ISSUE 529 | JULY 11, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Federal Legislation Seeks to Prohibit BPA in Food Containers

Sen. Edward Markey (D-Mass.), Rep. Lois Capps (D-Calif.) and Rep. Grace Meng (D-N.Y.) have introduced legislation that would ban the synthetic compound bisphenol A (BPA) from food and beverage containers, citing research reportedly linking BPA to a variety of health problems. In addition, the companion bills would authorize the U.S. Food and Drug Administration to grant one-year waivers from the provisions so long as the manufacturers begin labeling products that contain BPA. "The Ban Poisonous Additives Act will help ensure that our factories and our entire food supply are free from this damaging chemical," Markey said. "It's time to ban BPA and move to safer alternatives." *See Law360*, July 9, 2014.

U.S. Codex Delegates Schedule Meeting to Discuss Processed Fruit, Vegetables

The U.S. Department of Agriculture's Office of Food Safety and the Agricultural Marketing Service have **announced** an August 12, 2014, public meeting in Washington, D.C., to provide information and discuss draft U.S. positions to be discussed at the 27th Session of the Codex Committee on Processed Fruits and Vegetables slated for September 8-12 in Philadelphia.

Agenda items include draft standards and proposed draft annexes for certain canned fruits and quick frozen vegetables as well as a proposed draft standard for ginseng products. *See Federal Register*, July 8, 2014.

FDA to Present 4-MEI Survey Findings at ACS National Meeting

Food and Drug Administration (FDA) representatives are slated to present findings of the agency's analysis of more than 200 foods containing Class III and Class IV caramels for 4-methylimidazole (4-MEI), a chemical byproduct of manufacturing processes, during the American Chemical Society National Meeting & Exposition, August 10-14, 2014, in San Francisco, California.

According to the **session abstract**, FDA's analysis estimated dietary exposure to 4-MEI for six U.S. populations: infants younger than age 1; 1-year-olds; children ages 2 and older; children ages 2 to 5; children ages 6 to 12; and teenage boys ages 12 to 18.

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Consumer Reports has urged the agency to set standards for 4-MEI in foods and called on manufacturers to disclose the types of caramel color in their products so that consumers can avoid 4-MEI. The compound was added to California's Proposition 65 list of substances known to the state to cause cancer in 2011 based on National Toxicology Program studies that reportedly concluded that long-term exposure to 4-MEI increased the incidence of lung tumors in mice.

EFSA Calls Acrylamide "A Public Health Concern"

The European Food Safety Authority's (EFSA's) Panel on Contaminants in the Food Chain (CONTAM Panel) has **published** a draft scientific opinion on acrylamide (AA) in food that urges the further reduction of dietary exposure to the substance. According to the draft opinion, AA is formed when the sugars and amino acids in carbohydrate-rich foods—such as coffee, fried potato products, cookies, crackers, bread, and some baby foods—undergo a Maillard reaction during high-temperature cooking. Animal studies have allegedly linked AA consumption to an increased risk of certain cancers, although the panel noted that the substance's effects on the nervous system, pre- and post-natal development, and male reproduction are not considered a concern based on current exposure levels.

To estimate human dietary exposure to AA, the CONTAM Panel analyzed 43,419 results collected since 2010 by 24 EU member states and six food associations. The findings evidently showed that infants, toddlers and other children are the most exposed age groups based on body weight (bw) and consume on average between 0.5 and 1.9 µg/kg bw per day. For infants, the most common exposure routes were "baby foods, other than processed cereal-based," "other products based on potatoes" and "processed cereal-based baby foods." For toddlers, other children and adolescents, "potato fried products" accounted for one-half of total AA exposure, followed by "soft bread," "biscuits," "crackers," "crisp bread," "other products based on cereals," and "other products based on potatoes."

"Acrylamide consumed orally is absorbed from the gastrointestinal tract, distributed to all organs and extensively metabolised. Glycidamide, one of the main metabolites from this process, is the most likely cause of the gene mutations and tumours seen in animal studies," CONTAM Panel Chair Diane Benford said in a July 1, 2014, EFSA news release. "So far, human studies on occupational and dietary exposure to acrylamide have provided limited and inconsistent evidence of increased risk of developing cancer." EFSA will accept comments on the draft opinion until September 15. *See EFSA News Release*, July 1, 2014.

