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ISSUE 485 | MAY 31, 2013

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

U.S. Senate Rejects Farm Bill Amendment on GM Labeling

The U.S. Senate has reportedly rejected by a vote of 71 to 27 a Farm Bill amendment that would have clarified the right of states to enact laws requiring special labeling for food and beverages manufactured with genetically modified (GM) ingredients. Co-sponsored by Sens. Mark Begich (D-Alaska), Michael Bennet (D-Colo.), Richard Blumenthal (D-Conn.), Jeff Merkley (D-Ore.), and Bernie Sanders (I-Vt.), the amendment apparently aimed to protect states against lawsuits filed by food and beverage industry interests opposed to GMO labeling.

"An overwhelming majority of Americans favor GMO labeling but virtually all of the major biotech and food corporations in the country oppose it," said Sanders in a May 23, 2013, press release. "Today's vote is a step forward on an important issue that we are going to continue to work on. The people of Vermont and the people of America have a right to know what's in the food that they eat."

Meanwhile, a recent *New York Times* article has documented the push to not only disclose the presence of GMO ingredients to consumers, but to certify foods, beverages and even livestock feed as GMO-free. According to *Times* writer Stephanie Strohm, the Non-GMO Project has seen an increased demand for its certification service as companies try to anticipate state GMO labeling laws before they are passed. At the same time, however, manufacturers that currently rely on conventional crops are concerned about whether farmers and suppliers will be able to meet the needs of a "GMO-free" marketplace.

"Suppliers are going overseas to get what they need," a national grocery buyer at Whole Foods told Strohm. "We know farmers need to feel secure that there's a market for what they grow, and I'm saying, please plant these crops, there is a demand." *See The New York Times,* May 26, 2013.

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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FTC Slates Packaging and Labeling Regulations for Review

The Federal Trade Commission (FTC) has issued a modified 10-year review schedule that includes Fair Packaging and Labeling Act regulations among those for which the agency plans to request public input in 2013 as to their need, costs, benefits, and burdens. Specifically at issue are the regulations under sections 4 and 5(c), exemptions from requirements under 16 C.F.R. Part 500, and statements of general policy or interpretation (16 C.F.R. Part 503). FTC also intends to review and solicit public comments on its telemarketing sales rule. *See Federal Register*, May 23, 2013.

TTB to Allow Voluntary Nutritional Content Statements on Alcoholic Beverages

The U.S. Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued a May 28, 2013, ruling that will allow alcoholic beverage manufacturers "to provide consumers with nutritional information about their products." Acting under the authority of the Federal Alcohol Administration Act, TTB will permit the use of "Serving Facts" statements on wine, distilled spirits and malt beverages that describe the product's "serving size, the number of servings per container, the number of calories, and the number of grams of carbohydrates, protein, and fat per serving." Manufacturers may also choose to include information "about the alcohol content of the product as a percentage of alcohol by volume and may also include a statement of the fluid ounces of pure ethyl alcohol per serving."

According to the new ruling, TTB issued the voluntary guidance pending plans to require similar Serving Facts statements on all alcoholic beverage labels. "We wish to advise the public and the industry of our policy with regard to the use of such statements and representations in the labeling and advertising of alcohol beverages," states the bureau in the ruling, which does not require manufacturers to submit revised labels for approval provided the Serving Facts panel conforms to the examples supplied by the guidance. "We also wish to clarify that we will take appropriate action with regard to labeling or advertising representations that mislead the consumer about the nutritional value or health effects of alcohol beverages." *See TTB Press Release,* May 28, 2013.

Meanwhile, Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson has criticized the ruling as a "small bit of 'interim' progress on alcohol labeling." Pointing to a 2003 petition that sought mandatory alcohol facts labeling, Jacobson denounced the voluntary measure for allegedly failing, among other things, to disclose a complete list of product ingredients as is required for food and beverages. "Including fat and carbohydrates on labels could imply that an alcoholic beverage is positively healthful, especially when the drink's alcohol content isn't prominently labeled," opined Jacobson. "In this era of obesity, calorie labeling is critically important to

inform or remind consumers that alcoholic drinks are not 'free' when it comes to calories." *See CSPI Press Release,* May 29, 2013.

