Shook, Hardy & Bacon L.L.P.

ISSUE 498 | SEPTEMBER 27, 2013

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Legislators Seek to Modernize Food Labeling

U.S. Rep. Rosa DeLauro (D-Conn.), Rep. Frank Pallone (D-N.J.) and Sen. Richard Blumenthal (D-Conn.) have introduced legislation (**H.R. 3147**) seeking to "modernize" food labeling by updating the Nutrition Facts panel and ingredient list requirements, addressing front-of-package (FOP) labeling, and eliminating misleading health claims. Titled the Food Labeling Modernization Act of 2013, the bill would require the Department of Health and Human Services (HHS) "to issue comprehensive guidance for industry clarifying the scientific support needed to prevent false or misleading information for structure/function claims and giving the Secretary the legal authority to compel companies to turn over their substantiation documents." It would also direct HHS to (i) establish "a single, standard [FOP] labeling system in a timely manner for all food products required to bear nutrition labeling," (ii) update the definition of the term "healthy" according to the Dietary Guidelines for Americans, (iii) standardize the term "natural," (iv) require products identified as "made with whole grain" to disclose the percentage of whole grain, (v) require labels to disclose the amount of caffeine in a product if it exceeds 10 milligrams, (vi) revise the Nutritional Facts panel to include "the percent daily values for calories and sugar, as well as the amount of sugar that is not naturally occurring," and (vii) ensure that "any product containing an amount of food reasonably consumed on a single occasion to state on the label that a single package contains one serving size."

"Childhood obesity has nearly tripled in the past 30 years and is a huge public health problem in this country that puts millions of American children at risk. Healthy eating is critical to combating this epidemic. That is why it is so important that when families make the effort to eat nutritious, healthy food, the labels on food products help them make the right choices—not confuse or mislead them," said Pallone. "The Food Labeling Modernization Act is a comprehensive approach to updating labels so that consumers have the clear, consistent information they need when making important decisions about the food they buy and give to their families." *See Congressional Fact Sheet* and *Press Releases of Rep. DeLauro and Rep. Pallone,* September 19, 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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CDC Report Targets Antibiotic-Resistant Bacteria

The Centers for Disease Control and Prevention (CDC) has **issued** a report examining the impact of antibiotic-resistant bacteria on human health. Titled *Antibiotic Resistance Threats in the United States, 2013,* the report categorizes bacterial strains as either urgent threats, serious threats or concerning threats according to their clinical and economic impacts, incidence, 10-year projection of incidence, transmissibility, availability of effective antibiotics, and barriers to prevention. Among the bacteria identified by CDC as serious threats are drug-resistant *Campylobacter,* drug-resistant non-typhoidal *Salmonella,* methicillin-resistant *Staphylococcus aureus* (MRSA), and drug-resistant tuberculosis.

In particular, the agency has noted that the "use of antibiotics in food-producing animals allows antibiotic-resistant bacteria to thrive while susceptible bacteria are suppressed or die." Warning that "much of antibiotic use in animals is unnecessary and inappropriate and makes everyone less safe," the report highlights CDC's work with the Food and Drug Administration and U.S. Department of Agriculture to monitor trends in antibiotic resistance "among enteric bacteria from humans, retail meats, and food-producing animals." It also recommends that antibiotics only be used in food-producing animals "to manage and treat infectious diseases, not to promote growth."

"Perhaps the most important action needed to greatly slow down the development and spread of antibiotic-resistant infections is to change the way antibiotics are used," concludes the report, which estimates that at least 23,000 people die each year from antibiotic-resistant infections. "Stopping even some of the inappropriate and unnecessary use of antibiotics in people and animals would help greatly in slowing down the spread of resistant bacteria."

In a related development, a recent study has reportedly concluded that "the contributions of local animal populations to human drug-resistant *Salmonella* may previously have been overstated." A. E. Mather, et al., "Distinguishable Epidemics of Multidrug-Resistant *Salmonella Typhimurium* DT104 in Different Hosts," *Science*, September 2013. According to a recent press release, researchers with the Wellcome Trust Sanger Institute analyzed the genomes of 373 *Salmonella Typhimurium* samples taken from humans and animals, not only finding that the bacteria populations in these two hosts were distinguishable, but that humans tended to acquire infections from other humans while harboring a greater diversity of drug resistance.

