

# Food & Beverage

## LITIGATION UPDATE

Issue 127 • May 18, 2005

### Table of Contents

#### Legislation, Regulations and Standards

- [1] FTC Schedules Childhood Obesity Workshop for July 2005, Solicits Public Comment and Participation . . . . .1
- [2] USDA's Biotechnology Committee Issues Two Reports .1
- [3] Codex Committee Defers Action on GM Food Labeling Standards . . . . .2

#### Litigation

- [4] U.S. Supreme Court Strikes Down Ban on Direct Shipments of Wine . . . . .2

#### Media Coverage

- [5] "Food for Thought," Jack Schuessler, *The Wall Street Journal*, May 17, 2005 . . . . .3

#### Scientific/Technical Items

- [6] Low-Fat Diet Linked to Reduced Risk of Breast Cancer Recurrence . . . . .3

Shook,  
Hardy &  
Bacon LLP®

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

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Trade Commission (FTC)

##### [1] **FTC Schedules Childhood Obesity Workshop for July 2005, Solicits Public Comment and Participation**

FTC and the Department of Health and Human Services (HHS) will co-host a [public workshop](#) titled “Marketing, Self-Regulation & Childhood Obesity” on July 14-15, 2005, in Washington, D.C. Comments and requests to participate as a panelist in the event must be received by June 9. “Childhood obesity is a public health issue that must be addressed from all angles,” FTC Chair Deborah Majoras was quoted as saying. “This workshop will bring together a wide range of voices to examine ways, including self-regulation, to best promote competition among marketers of healthy foods and the dissemination of good information so that consumers can make healthy food choices.”

In preparation for the workshop, FTC and HHS are requesting comments on the following topics: (i) the types of foods and beverages marketed to children and the extent of kids’ exposure to such marketing; (ii) research on the impact of marketing on children’s health, e.g., the alleged correlation between marketing and obesity rates; (iii) the scope and effectiveness of existing industrywide self-regu-

lation; (iv) individual company efforts at self-regulation and best marketing practices; (v) various stakeholders’ efforts to educate consumers about the nutritional content of food and beverage products and the importance of a healthy lifestyle; and (v) proposals for new initiatives.

FTC/HHS staff will select panelists for the workshop using the following criteria: (i) the party has particular expertise or knowledge of the relevant issues; (ii) the party’s participation would promote a balance of the interests being represented at the event; and (iii) “the party has been designated by one or more interested parties (who timely file requests to participate) as a party who shares group interests with the designator(s).” See *FTC Press Release*, May 11, 2005; *Federal Register*, May 12, 2005.

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

##### [2] **USDA’s Biotechnology Committee Issues Two Reports**

USDA’s Advisory Committee on Biotechnology and 21st Century Agriculture last week issued [two reports](#) on agricultural biotechnology that focus on traceability and labeling issues and the use of biotechnology in the future. The first report looks at the growing number of mandatory traceability and labeling rules in other countries, ways that different segments of the U.S. food and feed supply chain are addressing those requirements, and attendant marketplace issues. The second report reviews



trends that will affect the use of biotechnology in the future and “key uncertainties that could drive the future in different directions.” See *USDA Press Release*, May 9, 2005.

## Codex Alimentarius Commission

### [3] Codex Committee Defers Action on GM Food Labeling Standards

Meeting last week in Kota Kinabalu, Malaysia, the Codex Committee on Food Labeling reportedly delayed making a decision on creating mandatory labeling guidelines for genetically modified foods, choosing instead to continue debate on the issue over the next year. Thirty of the 55 country delegations present at the meeting favored GM labeling standards, while the United States, Argentina, Australia, Mexico, Paraguay, the Philippines, and Thailand reportedly advocated “terminating” GM labeling discussions completely, and 18 delegations “remained silent” on the topic. “The interests of biotech countries are being put before consumer interests,” a spokesperson for Consumers International said in response to the Codex committee’s deferred decision on the labeling standards. “GM food is substantially different from non-GM food ... The health impacts are unknown, and GM food is not currently safety tested.” Meanwhile, the U.S. Public Interest Research Group has issued a [report](#) titled *At a Standstill: The United States’ Role in Stalling International Efforts to Label Genetically Engineered Foods*. See *Consumers International Press Release*, May 12, 2005; *Food Production Daily.com*, May 18, 2005.

