Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FTC to Accept Public Comments on Competition in Pet Medications Industry Through Nov. 1

The Federal Trade Commission (FTC) has **reopened** the comment period for its October 2, 2012, workshop on competition and consumer protection issues in the pet medications industry. The commission is "seeking the views of consumers, veterinarians, pharmacists, manufacturers, business representatives, economists, lawyers, academics, and other interested parties" submitted by November 1, 2012. FTC's workshop agenda includes discussions on how pet medications are distributed to consumers and "how these distribution practices affect consumer choice and price competition." *See FTC News Release*, September 19, 2012.

Public Citizen Calls for FDA to Change FOIA Response Policy

Consumer organization Public Citizen has filed a **citizen petition** with the Food and Drug Administration (FDA) challenging its policy of instructing staff, when responding to requests under the Freedom of Information Act (FOIA), to not consider "minor deletions," which can be up to 20 percent of the responsive documents, as a partial FOIA denial that would trigger a requester's right to an administrative appeal. Public Citizen specifically requests that FDA revoke 21 C.F.R. § 20.49(d) which states, "Minor deletions of nondisclosable data and information from disclosable records shall not be deemed a denial of a request for records." The organization also asks the agency to revoke parts of its staff manuals.

According to the petition, more than 20 years ago, the General Accounting Office (now the Government Accountability Office) (GAO) "urged FDA to rescind its deletions regulation and a similar policy on 'minor deletions'" because it violates FOIA. Attached to the petition, the 1991 GAO report notes that this minor deletion policy precludes "immediate appeals of minor deletions of information" and "creates a procedure for requesters that is not authorized by FOIA. If the same information had been denied, as the law contemplates, the requester would have been permitted to appeal

immediately; when the information is instead the subject of minor deletions, the requester must make a second request for the deleted information, and may not appeal until that second request is denied."

Public Citizen contends that the policy "creates an incentive for FDA staff to over-redact documents" and has resulted in some documents produced under FOIA to the organization with entire pages deleted. The petition also argues that FDA's policy is not needed in the interest of serving FOIA requesters promptly. GAO questioned that reasoning, but stated, "our objection to the minor-deletions policy is based on its inconsistency with the requirements of FOIA, not on whether it benefits the requestor."

FDA Seeks Industry Nominations for TSEAC

The Food and Drug Administration (FDA) recently **published** a notice seeking "any industry organizations interested in participating in the selection of a nonvoting industry representative to the Transmissible Spongiform Encephalopathies Advisory Committee [TSEAC]." Organizations that wish to participate in the selection of this nonvoting member should submit a letter stating their interest to FDA by October 18, 2012. The agency has also requested nominations for the post by the same date.

FDA has charged TSEAC with reviewing and evaluating "the available scientific data concerning the safety of products which may be at risk for transmission of spongiform encephalopathies having an impact on the public health." The committee includes 15 voting members "knowledgeable in the fields of clinical and administrative medicine, hematology, virology, neurovirology, neurology, infectious diseases, immunology, transfusion medicine, surgery, internal medicine, biochemistry, biostatistics, epidemiology, biological and physical sciences, sociology/ethics, and other related professions." *See Federal Register,* September 18, 2012.

NOP Final Rule Permits Synthetic Methionine Use in Organic Poultry

The U.S. Department of Agriculture's National Organic Program (NOP) has **issued** a final rule permitting the use of synthetic methionine in organic poultry production. Effective October 1, 2012, the final rule reduces the maximum levels of methionine per ton of feed as follows: (i) 2 pounds for laying and broiler chickens, and (ii) 3 pounds for turkeys and all other poultry. The final rule also amends the Chemicals Abstracts Service (CAS) numbers "for the allowable forms of synthetic methionine."

