**. While the case is one of several that may be transferred to a multidistrict litigation panel (MDL No. 2374) under a motion pending before the Judicial Panel on Multidistrict Litigation, the court retained the authority to decide the jurisdiction issue.

To meet its burden of showing that the lawsuit satisfied CAFA's amount-in-controversy requirement, that is, "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs," the defendant apparently relied on the declaration of a vice president who calculated that the company sold $508,995 worth of the product every two years. Noting that the plaintiff's request for injunction would permanently bar it from selling CVS honey, the defendant argued that "the costs it will incur for complying with the injunction will satisfy the $5,000,000 threshold within fifteen years." Rejecting this argument, the court stated, "[b]ecause it is equally plausible that Defendant will and will not make a profit of $508,995 from CVS Honey sales every two years, Defendant has not met its burden by a preponderance of the evidence. The Court cannot base jurisdiction on Defendant's speculation."

JPML Set to Hear Consolidation Requests in "All Natural" Orange Juice Lawsuits

According to a news source, the Judicial Panel on Multidistrict Litigation (JPML) will conduct a hearing May 31, 2012, to consider the petitions filed by two consumer groups seeking to consolidate, for pre-trial proceedings, putative class actions filed in various federal district courts alleging that companies selling orange juice as "All Natural" mislead consumers because the products undergo processing to increase shelf-life. *In re: Orange Juice Mktg.*, MDL No. 2353 (J.P.M.L., May 31, 2012, hearing); *In re: Simply Orange Juice Mktg. & Sales Practices Litig.*, MDL No. 2361 (J.P.M.L., May 31, 2012, hearing). Additional details about the litigation appear in issues **425** and **431** of this *Update. See Bloomberg BNA Product Safety & Liability Reporter,* April 30, 2012.

Employee Claims She Lost Job by Reporting Illegal Seafood Co. Practices

A New Jersey resident from Scotland, who began working in 2000 for seafood company North Landing Ltd. at the invitation of its former owner, has filed a wrongful discharge suit against the company, its new owners and a supervisor claiming that her concerns over the company's purportedly illegal practices, when brought to the attention of her supervisor, resulted in him verbally berating and slapping her, thus creating a hostile work environment that she could no longer tolerate. *Chadwick v. North Landing Ltd.*, No. L1776-12 (N.J. Super. Ct., Passaic Cnty. Div., filed April 26, 2012).

Among other matters, the plaintiff alleges that the company processed and sold farm-raised salmon treated for sea lice with Salmosan, a chemical that she claims the Food and Drug Administration (FDA) has not approved. She contends that when she brought this to her supervisor's attention, he told her to "delete computer records showing the fish having been treated with Salmosan." She also alleges that the company used a salinating machine on the production floor to add weight to salmon fillets and did not disclose this practice to its customers. According to the complaint, when an FDA inspector arrived on the premises, her supervisor asked if she had instructed a co-worker to turn off the salinating machine, and when she indicated she had not done so, her supervisor called her a "stupid bitch" and ran to the production floor to find the co-worker.

The plaintiff also alleges that the company sold to its customers "cheap salmon dumped in Miami from Chile" after falsely repackaging it as Scottish salmon. In March 2012, concerned about these alleged practices, the plaintiff claims that she confronted her supervisor and told him she did not want to participate in these activities. He allegedly slapped her and screamed at her and later told her to "go home and think about what you just made me do." Thereafter, she allegedly reported the attack to the police and then went to the hospital where she was allegedly "found to have severe tachycardia and acute anxiety reaction in response to the assault and battery."

Claiming liability under New Jersey's Conscientious Employee Protection Act, which she avers protects employees from retaliation for reporting practices reasonably believed to be in violation of a law, rule or regulation, the plaintiff seeks lost wages and benefits, costs, and attorney's fees, as well as payment of civil penalties to the state. She also alleges battery and negligence and seeks further damages for "emotional injuries accompanied by physical manifestations."

Putative Class Alleges Mislabeling of "Greek Yogurt" by Retailer and Subsidiary

Seeking to certify a class of all consumers who purchased Lucerne® brand Greek yogurt from any of its parent Safeway grocery stores, a California resident has filed a complaint in state court alleging that the product is mislabeled because it is not thickened through straining but rather by the addition of milk protein concentrate (MPC). *Tamas v. Safeway, Inc.*, No. RIC 1206341 (Cal. Super. Ct., Riverside Cnty., filed April 27, 2012). According to the complaint, MPC "is essentially a blend of dry dairy ingredients," often imported and used to increase protein ratios in dairy products; it is allegedly not among "generally recognized as safe" food additives listed by the Food and Drug Administration (FDA). "Thus," the plaintiff claims, "using MPC in any human food constitutes adulteration." The plaintiff also alleges that the product does not meet FDA's standard of identity for yogurt products.

