Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Seeks Comments on Proposed Study of Carbohydrate Claims

FDA is seeking **public comments** on a proposed study whose data would enhance its understanding of consumer responses to carbohydrate content claims on the front panel of food labels and thereby assist the agency to amend current regulations by defining acceptable terms for carbohydrate claims. The claims to be tested in the proposed online study of 10,000 U.S. consumers include "carb-free," "low-carb," "x g net carbs," "carbconscious," "good source of carb," and "excellent source of carb." Disclosure statements to be tested include "see nutrition information for fat content," "see nutrition information for sugar content" and "not a low-calorie food." Participants in the study would see mock label images for a loaf of bread, a canned soft drink and a frozen entrée. Comments are due by September 16, 2005. *See Federal Register*, August 17, 2005.

Australia/New Zealand

[2] Australian Agency Seeks Public Input on New Country-of-Origin Labeling Rules

Food Standards Australia New Zealand (FSANZ) last week issued a **discussion paper** outlining proposed mandatory country-of-origin labeling for all packaged food products as well as unpackaged seafood, fruit, vegetables, and nuts. "We have already held two rounds of public comment on country-of-origin labeling and, as some stakeholders appear to feel strongly about this issue, we are taking the unusual step of consulting again with consumers, growers, retailers, and food manufacturers," a FSANZ spokesperson was quoted as saying. Comments on the new labeling requirements are due by September 5, 2005; the Food Regulation Ministerial Council is expected to begin its review of the new rules in October. *See FSANZ Media Release,* August 12, 2005.

Litigation

Deceptive Trade Practices

[3] Kraft Dropped from PCRM Lawsuit over Weight-Loss Claims

Following Kraft Foods' announcement that the company had withdrawn advertisements suggesting dairy consumption could enhance weight loss, the Physicians Committee for Responsible Medicine (PCRM) last week dropped the food manufacturer from its lawsuit alleging the dairy/weight loss claims are deceptive and based on unreliable science. (*PCRM and Catherine Holmes v. Kraft Foods, Inc., et al.*, No. CH-05-002179, Va. Cir., Alexandria City) (filed 6/28/05). Remaining defendants in the putative class action include General Mills, Inc., Dannon

Co., Inc., McNeil-PPC, Inc., International Dairy Foods Association, Dairy Management, Inc., National Dairy Council, and Lifeway Foods, Inc. Plaintiffs seek (i) class action damages for alleged violations of the Virginia Consumer Protection Act and the Virginia False Advertising Statute; (ii) a permanent injunction banning continuation of the weight-loss advertising campaign; and (iii) corrective advertising. *See PCRM News Release,* August 19, 2005.

[4] CSPI Resolves Labeling Disputes with Two Food Companies

The Center for Science in the Public Interest (CSPI) has reportedly resolved product-labeling disputes with Pinnacle Foods and Pepsico Inc. Under the apparent threat of a lawsuit alleging "deceptive health claims," Pinnacle Foods, maker of Aunt Jemima Blueberry Waffles, recently agreed to revise the waffle labeling to clearly indicate the product contains "artificially flavored" or "imitation" blueberry bits even though the label depicts images of fresh blueberries.

PepsiCo Inc. has agreed to revise the labeling on its Tropicana Peach Papaya and Tropicana Strawberry Melon juice drinks to settle a lawsuit filed in February 2005 on behalf of a New Jersey consumer who alleged the products' labeling misrepresented the nature of their ingredients. Under terms of the **settlement agreement**, modified labels will drop the statement "made with real fruit juice" and describe each product as a "flavored juice drink from concentrate with other natural flavors." Pepsico will also donate $100,000 to the American Heart Association of New Jersey, pay the New Jersey plaintiff $2,500, and cover attorney's fees. *See CSPI News Releases* and *Associated Press,* August 11, 2005; *The Washington Times,* August 12, 2005.