According to NOP, "[m]ethionine is classified as an essential amino acid for poultry because it is needed to maintain viability and must be acquired through the diet… Natural feed sources with a high percentage of methionine include blood meal, fish meal, crab meal, corn gluten meal, alfalfa meal, and

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sunflower seed meal." In reviewing the rules governing the use of synthetic methionine, a water-soluble crystalline powder, in organic poultry production, the National Organic Standards Board sought to balance the basic maintenance requirements of organic poultry with consumers' expectations and the need for industry "to continue the pursuit of commercially sufficient sources of methionine." Additional details about the proposed rule appear in Issue 426 of this *Update*. *See Federal Register,* September 19, 2012.

Draft EFSA Guidance Targets Effects of Plant Protection Products on Bees

The European Food Safety Authority (EFSA) has launched a public consultation on new "draft Guidance on the Risk Assessment of Plant Protection Products [PPPs] on Bees (including *Apis mellifera, Bombus* spp. and solitary bees)." Intended to help applicants and authorities evaluate PPPs "and their active substances under Regulation (EC) 1107/2009," the draft guidance outlines a process "by which [PPPs] can be evaluated for their potential risk in causing unacceptable harm to a group of non-target organisms (bees)."

To these ends, EFSA has identified a maximum level of harm as defined by Specific Protection Goals (SPGs), which aim to protect the survival and development of bee colonies, preserve biomass and reproduction to ensure long-term survival, and minimize the effect of PPPs on larvae and bee behavior. Recognizing that the viability of a colony depends on the number of bees it contains, the SPGs establish that the magnitude of PPPs' effects on colonies "should not exceed 7% reduction in colony size" and that forager mortality "should not be increased compared to controls by a factor of 1.5 for 6 days or a factor of 2 for 3 days or a factor of 3 for 2 days." The SPGs also propose including honey production "as an endpoint measurement in field studies" in addition to the exposure percentiles to be established during the course of the public consultation for each regulatory zone.

The draft guidance thus outlines a risk assessment process involving (i) a preliminary exposure assessment "that yields the Predicted Environmental Concentration (PEC) of the PPP that the bees are exposed to in a severe case," and (ii) "an effect assessment that compares the degree of harm that can result from exposure of bees to the PEC against the maximum level given by the SPGs." This risk assessment is spread over multiple tiers, with the First Tier "intended to sift out PPPs that are of negligible risk to bees and so prevent unnecessary testing." If the First Tier indicates that the PPP in question "potentially presents an unacceptable risk," however, "either the assessment must be refined by including improved information and/or mitigation measures or the Higher Tier tests are invoked, which involve semi-field and field tests… formulated to reflect the SPGs." EFSA will accept written comments on the draft guidance until October 25, 2012.

LITIGATION

Jury Awards Colorado Man $7.2 Million for "Popcorn Lung"

A federal jury has reportedly awarded $7.2 million to a man who claimed that he developed *bronchiolitis obliterans*, a debilitating lung disease also known as popcorn lung, from consuming two to three bags of microwave popcorn every day for six years. *Watson v. Dillon Cos., Inc.*, No. 08-cv-00091-WDM-CBS (U.S. Dist. Ct., D. Colo., decided September 19, 2012). Details about the case appear in issue 244 of this *Update*. The settlement that the plaintiff reached with one of the defendants, a flavoring manufacturer, is discussed in Issue 331 of this *Update*.

According to a news source, the jury found that Gilster-Mary Lee Corp., which manufactured the popcorn, and a retailer were negligent for failing to warn that diacetyl, the butter flavoring chemical in the product, was dangerous. The manufacturer was found liable for 80 percent of the damages, and the supermarket chain was found liable for 20 percent. The retailer has indicated that it will appeal the verdict. The plaintiff was represented by Kenneth McClain, a Missouri-based attorney, who has brought successful occupational exposure claims since 2004 on behalf of popcorn and flavoring workers who also developed the disease. *See Thomson Reuters* and *The Kansas City Star*, September 19, 2012.