UK Report Seeks to Cut Sugar Intake Targets

The Scientific Advisory Committee on Nutrition (SACN) recently **issued** a draft "Carbohydrates and Health" report urging Public Health England (PHE) to halve the current population guidelines for added sugar intake.
An independent expert panel that advises government agencies on nutrition and dietary matters, SACN created a Carbohydrates Working Group at the request of the U.K. Food Standards Agency and Department of Health to clarify "the relationship between dietary carbohydrates and health." To this end, the working group reviewed scientific literature on "the terminology, classification and definitions of types of carbohydrates in the diet," as well as evidence concerning the effects of dietary carbohydrates on oral, colorectal and cardiovascular health.

After analyzing 225 prospective cohort studies and 403 randomized controlled trials, the working group concluded that although "total carbohydrate intake appears to be neither detrimental nor beneficial to cardio-metabolic health and colorectal health," the consumption of added sugars increases energy intake as well as body mass index. The draft report thus recommends that regulators adopt a "free sugars" definition comprising "all monosaccharides and disaccharides added to foods by the manufacturer, cook or consumer, plus sugars naturally present in honey, syrups and unsweetened fruit juices." Noting that free sugars should not exceed 10 percent of total energy intake at an individual level, the report halves current population-based targets by setting a dietary reference value for free sugars "at a population average of around 5% of dietary energy for age-groups from 2.0 years upwards." Increasing target intakes of starches, sugars contained within the cellular structures of foods and sugars contained in milk and milk products would offset this reduction in the population reference intake of free sugars.

"The evidence that we have analyzed shows quite clearly that high free sugars intake in adults is associated with increased energy intake and obesity. There is also an association between sugar sweetened beverages and type-2 diabetes," said SACN Carbohydrates Working Group Chair Ian McDonald. "In children there is clear demonstration that sugar-sweetened beverages are associated with obesity. By reducing it to 5% you would reduce the risk of all of those things, the challenge will be to get there."

Slated to review the report at its November 5 meeting, SACN will accept comments on the draft scientific consultation until September 1, 2014.
See Wales Online, June 27, 2014.

Danish Environment Ministry Seeks EU Limits on Phthalates

The Danish Ministry of the Environment has stated that the government intends to pressure the European Commission to phase out certain phthalates—including BBP, DEHP, DBP, and DIBP, which are used to soften plastics such as food containers—after the European Court of Justice found that Denmark's proposed ban on them conflicts with EU regulations. Environment Minister Kirsten Brosbøl said, "I'm putting pressure on the Commission to speed up assessment and regulation of these substances in the EU. I haven't given up on the ban or other regulation on phthalates, and therefore I've asked the Danish EPA to look into whether there is a new basis for Danish phthalate regulations, if the assessment by the European Chemicals Agency does not result in common EU regulations." According to Brosbøl, the ministry will step up efforts to educate consumers "about products containing harmful chemistry and increase the use of the Nordic Ecolabel on products in Denmark." *See Danish Ministry of the Environment Press Release*, July 1, 2014.

California Cities to Vote on Soft Drink Tax

Citizens of San Francisco and Berkeley will be voting on the implementation of a soda tax in the November 2014 elections. Similar taxes have failed to garner sufficient support in the past five years, with about 30 propositions introduced and none passed, including two that went to ballot and were defeated in California in 2012.

Other countries have found more success with similar measures—among others, France and Mexico have each imposed taxes on sugary drinks. The San Francisco proposal, which needs a two-thirds vote to pass, would add a 2-cent-per-ounce tax on sugary drinks, excluding milk or natural fruit juice without added sugar, while the similar Berkeley proposal is 1-cent-per-ounce and needs only a majority of the vote. *See Associated Press*, July 8, 2014.

LITIGATION

Environmental Groups Sue California, Petition EPA to Protect Bees

Environmental groups have brought actions in state court and before the U.S. Environmental Protection Agency (EPA) seeking action to halt the use of certain insecticides that they claim are linked to the collapse of bee colonies.

