

# Food & Beverage

## LITIGATION UPDATE

Issue 124 • April 27, 2005

### Table of Contents

#### Legislation, Regulations and Standards

- [1] Commercial Alert Urges USDA to Enforce Competitive Foods Rule .....1
- [2] Senator Ted Kennedy Reintroduces the Prevention of Childhood Obesity Act .....1
- [3] FTC Seeks Comments on Children’s Online Privacy Protection Rule .....2
- [4] EU Regulators Approve Testing Method for Biotech Corn .....2
- [5] Arizona Governor Signs Nutrition Standards Legislation .....2

#### Litigation

- [6] California Supreme Court Denies Review of “Happy Cows” Lawsuit .....3
- [7] Plaintiffs’ Counsel David Boies III Files Another Putative Class Action Accusing Alcohol Manufacturers of Targeting Underage Consumers .....3

#### Other Developments

- [8] NIEHS Conference to Address Environmental Solutions to Childhood Obesity Issue .....4

#### Scientific/Technical Items

- [9] Consumption of Processed Meat Purportedly Linked to Pancreatic Cancer .....4

Shook,  
Hardy &  
Bacon LLP

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] Commercial Alert Urges USDA to Enforce Competitive Foods Rule

An Oregon-based nonprofit group that strives “to reduce the incidence of marketing-related diseases” this week filed a [petition for rulemaking](#) with USDA requesting the agency promulgate new reporting and enforcement regulations to bolster child nutrition program rules that prohibit the sale of “foods of minimal nutritional value” in public schools during mealtimes. “We’re asking the USDA to side with parents who want their kids to grow up healthy, not with the junk food companies that want to stuff our children with sugar and caffeine,” Gary Ruskin, executive director of the group Commercial Alert, was quoted as saying. “The USDA should strengthen existing rules against the sale of junk food in school before the childhood obesity gets any worse,” he said. As defined by federal statute, foods of [minimal nutritional value](#) include soft drinks, chewing gum and most hard candies. Impetus for the group’s action reportedly came from a March 2005 USDA report that stated, “it is unclear to what extent federal and state regulations [against the sale of foods of minimum nutritional

value] are enforced at the local level.”

In its petition, Commercial Alert urges USDA to (i) require schools that participate in the national school breakfast and lunch programs to certify compliance with the competitive foods rule on a monthly basis; (ii) require state agencies to conduct annual “surprise” compliance visits; and (iii) make compliance with the rule part of Food and Nutrition Service reviews of state agencies. *See Commercial Alert News Release*, April 26, 2005.

#### U.S. Congress

##### [2] Senator Ted Kennedy Reintroduces the Prevention of Childhood Obesity Act

Massachusetts Senator Ted Kennedy (D) has reintroduced legislation ([S. 799](#)) that would amend the Public Health Service Act to provide for coordination of federal activities and policies to prevent childhood obesity. Among other things, the measure would establish a federal leadership commission charged with (i) coordinating anti-obesity activities across all departments and agencies; (ii) requesting Institute of Medicine recommendations on national guidelines for “junk food” advertising and marketing practices; (iii) requesting a Government Accountability Office study assessing the impact of nutrition assistance programs and agricultural policies on childhood obesity prevention; (iv) convening a national



summit to set guidelines for advertising and marketing to children; and (v) authorizing the Federal Trade Commission to monitor media compliance with such guidelines.

With respect to schools, the proposed legislation would require facilities that receive federal funding to (i) limit access to soft drinks “or other foods of poor or minimal nutritional value,” (ii) prohibit food advertising and marketing, and (iii) provide age-appropriate daily physical activity. The bill would also authorize community grants for construction of walking and cycling paths, playgrounds, and dietary education programs. S. 799 has been referred to the Health, Education, Labor, and Pensions Committee.

## Federal Trade Commission (FTC)

### [3] FTC Seeks Comments on Children’s Online Privacy Protection Rule

FTC is currently [requesting public comments](#) related to the Children’s Online Privacy Protection Act (COPPA), a law that imposes certain requirements on operators of Web sites or online services that target and collect information from children younger than age 13. More specifically, the agency seeks comments about (i) the overall effectiveness of COPPA on children’s online privacy and safety, (ii) the impact of the Act on operators, (iii) problematic practices that the Act fails to address, (iv) the number of new Web sites created each year that target children, and (v) the effectiveness of the COPPA provision that prohibits operators from conditioning children’s participation in online activities on the disclosure of additional personal information. Comments are due by June 27, 2005. See *Federal Register*, April 22, 2005.

## European Union (EU)

### [4] EU Regulators Approve Testing Method for Biotech Corn

EU regulators this week approved a method for testing U.S. corn gluten imports for the presence of unauthorized Bt10 genetically modified corn. “All imports of brewer’s grain and corn gluten imports must have a certificate that they do not contain Bt10,” an EU official said. Earlier this month, the European Commission voted to halt such U.S. corn imports absent guarantees that they contained none of the unapproved Bt10 strain. In February, the Swiss agrichemicals company Syngenta admitted to having inadvertently sold Bt10 corn seed to U.S. farmers from 2001-2004. EU officials contend that some of the products resulting from the crops grown with that seed likely entered the EU as animal feed, corn flour and corn oil. See *Associated Press*, April 25, 2005.