Florida Court Dismisses Claims That Honey Sold at Target Isn't Honey

While a federal court in Florida has dismissed a putative class action alleging that Target Corp. violates consumer fraud laws by selling honey that does not conform to the state's honey standard, it gave the plaintiff leave to amend the complaint and also found that (i) the plaintiff had standing to bring the claims, (ii) Federal Rule of Civil Procedure 9(b)'s heightened pleading standard did not apply, and (iii) the claims were not preempted by federal law. *Guerrero v. Target Corp.*, No. 12-21115 (U.S. Dist. Ct., S.D. Fla., decided September 4, 2012).

The court dismissed the complaint without prejudice because it failed "to provide any more specific details regarding how Plaintiff knows that Defendant's honey did not contain pollen. Thus, the Court agrees with Defendant's argument that Plaintiff's Complaint, as currently plead (sic), fails to state a claim because it does not provide fair notice to Defendant regarding the factual basis for Plaintiff's claim."

Both parties agreed that the Food and Drug Administration has not established a standard of identity for honey, and thus, the court ruled that the "Florida Honey Standard does not conflict [with federal law] because there is no federal standard of identity for honey." The plaintiff contends that the defendant's honey products are not honey because "all traces of naturally

occurring pollen" have been removed. She further alleges that "'the presence of pollen in honey also allows for identification of the geographical origin of that particular honey,' thus allowing consumers to ensure that the honey they have purchased is not from undesirable locations such as China."

$33-Million Default Judgment Entered Against Spice Co. over Salami Recall

A federal court in Rhode Island has reportedly agreed to enter a default judgment of $33 million against a spice company purportedly involved in a 2010 *Salmonella* outbreak affecting a salami product that sickened more than 250 people in 44 states. *Daniele Int'l, Inc. v. Wholesome Spice & Seasonings, Inc.*, No. 1:2010cv00155 (U.S. Dist. Ct., D.R.I., decided September 17, 2012). The court granted the request for default judgment filed by meat producer Daniele International, which was forced to recall in excess of 1.2 million pounds of meat. Health officials traced the contamination to the pepper supplied by the defendant, a company that was reportedly dissolved in April 2012. According to a news source, Daniele's counsel is uncertain whether they will be able to collect the judgment. *See The Wall Street Journal*, September 17, 2012.

Court Refuses to Enjoin California's Foie Gras Ban Pending Challenge Resolution

A federal court has reportedly denied the request of Canadian and U.S. foie gras producers to preliminarily enjoin the enforcement of California's law barring the sale of food products made from force feeding birds. *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 12-5735 (U.S. Dist. Ct., C.D. Cal., W. Div., order entered September 19, 2012). More information about the case appears in Issue **446** of this *Update*. According to a news source, the court will issue a formal ruling on its denial of injunctive relief at a later date. A hearing on the state's motion to dismiss the lawsuit is scheduled for November 19. *See Law360*, September 20, 2012.

California Law Applied to Costco's Cheese Recall Insurance Coverage Dispute

Finding that California law applies to a dispute between Costco Wholesale Corp. and Nationwide Mutual Insurance Co., a federal court has dismissed Costco's claims for violations of Washington state law and for bad faith coverage by estoppel arising out of the insurer's refusal to handle claims of personal injury from cheese that Costco sold. *Costco Wholesale Corp. v. Nationwide Mut. Ins. Co.*, No. C11-1550 RAJ (U.S. Dist. Ct., W.D. Wash., Seattle, decided September 20, 2012). The court determined that, under the "most significant relationship" test applied in the context of a conflict of laws, "the most significant contacts between Costco and Nationwide occurred in California." Because California law does not provide relief as to a number of Costco's claims, the court dismissed them but gave the company the opportunity to amend the complaint by November 1, 2012. If it does not do so, the matter will be dismissed.

New Class Action Alleges Ben & Jerry's Ice Cream Is Not "All Natural"

The day after a California court apparently refused to approve the settlement of class claims against the company that makes "All Natural Ben & Jerry's Ice Cream," an Illinois resident filed a putative class action against the company in a New Jersey federal court, alleging that the product contains many unnatural ingredients including those that are genetically modified. *Tobin v. Conopco, Inc.*, No. 1:33-av-00001 (U.S. Dist. Ct., D.N.J., Newark Div., filed September 13, 2012).