"For the first time, we've determined in detail and on a large scale how *Salmonella* strains taken from humans and animals in the same setting and over the same time period relate to each other," explained the lead author. "Our genomic data reveal how the *Salmonella* bacteria spread during the course of a long-term epidemic. We found that people have a more diverse source of infection and antibiotic resistance than just the local animals, pointing towards alternative sources." *See Wellcome Trust Sanger Institute Press Release,* September 12, 2013.

FTC Seeks Comments on Self-Regulatory Guidelines Submitted Under COPPA

The Federal Trade Commission (FTC) has **requested** comments on proposed self-regulatory guidelines submitted by the kidSAFE Seal Program under the safe harbor provisions of the Children's Online Privacy Protection Rule (the COPPA Rule). Owned and operated by Samet Privacy, LLC, the kidSAFE Seal Program identifies itself as "a fast-growing safety certification service and seal-of-approval program designed exclusively for children-friendly Websites, mobile applications, tablet devices, and other similar interactive services and technologies." The program is seeking safe harbor status pursuant to Section 312.11 of the Revised COPPA Rule.

In particular, FTC has asked respondents to consider, among other things, whether (i) the proposed guidelines provide "the same or greater protections for children" as those contained in Sections 312.2-312.10 of the Rule; (ii) "the mechanisms used to assess operators' compliance with the proposed guidelines" are effective; (iii) "the incentives for operators' compliance with the proposed guidelines" are effective; and (iv) the proposed guidelines provide adequate means for resolving consumer complaints. FTC will accept comments on kidSAFE's application until October 18, 2013. *See Federal Register,* September 18, 2013.

USDA Issues Final Rule on Food Container Standards

The U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service (AMS) has **issued** a final rule, effective Oct. 17, 2013, amending regulations governing the standards for the condition of food containers. According to the agency, revising existing tables, removing operating characteristic curves and updating language in the standards will render them applicable to most types of food containers and align them with current industry practices. AMS also noted that since the standards were last amended in May 1983, innovations in packaging technologies have provided an increasingly wide variety of acceptable new food containers, including aseptic packaging, metal cans with easy-open lids, and plastic rings that hold several containers together. *See Federal Register,* September 17, 2013.

EC Amends Nano Elements of Food Information and Labeling Rule

The European Commission (EC) has **issued** a draft rule amending Regulation 1169/2011—a food information and labeling rule adopted in 2011—with regard to use of the term "nano" to describe food additives. The amended rule requires adherence to the definition of "engineered nanomaterial" provided in Recommendation 2011/696/EU, because this rule "reflects the technical and scientific progress to date." The revised rule further states that the definition of a nanomaterial should be "linked" to the International Organization for Standardization's definition that an engineered nanomaterial is "a nanomate-

rial designed for a specific purpose or function." According to the revised regulation, some food additives, which had been registered as "nano," may no longer be categorized as such.

Noting that it would be "unsuitable" and confusing for certain food additives to be preceded by the word "nano," the revision states that "food additives included in the [Union lists] should not be mandatorily qualified as 'nano' in the list of ingredients and should therefore not be covered by the definition of engineered nanomaterials." The proposed legislation also suggests that specific nano-related labeling requirements for food additives be evaluated by the European Food Safety Authority. *See Nanotechnology Industries Association News Release,* September 12, 2013.

Prop. 65 Relief for Small Business Awaits Gubernatorial Signature

The California Legislature has approved a bill (**A.B. 227**) that would impose a number of restrictions on private parties seeking to enforce the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) and provide relief for small businesses that have been litigation targets since its enactment. If approved by the governor, who has until mid-October to do so, the law would require a person bringing a matter in the public interest to prepare a certificate of merit stating that the person or her attorney "has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical" and, on the basis of that information, the person executing the certificate "believes there is a reasonable and meritorious case for the private action."

If a court concludes that "there was no actual or threatened exposure to a listed chemical," it would be permitted to review the information in the certificate of merit and deem the action "frivolous" if it "finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened." To approve a Prop. 65 settlement, a court would be required to find that the warning required complies with the law, the attorney's fee award is reasonable and the penalty is reasonable.

