Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Advocacy Coalition Seeks FTC Review of Digital Youth Marketing

A coalition of advocacy organizations has filed five complaints with the Federal Trade Commission (FTC) against companies including McDonald's Corp., General Mills, Inc. and Doctor's Associates, Inc., calling for an investigation into Websites they purportedly use to promote food and TV programs to children. According to the coalition, the food-related Websites—HappyMeal.com, ReesesPuffs.com, TrixWorld.com, and SubwayKids.com—violate the Children's Online Privacy Protection Act (COPPA) by encouraging children to provide their friends' email addresses and create videos promoting branded products to send to their friends. According to the coalition, "tell-a-friend," or "viral marketing," is profitable given the effectiveness of word-of-mouth advertising and the opportunity to create "lifetime customers."

The coalition is also requesting that FTC update existing COPPA regulations "to include data collection and storage of photographs online from children, as well as placement of cookies used for types of behavioral advertising." Claiming that "several of the child-directed websites we investigated place third-party cookies both on the computer of the child that initially visits the website and on the computers of friends who click on the link in refer-a-friend emails," coalition members claim that "[s]ome, if not all, of these cookies may be used for tracking and/or behavioral targeting." They contend that this use of cookies and "persistent identifiers" is at odds with COPPA and should be prohibited "unless the operator first provides effective notice and obtains verifiable advance parental consent."

Georgetown Law Professor Angela Campbell, who is providing counsel to coalition leader the Center for Digital Democracy, contends that such "tell-a-friend" practices commercially exploit children and violate the law "because they are done without adequate notice to parents and without parental consent." American University Professor of Communication Kathryn Montgomery, who apparently sought passage of COPPA in the 1990s, said,

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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"These are particularly insidious practices. The companies identified in these complaints are clearly trying to circumvent privacy safeguards for children. They are also enlisting kids and their friends in deceptive marketing schemes disguised as play—in some cases for junk foods and other unhealthy practices—completely under the radar of parents."

A General Mills spokesperson reportedly responded to news of the complaints by claiming that the advocacy organizations "have mischaracterized or misunderstood" the issue and that COPPA "permits 'send-to-friend' emails, provided the sending friend's email address or full name is never collected and the recipient's email address is deleted following the sending of the message." Speaking on behalf of McDonald's, Danya Proud apparently indicated that the "alleged complaint was shared with members of the media under embargo. McDonald's was not provided the opportunity to review in advance. As such, it would be inappropriate to comment or speculate." The coalition claims that McDonald's, by allegedly storing photographs taken or uploaded by children using its Website in unprotected publicly accessible directories, "fails to protect children's photographs from unauthorized outside access."

Other coalition participants include the Berkeley Media Studies Group, Center for Science in the Public Interest, Consumer Federation of America, Public Citizen, Public Health Advocacy Institute, and Rudd Center for Food Policy & Obesity at Yale. *See Center for Digital Democracy News Release* and *Advertising Age*, August 22, 2012.

FDA Responds to Senator's Concerns About "Energy Drinks"

The Food and Drug Administration (FDA) has responded to Senator Dick Durbin's (D-Ill.) letter requesting that the agency take regulatory action "to address the rising health concerns around energy drinks" purportedly containing high levels of caffeine and other ingredients such as taurine, guarana and ginseng. Among other matters, in its August 10, 2012, **letter**, FDA suggests that research to date shows that "even when the consumption of energy drinks is considered, most of the caffeine consumed [in the United States] comes from what is naturally present in coffee and tea."

For most healthy adults, according to FDA, caffeine intake up to 400 mg per day is not associated with untoward health effects. Additional details about Durbin's letter appear in Issue **435** of this *Update*.

FDA's generally recognized as safe (GRAS) regulation for caffeine applies to cola-type beverages; the agency "has not challenged the use of caffeine in other beverages at levels comparable to the prior-sanctioned use level of 200 ppm." The agency acknowledged a 2011 report indicating that energy drinks contained caffeine at levels ranging from 160 to 500 mg per serving and is

following up "regarding [the] source data to better assess whether any of the incidents cited in the report involved products marketed as dietary supplements and, if so, whether there were adverse event reports sent to the FDA on those incidents." FDA will use the information to determine whether gaps in the oversight system exist.