## State/Local Initiatives

### [5] Arizona Governor Signs Nutrition Standards Legislation

Arizona Governor Janet Napolitano (D) yesterday signed [legislation](#) that directs the Department of Education to develop by July 1, 2006, minimum nutrition standards for foods and beverages served or sold in elementary, middle and junior high schools. State Superintendent of Public Instruction Tom Horne reportedly called the law a boon to children’s health and “a victory for parental rights and choice. Most parents teach their children to eat healthy, and they resent it when schools undermine it by having candy bars and sugared sodas.” See *The Arizona Republic*, April 27, 2005.



## Litigation

### Deceptive Trade Practices

#### [6] California Supreme Court Denies Review of “Happy Cows” Lawsuit

The California Supreme Court last Wednesday denied review of a January 2005 Court of Appeal decision which found that the state advisory board responsible for the popular “Happy Cows” advertising campaign could not be sued for false advertising or unfair business practices. [\*People for the Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Board, No. A103481 \(Cal. Ct. App. 1/11/05\)\*](#). The advertising campaign depicts cows grazing in green pastures with the slogan, “Great cheese comes from happy cows. Happy cows come from California.” The campaign offended the Virginia-based People for the Ethical Treatment of Animals (PETA), which sued under California’s Unfair Business Practices Act, Business and Professions Code sections 17200 et seq., alleging the ads’ depiction of a cow’s life were “explicitly and implicitly untrue, deceptive and misleading” because California dairy cows “commonly spend their lives in dirt and mud, are repeatedly impregnated and milked throughout their pregnancies, often suffer painful maladies, and are slaughtered when they can no longer meet the industry’s production demands.” *See San Francisco Chronicle*, April 21, 2005.

## Youth Marketing Claims

#### [7] Plaintiffs’ Counsel David Boies III Files Another Putative Class Action Accusing Alcohol Manufacturers of Targeting Underage Consumers

As in other similar cases across the country, a purported class action lawsuit recently filed in West Virginia state court alleges that alcohol companies have engaged in “a long-running, sophisticated, and deceptive scheme ... to market alcoholic beverages to children and minors ... to generate billions of dollars per year in revenue.” [\*Bertovich v. Advanced Brands & Importing Co., et al., No. 05-C-42M \(Circuit Court of Hancock County, West Virginia\) \(complaint filed 2/17/05\)\*](#).

The complaint describes plaintiffs Roger and Kathy Bertovich as “parents whose children are being subjected to alcohol advertising and whose children have consumed one or more of the Defendants’ products.” They seek certification of a guardian class and disgorgement of profits earned by the alleged illegal sale of alcoholic beverages to minors. Claims asserted under West Virginia law include deceptive trade practices, unjust enrichment, negligence, public nuisance, and conspiracy. Ten marketing-related class actions against alcohol manufacturers have been filed since November 2003.



## Other Developments

### [8] NIEHS Conference to Address Environmental Solutions to Childhood Obesity Issue

Approaches that support a healthy physical and nutritional environment for youth will be the focus of a National Institute of Environmental Health Sciences (NIEHS) [conference](#) on June 1-2, 2005, in Washington, D.C. Sessions at the event will cover the health effects of obesity, vulnerable populations, land use/community design, and industry perspectives. Confirmed speakers include U.S. Surgeon General Richard Carmona; HHS Secretary Michael Leavitt; Arkansas Governor Mike Huckabee; and representatives of PepsiCo and Stonyfield Farm.

## Scientific/Technical Items

### Pancreatic Cancer

#### [9] Consumption of Processed Meat Purportedly Linked to Pancreatic Cancer

Heavy consumption of processed meats such as hotdogs, sausage and lunch meat increases the risk of pancreatic cancer, according to study results reported last week by University of Hawaii and University of Southern California scientists during the 96th Annual Meeting of the American Association for Cancer Research. The study included

nearly 200,000 men and women who were followed for an average of seven years. Individuals who reported the heaviest consumption of processed meats exhibited a 67 percent increase in pancreatic cancer risk over participants who reported the lowest intake of such foods, after adjusting for age, smoking status, history of diabetes, family history of pancreatic cancer, and ethnicity. Diets rich in pork and red meat reportedly increased the risk of pancreatic cancer by nearly 50 percent. Neither consumption of poultry, fish and dairy products nor overall intake of total fat, saturated fat and cholesterol, were associated with increased pancreatic cancer risk. The American Meat Institute disputed the study's findings by saying that "the most important fact is that the larger body of evidence has shown processed meats are a healthy part of a balanced diet." See *The Associated Press*, April 22, 2005.



---

# Food & Beverage

## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by  
Mark Cowing and Mary Boyd in the Kansas City office of SHB.  
If you have questions about the Update or would like to receive back-up materials,  
please contact us by e-mail at [mcowing@shb.com](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com).  
You can also reach us at 816-474-6550.  
We welcome any leads on new developments in this emerging area of litigation.

Shook,  
Hardy &  
Bacon<sup>LLP</sup>

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