The bill would also give an alleged violator an opportunity to correct an alleged transgression and, further, would forbid the filing of a Prop. 65 action or any recovery if it has done so and if the violation involves exposure to (i) alcoholic beverages consumed on the alleged violator's premises; (ii) a listed chemical "in a food or beverage prepared and sold on the alleged violator's premises" to the extent "the chemical was not intentionally added" or formed by cooking "necessary to render the food or beverage palatable or to avoid microbiological contamination"; (iii) "environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises";

or (iv) listed chemicals in engine exhaust, "to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles."

New York AG Announces Crackdown on Fake Online Reviews

New York Attorney General Eric Schneiderman recently **announced** that 19 companies have agreed to stop hiring search engine optimization (SEO) and marketing entities to write fake online reviews after an undercover investigation into digital "astroturfing" allegedly found that such practices violate "multiple state laws against false advertising." According to a September 23, 2013, press release, "Operation Clean Turf" reportedly revealed that companies posting fake consumer reviews on Yelp, Google Local and similar sites often used techniques to conceal their identifies, including "creating fake online profiles on consumer review websites and paying freelance writers from as far away as the Philippines, Bangladesh and Eastern Europe for $1 to $10 per review." The investigation also identified SEO companies that purportedly offered to produce fake reviews on behalf of their clients as part of their reputation management services.

"Consumers rely on reviews from their peers to make daily purchasing decisions on anything from food and clothing to recreation and sightseeing," said Schneiderman, who noted that astroturfing violates, inter alia, New York Executive Law § 63(12), and New York General Business Law §§ 349 and 350. "This investigation into large-scale, intentional deceit across the Internet tells us that we should approach online reviews with caution. And companies that continue to engage in these practices should take note: 'Astroturfing' is the 21st century's version of false advertising, and prosecutors have many tools at their disposal to put an end to it." *See The New York Times,* September 22, 2013.

San Francisco Supervisor Wants Report on SSB Consumption

San Francisco Supervisor Eric Mar has reportedly requested a study from the Budget and Legislative Analyst's office analyzing the impact of sugar-sweetened beverages (SSBs) on Bay Area residents' health and health care costs, as well as summarizing what initiatives other U.S. cities have taken to reduce consumption of soft drinks, sweet teas and sports drinks. After the study is completed, the board of supervisors will hold a hearing on the findings. *See San Francisco Examiner,* September 27, 2013.

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LITIGATION

Fourth Circuit Rules Alcohol Ad Ban Unconstitutional As Applied

A divided Fourth Circuit Court of Appeals panel has determined that a Virginia Alcohol Beverage Control Board prohibition on alcohol advertisements in college newspapers, as applied, violates the First Amendment rights of two campus newspapers because the majority of the papers' readers are age 21 or older, and thus the rule is "not appropriately tailored to Virginia's stated aim." ***Educ. Media Co. at Va. Tech, Inc. v. Insley*, No. 12-2183 (4th Cir., decided September 25, 2013)**. So ruling, the court reversed a district court decision upholding the rule's validity.

The board argued that the purpose of the regulation "is to combat underage and abusive college drinking." The court majority found that, under either a strict scrutiny or intermediate scrutiny analysis, the regulation was overbroad as applied to college newspapers that were read by college students of legal age. The regulation failed, said the court, "because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume." In response to the board's contention that the regulation was designed, in part, to prevent abusive drinking by those who are of legal age, the court also observed, "states may not 'seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements.'"

A dissenting judge would have found the rule constitutional, finding that it "only minimally impacts commercial speech by attempting to limit advertising aimed at a targeted market which includes a substantial percentage of readers for whom use of the product is illegal." In this case, the evidence showed that one newspaper's readership included 60 percent of legal age, the other's had 64 percent of legal age.

