

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Communications Commission (FCC)

[1] FCC Issues Final Rule on Children's Programming Guidelines

The FCC has issued a final rule, effective January 2, 2007, that revises a 2004 order requiring television broadcasters to provide educational children's programming free from "excessive and inappropriate commercial messages." In addition to clarifying the "multicasting" rules adopted in 2004, the final rule (i) amends "host selling restrictions," (ii) revises the definition of commercial matter, and (iii) vacates "the percentage cap on the number of permissible core program preemptions."

In 2004, the FCC implemented a four-pronged Web site test to determine if links shown during children's programs complied with FCC regulations. In the final rule, this test remains intact, but host selling restrictions are applied less broadly and certain third party Web sites are exempted. Host selling restrictions prohibit TV characters from selling products during or adjacent to the shows in which they appear, a rule the 2004 order extended to cover Web site addresses displayed in children's programs and intervening commercial material. Vacating this language, the FCC has redefined prohibited Web sites and said that the rule does not

apply to (i) "[t]hird-party sites linked from the companies' web pages"; (ii) "on-air third-party advertisements with Web site references to third-party Web sites"; or (iii) "pages that are primarily devoted to multiple characters from multiple programs." Public service announcements have also been excluded from the Web site rule because they are unlikely to direct viewers to commercial Web sites.

The definition of "commercial matter" has also been amended to prevent the promotion of upcoming programs from counting as advertising time. In 2004, "commercial matter" included ads for non-educational programming, but the new definition exempts (i) "promotions for any children's or other age-appropriate programming appearing on the same channel," and (ii) "promotions for children's educational and informational programming appearing on any channel."

The FCC also stipulates that, in vacating the 10 percent cap on permissible core program preemptions and rescheduling, it returns to addressing preemptions on a "case-by-case basis." See *Federal Register*, November 1, 2006.

U.S. Department of Agriculture (USDA)

[2] National Animal ID System Should Remain Voluntary, Says USDA

USDA has announced that its controversial animal identification program (NAID) will remain voluntary. Designed to track foreign disease outbreaks, NAID



would have required all ranchers to register cattle, pigs and poultry in a national database by 2009. At an estimated cost of \$100 million per year, NAID drew criticism from farmers who feared that confidential information would be made public. "It is critically important for USDA to explain what the cost of this program will be, and how the proprietary information will be protected, before they go any further," said a Ranchers-Cattlemen Action Legal Fund (R-CALF) spokesperson. "We believe USDA has gone too far, too fast." See *Associated Press*, November 22, 2006.

[3] USDA Seeks Comments on COOL Proposal for Fish and Shellfish

The Agricultural Marketing Service (AMS) is seeking comments on an interim final rule for mandatory country-of-origin labeling (COOL) for fish and shellfish. The rule, which took effect in 2005, requires "certain retailers and their suppliers to notify their customers of the country of origin and the method of production (wild and/or farm-raised) of specified fish and shellfish products." AMS is asking affected parties to submit comments on or before February 26, 2007, that address only the economic impact of the interim final rule. See *Federal Register*, November 27, 2006.

In a related development, USDA is reportedly considering organic certification for farm-raised fish. If approved, the certification would include fish raised on (i) all-organic feed, (ii) non-organic fish meal during a seven-year transition period to all-organic, or (iii) non-organic fish meal from "sustainable" fisheries. The proposal has apparently spawned much debate, partly because wild fish would be disqualified due to their living conditions. Environmentalists have also argued that many fisheries pollute the water and that non-organic feed is antithetical to the organic ethos. But fish farmers

contend that the organic label would give the nation's aquaculture a competitive edge in the global seafood market. See *The New York Times*, November 28, 2006.

Environmental Protection Agency (EPA)

[4] EPA Plans to Regulate Nanomaterials Marketed as "Germ-Killing"

"This is something of a test case," a Woodrow Wilson Center adviser said in one report about EPA's decision to regulate nanomaterials marketed as antimicrobial. In a policy reversal, EPA has announced that it will begin regulating nanotech silver, which is often used in germ-fighting agents, or similar technologies under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Though only applicable to products claiming to fight germs, the regulations could potentially affect items ranging from food-storage containers to odor-eating shoe liners. EPA reportedly reconsidered its position after environmentalists contended that nanosilver, in addition to killing aquatic life, may harm human health. See *The Washington Post*, November 23, 2006.

In related news, Germany's Federal Institute for Risk Assessment (BfR) claims that consumers are "especially critical" of nanomaterials in foods. Sixteen participants in BfR's recent Consumer Conference on Nanotechnology were randomly selected to report on the "consumer aspects" of nanotechnology. "Consumers felt that the promised advantages to be derived from using nanotechnology like changes to the flow properties of ketchup or the trickling properties of products were non-essential given the potential risks," the group concluded. See *Food Production Daily Europe*, November 27, 2006.