In California, Pesticide Action Network North America and other groups call on the state Department of Pesticide Registration to "stop approving neonicotinoid pesticides pending its completion of a comprehensive scientific review of impact to honeybees." ***Pesticide Action Network N. Am. v. Cal. Dep't of Pesticide Regulation*, No. RG14731906 (Cal. Super. Ct., Alameda Cnty., filed July 8, 2014)**. They specifically challenge the department's June

13, 2014, decision to expand the use of two neonicotinoid insecticides while its scientific review, begun in 2009, remains pending. Claiming violations of the California Environmental Quality Act and Food and Agricultural Code, the organizations seek a stay of the decision or a writ of mandate directing the department to vacate the decision, declaratory relief, permanent injunctive relief, attorney's fees, and costs. *See Center for Food Safety News Release*, July 9, 2014.

Meanwhile, the Natural Resources Defense Council (NRDC) has **petitioned** EPA "to undertake urgent interim administrative review of neonicotinoid pesticides in light of serious potential harm to honey bees and native bees." It also calls for the agency to "initiate cancellation proceedings for all neonicotinoid pesticide products, beginning with those for which safer alternatives are available." NRDC claims that EPA has proposed deferring its evaluation of how this class of pesticides affects bees "until the completion of registration review in approximately 2019. This delay cannot be justified. A substantial and growing body of evidence has linked neonicotinoids to the drastic decline in bee populations in recent years, compelling urgent agency review of neonicotinoids' effects on bees." Requesting that EPA complete this review within one year, the July 7, 2014, petition was filed under the Federal Insecticide, Fungicide, and Rodenticide Act and Administrative Procedure Act.

According to an NRDC scientist, "The bee situation is dire. Getting rid of these bee-toxic pesticides is one thing we can do right now to stem the decline." The organization claims that statistics for 2011 show that 3.5 million pounds of these pesticides were used on 127 million acres of crops, or double the amount applied in 2006. *See NRDC Press Release*, July 7, 2014.

Court Revives and Stays ECJ Suits

A California federal court has granted motions to amend the judgment in two cases previously dismissed to accord primary jurisdiction to the U.S. Food and Drug Administration (FDA), each alleging that the defendants mislabeled their food products as including "evaporated cane juice" (ECJ) rather than the more common term, sugar. *Swearingen v. Santa Cruz Natural Inc.*, No. 13–4291 (U.S. Dist. Ct., N.D. Cal., order entered July 1, 2014); *Figy v. Amy's Kitchen Inc.*, No. 13–3816 (U.S. Dist. Ct., N.D. Cal., order entered July 7, 2014). The court cited "the unique circumstances," "the potential prejudice to plaintiff," and "the apparent lack of prejudice to the defendant" in amending its previous decisions to dismiss the cases without prejudice rather than stay them. The plaintiffs had argued that allowing the dismissal to remain rather than issuing a stay through the end of 2014 would likely result in the loss of a year of eligibility if the classes are later certified. Several similar cases have been dismissed without prejudice as courts await final guidance from FDA on the use of ECJ on food labels. Additional information about recent ECJ cases appears in Issues **524** and **525** of this *Update*.

Court Dismisses Mislabeling Suit Against Hain in California; New Case Filed in New York

A California federal court has dismissed with prejudice a putative class action alleging that Hain Celestial Group Inc. mislabels its vegetable juice products as "organic" and "raw" one day before a proposed class action was filed against the company in New York federal court alleging similar claims about its baby foods and home care products. *Alamilla, et al. v. Hain Celestial Group, Inc.*, No. 13–5595 (U.S. Dist. Ct., N.D. Cal., order entered July 2, 2014); *Segedie v. The Hain Celestial Group, Inc.*, No. 14–5029 (U.S. Dist. Ct., S.D.N.Y., filed July 3, 2014). The California court dismissed the case based on two articles cited and incorporated into the complaint concluding that "pressurization has 'little or no effects' on nutritional and sensory quality aspects of foods," which contradicted the plaintiffs' argument that the treatment deprives the juice of nutritional value and that the company's representations that it does not cook the juice are thus misleading. As a result of this internal contradiction, the court dismissed the case with prejudice.

The following day, different plaintiffs filed a putative class action alleging that Hain misleadingly labeled as "organic" and "all natural" its infant, baby and kids foods as well as home and baby care products. Calling the products "chemical soup," the complaint accuses Hain of including as many as 26 ingredients not permitted in organic foods under federal law in its Earth's Best Organic Infant Formula. The plaintiffs assert 10 causes of action, including violations of the California Organic Products Act and the New York General Business Law, and seek class certification, an order accounting for money Hain earned as a result of its alleged mislabeling, monetary damages, statutory damages, punitive damages, and an injunction.