Eighth Circuit Upholds Alcohol Wholesalers' Residency Requirement in Missouri

The Eighth Circuit Court of Appeals has found constitutional Missouri's four-tier alcohol distribution system which includes a residency requirement for wholesalers, which comprise the third tier. ***S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, No. 12-2502 (8th Cir., decided September 25, 2013)**. According to the court, the decision required it to examine the "current state of the relationship between the dormant Commerce Clause and the Twenty-First Amendment." The former forbids discrimination against out-of-state residents, while the latter gives states "certain prerogatives particular to the regulation of alcohol."

Missouri law requires those seeking a wholesaler license to be incorporated under the state's laws, with all officers and directors "qualified legal voters and taxpaying citizens of the county . . . in which they reside" and "bona fide

residents" of Missouri for at least three years. Resident shareholders must own at least 60 percent of all the financial interest in the business. The company challenging the law is incorporated in Missouri, but it is a wholly owned subsidiary of a Florida corporation, owned for the most part by four Florida residents who hold 97 percent of the parent company's voting shares. The court dismissed out of hand the company's argument that the residency requirement was "mere economic protectionism," because the company had not raised the issue before the district court and based it on a 1940s newspaper article quoting a single state legislator. In the court's view, not only was the argument waived, but "Newspaper articles are 'rank hearsay.'"

Drawing guidance from *Granholm v. Heald*, 544 U.S. 460 (2005), as the U.S. Supreme Court's most recent pronouncement on the intersection of the Commerce Clause and 21st Amendment, the court determined that Missouri's tiered system is "unquestionably legitimate" and subject to deferential scrutiny. According to the court, the state established a sufficient basis for the residency requirement, which has a rational basis.

Court Dismisses Consumer Fraud and Related Claims Against Yogurt Maker

On reconsideration, a federal court in California has dismissed a lawsuit against Chobani, Inc., in a putative class action alleging that its yogurt products are mislabeled because they include "evaporated cane juice" (ECJ) as an ingredient and state that they have no added sugar and contain only "natural ingredients." *Kane v. Chobani, Inc.*, No. 12-2425 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered September 19, 2013). Details about the order the court reconsidered appear in Issue 491 of this *Update*. The court dismissed the Unfair Competition Law (UCL), False Advertising Law (FAL) and Consumers Legal Remedies Act (CLRA) claims without prejudice and gave the plaintiffs 21 days to file a third amended complaint. Claims for unjust enrichment and violation of the Song-Beverly and Magnuson-Moss Warranty Act were dismissed with prejudice.

Essentially, the court found that the plaintiffs lacked standing to pursue their UCL, FAL and CLRA claims because they failed to allege a "coherent, plausible theory of reliance." Regarding the claim that the plaintiffs were deceived by the inclusion of ECJ on the label, the court stated, "Absent *some* factual allegation concerning what Plaintiffs believed ECJ to be if not a form of sugar or a juice containing some form of sugar, Plaintiffs' allegations that they read the label, were aware that the Yogurts contained ECJ, and nevertheless concluded that the Yogurts contained 'only natural sugars from milk and fruit and did not contain added sugars or syrups' is simply not plausible."

As to the "no sugar added" claims, the court determined that the plaintiffs could not have relied on them in making their purchasing decision because these product representations appear on the defendant's Website, and

"Plaintiffs do not allege that they ever viewed Defendant's website." The court rejected the plaintiffs' reliance on *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), because it "does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign may bring a claim for relief." The court also rejected their "illegal product" theory—that the products were misbranded under Food and Drug Administration labeling requirements and were not capable of being sold legally—finding that it would "eviscerate the enhanced standing requirements imposed by Proposition 64 and the California Supreme Court's decision in *Kwikset*."

The court further ruled that it was not plausible that the plaintiffs believed on the basis of the defendant's "only natural ingredients" or "all natural" representations that the yogurt products did not contain added fruit juice because "the labels clearly disclosed the presence of fruit or vegetable juice concentrate in the Yogurts." And because the plaintiffs failed to adequately allege the substantial similarity of the product representations as to products they did not purchase, the court found that they lacked standing with regard to those products.