The named plaintiff seeks to represent a nationwide class of individuals who purchased the products since 2006 relying on the allegedly false "all natural" label. According to the complaint, the Center for Science in the Public Interest (CSPI) tested the company's products in 2010 and found that they contain "alkalized cocoa, corn syrup, partially hydrogenated soybean oil, or other ingredients that either don't exist in nature or that have been chemically modified."

CSPI's letter to the manufacturer, claiming that the products were misbranded under the Federal Food, Drug, and Cosmetic Act, apparently compelled the companies to announce that the products would no longer be labeled "All Natural." The complaint alleges that no voluntary refund program was offered to consumers who had purchased the mislabeled products. The plaintiff contends that she did not learn about the false labeling until she heard about a proposed class action lawsuit in California. She claims to have objected to the proposed settlement of that action, alleging that it was "collusive" and would have limited "consumers [sic] damages to $2 to $20 on a claims made basis, coupled with a non-aggressive notice campaign, such that the total claims were less than $100,000." She further alleges that the settlement would have provided $7 million to the Unilever Foundation, "Defendant's 'charitable' arm used to leverage the type 'value-driven' marketing discussed above," and that counsel would have received $1.25 million.

Alleging an ascertainable monetary loss in excess of $5 million, the plaintiff brings two counts for violations of the New Jersey Consumer Fraud Act and breach of express written warranty under the Magnuson-Moss Warranty Act. She seeks disgorgement, restitution, costs, expenses, attorney's fees, damages, and equitable relief.

Frito-Lay Bean Dip Targeted in "All Natural" Lawsuit

A Florida resident has filed a putative statewide class action alleging that Frito-Lay falsely labels its snacks, including "Bean Dip products," as "ALL NATURAL" despite the use of ingredients—particularly soy—containing genetically modified organisms (GMOs). *Altman v. Frito-Lay N. Am., Inc.*, No. 0:12-cv-61803 (U.S. Dist. Ct., S.D. Fla., filed September 13, 2012). The gist of the complaint is that products containing GMOs should not be labeled "all natural" unless they also disclose that the products contain GMOs.

The plaintiff contends that she would not have purchased the company's bean dip if she had known the company "could not support its claim that the Product is all natural."

Seeking to represent a class of Florida consumers who purchased Frito-Lay "All Natural" products over the past four years, the plaintiff alleges violations of the state's Deceptive and Unfair Trade Practices Act and unjust enrichment. She requests injunctive relief, restitution, actual damages, punitive damages, attorney's fees, costs, and interest.

Second Class Action Filed Against Frozen Dessert Maker over Misstated Calories

A California resident has filed a putative nationwide class action with a California subclass against a company that makes low-calorie frozen desserts that allegedly have as much as 68 percent more calories than touted on the product label. *Freeman v. Arctic Zero, Inc.*, No. 12cv2279L BGS (U.S. Dist. Ct., S.D. Cal., filed September 18, 2012). Similar putative class claims filed by another California resident in August are summarized in Issue 451 of this *Update*.

According to plaintiff Brenda Freeman, "[c]onsumers do not receive the benefit of their bargain because the actual calorie content of the Frozen Desserts is up to 68 percent higher than Arctic Zero prominently represents on the front of the product packaging, on the nutritional label, and in Arctic Zero's other marketing materials." She cites testing on the company's Chocolate Peanut Butter and Vanilla Maple products showing them to be higher in calories than the 150 calories per pint on package labels. She also quotes purported consumer comments posted on the company's Website, expressing satisfaction with a dessert product containing so few calories.

Alleging violation of the Magnuson-Moss Warranty Act, breach of express warranty, unjust enrichment, and violations of California's Consumers Legal Remedies Act, Unfair Competition Law and False Advertising Law, the plaintiff seeks damages, restitution and/or disgorgement, punitive damages, costs, interest, and attorney's fees.