Class Cert. Request Denied in Skinnygirl Margarita Suit

A federal court in New Jersey has denied without prejudice the motion to certify three classes of multi-state claimants alleging that Beam Global Spirits & Wine falsely markets and sells its "Skinnygirl Margarita" product as "all natural" and a "healthy alternative to other commercial Margarita products." *Stewart v. Beam Global Spirits & Wine, Inc.*, No. 11-5149 (U.S. Dist. Ct., D.N.J., order entered June 26, 2014). Under Third Circuit Court of Appeals precedent, the court determined that class membership, essentially via affidavit relying on potentially faulty memory, was not sufficiently ascertainable. The plaintiffs will have the opportunity to renew their motion at any appropriate time "specifically taking into account the rulings in *Marcus*, *Hayes*, and *Carrera*."

Among other matters, the court rejected the plaintiffs' claim that the affidavits could be cross-checked using social media—for example, the "likes" or comments on the defendants' Skinnygirl Facebook pages, or the companies' consumer email records—or retailer records that would only show the number of bottles sold by location and not the identity of specific individuals.

The court further rejected claims that a class-action administrator could use "proven algorithms to identify fraudulent claims based on data and behavioral patterns tailored to this case." According to the court, the plaintiffs have not shown that these methods would actually work, "and Plaintiffs have done nothing but provide 'mere assurances' that [they] will."

Pre-Trial Rulings Mount in Peanut Corp. CEO Criminal Proceeding

A federal court in Georgia has entered a number of orders in criminal proceedings, expected to go to trial July 14, 2014, against the former owner of the Peanut Corp. of America, implicated in a 2008-2009 nationwide *Salmonella* outbreak that sickened hundreds and led to at least nine deaths; among the orders was one denying the prosecution's request for a psychiatric examination of Stewart Parnell. *United States v. Parnell*, No. 13-cr-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered July 10, 2014). Details about the criminal indictment appear in Issue 472 of this *Update*.

While Parnell's expert, whose testimony as to the defendant's purported ADHD condition has been excluded, described Parnell as "fidgety, restless, excitable," the court apparently found that this testimony did not otherwise indicate that Parnell would be unable to focus at trial. "Even if Stewart Parnell has an attention deficit disorder, Dr. Conley testified he is capable of focusing on matters he finds important," the court said. "Moreover, Parnell's attorneys could call his attention to matters requiring his assistance."

The court has also denied Parnell's request to stop the government from seeking documents or information from the company's former counsel. Parnell argued that the government would improperly use a "taint team" to identify privileged documents and that efforts to collect discovery now are untimely. The government had indicated to the court that any company documents from its former counsel would go through a taint team and Parnell could give the taint attorney a joint-defense agreement to determine whether it applies to any of the documents. The court found no authority to support Parnell's claim that the proposed use of a taint team was improper or would violate his rights. He also failed to support his argument that the taint team must give the documents first to the defense before providing them to the prosecutors. The court further disagreed that the government's discovery efforts were untimely. *See Law360*, July 10, 2014.

Is "Just" a Valid Trademark?

The Beech-Nut Nutrition Co. has filed a complaint against an organic baby-food maker seeking a declaration that Beech-Nut has not infringed any of Plum PBC's trademarks and that the trademarks Plum has asserted to the word "JUST" and certain phrases are invalid. *Beech-Nut Nutrition Co. v. Plum PBC*, No. 14-0791 (U.S. Dist. Ct., N.D.N.Y., filed June 30, 2014).

According to the complaint, Plum sent Beech-Nut a cease-and-desist letter in June 2014 shortly after Beech-Nut launched a new line of whole fruit and vegetable foods for babies including the word "just" on product labels and advertised them under a promotional campaign "This is not baby food" and "This is real food for babies." The letter allegedly demanded that Beech-Nut stop infringing Plum's "JUST" trademark and using the promotional phrases.

Beech-Nut contends that (i) the word "just" is simply descriptive and generic; (ii) Plum does not use the trademark symbol beside the word on its product labels; (iii) there is no likelihood of marketplace confusion between the products, which have distinctive promotional materials and packaging; and (iv) Plum has never used the promotional phrases that Beech-Nut uses in connection with its baby-food products. Beech-Nut seeks a declaratory judgment of unenforceability and non-infringement, the cancellation of two U.S. registrations for "JUST," and attorney's fees and costs.