Court Narrows Misbranding Allegations Against Dole

A federal court in California has granted in part and denied in part the motion to dismiss filed by Dole Food Co. in a putative nationwide class action alleging that the company misbrands a number of its fruit products by making certain "all natural," "fresh," nutrient content, antioxidant, sugar-free, and health claims, as well as failing to disclose that the products contain artificial additives, chemical preservatives and other artificial ingredients. *Brazil v. Dole Food Co.*, No. 12-1831 (U.S. Dist. Ct., N.D. Cal., order entered September 23, 2013).

According to the court, the plaintiff has standing at this stage of the proceedings to bring claims as to products he did not purchase, ruling that he may proceed with "substantially similar claims based on both products he purchased and substantially similar products he did not purchase" on behalf of unnamed class members. The court dismissed with prejudice claims based on the company's Website statements because the plaintiff "concedes that he did not view Defendants' website" and he will be unable to demonstrate that "he actually relied on" these representations in making his purchases. So ruling, the court rejected the plaintiff's argument that the Food and Drug Administration's position that Website statements are incorporated into the product label by reference rendered the products "illegal" and made the purchase of them a "sufficient injury to confer standing."

While the court rejected the defendants' assertion that the claims were not pleaded with sufficient particularity under Federal Rule of Civil Procedure 9(b), it dismissed with prejudice the claim that "the very fact that Defendants

sold [] misbranded products and did not disclose this fact to consumers is a deceptive act in and of itself." According to the court, this theory is preempted by federal law because it would impose a requirement—disclosing "one's own violation of federal labeling regulations on the very labels that violate those regulations"—not identical to those imposed by federal law.

Finally, the court refused to strike the plaintiff's nationwide class allegations on the ground that *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), prevents a plaintiff from pursuing claims under California law on behalf of consumer who purchased the products in another state. According to the court, no choice-of-law analysis has yet been conducted, and striking the nationwide class allegations at this stage would be premature.

HFCS Producers' Counterclaims in Sugar Producers' Suit Remain in Play

A federal court in California has denied the motion to dismiss defendants' counterclaims filed by plaintiff sugar producers in a dispute between them and companies that make high-fructose corn syrup (HFCS) and promoted it in a national campaign claiming that "HFCS is corn sugar," "HFCS is natural," and "sugar is sugar." *W. Sugar Coop. v. Archer-Daniels Midland Co.*, No. 11-3473 (U.S. Dist. Ct., C.D. Cal., order entered September 16, 2013).

The court ruled that (i) because the counterclaims do not allege fraud, they satisfy the pleading requirements of Federal Rule of Civil Procedure 8; (ii) whether the plaintiffs' statements, at issue in the counterclaims, are immune from liability under the *Noerr-Pennington* doctrine requires further factual development and is thus premature; (iii) the counterclaims' allegations do not demonstrate that the plaintiffs are immune from liability under the Communications Decency Act of 1996 in that they "neither demonstrate that Plaintiffs 'passively displayed' the statements [authored by others] nor that the original authors of the statements played an 'active role' in providing the statements to the Plaintiffs"; (iv) the counterclaims state a claim under the Lanham Act; and (v) the challenged counterclaims' allegations need not be stricken because they are not immaterial, impertinent or clearly insufficient.

Colorado Cantaloupe Farmers Charged in 2011 *Listeria* Outbreak

Brothers Eric and Ryan Jensen who own the Colorado cantaloupe farm linked to a deadly 2011 *Listeria* outbreak have reportedly been arrested on six misdemeanor charges of introducing adulterated food into interstate commerce and aiding and abetting. According to court records, they purportedly changed their cantaloupe cleaning process in May 2011 and never used the chlorine spray incorporated into the system. The Department of Justice (DOJ) alleges that they "were aware that their cantaloupes could be contaminated with harmful bacteria if not sufficiently washed." The Centers for Disease Control and Prevention determined that people in 28 states consumed the

contaminated cantaloupe, 33 died, 147 were hospitalized, and a pregnant women miscarried. The brothers reportedly pleaded not guilty and face a December 2, 2013, trial. If convicted, each could serve one year in prison and be fined up to $250,000 for each charge. *See DOJ News Release*, September 26, 2013; *Fox News*, September 27, 2013.