LEGAL LITERATURE

SHB's Phil Goldberg Comments on Pet-Injury Litigation Involving Non-Economic Damages

Shook, Hardy & Bacon Public Policy Partner Phil Goldberg has co-authored, with the current chair of the New Jersey State Bar Association's Animal Law Committee, a commentary titled "Barking Up the Wrong Tree," published in the September 17, 2012, issue of the *New Jersey Law Journal*. The commentary discusses a New Jersey Supreme Court ruling denying emotional distress damages to a woman whose dog was attacked by a neighbor's dog and died.

Noting that more and more pet owners are seeking these types of damages when their pets are injured or killed, the authors contend that limiting pet owners to economic damages will best protect their pets in the long run. According to the authors, "[p]et economics is simple. At litigation-inflated prices, many owners will no longer be able to afford services and products their pets need. The quality of pets' lives will be lowered, and in some cases, owners may be forced to euthanize their pets if they cannot or will not pay higher costs of care."

OTHER DEVELOPMENTS

Consumer Reports Finds Arsenic in Rice Products, Calls for Federal Standard

After testing more than 200 rice products, ***Consumer Reports*** purportedly found levels of total arsenic, both organic and inorganic, far in excess of the federal limit of 10 parts per billion (ppb) for arsenic in drinking water. Among the products tested were baby cereals, crackers, milk, pasta, flour, and an array of brown, white and basmati rice. One infant cereal product apparently contained up to 329 ppb of arsenic. *Consumer Reports* recommended that consumers cook their rice in twice the amount of water, 6 cups to 1 cup of rice, eat a varied diet and experiment with other grains that are less prone to absorbing arsenic from soil and water as they grow.

Its investigation included a data analysis by researchers experienced in National Health and Nutrition Examination Survey (NHANES) analyses. They found that of 3,633 rice consumers who participated in NHANES, those consuming one rice food item before their urine was tested had total urinary arsenic levels 44 percent greater than those who had not. The participants who consumed two or more rice products had arsenic levels 70 percent higher than those who had not eaten any rice. The researchers concluded that "rice is an important source of arsenic exposure for the U.S. population." *Consumer Reports* has called for a federal standard limiting the amount of rice in food and for industry to develop types of rice that take up less arsenic from water and soil.

The Food and Drug Administration (FDA) issued a **statement** indicating that it, too, has been testing rice products and will complete its data collection by the end of 2012. To date, its results have apparently been consistent with the data that *Consumer Reports* published. FDA Commissioner Margaret Hamburg said, "We understand that consumers are concerned about this matter. That's why the FDA has prioritized analyzing arsenic levels in rice. Our advice right now is that consumers should continue to eat a balanced diet that includes a wide variety of grains—not only for good nutrition but also to minimize any potential consequences from consuming any one particular food."

Representative Frank Pallone Jr. (D-N.J.) **expressed** his concern about the *Consumer Reports* findings and agreed that "there should be a federal arsenic standard for these products like there is for bottled water." He was pleased the FDA is collecting and analyzing data about arsenic in food, but noted that it has "yet to issue recommendations on consumer consumption."

An industry trade association criticized the *Consumer Reports* article on the results of its investigation, saying that it was "incomplete and inaccurate on many levels: it employs an 'arsenic content standard' that simply doesn't exist in federal law. It cites federal health data to allege health risk from arsenic ingestion when that data is (sic) based on arsenic *excreted from*, rather than *absorbed by*, the body. It offers consumption advice without addressing all of the relevant public health issues that must be taken into account." The USA Rice Federation also emphasized that "the Food and Drug Administration is not recommending that consumers change their diet based on this article. We agree with FDA that any limits set for arsenic in rice products should be the result of a carefully conducted risk-assessment." While some scientists have warned against complacency, citing studies linking arsenic consumption to lung and bladder cancer, as well as other diseases, the federation contends, "There is no documented evidence of actual adverse health effects from exposure to arsenic in foods made from U.S.-grown rice." *See FDA News Release,* September 19, 2012; *Delta Farm Press*, September 20, 2012.