Foster Farms Sues Insurers over Definition of "Recall"

Poultry manufacturer Foster Farms has filed an amended complaint in its lawsuit against its Lloyd's of London insurers, which had rejected its $14.2 million claim for economic losses resulting from a government-mandated shutdown of one of its facilities. *Foster Poultry Farms Inc. v. Certain Underwriters at Lloyd's, London*, No. 14–953 (U.S. Dist. Ct., E.D. Cal., amended complaint filed July 3, 2014). Foster Farms had paid almost $600,000 for a yearlong product contamination policy to three insurers operating on the Lloyd's of London insurance market, and the company later filed a claim to cover losses from the forced closure, including costs from the 1.3 million pounds of product it destroyed. The insurers rejected the claim because Foster Farms did not initiate the recall of its chicken, arguing instead that the policy covered economic losses associated with a voluntary recall from customers rather than losses from the destruction of products still in its warehouse. In a letter, one insurer reportedly accused Foster Farms of attempting to expand the definition of "recall" beyond the common meaning and dismissed the argument that the term is ambiguous. *See Reuters*, July 9, 2014.

Muscle Milk® Settlement Given Final Approval

A federal court in California has granted final approval to the nationwide class settlement of claims that the company which makes Muscle Milk® products deceived consumers by labeling them with the terms "Healthy, Sustained Energy" and "Healthy Fats." ***Delacruz v. CytoSport, Inc.*, No. 11-3532 (U.S. Dist. Ct., N.D. Cal., Oakland Div., order entered July 1, 2014)**. Additional information about the litigation and settlement appears in Issues **403**, **436**, **475**, and **505** of this *Update*. Under the agreement, CytoSport will pay $1 million to eligible class members and cease using the allegedly deceptive terms on all newly printed packaging for certain products. The company may continue

to use the designation "Healthy Fats" on the packaging for Muscle Milk® RTD and related products if they contain "fewer than 0.5 grams of saturated fat per serving, or CytoSport also includes the words 'See nutrition information for saturated fat content' in connection with the words 'Healthy Fats.'"

The court also awarded class counsel more than $855,000 in attorney's fees and $190,000 in costs. So ruling, the court overruled objections filed by several individuals including Theodore Frank, an adjunct fellow at the Manhattan Institute's Center for Legal Policy and editor of its Web magazine PointofLaw.com. According to the court, the agreement "does not provide Class Counsel with a disproportionate distribution of the Settlement and Settlement Class Members will receive a guaranteed monetary distribution of $1 million. The Settlement Agreement also does not contain any 'kicker' arrangement whereby any reduction in attorneys' fees reverts to CytoSport." The court also noted that more than 33,000 class members had already applied to receive more than $30.00 each and that no federal or state government officials who received notice filed objections.

Hawaii County Not to Release Info on GM Papaya Growers

A Hawaii state court has reportedly ordered Hawaii County not to publicly disclose the identity and specific location of farms that grow genetically modified (GM) papayas. While the order apparently allows the county to maintain registration information under a December 2013 law that also prohibited open-air use and testing of GM crops, the court agreed with two GM papaya growers that the registration program lacked clear rules as to information that could be released to the public. According to a news source, the growers are concerned about vandalism or other economic harms. The court's preliminary injunction states that releasing information about specific farm locations would not "protect farmers of nongenetically engineered crops" due to a "limited" cross-pollination risk and because GM papayas are not prohibited. A Kohala councilwoman reportedly expressed satisfaction with the ruling and contended that the general location of farms could still be made public under the injunction. *See West Hawaii Today*, July 9, 2014.

OTHER DEVELOPMENTS

Food Industry Presses Politicians to Support Meat-Label Repeal

Several major food companies have sent a letter to four U.S. senators and representatives urging Congress to direct Secretary of Agriculture Tom Vilsack to suspend revised country-of-origin labeling (COOL) rules on muscle cuts of meat because they discriminate against Canada and Mexico. The letter argues that if the WTO determines that the rule violates U.S. trade obligations, it could authorize retaliation from Mexico and Canada, which "has already

issued a preliminary retaliation list targeting a broad spectrum of commodities and manufactured products that will affect every state in the country." The new rules dictate that meat producers must disclose where their livestock was born, raised and slaughtered and can no longer commingle livestock from differing origins to ensure COOL accuracy. The food company coalition has also challenged the new U.S. Department of Agriculture rules in federal court, and the case is pending after an *en banc* rehearing in the D.C. Circuit. Additional information about the case appears in Issues **518** and **520** of this *Update*.