USDA Issues Revised COOL Rule

The U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service (AMS) has issued a final **rule** amending the Country of Origin Labeling (COOL) regulations to comply with a World Trade Organization (WTO) appellate ruling that certain provisions relating to muscle cut meat commodities were inconsistent the WTO Agreement on Technical Barriers to Trade (TBT Agreement), which includes an obligation "to accord imported products treatment no less favorable than that accorded to domestic products." Effective May 23, 2013, the final rule requires origin designations for muscle cut covered commodities "to specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation." It also eliminates "the allowance for commingling of muscle cut covered commodities of different origins" and expands the definition for "retailer" "to include any person subject to be licensed as a retailer under the Perishable Agricultural Commodities Act."

Despite the assurances of USDA Secretary Tom Vilsack that "these changes will improve the overall operation of the program," industry groups such as the American Meat Institute (AMI) have already questioned the rulemaking process, describing the final rule as "burdensome," "reckless" and unlikely to satisfy the TBT Agreement. "It is incomprehensible that USDA would finalize a controversial rule that stands to harm American agriculture, when comments on the proposal made clear how deeply and negatively it will impact U.S. meat companies and livestock producers. This rubber stamping of the proposal begs the question of the integrity of the process: many people spoke, but no one at USDA listened," opined AMI Senior Vice President of Regulatory Affairs and General Counsel Mark Dopp in a May 23 statement. "The decision to proceed with a rule that is more costly, complex and burdensome than the earlier version, when WTO and our trading partners have sent strong signals that this is no 'fix,' shows a reckless disregard for trade relations and for companies whose very survival is at risk because they rely upon imported livestock." Additional details about the rulemaking process and the WTO ruling appear in Issues **419**, **446** and **475** of this *Update*. *See AMS News Release* and *AMI Press Statement,* May 23, 2013.

DGAC Meeting to Update Dietary Guidelines

The U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) have **announced** two public meetings of the 2015 Dietary Guidelines Advisory Committee (DGAC) on June 13 and June 14, 2013, in Bethesda, Maryland. With an aim to create an updated version of its *Dietary Guidelines for Americans* report, required by HHS and USDA to be

issued "at least every five years," DGAC will reportedly evaluate new scientific evidence and resource documents to "develop a report to the Secretaries of HHS and USDA that outlines its science-based recommendations and rationale." *See Federal Register,* May 30, 2013.

FDA Issues Notice on Study of Consumer Responses to Nutrition Labels

The Food and Drug Administration (FDA) has issued a **notice** about a collection of information titled "Experimental Study on Consumer Responses to Nutrition Facts Labels with Various Footnote Formats and Declaration of Amount of Added Sugars" that the agency has submitted to the Office of Management and Budget for review. FDA reported that it plans to use the information to promote public health and explore consumer responses to various food label formats for the footnote section of the Nutrition Facts label, including "those that exhibit information such as a description of percent Daily Value, a succinct statement about daily caloric intake, a general guideline for interpreting percent Daily Values, or a footnote about nutrients whose daily intake should be limited." This study will also reportedly explore "how declaring the added sugars content of foods might affect consumers' attention to and understanding of the sugars and calorie contents and other information on the Nutrition Facts label." FDA will accept comments on the information until July 1, 2013. *See Federal Register,* May 30, 2013.

EFSA Issues New Guidance for Environmental Risk Assessment of GM Animals

The European Food Safety Authority (EFSA) has published new **guidance** on ways of assessing the potential risks of producing genetically modified (GM) animals, including fish, insects, mammals, and birds. Although EFSA reports that it has not yet received any applications for GM animals, the European Commission evidently requested that the agency develop environmental risk assessment (ERA) guidance because scientific developments indicate that "future submissions may be made for a number of species."

According to EFSA, the guidance will provide a "clear framework" for evaluating potential adverse effects of living GM animals on the environment and on human and animal health. "The core of the guidance is that ERAs for GM animals must be carried out in a scientifically sound and transparent manner," said Elisabeth Waigmann, head of EFSA's GMO Unit. "They must be based on sufficient scientific and technical data that enable conclusions to be drawn on possible environmental risks posed by a living GM animal. The inclusion of a comprehensive uncertainty analysis is of central importance given the current limitations in the availability, relevance and quality of data relating to GM animals."

The guidance document states that ERAs for GM animals would be performed on a case-by-case basis, depending on the animal type, the trait being introduced and the animal's intended use. *See EFSA News Release,* May 23, 2013.