Warnings

[5] FDA Claims Federal Preemption Prohibits California Prop. 65 Warnings for Tuna

"FDA believes that California should not interfere with FDA's carefully considered approach of advising consumers of both the benefits and possible risks of eating seafood," Food and Drug Administration Commissioner Lester Crawford stated in an August 12, 2005, **letter** to California Attorney General Bill Lockyer. At issue is a June 2004 lawsuit that Lockyer filed under the state's antitoxics law against three tuna producers for their failure to warn consumers that canned and packaged tuna fish products contain mercury and mercury compounds.

Proposition 65 (Prop. 65), the Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses to warn the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity"; the law does not apply to chemicals that occur naturally in food. Methylmercury has been listed as a known reproductive toxin under Prop. 65 since 1987; mercury and mercury compounds as known reproductive toxins since 1990; and methylmercury compounds as carcinogenic since 1996.

In March 2004, FDA and the U.S. Environmental Protection Agency issued a joint consumer advisory on methylmercury in fish and shellfish aimed specifically at reducing the exposure of women who may become pregnant, pregnant women, nursing mothers, and young children. The FDA commissioner contends that such health advisories targeting particular at-risk populations are more effective than product label warnings because consumers who become "overexposed" to label warnings might choose to disregard all such statements, thereby creating "a far greater public

health problem." Crawford also argues that tuna companies would be unable to comply with both Prop.
65 and labeling provisions of the Federal Food, Drug, and Cosmetic Act (FDCA). More specifically, the proposed Prop. 65 warning would conflict with federal law because tuna products bearing the warning would be deemed misbranded under FDCA for failing to state the amount of food required to cause harm through mercury ingestion.

The case against Tri-Union Seafoods (maker of Chicken of the Sea brand tuna), Del Monte (producer of Starkist) and Bumble Bee Seafoods (maker of Bumble Bee) is set for trial on October 18 in San Francisco Superior Court. *See Associated Press* and *The San Francisco Chronicle,* August 20, 2005.

Other Developments

[6] Eighty Percent of Sodium in American Diets Comes from Processed Foods and Restaurant Fare, Says Public Health Watchdog

The amount of salt in the typical U.S. diet is a major cause of hypertension, and food manufacturers and restaurants could easily reduce the sodium content of their foods without sacrificing flavor, says a Center for Science in the Public Interest (CSPI) **report** issued last week. "Because salt is in so many foods at such high levels, it is virtually impossible for people to follow health authorities' advice to cut way back on sodium, particularly when packaged foods and restaurant foods make up such a big part of Americans' diets," Michael Jacobson, CSPI's executive director, was quoted as saying. "Food companies should use less salt across the board, but especially in the products that have the most," Jacobson added. "Why not put consumers in the driver's seat and let them decide for themselves how much salt to add?"

The CSPI report compares the sodium content of different brands of similar processed foods and restaurant offerings, e.g., the salt contained in a small order of Burger King french fries (410 mg. per serving) versus the salt contained in a small order of McDonald's fries (140 mg. per serving). CSPI's recommendations for federal action include (i) establishment of a Division of Sodium Reduction in the Food and Drug Administration; (ii) regulations that mandate sodium disclosure on menus or menu boards; (iii) sodium restrictions for certain categories of processed foods; and (iv) shifting salt's status from "Generally Recognized as Safe" (GRAS) to "food additive." *See CSPI News Release* and *The Wall Street Journal*, August 17, 2005.

Media Coverage

[7] "The Oreo, Obesity and Us," Delroy Alexander, Patricia Callahan and Jeremy Manier, *The Chicago Tribune,* August 21-23, 2005

These *Chicago Tribune* writers claim to have "scoured internal company documents, scientific studies, government lobbying records, congressional testimony, [and] lawsuits and filings with the U.S. Security Exchange Commission," in crafting a three-part series about Kraft and the alleged role of snack foods in the "obesity crisis." The first article discusses the alleged "addictivelike" qualities of foods that are high in sugar and fat, while the second article focuses on Oreo marketing and the third on product lines reformulated without *trans* fats.

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