Mercury Policy Project Report Targets School Tuna

The Mercury Policy Project (MPP) and a coalition of other consumer groups have **released** a report claiming that canned albacore tuna sold in U.S. schools may contain higher mercury levels than those reported by the Food and Drug Administration (FDA). Of the 59 canned tuna samples that MPP tested from this market sector, 48 were "light" tuna products representing six brands and 11 were "white" or albacore tuna products representing two brands. Although the report acknowledged that "the mercury content of these products is similar to what has been reported for supermarket canned tuna by other investigators and by [FDA]," it nevertheless alleged that the albacore tuna samples "averaged 0.560 µg/g, much higher than FDA's reported average of .350 µg/g." The results also purportedly indicated a high variably in mercury content across tuna samples, revealing, for example, that U.S-caught light tuna "had the lowest country-of-origin average mercury level, 0.086 µg/g," while Ecuador-caught light tuna "had by far the highest average level, 0.254 µg/g."

Based on these findings and concerns over prolonged mercury exposure, the report ultimately recommended, among other things, that (i) all children avoid albacore tuna; (ii) smaller children eat light tuna "no more than once a month," (iii) schools and parents "limit most children's light tuna consumption to twice a month," (iv) schools and parents "identify children who 'love tuna' and eat it often, and limit them to two tuna meals per month," (v) children never

eat tuna every day, and (vi) parents "whose children eat tuna once a week or more" have their children's blood tested for mercury." MPP has also urged the U.S. Department of Agriculture to phase out school lunch program subsidies for tuna and exhorted the research community to focus on short-term exposure "spikes."

"Fish, including tuna, is generally a nutritious part of a healthy diet," said Sarah Klein, a staff attorney with the Center for Science in the Public Interest (CSPI), which co-sponsored the report. "But especially for our littlest, most vulnerable children, we have to make sure the risks from mercury in tuna don't outweigh the tuna's benefits. We're urging parents and schools to limit children's tuna consumption and, when they do serve it, to choose lower-mercury options." *See CSPI Press Release,* September 19, 2012.

Australian Medical Association Tackles Alcohol Marketing

The Australian Medical Association (AMA) has **released** a 60-page report in conjunction with its National Summit on Alcohol Marketing to Young People that accuses industry of targeting children with new media tactics as well as alcohol-flavored food and cosmetic products. Urging "more robust policy and stronger regulatory oversight," the report aims to document current alcohol advertising tactics in Australia, examine the impact of these tactics on drinking patterns, and make a case for regulatory and statutory reform.

In particular, the report claims that "the introduction of digital technologies has opened up new platforms for marketing and promotion, with alcohol companies aggressively harnessing the marketing potential of online video channels, mobile phones, interactive games, and social networks such as Facebook and Twitter." It also argues that alcohol-flavored foods and cosmetics, such as vodka-flavored lip gloss, not only "circumvent most existing regulations regarding marketing and the placement of alcoholic products" but introduce young consumers to alcohol brands at an early age, "encouraging them to develop familiarity with, and loyalty to, their product."

As a result, AMA has urged policy makers to take the following steps: (i) regulate alcohol marketing and promotion "independent of the alcohol and advertising industries"; (ii) impose "meaningful sanctions for serious or persistent non-compliance with marketing regulations"; (iii) phase out the sponsorship of sporting events by alcohol companies and brands"; (iv) prohibit sponsorship by alcohol companies and brands "at youth, cultural and musical events"; (v) enact regulations "to limit the volume or amount of alcohol marketing, as well as its content"; (vi) expand regulations "to incorporate point-of-sale promotions, branded merchandise, and new media and digital marketing, including marketing through social media, viral campaigns, mobile phones, and the use of data collection and behavioral profiling"; (vii) require alcohol companies to publicly disclose the amount spent annually on marketing, "including expenditures on social media, online video, mobile

campaigns, events sponsorship and product placement"; (viii) continue research "into the extent and impact of online and digital marketing, and the effectiveness of different regulatory approaches to this form of marketing"; (ix) work with international bodies such as the World Health Organization to develop "a cross-border, international response to alcohol marketing," and (x) revamp health education messages to build "the critical media literacy of young people." *See AMA Press Release,* September 19, 2012.