Report Describes Sugar Industry Efforts to Obscure Science

The Union of Concerned Scientists' Center for Science and Democracy has published a **report** describing how companies with an interest in promoting sugar consumption have hidden scientific evidence that reportedly reveals sugar to be a serious health threat. Goldman et al., "Added Sugar, Subtracted Science: How Industry Obscures Science and Undermines Public Health Policy on Sugar," June 2014. Likening sugar interests to the tobacco industry, the report accuses companies of (i) attacking science, including burying data and threatening funding to the World Health Organization; (ii) spreading misinformation through research institutes, trade associations and front groups; (iii) deploying industry scientists to conduct studies and participate in scientific discussions; (iv) influencing academia by paying academic scientists to persuade other scientists of their positions; and (v) undermining policy through lobbying and supporting political candidates.

The report urges the media to call out sugar interests' misrepresentations of science and encourages scientists to disclose all real or perceived conflicts of interest. It also advocates action from the U.S. surgeon general, National Prevention Council, Food and Drug Administration, and U.S. Department of Agriculture.

CSPI Slams Salty Menu Items

A Center for Science in the Public Interest (CSPI) **report** examining the sodium contents of popular restaurant meals has urged the Food and Drug Administration (FDA) to set "reasonable limits on the amounts of sodium that can be used in various categories of food." Although the 17 restaurant chains under review reduced sodium in their menu items by an average of 6 percent between 2009 and 2013, the consumer group singled out some companies for allegedly increasing sodium in the sample meals analyzed for the report. In particular, the report names the top 10 "saltiest meals in America" for both adults and children, noting that "79 percent of the 81 adult meals in the study

still contained more than 1,500 milligrams (mg) of sodium," with some meals topping out at 5,000 mg of sodium.

"For far too long, the FDA has relied on a voluntary, wait-and-see approach when it comes to reducing sodium in packaged and restaurant food," said CSPI Executive Director Michael Jacobson in a July 2, 2014, press release. "If chains… are actually raising sodium levels in some meals, FDA's current approach clearly isn't working."

AMA Calls for Ban on Growth Antibiotics in Farm Feed

The American Medical Association (AMA) has adopted a resolution pressing the federal government to prohibit the use of antibiotics in farm feed for the purpose of growth promotion in response to the rapid development of antibiotic-resistant bacteria. David Wallinga, a physician on the Keep Antibiotics Working steering committee, said that overuse of antibiotics has driven resistant bacteria to develop more quickly, and "[a]s much as 70 percent of the use in agriculture is unnecessary or overuse."

Replacing a previous policy that discouraged the use of anti-microbials for non-therapeutic use in agriculture, Resolution 513 states that the AMA will (i) "support federal efforts to ban antibiotic use in food-producing animals for growth promotion purposes, including through regulatory and legislative measures"; (ii) "support a strong federal requirement that antibiotic prescriptions for animals be overseen by a veterinarian"; and (iii) "support efforts to expand [Food and Drug Administration] surveillance and data collection of antibiotic use in agriculture."

MEDIA COVERAGE

Freudenberg Talks Sugar Policy

City University of New York School of Public Health Professor Nicholas Freudenberg authored a July 8, 2014, article for Corporations & Health Watch, offering eight policy approaches for reducing added sugar consumption. Titled "Time to Talk on Added Sugar Policy," the article recommends that, in light of New York City's failure to implement soda-size limitations, new policies should strive to (i) educate the public about the purported risks of excess sugar consumption; (ii) enact regulations requiring companies to reduce the amount of sugar in food and beverages; (iii) use public benefits and nutrition assistance programs to limit the purchase of sugary foods and beverages; (iv) implement taxation schemes targeting specific products and manufacturers; (v) lower dietary guidelines for sugar consumption; (vi) increase the price of sugar by ending sugar subsidies; (vii) encourage institutions to divest from industries that promote sugar consumption; and (viii) launch community-based campaigns to cut sugar.