FDA also discusses the differences between conventional foods and liquid dietary supplements, noting how regulatory requirements depend on how a product is marketed. The agency attributes any confusion over the definition of conventional foods to statutory language that requires FDA to "consider multiple factors to determine whether or not a product is 'represented' as a conventional food. This is a more difficult standard for FDA to meet." The agency indicates that a drinks draft guidance that is under development "once finalized, will help both FDA and industry to draw a line between beverages and liquid dietary supplements." The agency concludes with references to the person who died allegedly as a result of consuming an energy drink—the incident which led Durbin to write to FDA—and notes that it has received a voluntary adverse event report from Monster Energy Drink and the family. The investigation is apparently ongoing.

FDA Amends Rule on Compounds of Carcinogenic Concern Used in Food-Producing Animals

The Food and Drug Administration (FDA) has issued a **final rule** that amends regulations about concentrations of compounds of carcinogenic concern in the diet of food-producing animals and residues of carcinogenic concern in specific edible tissues. The changes clarify certain definitions "to enable the Center for Veterinary Medicine to consider allowing the use of alternative procedures to satisfy the DES [Diethylstilbestrol] Proviso without requiring the development of a second, alternative, set of terminology." The changes take effect September 21, 2012.

Among other matters, the amendment will change the existing emphasis in 21 CFR Part 500 on "no significant increase in the risk of cancer to the human consumer" to an emphasis on "the specific 1 in 1 million risk of cancer to the test animals approach." *See Federal Register*, August 22, 2012.

FDA Guidelines Target Prevention of *Salmonella* in Eggs

The Food and Drug Administration (FDA) has issued its "**Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation**." Comments may be submitted at any time, although the guidance, with nonbinding recommendations for complying with a final rule that took effect in September 2009, has incorporated comments submitted after the draft guidance was published. Presented in a Q&A format, the guidance

addresses compliance dates, the egg rule's coverage, definitions, *Salmonella* Enteritidis prevention measures, testing, sampling, and registration requirements. *See Federal Register*, August 21, 2012.

Noting that Americans consume 242 eggs per capita annually, New York University Nutrition Professor Marion Nestle draws attention to the guidance in her blog and cites a recent Canadian study claiming an association between the consumption of egg yolks and plaque formation in coronary arteries. She suggests that we should not "be eating so many eggs," but admits that she likes them and votes "for everything in moderation on this one. But . . . I'm buying them from farmers' markets these days—for reasons of food safety, animal welfare, and taste." *See FoodPolitics.com,* August 21, 2012.

LITIGATION

Eighth Circuit Allows Cattle Producers to Bring FTCA Claim for Alleged Conservation Program Errors

A divided Eighth Circuit Court of Appeals panel has reversed the dismissal of claims filed under the Federal Tort Claims Act (FTCA) by cattle producers alleging that a government employee negligently decimated their cattle herd by requiring that they plant a toxic seed mixture on pasture land enrolled in a conservation program; the court found that the negligence allegations were not barred by the discretionary-function exception to the FTCA's waiver of sovereign immunity. ***Herden v. United States*, No. 11-3530 (8th Cir., decided August 20, 2012)**. That exception bars liability for any claim based on the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." It applies where the action "involves an element of judgment or choice" and "the requisite judgment or choice is the type of government action Congress intended to protect from the 'second-guessing' attendant to tort suits," in other words, the action was "susceptible to policy analysis."

By participating in the Environmental Quality Incentives Program, farmers agree to accept a pasture-planting plan designed by technical specialists in exchange for the reimbursement of 90 percent of their costs. A grazing specialist assigned under the program to work with the plaintiffs, a multi-generation family of Minnesota cattle farmers, selected a seed mixture that included two types of grasses and a legume, Alsike Clover. The count of seeds per square foot was far in excess of an applicable field guide that contains planting mixture recommendations, and the plaintiffs allege that they complained about the prescribed amount of clover, which can be toxic to cattle. The specialist stated in his declaration that he did not recall the farmer discussing the clover's toxicity, but rejected the request to substitute alfalfa

due to concerns about difficult growing conditions and that a failed planting would waste program funds.

Cattle grazing the pasture and fed hay harvested from it subsequently experienced illnesses, birth defects and deaths. The complaint alleges that the high concentration of clover in the planting mixture caused the harm and "led to the loss of a multi-generational farming business." Claiming that the farmers' suit was barred by the FTCA's discretionary-function exception, the government moved to dismiss for lack of subject-matter jurisdiction. The district court dismissed the suit, finding that the specialist exercised properly delegated discretion and that the policy goals and considerations he balanced constituted the type of discretion Congress intended to exempt from suit.