LITIGATION

Ninth Circuit Upholds Deregulation of GM Alfalfa

The Ninth Circuit Court of Appeals has upheld a lower court ruling affirming the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) decision that genetically modified (GM) alfalfa is not a "plant pest" and thus that it lacked authority to stop its deregulation or to consult with the Fish and Wildlife Service regarding potential environmental impacts. ***Ctr. for Food Safety v. Vilsack*, No. 12-15052 (9th Cir., decided May 17, 2013)**. The Center for Food Safety, an organization dedicated to environmental advocacy, has announced its determination to appeal the ruling and to pursue other legal options to stop the planting and cultivation of GM alfalfa.

The gist of the Ninth Circuit's ruling is that while the plaintiffs' environmental and economic concerns may be valid, they have no bearing, under the current statutory scheme, on APHIS's authority vis-à-vis GM crops. The court's opinion methodically explains how GM alfalfa is created and carefully outlines the various agencies and statutory authorities bearing on GM crops and the herbicides used with them. According to the court, the plaintiffs' concerns—"transgenic contamination of conventional alfalfa and increased herbicide use"—do not "constitute plant disease, injury, or damage, which are the harms that the statute requires."

The statute at issue is the Plant Protection Act which gives APHIS regulatory authority over "plant pests." The court disagreed with the plaintiffs that the term should be defined broadly and stated in this regard, "The job of updating Title 7 of the United States Code to address the potential harms caused by genetic modification (including transgenic contamination and increased herbicide use) is a job for Congress, not this court, to undertake."

The parties have been litigating the deregulation of GM alfalfa since 2006. Information about a U.S. Supreme Court ruling on the breadth of an injunction imposed by a lower court appears in Issue **354** of this *Update. See Center for Food Safety Press Release*, May 17, 2013.

Court Rules "100% Natural" False Ad Claims May Proceed in GM Soup Ingredient Suit

A federal court in Florida has determined that a putative statewide class is not preempted under federal law from claiming that the presence of genetically modified (GM) corn in Campbell Soup Co. vegetable soups renders its "100%

Natural" labeling representations false. *Krzykwa v. Campbell Soup Co.*, No. 12-62058 (U.S. Dist. Ct., S.D. Fla., order entered May 24, 2013). The court also refused to dismiss the claims under the primary jurisdiction doctrine.

In the original complaint, the plaintiff alleged that he purchased two soup products with GM corn. Their labels had been pre-approved by the U.S. Department of Agriculture (USDA) because they also contained chicken and the agency has pre-approval authority as to these products. Campbell argued that USDA's seal of approval preempted state law-based labeling-related claims. Later complaint amendments changed the products at issue to vegetarian soups whose labels are under the Food and Drug Administration's (FDA's) regulatory purview and do not require pre-approval. Still, Campbell argued that FDA and USDA "have developed similar policies that govern the labeling of food products with 'natural' claims, and both have determined there is nothing material about bioengineered foods that differs from other foods."

According to the court, "[d]efendant claims that the facts presented in this case create an issue of first impression, as the USDA approved labels of Campbell soups containing poultry meat that have the same GM[] corn and are in the same 'line of soup products' as the vegetable soups at issue in this case." The court disagreed, finding "nothing special about being in the same product line from a preemption perspective." According to the court, if it adopted Campbell's position, "there would be no authentic reason to not also necessarily take the position that because the USDA approved two Campbell poultry meat soups not at issue in this case that no claims can be made in any case against any defendant that it is misleading to [label] a food product containing GM[] corn as '100% Natural.'"

The court also noted that USDA's approval of the label's use on chicken soups would not necessarily bind other agencies because it is unclear whether "USDA even knew that the soup contained GM[] corn, particularly as there is nothing on the soup label to so indicate."

The court further determined that the action should not be dismissed under the primary jurisdiction doctrine, agreeing with the plaintiff that FDA's lack of a disclosure requirement as to GM ingredients "does not necessarily close the door on whether a particular labeling or advertising may mislead and deceive consumers in violation of consumer protection laws." The court opined that reliance on the doctrine is "also misplaced because the FDA has repeatedly declined to adopt formal rule-making that would define the word 'natural.'" In addition, the court refused to dismiss the unjust enrichment claim. Campbell had argued that the plaintiff had an adequate remedy at law, but the court found that it was pleaded in the alternative and that it had been sufficiently pleaded.