Meanwhile, a federal court has apparently chastised the attorneys who represented the former Postville, Iowa, meatpacking plant CEO who was sentenced in 2010 to 27 years in a federal prison for his conviction of bank, mail and wire fraud, which came to light after a May 2008 immigration raid at the facility. In violation of a local court rule, the attorneys purportedly contacted the jurors who convicted Sholom Rubashkin. A U.S. attorney reportedly filed a motion in the matter after a former juror informed him that a private investigator and Rubashkin's daughter contacted him at home asking for his assistance in a possible appeal.

According to a news source, Rubashkin's attorneys told the court that they believed the proscription on jury contact had been lifted after the trial when the court informed the jurors that they could talk to "anyone or no one." U.S. District Chief Judge Linda Reade reportedly stated that the lawyers were "dead wrong" to think this gave them permission to contact jurors. She also apparently admonished them not to waste her time "with a ridiculous argument." Reade will decide at a later date how she will sanction them. *See The Gazette*, September 23, 2013.

Cargill to Settle Claims That "Natural" Ads for Truvia® Sweetener Are Misleading

While continuing to deny that its labeling and marketing for Truvia® sweetener products misled consumers, Cargill has apparently agreed to settle a putative nationwide class action alleging consumer fraud and breach of warranty. *Martin v. Cargill, Inc.*, No. 13-2563 (U.S. Dist. Ct., D. Minn., preliminary agreement filed September 19, 2013). The plaintiffs claimed that the products are not "natural" because they contain "highly processed" ingredients or those derived from genetically modified organisms. Under the agreement, the company would create a $5 million fund for cash refunds and vouchers on selected Truvia® products. The company has also agreed to modify product labels that will refer consumers to its Website where it will explain in some detail how the erythritol in Truvia® is produced. Cargill has agreed not to oppose attorney's fees and expenses of $1.59 million. Any residual funds remaining in the settlement fund would be distributed to the National Consumer Law Center and Consumer Federation of America.

Organic Evaporated Cane Juice Labels Targeted in Lawsuit

California residents have filed a putative nationwide class action against Late July Snacks LLC, alleging that the company's snack products are misbranded because they include "organic evaporated cane juice" on their ingredient lists in violation of the state's Sherman law, which incorporates the federal Food, Drug, and Cosmetic Act. *Swearingen v. Late July Snacks LLC*, No. 13-4324 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed September 18, 2013).

The plaintiffs contend that regardless whether the products actually contain sugar or dried sugar cane syrup as sweeteners, the Food and Drug Administration (FDA) requires that these terms, and not "evaporated cane juice," be used on product labels. They cite a 2000 FDA guidance letter and warnings that FDA subsequently provided to companies using the prohibited term on food labels. They assert that the state's unfair competition law does not require that they relied on the labels in making their purchasing decisions, just that they would not otherwise have purchased an unlawful product, "absent the Defendant's failure to disclose the material fact that the product was unlawful to sell or possess." Alleging violation of California's unlawful business acts and practices law and Consumer Legal Remedies Act, they seek restitution, injunctive relief, equitable remedies, attorney's fees, costs, and interest.

Safeway Sued for Using Preservative in "100% Natural" Products

A California resident has filed a putative class action on behalf of statewide and nationwide classes alleging that Safeway, Inc. labels and promotes its Open Nature waffle products as "100% Natural" while using the synthetic chemical preservative, alternatively referred to as sodium acid pyrophosphate and disodium dihydrogen pyrophosphate, as an ingredient. *Richards v. Safeway, Inc.*, No. 13-4317 (U.S. Dist. Ct., N.D. Cal., filed September 18, 2013). According to the plaintiff, the chemical "has various applications—from its use in leather treatment to remove iron stains on hides during processing, to stabilizing hydrogen peroxide solutions against reduction, to facilitating hair removal in hog slaughter, to feather removal from birds in poultry slaughter, to use in petroleum production." According to the plaintiff, the ingredient is not listed on the front of the package with the other ingredients.

Claiming that he relied on the company's "100% Natural" claims in purchasing products for which he paid a premium, the plaintiff alleges, as to the California class only, statutory deceptive advertising practices, violation of the Consumers Legal Remedies Act, breach of express warranty, and statutory unfair business practices. As to both putative classes, the plaintiff alleges common law fraud, negligent misrepresentation, breach of contract, and quasi-contract/unjust enrichment. He seeks declaratory and injunctive relief; corrective advertising; restitution and disgorgement; an accounting; compensatory, punitive and exemplary damages; attorney's fees; costs; and interest.