Spain

[5] Spanish Health Ministry Asks Burger King to Pull “XXL” Ads

Arguing that a Burger King commercial breaks a promise not to promote large portions, the Spanish Health Ministry has reportedly asked the chain to stop advertising its double bacon cheese “XXL” burger. Burger King, a member of the Spanish Federation of Hoteliers and Restaurateurs, reportedly agreed to an anti-obesity initiative supported by the government, but contends that its menu also promotes healthy options like salads and customizable ingredients. While the ministry and public advocates threaten to press charges if the ads are not withdrawn, debate has intensified over whether the government is overreaching. *See Associated Press* and *MSNBC*, November 17, 2006.

Litigation

[6] WTO Says EU Violated Trade Regulations by Banning GMO Imports

In a ruling that the European Commission has decided not to appeal, the World Trade Organization (WTO) has reportedly found that European countries violated international regulations by blocking the import of genetically modified (GMO) foods. Earlier WTO decisions established that the European Union (EU) had imposed an illegal *de facto* moratorium on approving agricultural GMO products from 1999 through 2003. Further details about previous rulings in the case can be found in issues 159 and 187 of this Report. The dispute was brought to the WTO by Argentina, Canada and the United States; U.S. Ambassador Peter Allgeier was quoted as saying the WTO’s ruling

upholds “the principle of science-based policy-making over unjustified, anti-biotech policies.”

An EU trade negotiator contended that no changes were required by the decision because the EU no longer maintains the moratorium and has approved some biotech crops. Environmental groups are reportedly blasting the EU’s decision not to appeal. *See Reuters*, November 22, 2006; *Associated Press*, November 21, 2006.

Meanwhile, the agriculture department has apparently approved a strain of GMO rice, announcing that LLRICE601 is as safe as traditionally bred counterparts and can be grown without USDA oversight. Contamination of non-GMO crops with this particular strain has led to restrictions on rice imports from the United States by the EU and Japan. In approving the GMO rice, the USDA also reportedly indicated that it had no plans to recall or destroy the contaminated commercial product. *See Reuters*, November 24, 2006.

[7] California County Sues Tax Commission over Malt Beverages

According to a news source, Santa Clara County has filed a lawsuit against California’s tax commission, seeking an increase in the tax imposed on flavored malt beverages. While beverages such as Mike’s Hard Lemonade, Smirnoff Ice and Bacardi Silver are classified and taxed as “beer,” they apparently contain distilled spirits. Beer is reportedly taxed at a rate of 20 cents per gallon, while distilled spirits are taxed at a rate of \$3.30 per gallon. County counsel was quoted as saying, “The county is simply asking that the (California Board of Equalization) do its duty and properly classify the alcohol. And in so doing, we are hoping to eliminate underage drinking and at the same time increase the amount of revenue the state of California is lawfully entitled to collect.”



A Board of Equalization spokesperson reportedly indicated that the current classification is based on federal guidelines and contended that changing the classification could require changing the law or requiring the board's elected members to change how they interpret the law. The lawsuit alleges that the board's reliance on federal law is unavailing because the U.S. Constitution gives the states authority over alcohol. The National Institute on Drug Abuse reportedly found in 2005 that some 30 percent of high school seniors had consumed such beverages in the 30 days preceding its survey, while the American Medical Association has concluded that about 40 percent of girls between the ages of 16 and 18 have tried the beverages. See *Gilroy Dispatch*, November 16, 2006.

[8] Ninth Circuit Refuses to Dismiss Cattle Import Case Against USDA

The Ninth Circuit Court of Appeals has reportedly denied the U.S. Department of Agriculture's (USDA) motion to dismiss an appeal by the Ranchers-Cattlemen Action Legal Fund (R-CALF) in an ongoing dispute about live cattle imports from Canada. USDA had apparently asked the court for summary affirmance, which requests that the court refuse to hear a case because all the facts have been settled. The court apparently ruled that "the arguments raised in [R-CALF's] response to the motion are sufficiently substantial to warrant further argument." R-CALF will have until December 11 to submit a brief arguing that the case should be returned to a district court in Montana for a full hearing on its claim that the USDA's rule allowing imports of live Canadian cattle into the United States puts the U.S. beef herd in danger and violates USDA standards. Further details about the dispute can be found in issues 118, 119, 134, and 177 of this Report. See *meatingplace.com*, November 22, 2006.

[9] Class Action Challenges Ingredients Claim of Vienna Hot Dogs

Identifying themselves as "observant Jews," three named plaintiffs have filed a putative class action lawsuit against a hot dog producer in Cook County, Illinois, alleging that its 100 percent beef claims breach an express warranty, violate the Uniform Commercial Code's provisions on conforming goods, and constitute consumer and common law fraud. [*Gershengorin v. Vienna Beef, Ltd., No. 06CH25277 \(Cook County, Illinois, filed Nov. 20, 2006\)*](#). According to the complaint "Vienna Beef knowingly omits informing the consumer public that Vienna Beef is using pork intestine as casing for its Natural Casing Beef hotdogs." The plaintiffs, who claim they have been injured emotionally by the company's fraudulent advertising campaign, are bringing the action on behalf of all U.S. residents who consumed a "Natural Casing Beef" hot dog manufactured by Vienna Beef that actually contained pork intestine casing.