"First, there is no magic bullet," opines Freudenberg, the author of *Lethal but Legal: Corporations, Consumption, and Protecting Public Health*. "Second, we need to re-frame the debate from the rights of individuals to choose whatever products they want to the right of corporations to profit at the expense of public health… [W]e need to focus public attention on corporate obfuscation of science, manipulations of democracy, and deceptive marketing." Additional details about Freudenberg's work appear in Issues **515**, **518** and **523** of this *Update*.

NPR Tackles Burrito/Sandwich Conundrum

NPR's "All Things Considered" has tackled a conundrum that has apparently stymied courts and regulators alike: is a burrito considered a sandwich? According to *NPR*'s Elise Hu, the U.S. Department of Agriculture (USDA) currently distinguishes a sandwich—"meat or poultry filling between two slices of bread, a bun or a biscuit"—from burritos, wraps and hot dogs, but state agencies have also drawn their own conclusions for inspection and tax purposes.

"My new home state of New York has a special tax category for sandwiches. And because they have that, it means they then have to go and define what they think a sandwich is," explains Noah Veltman, a self-identified aficionado of obscure government memoranda. "So they publish this memo that explains that a sandwich includes club sandwiches and BLTs, but they also include hot dogs and they include burritos and they include gyros. And then you have to sort of say, are burritos really a sandwich?"

Noting that "New York says yes, USDA says no," Hu points out that the answer has ramifications for food inspection procedures that may apply to meat-filled burritos but not bread-based sandwiches. The question also sparked a contract dispute between Qdoba Mexican Grill and a shopping center that went all the way to the Massachusetts Superior Court, which reportedly ruled that burritos are not sandwiches.

"Whether it's sandwiches or smartphones, government tries to classify these things to protect the public. But innovation moves faster than the standards can change," concludes Hu, adding that one San Francisco blogger has already created a "torta defense" positing that if a burrito were indeed a sandwich, it would be a torta. "For the taste of the speed of innovation and the confusion it can cause, look no further than sliced bread." *See All Things Considered*, July 9, 2014.

In a related development, a Scottish tax tribunal's decision to classify coconut-covered marshmallows as cakes has apparently raised the ire of food writer Emma Sturgess, who recently penned an article for *The Guardian*'s "Word of Mouth" blog criticizing the "sugar-addled" judge for failing to understand "the true nature of a cake." According to Sturgess, these confections should

not benefit from a value-added tax (VAT) exemption—a rebate estimated at £2.8 million—because "however big you make a snowball, it will never have sponge in it."

"Cakes, like caravans, bingo and cremation, are exempt from VAT," opines Sturgess. "Different rulings have given snowballs exempt status, then shifted them to standard-rated. Last week's successful appeal, made by two Scottish snowball manufacturers to the first-tier tax tribunal in Edinburgh, took them back to cakehood and thus exemption… But the fact remains that a snowball—soft, fluffy marshmallow with a thin chocolate carapace sprinkled with coconut—ain't no cake." *See The Guardian's Word of Mouth Blog*, June 30, 2014.

SCIENTIFIC/TECHNICAL ITEMS

Study Identifies 175 "Chemicals of Concern" in Food Contact Materials

A study published this week by researchers associated with the Zurich, Switzerland-based Food Packaging Forum has sounded the alarm about the number of allegedly hazardous substances contained in food packaging or those that may contaminate food during production, processing, storage and transportation. Birgit Geueke, et al., "Food contact substances and chemicals of concern: a comparison of inventories," *Food Additives & Contaminants: Part A*, published online July 7, 2014.

The researchers reportedly compared the inventories of three food contact material (FCM) databases—the Pew Charitable Trusts' list of legal direct and indirect food additives, the EU-wide positive list for plastic FCMs and the European Food Standard Authority's 2011 non-plastics FCM substances list—with the Substitute It Now! (SIN) list 2.1 and the TEDX database of endocrine-disrupting chemicals. Ultimately identifying 175 substances "with hazardous properties," they found "(1) gaps in the regulation of FCMs and (2) how knowledge from different authorities and organizations could be used to increase chemical safety with the objective of improving public health."

"From a consumer perspective, it is certainly undesirable and also unexpected to find chemicals of concern being intentionally used in food contact materials, and thus it seems appropriate to replace substances case by case with inherently safer alternatives," the study concludes.

Food Logo Familiarity Linked to Childhood Obesity?