## Litigation

### Interstate Commerce

#### [4] U.S. Supreme Court Strikes Down Ban on Direct Shipments of Wine

Wine may be purchased directly from out-of-state vineyards, the U.S. Supreme Court [ruled](#) this past Monday. *Granholm v. Heald*, No. 03-1116, 544 U.S. \_\_\_ (5/16/05). In a 5-4 decision, the Court overturned laws in New York and Michigan that were reportedly designed to protect local wineries and keep minors from purchasing wine without showing proof of age. Direct wine purchases have increased dramatically because of the Internet and growing popularity of winery tours, according to news reports.

The Court found that the state laws, which make it illegal to buy wine directly from out-of-state vineyards, are discriminatory and anticompetitive. “States have broad power to regulate liquor. This power, however, does not allow states to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers,” wrote Justice Anthony Kennedy for the majority. The decision requires that states treat in-state and out-of-state wineries equally. Thus, the 24 states with similar laws could choose to allow out-of-state wineries to sell directly to consumers or bar all wineries from doing so. Justices Antonin Scalia, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined Justice Kennedy in his opinion. In dissent, Justice Clarence Thomas argued that the states have clear authority to regulate alcohol under the 21st Amendment and that the majority opinion overturns long-established laws intended, in part, to protect minors.



According to news reports, the decision could soon affect Internet sales of other alcohol products and other types of Internet commerce, such as mortgage lending.

## Media Coverage

### [5] "Food for Thought," Jack Schuessler, *The Wall Street Journal*, May 17, 2005

"There's nothing quite as unnerving as becoming the target of fraud," writes the CEO of Wendy's in recounting how the fast food chain recently responded to a California customer's "discovery" of a human finger in a bowl of chili. The company's response to the incident included reviewing food handling procedures with the local health department, giving employees lie-detector tests, reviewing the safety records of suppliers, and offering a \$100,000 reward to anyone who could identify the source of the contamination. "The disturbing truth for everyone in the business community," he concludes, "is that a devastating fraud can be perpetuated by a single individual. And the ramifications to a company's reputation are frightening. ... It may not be possible to completely safeguard a company's profits, reputation and employees, but the lessons learned from this crisis are clear: Stay true to your values in good times and bad. This was an arduous test of our resolve as a company. But I think it's at times like this that your customers and your employees get a true measure of who you really are."

## Scientific/Technical Items

### Breast Cancer

#### [6] Low-Fat Diet Linked to Reduced Risk of Breast Cancer Recurrence

Findings from a study reported this week at the Annual Meeting of the American Society of Clinical Oncology suggest that low-fat diets reduce the risk of breast cancer recurrence in women. (R. Chlebowski, et al., "Dietary Fat Reduction in Postmenopausal Women with Primary Breast Cancer: Phase III Women's Intervention Nutrition Study (WINS)," Presentation at the 2005 ASCO Annual Meeting, May 15, 2005).

The five-year study followed 2,400 middle-age and elderly women receiving treatment for breast cancer. The nearly 1,000 women who were placed on a moderately low-fat diet limited to 33 grams of fat daily were 24 percent less likely to have their cancers recur than the rest of the women in the study. While 80 percent of breast cancers are believed to be related to the hormone estrogen, which is produced by fat cells, the researchers found that the most pronounced effect from the low-fat diet could be seen in women whose breast cancer tumors were hormone-receptor negative, meaning that they did not respond to estrogen. In that group, the reduced-fat diet decreased the recurrence of cancer by some 42 percent over the five-year observation period. Lead researcher, Rowan Chlebowski, M.D., of the University of California at Los Angeles, was quoted as saying that the protective effect of low-fat diets may lie in the resulting lowered amounts of the hormone insulin, which in addition to controlling blood sugar levels, may also be linked to cancer growth. *See The Washington Post*, May 16, 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.