The plaintiff contends that she would not have purchased the yogurt at a premium price if she had known that it was not "true" Greek yogurt, stating that she "detrimentally relied on Defendants' representations that they were selling 'Greek' yogurt, and parted with her money as a result thereof causing financial loss and injury." Alleging violations of the California Consumers Legal Remedies Act and Unfair Competition Law, the plaintiff seeks injunctive and declaratory relief, "restitution of monies wrongfully obtained and/or disgorgement of ill-gotten revenues and/or profits," and attorney's fees and costs. She argues that her suit is not preempted by federal food labeling laws.

Australian Court Finds KFC Liable for Injury Caused by *Salmonella*-Tainted Chicken

An Australian court has reportedly awarded $8 million to the family of a girl who allegedly ate a *Salmonella*-contaminated chicken product from a KFC restaurant and became critically ill with organ system failures, septic shock, severe brain injury, and spastic quadriplegia. *Samaan v. Kentucky Fried Chicken Pty Ltd*, No. 2006/20457 (NSW Sup. Ct., decided April 4, 2012). The court exhaustively explores inconsistencies in the testimony and evidence concerning the source of the chicken that allegedly caused the injury, but concludes that the KFC "Twister" product "was the only common meal to the affected family members (and no others) and it was consumed within the incubation period for Salmonella poisoning."

According to the court, many of the inconsistencies could be attributed to language and translation issues given that the parents and one child were born in Sudan and were native Arabic speakers. Other inconsistencies could be attributed to concerns over the child's illness, so severe that she was administered last rites in the hospital, and that the mother had given birth to a sibling a few days before the older girl was stricken. The court also found sufficient breakdowns in the restaurant's procedures to conclude that the *Salmonella* contamination of one of its products was not impossible. A company spokesperson has indicated that KFC will appeal the decision, contending, "We believe the evidence showed KFC did not cause this tragedy." *See Law360*, April 27, 2012.

OTHER DEVELOPMENTS

CAMY Criticizes States for Failure to Address Youth Exposure to Alcohol Marketing

The Johns Hopkins Bloomberg School of Public Health's Center on Alcohol Marketing and Youth (CAMY) has issued a May 1, 2012, **report** claiming that the majority of states have failed to adequately address youth exposure to alcohol advertising. According to a concurrent press release, CAMY researchers apparently reviewed state advertising laws to determine whether each law incorporated all, some or none of eight "best practices" designed to limit alcohol advertising that is likely to be viewed by children and underage youth. Their results purportedly revealed that no state successfully applied more than five of the eight recommended policies and only 11 states used more than one.

In particular, CAMY has urged states looking to reduce youth exposure to alcohol marketing to (i) "prohibit false or misleading advertising;" (ii) "prohibit alcohol advertising that targets minors"; (iii) "establish jurisdiction over in-state electronic media (TV and radio)"; (iv) "restrict outdoor alcohol advertising in locations where children are likely to be present"; (v) "restrict alcohol advertising on alcohol retail outlet windows and outside areas"; (vi) "prohibit alcohol advertising on college campuses"; (vii) "restrict alcohol sponsorship of civic events"; and (viii) "limit the alcohol industry's ability to provide free goods (giveaways)."

"Twenty-two states have no best practices across the eight policies, meaning almost half of all states in the U.S. are doing far less than they could to keep alcohol marketing from reaching youth," said CAMY Director David Jernigan. "This report should open people's eyes to the unrealized potential of state action in this arena."

Meanwhile, researchers with the Children's Hospital at Dartmouth-Hitchcock Medical Center (DHMC) have reportedly presented two studies on youth

exposure to alcohol and fast food advertising at the Pediatric Academic Societies Annual Meeting held April 28-May 1 in Boston, Massachusetts. As explained in an April 30, 2012, DHMC press release, the studies apparently involved showing children and young adults 20 images scrubbed of brand names and logos that had appeared during the previous year in commercials "for beer and hard-liquor brands and for quick-service restaurants."

Based on these nationwide surveys, the researchers evidently found that, out of 2,541 participants ages 15 to 20 years old, those who reported consuming alcohol "regularly" "recognized many more of the commercials for beer and other spirits than did those who claimed not to drink." Similarly, "among the 3,342 youths ages 15 to 23 who answered questions about their weight, their levels of exercise, and their habits of eating and watching TV, those who described themselves as obese—15 percent of participants—were more than twice as likely to recognize the disguised ads as their less-overweight peers."

"At present, the alcohol industry employs voluntary standards to direct their advertising to audiences comprised of adults of legal drinking age," one of the presenters was quoted as saying. "While this study cannot determine which came first—the exposure to advertising or the drinking behavior—it does suggest alcohol advertising may play a role in underage drinking, and the standards for alcohol ad placement perhaps should be more strict."