A new study has reportedly concluded that "the more a child is familiar with logos and other images from fast-food restaurants, sodas and not-so-healthy snack food brands, the more likely a child is to be overweight or obese." T. Bettina Cornwell, "Children's knowledge of packaged and fast food brands and their BMI: Why the relationship matters for policy makers," *Appetite*,

July 2014. According to a recent press release, researchers found that among two groups of children aged 3 to 5 years, the preschoolers best able to match pictures of food items, packaging and cartoon characters with the corresponding logos were more likely to have higher body mass indexes (BMIs) than those with little knowledge of food and beverage brands. In particular, the study noted that only in one group of children did exercise appear to mitigate this association.

"The inconsistency across studies tells us that physical activity should not be seen as a cure-all in fixing childhood obesity," one author was quoted as saying. "Of course we want kids to be active, but the results from these studies suggest that physical activity is not the only answer. The consistent relationship between brand knowledge and BMI suggest that limiting exposure might be a step in the right direction too." *See Michigan State University Press Release*, June 27, 2014.

Study Targets Purported Dangers of Yogurt Mold

Duke University researchers have reportedly identified a "highly pathogenic mold" in recalled yogurt samples, raising questions about the human health implications of fungal pathogens such as *Mucor circinelloides*. Soo Chan Lee, et al., "Analysis of a foodborne fungal pathogen outbreak: virulence and genome of a *Mucor circinelloides* isolate from yogurt," *mBio*, July 2014.

After isolating the fungal strain from Chobani Greek yogurt voluntarily recalled in September 2013, the study's authors apparently identified the pathogen as *M. circinelloides* f. *circinelloides*, a subspecies "commonly associated with human infection," and noted that the yogurt isolate was virulent in both mouse and wax moth larva host systems. These isolates also survived transit through the GI tract in the mouse model, suggesting that "*M. circinelloides* can spoil food products and cause gastrointestinal illness in consumers and may pose a particular risk to immunocompromised patients."

"Typically when people think about food-borne pathogens, they think about viruses or bacteria, they don't think of fungi," the lead author was quoted as saying. "Our research suggests it may be time to think about fungal pathogens and develop good regulations to test them in manufacturing facilities." *See Duke University Press Release*, July 8, 2014.

Meanwhile, Chobani's Vice President of Quality, Safety and Regulatory Affairs Alejandro Mazzotta told media sources that the Duke study was "highly irresponsible" and "sensationalist." Highlighting a "lack of scientific rigor," he noted that researchers injected fungal spores directly into the bloodstream of mice to obtain their results as opposed to focusing on oral ingestion. "We don't know how long the yogurt had been there, opened, whether the tests were conducted after the expiration date, what else it had been exposed to," Mazzotta concluded. *See FoodNavigator-USA.com*, July 8, 2014.

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 529 | JULY 11, 2014

Children's TV Allegedly Promotes Unhealthy Diet

A recent study asserts that even when children's TV programs are free of product advertisements, they still include positive cues for unhealthy food and beverages. Paul Scully, et al., "Food and beverage cues in UK and Irish children-television programming," *Archives of Disease in Childhood*, July 2014. Researchers with the University of Limerick Graduate Entry Medical School apparently analyzed 85.2 hours of primetime children's programming that aired over five weekdays on two national public broadcast channels. Of the 1,155 food and beverage cues recorded, 47.5 percent represented unhealthy foods and 25 percent represented sugary drinks. Sweet snacks (13.3 percent) and confectionary/candy (11.4 percent) were the most common food cues, while tea and coffee (13.5 percent) and sugar-sweetened drinks (13 percent) were the most common beverage cues.

In addition, the study's authors noted that individual food or beverage cues were portrayed neutrally 47.5 percent of the time, positively 32.6 percent of the time and negatively 19.8 percent of the time. "While there is a clear link between exposure to advertising of unhealthy foods and their consumption in young children, the impact of unhealthy food/drink content in TV programs aimed at children, is not clear," the lead author said in an July 4, 2014, University of Limerick press release. "Eating and drinking are common activities within children specific programming with unhealthy foods and beverages especially common and frequently associated with positive motivating factors, and seldom seen with negative outcomes. This is something that parents, policy makers and physicians should be aware of, and this should be balanced by more frequent and positive portrayals of healthy foods and behaviors."

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