The Eighth Circuit disagreed, characterizing the specialist's action as "the final technical step in a process that has already hammered out the policy and societal issues embedded in the Program." That the specialist considered costs in deciding the appropriate seed mixture was not, according to the court, "a sufficiently important aspect of seed plant selection to permit characterization of the decision as a protected economic analysis." The court remanded the case for further proceedings. The dissenting judge would have shielded the government from suit finding that the specialist was called on to weigh broad environmental as well as cost issues in making his seed selection, decisions that this judge believed were intended by Congress to be insulated from suit.

Non-Natural Meat Claims Against Chipotle Survive Motion to Dismiss

A federal court in California has denied Chipotle Mexican Grill's motion to dismiss putative class claims alleging that the company fraudulently represents that it uses only naturally raised meat in its menu items. *Hernandez v. Chipotle Mexican Grill, Inc.*, No. 12-5543 (U.S. Dist. Ct., C.D. Cal., order entered August 23, 2012). According to the court, "Plaintiff need not show that he consumed non-naturally raised meat on one of his visits to Chipotle [because] the harm alleged [is that] Plaintiff purchased food at Chipotle, at a premium, based on Defendant's representations that non-naturally raised meat was not used there."

The court also determined that the plaintiff adequately alleged a claim for fraudulent concealment and denied as premature that part of the defendant's motion addressing the class allegations. The court did, however, order briefing on whether plaintiff's counsel "would be adequate counsel to represent the class if a class were certified." In this regard, the court observed, "it appears an early preliminary determination of whether Plaintiff's counsel would be adequate class counsel would serve the interests of the putative class and of judicial economy." Among other matters, the court indicated that plaintiff's

counsel's response should provide any agreement between the plaintiff and counsel, "any agreement relating to this action with any other person or entity, and counsel's proposal for terms for attorney's fees and nontaxable costs."

Industry Interests Abandon Appeal of Adverse Ruling on Prop. 65 Listing of 4-MEI

Industry interests that lost their challenge to the listing of 4-MEI as a chemical known to California to cause cancer have abandoned the appeal they filed before the Third District Court of Appeals in February 2012. *Cal. League of Food Processors v. OEHHA*, No. C070406 (Cal. Ct. App., case complete August 15, 2012). Additional information about the challenge and trial court decision appears in Issues **420** and **429** of this *Update*. California EPA's Office of Environmental Health Hazard Assessment (OEHHA) added the chemical, commonly found in foods such as soy sauce, roasted coffee and the caramel coloring added to colas and beer, to the Proposition 65 (Prop. 65) list in January 2011.

Securities Class Action Filed Against Monster Beverage

Contending that Monster Beverage Corp. either misled or failed to disclose that it was improperly advertising, marketing and promoting its Monster Energy® drinks and thus filed materially false and misleading financial statements, a putative securities class action has been filed against the company in a federal court in California. *Rausch v. Monster Beverage Corp.*, No. 3:2012cv02058 (U.S. Dist. Ct., S.D. Cal., filed August 21, 2012).

The filing follows news that an unnamed state attorney general subpoenaed company records in July 2012 seeking information about "the Company's advertising, marketing, promotion, ingredients, usage and sale of its Monster Energy® brand of energy drinks." Details about that action are included in Issue **450** of this *Update*. According to a news source, the company's stock declined nearly 11 percent the day after Monster disclosed the investigation in a filing with the Securities and Exchange Commission. *See Bloomberg*, August 21, 2012.

Frozen Dessert Maker Sued for Misstating Calories on Packaging and in Promotions

A California resident has filed a putative nationwide class action against a company that makes low-calorie frozen desserts, alleging that they do not, as advertised, contain just "150 calories per pint." *Michelle v. Arctic Zero, Inc.*, No. n/a (U.S. Dist. Ct., S.D. Cal., filed August 21, 2012). According to the complaint, Arctic Zero's Vanilla Maple dessert "has 46% more calories than the 150 calories advertised on the product packaging and reflected on the nutritional

label" and the company's "Chocolate Peanut Butter has 68% more calories than the 150 calories advertised."

Claiming that she would not have purchased the products had she not been misled, the plaintiff alleges violations of California's Unfair Competition Law (unlawful, unfair and fraudulent conduct), False Advertising Law and Consumers Legal Remedies Act, as well as unjust enrichment. She seeks preliminary and permanent injunctive relief; corrective disclosures; compensatory, consequential, statutory, exemplary, treble, and punitive damages; restitution; attorney's fees; costs; and pre- and post-judgment interest.