Former Benihana Chef Claims FLSA Violations and Retaliation

On behalf of current and former Benihana chefs, a former chef has filed an action under the Fair Labor Standards Act (FLSA) alleging that the company forced chefs to work off the clock without compensation, illegally deducted from the chefs' tips to provide tips to employees not entitled to share them and harassed or fired the chefs if they complained about the practices. *Kim v. Benihana Nat'l Corp.*, No. 13-62061 (U.S. Dist. Ct., S.D. Fla., filed September 20, 2013). Alleging unpaid overtime or minimum wages in the alternative, illegal tip deductions and retaliation, the plaintiff seeks an order requiring notice to all Benihana chefs, declaratory relief, damages, interest, attorney's fees, and costs.

LEGAL LITERATURE

Scholar Seeks to Insert Fairness into Assumption of Risk Defense

Tel Aviv University Senior Law Lecturer Avihay Dorfman explores the theoretical underpinnings of assumption of the risk as a tort defense and illustrates its nuances in the context of obesity. **"Assumption of the Risk, After All," Theoretical Inquiries in Law (forthcoming 2013)**. Observing that any hostility toward the doctrine stems from the perception that it has a libertarian basis, the author develops a liberal-egalitarian account, "arguing that the *fact* of making a choice (to assume a given risk) is not sufficient to *justify* the shifting of responsibility from the negligent injurer to the choosing victim. For it is also necessary that the latter must be acting under conditions that render this shifting fair." In the case of an obese individual residing in a "food desert" where "junk food" is the only food readily available at an affordable price, Dorfman contends that it would not be fair to attribute responsibility for any harm allegedly caused by poor food choices to the decisionmaker.

OTHER DEVELOPMENTS

Credit Suisse Issues Report on Sugar Consumption

Credit Suisse's Research Institute has issued a September 2013 report titled *Sugar Consumption at a Crossroads* that examines the world sweetener market as well as the latest research on the health effects of sugar and high-fructose corn syrup (HFCS). Noting that soft drinks have drawn the most attention from legislators, regulators and consumer groups, the report summarizes the medical consensus on the role of increased sugar consumption in chronic disease and chronicles those issues still open for debate.

The report also describes how the increased focus on the health effects of excess sugar consumption will affect food and beverage companies, the sugar industry as a whole, individual producers of artificial and natural sweeteners,

and the health care industry. In particular, Credit Suisse expects companies in the beverage industry "to react to the growing public concern and the threat of taxes on sugary drinks by moving as fast as they can to self-regulate," while the impact on the food industry "should be minimal as they do not suffer from the same negative image as the beverage industry, they are more difficult to regulate and they are less affected by the biomedical issues linked to sugary beverages." In addition, the report identifies the following "actionable responses" currently available to manufacturers: (i) "increase availability of the zero-calorie version in every region and country"; (ii) "promote the marketing of 'diet' drinks more than full-calorie drinks"; (iii) "gradually reduce the calorie content of the full calorie version"; (iv) "improve and make more visible the labeling of the sugar content of drinks"; (v) "replace sugar and artificial, intense sweeteners with natural, low- or zero-calorie sweeteners"; (vi) "expand portfolios to offer alternative drinks"; and (vii) "launch public initiatives and campaigns to foster a healthier and more active way of life."

"Although a major consumer shift away from sugar and [HFCS] may be some years away, and outright taxation and regulation a delicate process, there is now a trend developing," states Credit Suisse, which prepared the report for investors and analysts. "From the expansion of 'high-intensity' natural sweeteners to an increase in social responsibility messages from the beverage manufacturers, we see green shoots for dietary changes and social health advancement."