MEDIA COVERAGE

Reuters Focuses on Corporate Spending and Effects on Gov't Anti-Obesity Initiatives

Reuters has issued a "special report" titled "How Washington went soft on childhood obesity" that details how food and beverage industry interests have allegedly turned aside national and statewide initiatives aimed at addressing childhood obesity. According to the article, "[a]t every level of government, the food and beverage industries won fight after fight during the last decade. They have never lost a significant political battle in the United States despite mounting scientific evidence of the role of unhealthy food and children's marketing in obesity." A number of industry critics, including Senator Tom Harkin (D-Iowa), Rudd Center for Food Policy and Obesity Director Kelly Brownell, and Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson, are quoted making comparisons between the tactics used by the food and beverage industries and those used by tobacco companies.

The report focuses on first lady Michelle Obama's "Let's Move" campaign, which has over time shifted its focus from healthy foods to exercise as a means to address obesity, and the 2009 congressional mandate that federal agencies draft voluntary nutrition standards for food marketing to children,

an effort that died two years later when the budget bill included a 55-word sentence "requiring the agencies to do a cost-benefit analysis of their recommendations before finishing the report." After the budget provision passed, the Federal Trade Commission (FTC) noted, "Congress has clearly changed its mind about what it would like the Interagency Working Group to do with regard to the report on food marketed to children," and FTC Chair Jon Leibowitz said during a March 2012 congressional hearing that the voluntary food standard was no longer a priority.

According to the report's authors, these changes in direction may be attributable to significant increases in the money the industry has spent on lobbying. For example, the effort to remove the least nutritional foods from the government's $10.5 billion school lunch program ultimately preserved French fries as a staple and designated pizza as a vegetable after more than $1 million was spent to defeat it and a champion was found in a Democratic senator from Minnesota, home to Schwan Food Co. with 70 percent of the school frozen pizza market. The article also notes that when CSPI spent $70,000 for lobbying to improve the nation's diet in 2011, that represented what opponents spent every 13 hours.

The report highlights the Centers for Disease Control and Prevention's "Weight of the Nation" conference to be held in Washington, D.C., May 7-9, 2012; it will premiere an HBO documentary series of the same name as part of the campaign discussed in **Issue 423** of this *Update.* According to the report, the initiative could renew public debate over the issue despite the lack of any pending legislative action on childhood obesity during an election year. New York University Professor Marion Nestle responded to *Reuters*' report by calling on readers of her blog to send a note to the White House to support the first lady's Let's Move campaign. Nestle attributes White House caution on the issue "to the upcoming election." *See Reuters*, April 27, 2012.

Dana Goodyear, "Raw Deal," *The New Yorker,* April 30, 2012

"The new wave of American cuisine has a regressive side, wrapped up in nostalgia for an imagined past… To chefs like [Daniel Patterson], unprocessed milk does not just taste better; it is sentimental and, more important, it is pure," claims *New Yorker* staff writer Dana Goodyear in this article chronicling the raw milk movement and its ongoing confrontation with government regulators. Focusing on a California-based group known as "the Rawesome Three" who in 2011 were arrested for—among other charges—running an unlicensed milk plant and processing milk without pasteurization, Goodyear likens the covert world of raw milk to that of marijuana and other illicit substances. Despite the insistence of food safety officials that unpasteurized milk "can carry salmonella, campylobacter, and E. coli O157:H7," the raw milk acolytes quoted in Goodyear's report apparently believe in the product's natural healing properties and will go to great lengths to obtain

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it, frequenting undercover specialty stores and participating in clandestine "deals" with others in a community that ranges from "health-seekers" and "the seriously ill" to celebrities such as Liv Tyler and Mandy Moore.

But even as disparate political causes have come to adopt the government's recent crackdown on raw milk as evidence of regulatory fervor run amok, the movement has also drawn criticism from outsiders for its apparent inability to address vulnerabilities in its supply chain. As Goodyear notes, the largest supplier of raw milk in California has twice been implicated in *E. coli* outbreaks involving young children, while two members of the Rawesome Three allegedly planned to purchase additional farm land by defrauding a bank. Meanwhile, such anecdotes have reportedly done little to persuade public health officials that raw milk purchases should be left to the consumer's discretion despite the health risks.

"From a public-health perspective, milk has fallen into the category of water. Providing a clean milk and water supply is fundamental to what the government sees as its job. If the government were stopping people from selling impure water, it's hard to imagine there would be a great public outcry," concluded Michele Jay-Russell of the University of California, Davis, Western Institute for Food Safety and Security. "The crux of the conundrum is: why shouldn't it be their choice?"

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