EEOC Charges Burger King with Religious Discrimination

The Equal Employment Opportunity Commission (EEOC) has filed a Title VII civil rights action against a Burger King restaurant claiming that it failed to accommodate the religious beliefs of a Pentecostal Christian woman who sought to wear skirts or dresses to work instead of uniform pants. *EEOC v. Fries Rest. Mgmt., LLC,* No. 3:12-cv-3169 (U.S. Dist. Ct., N.D. Tex., Dallas Div., filed August 22, 2012).

The employee was hired as a cashier and had allegedly been informed when she interviewed for the position that she could wear a skirt to work, an accommodation she required because she "adheres to an interpretation of the scripture that requires women to wear only skirts or dresses." When she arrived at work for orientation in a skirt, she was told she could not wear it and would have to leave the store. According to the complaint, "The result of the foregoing practice has been to deprive Ashanti McShan of equal employment opportunities because of her religious beliefs and observances as a Christian Pentecostal."

EEOC seeks to enjoin the defendant from discriminating on the basis of religion and an order requiring the defendant to accommodate McShan's religion and make her whole with back pay and prejudgment interest; compensation for pain and suffering, humiliation, embarrassment, and emotional distress; and punitive damages for "malicious conduct or reckless indifference to Ashanti McShan's federally protected rights."

Migrant Farmworkers Seek Damages for Alleged Forced Labor and Debt Peonage

Four migrant farmworkers have filed suit against farm labor contractors who allegedly "recruited undocumented field workers in Mexico and the United States to work on farms ('growers') and relied on a pattern of threats, violence, harassment, and indebtedness to force Plaintiffs and other migrant farmworkers to perform grueling, back-breaking manual labor as Defendants transported the workers between several states including Florida, Illinois,

Georgia, Mississippi, and New York." *John Does I-IV v. Sunrise Labor Corp.*, No. 9:12-cv-80883-JMH (U.S. Dist. Ct., S.D. Cal., filed August 20, 2012). According to the complaint, the individual defendants face federal criminal charges for hiring unauthorized aliens.

Among other matters, the anonymous plaintiffs allege that the defendants imposed debts on them—involving fees paid to "coyotes" to smuggle them across the border and charges for food, rent and remittances to their families—threatened them with injury or death, did not pay them compensation to which they were entitled, forced them to work when injured and sick, created a hostile work environment based on sexual orientation, provided them with horrendous housing conditions, repeatedly exposed them to pesticides, and otherwise held them in forced labor and trafficked them with respect to peonage in violation of the Trafficking Victims Protection Reauthorization Act. They also allege violations of the Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, and New York Human Rights Law. They seek actual, punitive and exemplary damages, as well as attorney's fees, costs and interest.

Wine Maker and Beer Brewer Dispute Right to Bow Tie Marks

A California winery has filed a complaint against Anheuser-Busch, LLC seeking a declaration that the winery has not infringed any of the brewer's protectable trademark rights and that the winery's use of the BOW TIE word mark and Bow Tie slogan to sell its wine "does not constitute unfair competition." *San Antonio Winery, Inc. v. Anheuser-Busch, LLC*, No. 12-7067 (U.S. Dist. Ct., C.D. Cal., filed August 16, 2012). The winery claims that it started using the BOW TIE word mark in the United States in 2012 and had filed a trademark application for the mark in November 2011. After the application was published for opposition, Anheuser-Busch allegedly demanded that the winery abandon the application and refrain from using the BOW TIE word mark on the ground that the brewer held design marks depicting bow ties and that "there is a likelihood of consumer confusion, mistake, or deception between San Antonio's BOW TIE Word Mark and the Budweiser Design Marks."

Claiming that consumers will not be confused about the parties' respective marks, the winery alleges that it is entitled to a declaration that the use of the word mark or slogan does not infringe any valid rights of Anheuser-Busch or constitute unfair competition.

German Court Refuses to Stop Sale of Rival Capsules Compatible with Nestlé Coffee Machines

According to news sources, the Dusseldorf Regional Court has refused a request for preliminary injunction filed by Nestlé seeking to stop competitors from selling capsules that fit its Nespresso™ coffee makers in Germany. The

court reportedly ruled that Nestlé's patent for the machine does not extend to capsules sold at a lower price by two other Swiss firms. Defendants Ethical Coffee and Betron market their products in a number of European countries as "usable for Nespresso machines." The rival capsules are about a third less expensive than the Nestlé capsules. The company, which has aggressively defended its Nespresso™ business—worth $3.6 billion worldwide—can apparently either ask the court for a full civil-trial process or appeal the ruling. *See The New York Times, Associated Press* and *Bloomberg*, August 16, 2012.