The complaint asserts that questions of law and fact common to the class members include (i) "Whether Vienna Beef engaged in a pattern or practice of selling Vienna Natural Casing Hot Dogs as 'all beef' or 'pure beef' hotdogs without disclosing that it used port intestines as the casing for such product"; (ii) "Whether Vienna Beef concealed the material fact that it was selling Vienna Natural Casing Hot Dogs as 'all beef' or 'pure beef' hotdogs without disclosing that they used pork intestines as the casing"; (iii) "Whether Vienna Beef advertised and sold Vienna Natural Casing Hot Dogs as 'all beef' or 'pure beef' hotdogs and whether this was a false and/or misleading statement or representation; and " (iv) "Whether Vienna Beef engaged in consumer fraud, deceptive trade practices, or other unlawful acts."



Plaintiffs are seeking actual and punitive damages; injunctive relief; restitution, disgorgement and other equitable monetary relief, attorney's fees, and costs. Plaintiffs' counsel Lance Raphael was quoted as saying "The case isn't about Jews suing Vienna beef. The case is about Vienna beef not telling consumers that their all-beef hot dog contains pork, whether they're Jews, Muslims, or Samuel L. Jackson." See *blogs.wsj.com*, November 27, 2006.

[10] Humane Society Continues Battle Against New York Foie Gras Producer

The Humane Society of the United States has filed a lawsuit against the New York State Department of Agriculture and Markets seeking to prohibit the production and sale of foie gras. *The Humane Soc'y of the U.S. v. Brennan* (N.Y. Supreme Ct., Albany County, N.Y., filed Nov. 15, 2006). The complaint apparently contends that ducks are overfed to the point that they are diseased and unfit for sale under state law. The suit reportedly takes state regulators to task for not classifying foie gras as adulterated food and taking it off the market. According to a news source, if the litigation succeeds, it will likely end foie gras production in the United States. Two Sullivan County farms that have also been named as defendants are apparently the only foie gras producers in the country, with the exception of a single facility in California that will probably close due to a new state law that bans the industry.

Meanwhile, a New York City councilman is considering introducing a bill to prohibit foie gras sales in the city, said a news source. Foie gras interests, such as the Artisan Farmers Alliance, are

apparently planning to fight any such initiatives. See *The New York Times*, November 28, 2006; *The New York Sun* and *HSUS Press Release*, November 16, 2006.

Other Developments

[11] European Countries Sign Anti-Obesity Charter

Initiated by the World Health Organization (WHO), an anti-obesity charter signed by 53 European health ministers pledges to improve health initiatives and to reduce the marketing of alleged junk foods to children. The charter apparently "calls for specific regulatory measures" to limit kid-oriented food advertising, including an international code that would move beyond industry self-regulation. Supporters have reportedly hailed the charter as "a major turning point in addressing the challenges of childhood obesity," but one WHO official acknowledged that the charter will take time to implement. See *Associated Press*, November 16, 2006.

[12] British Regulatory Agency Issues Food Advertising Ban

Ofcom, an independent TV, radio and telecommunications regulator in the United Kingdom, recently issued a [ban](#) on advertising foods high in fat, salt or sugar (HFSS) during or around programs with viewers primarily younger than age 16. Slated for March 2007, the measure covers channels like MTV that have high "kid appeal" but are not specifically geared toward children. The regulations also propose revised content standards for all food advertisements and prohibit celebrities and licensed characters from promoting HFSS foods to young



children. Notably, HFSS foods will be assessed by the Food Standards Agency's "nutrient profiling scheme," which will reportedly include low-fat cheese and butter in the ban.

According to Ofcom, the ban will cost the broadcasting industry £39 million annually, with children's channels losing up to 15 percent of ad revenue. Proponents have apparently lauded the effort, which one group says "is far better than the paltry voluntary self-regulatory approaches underway in the United States." Meanwhile, those in the media and food industries have criticized the "scientifically flawed" nutrient profiling scheme. "We are shocked that after a lengthy consultation Ofcom has moved the goalposts," one industry representative told the press. "We will of course be responding to the latest consultation, but have strong concerns that the proposed regulations are over the top." See *Center for Science in the Public Interest Press Release* and *BBC News*, November 17, 2006; *Food Production Daily Europe*, November 21, 2006; and *Advertising Age*, November 27, 2006.

Scientific/Technical Items

[13] Bacon Allegedly Linked to Increased Risk of Bladder Cancer

People who eat more than five servings of bacon per week may have a 60 percent increased risk of bladder cancer. Dominique Michaud, et al., "Meat intake and bladder cancer risk in 2 perspective cohort studies," *The American Journal of Clinical Nutrition*, November 2006. Following more than 135,000 people for 22 years, Harvard School of Public Health researchers speculated that nitrosamines, a carcinogen found in bacon, may be a factor in disease development. They noted, however, that bacon consumers were more likely to be smokers and infrequent exercisers, in addition to eating more fat and less vitamins in general. The study also found a correlation between skinless chicken and bladder cancer, although skin-on chicken apparently did not pose the same risk.



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