Court Allows "Antioxidant" Claims to Proceed as to Certain Teas

A federal court in California has granted in part and denied in part the motion to dismiss filed by Twinings North America, Inc. to the second amended putative class complaint filed by a woman who alleged that she paid a premium for the company's green, black, white, and red teas relying on their purportedly misleading label—"a natural source of antioxidants." *Lanovaz v. Twinings N. Am., Inc.*, No. 12-2646 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered May 23, 2013). The company sought to dismiss claims relating to products the plaintiff did not purchase, labeling the plaintiff did not see or advertising upon which the plaintiff did not rely.

According to the court, as long as the "not purchased products" are nearly identical, a plaintiff may bring claims on behalf of others related to those products. Here, "Because the claims for 51 of the varieties of tea are based upon the exact same label describing the same product, camellia sinensis, the court finds that Lanovaz has standing to sue on behalf of purchasers of these teas and thus denies Twinings' motion with respect to these products. Red tea, on the other hand, is made from a different plant and is thus a significantly different product. Therefore, the court strikes Lanovaz's claims related to the two varieties of red tea because they are not sufficiently identical."

Acknowledging that references to Web site statements in the complaint could be clearer, the court found most of them sufficiently pleaded, although it agreed to strike a few of them.

Court Overrules U.S. Objections to Peanut Corp. Owner's Attorney

A federal court in Georgia has overruled the government's objections to Stewart Parnell's representation by attorney Kenneth Hodges in the defense of criminal charges arising from a *Salmonella* outbreak allegedly traced to Parnell's former company, Peanut Corp. of America. *United States v. Parnell*, 13-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered May 30, 2013). Because the government's motion was sealed, further details about the objections are unknown. According to the court, Parnell "knowingly and voluntarily waived his right to object to Hodges' potential or actual conflict." Additional information about the criminal charges appears in Issue **472** of this *Update*.

Shareholder Claims YUM! Directors Knew About Tainted Chicken Sales in China

A YUM! Brands shareholder has brought a derivative action on behalf of the company against its officers and directors in a federal court in Kentucky, alleging they inflated the company's growth predictions and failed to promptly inform shareholders that the company purchased chicken with allegedly excessive levels of antibiotics and toxic chemicals for sale in KFC establishments in China; according to the complaint, once the information

became public, business in China and the company's share price plummeted, while the defendants "profited handsomely" from "dumping more than $64.6 million of personally held common stock during the Relevant Period." *Zona v. Novak*, No. 13-506 (U.S. Dist. Ct., W.D. Ky., filed May 21, 2013).

Alleging breach of fiduciary duty, insider selling and misappropriation of information, and unjust enrichment, the plaintiff seeks damages, injunctive relief, disgorgement, attorney's fees, costs, and expenses. She claims that management knew as early as 2009 that the chicken purchased in China was tainted and had pinpointed the supplier by 2010, but continued to purchase from this supplier until "at least August 2012." The plaintiff also alleges that the defendants filed false financial disclosures with the Securities and Exchange Commission by, among other matters, failing to "correct materially false and misleading statements concerning the Company's current and future business and financial condition." According to the complaint, falsely optimistic growth projections inflated the share price by 12.7 percent, while news about the purportedly tainted chicken caused a 16.6 percent fall; the defendants' conduct also allegedly exposed the company to civil and criminal penalties.

Unsolicited Spam Texts Yield $16.5-Million Settlement with Papa John's

Class representatives in litigation against Papa John's International have filed an unopposed motion for preliminary approval of a class action settlement in a case involving claims that the company's franchisees sent unlawful commercial text messages through OnTime4U to some 220,000 individuals without their express consent. *Agne v. Papa John's Int'l, Inc.*, No. 10-1139 (U.S. Dist. Ct., W.D. Wash. at Seattle, filed May 17, 2013). Details about the court's grant of class certification appear in Issue **463** of this *Update*.

Under the proposed agreement, class members who are provided notice will automatically receive a merchandise certificate for a free Papa John's pizza—a $13 retail value with a collective value of $2.86 million. Class members who submit claims and whose phone numbers are verified will also receive $50 each at an aggregate value of $11 million. Attorney's fees and costs will add $2.45 million to the settlement fund, and $25,000 in incentives for the named plaintiffs will bring the settlement's total value to more than $16.5 million.