OTHER DEVELOPMENTS

Brownell Co-Edits Book of Essays on Food and Addiction

Yale University Psychology Professor Kelly Brownell has published a collection of essays with co-editor Mark Gold, *Food and Addiction: A Comprehensive Handbook*, that, according to Amazon.com "brings scientific order to the issue of food and addiction, spanning multiple disciplines to create the foundation for what is a rapidly advancing field and to highlight needed advances in science and public policy. The book assembles leading scientists and policy makers from fields such as nutrition, addiction, psychology, epidemiology, and public health to explore and analyze the scientific evidence for the addictive properties of food." New York University Nutrition Professor Marion Nestle calls the work "an instant classic." She notes that the edited pieces included in the book range from "the seriously scientific to the thoroughly anecdotal." Asking whether food is "addictive in ways similar to alcohol or cocaine," Nestle states, "In some ways yes, maybe, and no. Read it and decide for yourself."

Rudd Center Posts Fall 2012 Speakers Schedule

The Yale Rudd Center for Food Policy & Obesity has posted its fall 2012 speakers **schedule**, noting that the center "welcomes speakers from different disciplines to present and discuss their work and its implications for the study of obesity and food policy." Among those on the roster are Harvard Business School Assistant Professor Jason Riis, "Field Studies of Consumer Behavior in Food Retail Settings," September 12; University of Washington Clinical Professor James Krieger, "Using Policy and Systems Changes to Create Healthy Environments at the Local Level," October 10; Northwestern University Psychology Professor Ellen Wartella, "Media Characters: The Unhidden Persuaders in Food Marketing to Children," October 17; Mathematica Policy Research Senior Fellow Ronette Briefel, "National Data to Inform Childhood Obesity Prevention Strategies: Beverage, Dietary, and Activity Practices at Home and School," November 7; and University of Pennsylvania Media & the Developing Child Director Amy Jordan, "Testing the Effectiveness of Public Service Advertising Aimed at Reducing Consumption of Sugar-Sweetened Beverages," November 13.

The seminars are conducted at the Rudd Center in New Haven, Connecticut, and are free and open to the public on a first-come-first-served basis. Seating is apparently limited.

SCIENTIFIC/TECHNICAL ITEMS

NYU Researchers Claim Early Exposure to Antibiotics Associated with Increase in Body Mass

New York University researchers using the Avon Longitudinal Study of Parents and Children with data on more than 11,000 children have purportedly found a consistent association between antibiotic exposure in the first six months of life with "elevations in body mass index with overweight and obesity from ages 10 to 38 months." L. Trasande, et al., "Infant antibiotic exposures and early-life body mass," *International Journal of Obesity*, August 21, 2012 (online).

The researchers suggest that the administration of antibiotics during early life, "a critical period for gut colonization," may disrupt "ancient patterns of intestinal colonization." U.S. farmers since the late 1940s have apparently given low-dose antibiotics to domesticated mammalian and avian species to hasten weight gain with the understanding that "alterations in the microbiota change 'feed efficiency.'" Thus, the researchers explored the possibility of similar effects in human children. According to lead researcher Leonardo Trasande, "Microbes in our intestines may play critical roles in how we absorb calories, and exposure to antibiotics, especially in early life, may kill off healthy bacteria that influence how we absorb nutrients into our bodies, and would otherwise keep us lean." Confounders accounted for included parental body mass index (BMI), smoking, breastfeeding, timing of food introduction, and lifestyle variables, among others. The study was limited to the use of two medications: antipyretics and eye ointment.

While exposures during the birth-6 month window were consistently associated with elevations in body mass, exposure during the 6-14 month window was not, and "[t]he pattern of association for exposure 15-23 months was less clear." Those in this exposure window "were significantly associated only with elevated standardized BMI score at 7 years, but not with consistently elevated scores in the interim." The study found that "[a]t 38 months, children who had been exposed to antibiotics during [the] earliest period had significantly higher standardized BMI scores, and were 22% more likely to be overweight than children who had not been exposed."

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FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 451 | AUGUST 24, 2012

While the researchers conclude that the study "reinforces concerns that early-life antibiotic exposure may cause increases in body mass later in life," they note that important limitations are presented by "multiple social, behavioral and biological factors" as well as parental recall regarding antibiotic usage. They call for additional research "to disaggregate the effect of early exposures to antibiotics from those occurring in the prenatal and perinatal periods, and to quantify the life-course implications for body mass and cardiovascular risks, at the population level." *See CommonHealth.wbur.org*, August 2012.

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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.