Documentary Short on Prosecutorial Conduct Highlights Kosher Meatpacking Plant Executive's Case

A recently released documentary **short**, titled "Unjustified: The Unchecked Power of America's Justice System," focuses on the fallout from a 2008 immigration raid on a kosher meatpacking plant in Iowa. Former Agriprocessors executive Sholom Rubashkin was later charged with numerous violations, including violating child labor laws, identity theft and bank fraud. He was convicted on 86 financial fraud counts and sentenced to 27 years in prison, and his case has been appealed to the U.S. Supreme Court. The documentary was apparently directed by an Emmy-nominated producer who has worked on Comedy Central's "The Daily Show," and Michael Moore's Bravo TV series "The Awful Truth." Additional information about Rubashkin's case appears in Issue **439** of this *Update*. *See The Des Moines Register*, September 19, 2012.

MEDIA COVERAGE

Anton Troianovski, "Child's Play: Food Makers Hook Kids on Mobile Games," *The Wall Street Journal,* September 18, 2012

"U.S. food companies are reaching children by embedding their products in simple and enticing games for touch-screen phones and tablets," writes *The Wall Street Journal's* Anton Troianovski in this September 18, 2012, article examining how food and beverage manufacturers allegedly use mobile games and phone apps to sidestep "government and public pressure to limit advertising to minors on TV and the Web." According to Troianovski, some of these companies have argued that food-branded apps are a cost-effective marketing tool that would not violate any advertising restrictions because parents much purchase the games first. "We don't view it as our place to be a superparent—the nanny of the parents or the children to say what products that can see and what games they can play," Children's Food and Beverage Advertising Initiative Director Elaine Kolish told the *Journal*.

Troianovski notes, however, that the proliferation of such apps has raised questions among consumer advocates about whether parents or government should police their impact on children. "Right now there are some limits to how much exposure kids can have to advertising on the Internet just because

they're not always sitting at a computer," Jennifer Harris, the Rudd Center for Food Policy and Obesity's director of marketing practices, was quoted as saying. "But if they have their phone with them, they can be playing these games that are basically advertisements in school and basically 24/7."

SCIENTIFIC/TECHNICAL ITEMS

JAMA Publishes Obesity-Themed Issue

The *Journal of the American Medical Association (JAMA)* has devoted its latest issue to articles focusing on obesity. Among them is a commentary authored by Thomas Farley, who is affiliated with New York City's Department of Health and Mental Hygiene, which recently adopted a prohibition on sugar-sweetened beverages larger than 16 ounces. Titled "The Role of Government in Preventing Excess Calorie Consumption," the opinion piece calls for "governments to regulate food products that harm the most people, simultaneously encourage food companies to voluntarily produce and market healthful products, and then provide information to consumers in ways that facilitate their choosing healthful products." He argues that New York City has taken this approach and compares it to the city's action on smoking, which has purportedly led to a 35-percent decline in smoking since 2002.

Farley claims that industry opposes New York City's portion rule by portraying it as a "limit on consumer choices," but says that "[t]he sale of huge portions is driven by the food industry, not by consumer demand." He compares the regulation to restaurant health and safety inspections, seat belt mandates and laws prohibiting the use of lead in paint. "None of the health problems prevented by these actions kill nearly as many people each year as obesity does," he states, adding, "Although the idea of government action to prevent obesity by regulating portion size is new, this action is easily justifiable, is manageable by the dynamic food industry, and will be effective in preventing needless deaths." *See Journal of the American Medical Association*, September 19, 2012.