MEDIA COVERAGE

Scientific American Article Focuses on "Food Addiction"

A recent article detailing the history of food addiction studies has claimed that foods dense in fat and sugar can override our appetite-suppressing hormones, activate our neurological reward systems and prompt us to continue eating past the point of satiety. Paul Kenny, "Is obesity an addiction?," *Scientific American,* September 2013. According to author Paul Kenny, a neuroscientist with The Scripps Research Institute, obesity in some cases may be caused "by hedonic overeating that hijacks the brain's reward networks," thus creating "a feedback loop in the brain's reward centers—the more you consume, the more you crave, and the harder it is for you to satisfy that craving."

Asking whether this cycle of hedonistic overeating constitutes an addiction, Kenny not only describes several studies that seem to highlight the similarities between drug addiction and obesity, but also explains important differences between the two conditions. In particular, he notes that "research overall indicates no one ingredient stokes addiction-like behaviors," adding that "the difference in obesity… is that modern high-calorie foods can overwhelm our biological feedback networks in a way that other foods cannot."

"Still, compulsive eating and compulsive drug use seem to share obvious features, most notably an inability to control consumption," concludes Kenny. "It is up to scientists to determine if these similarities are superficial or stem from common, underlying alteration in the brain. More important will be determining if the addiction model is useful. Unless it helps us design new treatment approaches, the debate is simply an academic exercise."

SCIENTIFIC/TECHNICAL ITEMS

BPA Study Criticized for Misinterpreting Statistical Data

Tufts University researchers who recently published a study in *Environmental Health Perspectives* linking bisphenol A (BPA) to mammary gland cancer in rats have walked back their claims after *Forbes* reported that the statistical data cited in the results "clearly showed BPA had no effects and did not cause cancer." Nicole Acevedo, et al., "Perinatally Administered Bisphenol A as a Potential Mammary Gland Carcinogen in Rats," *Environmental Health Perspectives,* September 2013. When first published ahead of print, the study in question apparently concluded that "developmental exposure to environmentally relevant levels of BPA during gestation and lactation induces mammary gland neoplasms in the absence of any additional carcinogenic treatment." The researchers also noted that human-relevant doses of BPA "led to the induction of malignant mammary gland tumors and other lesions in adult female rats."

But *Forbes,* after consulting with experts at the Bioinformatics at the National Institute of Statistical Science, argued that the evidence touted in the study was in fact random and could be ascribed to chance. "There is no dose response for cancer, which is their claim," the institute's assistant director, Stanley Young, told *Forbes.* "The observed results given in Table 4 are consistent with chance."

As a result of these critiques, the study's authors toned down the claims in the printed version of their work, writing instead that BPA "was associated with" the induction of malignant gland tumors and other lesions in adult female rats. "And to add insult to the injury done to science, *Environmental Health Perspectives* accompanied the article with a journalistic piece commenting on the significance of the study, which made not one reference to the actual statistical data," opines *Forbes* contributor Trevor Butterworth. "It is difficult not to see the heavy hand of an agenda at work here—one which seeks to indict BPA no matter what the data says." *See Forbes.com,* July 30, 2013, and September 26, 2013.

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

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Certain Diets Allegedly Linked to Alzheimer's Disease

A recent study has reportedly claimed that diets high in calories and animal fat are associated with increased rates of Alzheimer's disease (AD) in Japan and eight other countries. William Grant, "Trends in Diet and Alzheimer's Disease During the Nutrition Transition in Japan and Developing Counties," *Journal of Alzheimer's Disease,* September 2013. Using nutrition data supplied by the U.N. Food and Agriculture Organization, Sunlight, Nutrition and Health Research Center Director William Grant compared AD trends in Japan with changes in national dietary supply factors, alcohol consumption and lung cancer mortality rates over 25 years, in addition to comparing AD trends in eight developing countries with changes in national dietary supply factors over the same time period.

The results evidently showed that in Japan, "alcohol consumption, animal product, meat and rice supply, and lung cancer rates correlated highly with AD prevalence data, with the strongest correlation for a lag of 15-25 years," while the eight-country study found that "total energy and animal fat correlated highly with AD prevalence data, with a lag of 15-20 years." As Grant thus concluded, these findings suggest that "the rate of AD and dementia will continue to rise as estimated… unless dietary patterns change to those with less reliance on animal products or new ways are found to reduce the risk of AD." *See Journal of Alzheimer's Disease Press Release,* September 22, 2013.

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