The defendants' notice of appeal on class certification to the Ninth Circuit has been stayed pending approval of the settlement agreement which was the product of mediation sessions before two retired judges. To support the incentive claim for one of the named plaintiffs, the motion reports that she actively participated in the litigation at some personal cost and also received *ex parte* letters sent to her undisclosed home address "in which the OnTime4U defendant made threats such as having collection agencies go after her personally for in excess of $150,000 in legal fees." Finding this conduct "improper and intolerable," the court apparently "issued both a temporary restraining order and a preliminary injunction to enjoin" this conduct.

DOJ Seeks Public Comment on Anheuser-Busch InBev/Grupo Modelo Merger Settlement

The Department of Justice (DOJ) has published the antitrust **complaint** filed with a proposed final judgment and competitive impact statement, resolving its concerns that the acquisition of Grupo Modelo S.A.B. de C.V. by Anheuser-Busch InBev SA/NV would violate section 7 of the Clayton Act. According to DOJ, the final judgment requires the companies "to divest Modelo's entire U.S. business to Constellation Brands, Inc.," or to an alternative purchaser if that transaction fails, to avoid a threat to the competitive U.S. beer market. Court approval of the agreement is required, and public comment is requested within 60 days of publication. *See Federal Register*, May 22, 2013.

OTHER DEVELOPMENTS

Childhood Obesity Conference to Feature Keynote by Michael Moss

The seventh biennial **Childhood Obesity Conference** is slated for June 18-20, 2013, in Long Beach, California. Described as "the nation's largest, most influential collaboration of professionals dedicated to combating pediatric obesity," the event expects to draw nearly 2,000 attendees from across the nation.

Agenda highlights include presentations by *New York Times* investigative journalist Michael Moss, New York University Professor Marion Nestle, food activist and attorney Michele Simon, and Center for Science in the Public Interest Director of Nutrition Policy Margo Wootan.

New "Buycott" App Draws Media Attention

A new mobile application that allows consumers to learn more about the company and manufacturing process behind a specific product has attracted nationwide media attention, with *ABC News* "Technology Review" recently naming it "App of the Week." Created by Los Angeles-based developer Ivan Pardo, the "Buycott" app encourages consumers to scan product barcodes to determine whether the purchase conflicts with any causes identified by the user, who can decide to join preexisting Buycott campaigns or create new ones based on individual concerns. For example, as a May 14 *Forbes* article explains, the "Demand GMO Labeling" campaign will tell consumers if a box of cereal "was made by one of the 36 corporations that donated more than $150,000 to oppose the mandatory labeling of genetically modified food."

In addition to helping consumers source products, Buycott reportedly supplies company information ranging from "phone numbers, emails, social media accounts, and headquarters location… to a family tree that lists off all related companies and shows you how they are connected." It also asks users to

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contribute knowledge about companies and products to its growing database, which Buycott's developer admits is "rich, but ultimately limited" and not guaranteed for accuracy. *See Digital Trends,* May 25, 2013.

SCIENTIFIC/TECHNICAL ITEMS

Phthalates Allegedly Linked to High Blood Pressure in Children

A recent study has allegedly linked di-2-ethyhexylphthalate (DEHP) exposure to elevated blood pressure (BP) in children, raising concerns about the effect of phthalates and other plastic additives on long-term heart health. Leonardo Trasande, et al., "Urinary Phthalates Are Associated with Higher Blood Pressure in Childhood," *The Journal of Pediatrics,* May 2013. Researchers with the New York University (NYU) Langone Medical Center, University of Washington, University of Cincinnati, and Penn State University apparently used urinary metabolite data from 3,000 children enrolled in the National Health and Nutrition Examination Survey 2003-2008 to quantify exposure to three phthalate families, including DEHP. Although the results evidently found no association between the phthalates used in cosmetics and personal care products and increased BP, dietary exposure to DEHP was reportedly associated "with higher systolic BP in children and adolescents."

"Phthalates can inhibit the function of cardiac cells and cause oxidative stress that compromises the health of arteries," explained NYU Associate Professor of Pediatrics, Environmental Medicine and Population Health Leonardo Trasande in a May 22, 2013, press release. "We wanted to examine the link between phthalates and childhood blood pressure in particular given the increase in elevated blood pressure in children and the increasing evidence implicating exposure to environmental exposures in early development of disease."

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