Meanwhile, *The Wall Street Journal* recently invited New York University Nutrition Professor Marion Nestle, Cornell University Marketing Professor Brian Wansink and Cato Institute Senior Fellow Michael Tanner to discuss "What Role Should Government Play in Combating Obesity?" Nestle indicated that "government is up to its ears in policies that promote obesity" and claimed that "[t]he food, beverage and restaurant industries collectively spend roughly $16 billion a year to promote sales through advertising agencies, perhaps $2 billion of that targeted at children." According to Nestle, "[o]n ethical grounds alone, government intervention is essential."

Tanner said, "If the state is going to abrogate . . . self-ownership, the burden is on it to show both that its goals are necessary and that they cannot be achieved in any other way. To claim otherwise is to give the state all manner

of control over our lives—indeed to reduce us to little more than functionaries of the state." Wansink observed that "people don't behave like we expect" when it comes to food and thus, that government efforts can do "more damage than we can stand." Wansink also said, "The biggest disservice that public health has ever done to Americans is to make them believe that they and their kids were fat because the schools, the food companies, the fast-food restaurants and the government made them that way. It stripped people of their hope and empowerment." He opined that government's role is to "give people hope and . . . the tools to make it happen." *See The Wall Street Journal*, September 18, 20121.

CDC Researchers Raise Concerns over Children's Sodium Intake

U.S. Centers for Disease Control and Prevention (CDC) researchers recently published a study finding that sodium intake among U.S. children and adolescents "is positively associated" with systolic blood pressure (SBP) and risk for pre-high blood pressure and high blood pressure (pre-HBP/HBP). Quanhe Yang, et al., "Sodium Intake and Blood Pressure Among US Children and Adolescents," *Pediatrics,* October 2012. According to the study, which used 24-hour dietary recalls to estimate the sodium intake of 6,235 children ages 8-18 years, the subjects consumed an average of 3,387 milligrams of sodium daily. The results also apparently indicated that the associations between sodium intake and increased SBP and risk for pre-HBP/HBP "may be stronger" among the 37 percent of participants who were overweight or obese than among those who were not. While in normal-weight children every 1,000 mg extra of sodium evidently corresponded with a one-point rise in SBP, in obese or overweight children every 1,000 mg extra of sodium corresponded with a 1.5-point rise in SBP.

"The average sodium consumption among US children and adolescents aged 8 to 18 years is as high as that of adults," concludes the study. "Evidence-based interventions that help participants reduce their sodium intake, increase their physical activity, and attain or maintain a healthy weight may help reduce the greater than expected prevalence of HBP and other cardiovascular disease risk factors among children and adolescents."

New Study Alleges Link Between BPA and Obesity in Youth

A recent study has purportedly identified an association between urinary bisphenol A (BPA) concentration and obesity in children and adolescents. Leonardo Trasande, et al., "Association Between Urinary Bisphenol A Concentration and Obesity Prevalence in Children and Adolescents," *Journal of the American Medical Association,* September 2012. Relying on data from 2,838 participants ages 6-19 years who were enrolled in the 2003-2008 National Health and Nutrition Examination Surveys, researchers evidently found that urinary BPA concentration "was significantly associated with obesity." In particular, the study reported that urinary BPA values in the second, third and fourth quartiles

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showed "a substantial elevation in the odds of obesity" when compared with first-quartile values, with "an adjusted prevalence of obesity of 22.3%... among children in the highest quartile, compared with a 10.3% prevalence…among those in the lowest quartile."

"To our knowledge, this is the first report of an association of an environmental chemical exposure with childhood obesity in a nationally representative sample," wrote the study's authors, who nevertheless warned that explanations of the association "cannot rule out the possibility that obese children ingest food with higher BPA content or have greater adipose stores of BPA." As they concluded, however, "We note the recent FDA ban of BPA in baby bottles and sippy cups, yet our findings raise questions about exposure to BPA in consumer products used by older children. Last year, the FDA declined to ban BPA in aluminum cans and other food packaging, announcing 'reasonable steps to reduce human exposure to BPA in human food supply' and noting that it will continue to consider evidence on the safety of the chemical."

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