

Food & Beverage

LITIGATION UPDATE

Issue 149 • November 2, 2005

Table of Contents

Legislation, Regulations and Standards

- [1] Center for Science in the Public Interest Accuses
FDA of Failing to Enforce Labeling Regulations1
- [2] National Bird Flu Strategy Includes Enhancing USDA
Efforts to Prevent Disease Outbreaks1
- [3] National Advisory Panel to Focus on Risk-
Based Approach for Meat and Poultry Inspection2
- [4] U.S. Delegates Schedule Public Meeting to Discuss
Food Import and Export Inspection Issues2
- [5] EC Committee Requests Stakeholder Input on
Nanotechnology Risks2

Litigation

- [6] District Court Orders *Pelman* Plaintiffs to Make More
Definite Statement3
- [7] Public Health Lawyers Poised to File Putative Class
Action over Soft Drinks in Schools3

Other Developments

- [8] Pew Initiative Posts Proceedings of Workshop on G.E.
and Cloned Animals4

Shook,
Hardy &
Bacon²⁰⁰⁵ L.L.P.®

Global Product Liability Law Firm of the Year
WHO'SWHOLEGAL
The International Who's Who of Business Lawyers

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Center for Science in the Public Interest Accuses FDA of Failing to Enforce Labeling Regulations

The FDA lacks the resources and capabilities to investigate misleading food labeling, according to the public health watchdog Center for Science in the Public Interest (CSPI). “Food manufacturers are shamelessly tricking consumers who are trying to eat more fruits, vegetables and whole grains,” Bruce Silverglade, CSPI’s director of legal affairs, was quoted as saying during a Washington, D.C., press conference held late last week. “Too many processed foods contain only token amounts of the healthful ingredients highlighted on labels and are typically loaded with fats, refined sugars, refined flour, and salt in various combinations.”

In an October 27, 2005, [letter](#) to FDA Acting Commissioner Andrew von Eschenbach, CSPI asserts that FDA’s Office of Nutritional Products, Labeling and Dietary Supplements “does not appear to have the ability (or possibly even the desire)” to evaluate specific “heart healthy” and “low calorie” claims as well as inaccurate ingredients disclosure on nutrition facts panels. The advocacy group not only urges FDA to implement a wide-ranging

strategy “to restore the integrity of the food label” and seek a \$30 million budget increase to bolster enforcement activities, but immediately remedy disputed labeling claims on several specific foods. Those products include Smucker’s Simply 100% Fruit, the strawberry version of which CSPI says contains 30 percent strawberries; and General Mills’ Yoplait Light Fat Free Yogurt, whose label alleges a link between dairy consumption and weight loss. According to CSPI, the federal Dietary Guidelines Advisory Committee has deemed the evidence supporting that link to be inconclusive.

Silverglade was accompanied at the October 27 press conference by Connecticut Attorney General Richard Blumenthal and U.S. Representative Rosa DeLauro (D-Ct.), a longtime advocate of food-labeling reform. “An understaffed, unmotivated FDA is unacceptable,” Blumenthal said. “Informed and safe diet decisions require the truth. Our message to the FDA and the food industry: Do your job – give consumers the real facts, not feckless spin.” See *CSPI News Release*, October 27, 2005.

U.S. Department of Agriculture (USDA)

[2] National Bird Flu Strategy Includes Enhancing USDA Efforts to Prevent Disease Outbreaks

President George W. Bush (R) yesterday announced a comprehensive strategy to respond to the threat of an influenza pandemic. The \$7.1 billion plan includes \$91 million for the agriculture



department to intensify its disease prevention efforts both in the United States and abroad. More specifically, \$18 million would be directed toward biosecurity and surveillance measures worldwide; \$10 million to increase the current animal vaccine stockpile by 40 million doses; \$32 million to augment wild bird surveillance; \$6 million for additional biosecurity measures to quickly contain or exclude H5N1 AI virus from U.S. poultry facilities; \$9 million for trade compliance smuggling interventions enforcement; \$7 million for bolstering research generally; and \$9 million for preparedness training and the development of simulation models. *See USDA News Release*, November 1, 2005.

[3] National Advisory Panel to Focus on Risk-Based Approach for Meat and Poultry Inspection

The National Advisory Committee on Meat and Poultry Inspection has scheduled a public meeting for November 15-16, 2005, at USDA headquarters in Washington, D.C. Interested stakeholders are invited to attend the meeting and submit comments on the advisory group's discussions of ways to more efficiently utilize Food Safety and Inspection Service personnel in a more risk-based approach to inspection. More information about the committee and agenda details will be posted [here](#). *See Federal Register*, October 28, 2005.

Codex Alimentarius Commission

[4] U.S. Delegates Schedule Public Meeting to Discuss Food Import and Export Inspection Issues

The USDA, Food and Drug Administration, and Department of Health and Human Services have scheduled a November 10, 2005, [public meeting](#) in Washington, D.C., to discuss U.S. draft positions to be presented at the November 28-December 2 meeting of the Codex Committee on Food Import and Export Inspection and Certification Systems in Melbourne, Australia. Issues to be discussed at the Melbourne meeting include (i) draft appendices to the Guidelines on the Judgment of Equivalence of Sanitary Measures Associated with Food Inspection and Certification; (ii) proposed draft Guidelines for Risk-Based Inspection of Imported Foods; and (iii) a discussion paper on revising the Guidelines for the Exchange of Information Between Countries on Rejection of Imported Foods. *See Federal Register*, September 28, 2005.

European Commission (EC)

[5] EC Committee Requests Stakeholder Input on Nanotechnology Risks

The EC's Health and Consumer Protection DG has launched an [online public consultation](#) inviting public input on a nanotechnology risk assessment document recently adopted by the independent Scientific Committee on Emerging and Newly Identified Health Risks. Among other things, the report discusses nanoparticle toxicology, potential exposure scenarios, current risk assessment methodologies, regulatory issues, and knowledge gaps. Comments must be submitted online by December 16, 2005.



Litigation

Obesity

[6] District Court Orders *Pelman* Plaintiffs to Make More Definite Statement

In a teenage obesity lawsuit that has already been to the Second Circuit and back, a federal district judge in New York has ordered plaintiffs to be more definite in selected allegations against McDonald's Corp. *Pelman v. McDonald's Corp.*, 02 Civ. 7821 (SDNY) (order entered October 24, 2005). Specifically, Judge Robert Sweet ordered plaintiffs to: (1) identify the McDonald's advertisements about which they are complaining; (2) explain briefly why they allege that the ads are materially deceptive to an objective consumer; (3) explain briefly how the plaintiffs were aware of the acts alleged to be misleading; and (4) describe briefly "the injuries suffered by each plaintiff by reason of defendant's conduct."

Named plaintiffs Ashley Pelman and Jazlyn Bradley were teenagers when they filed this case in August 2002. They purport to represent a class of consumers under New York's consumer protection act. The district court dismissed plaintiffs' original complaint in January 2003 but granted plaintiffs leave to amend, which they did on February 19, 2003. Five months later, in September 2003, the district court dismissed the amended complaint, ruling that plaintiffs did not establish a connection between their alleged injuries and their consumption of McDonald's food. *See* issue 47 of this

Update, September 4, 2003. The Second Circuit Court of Appeals reinstated and remanded the case in January 2005. *See* issue 111 of this Update, January 26, 2005.

Deceptive Trade Practices

[7] Public Health Lawyers Poised to File Putative Class Action over Soft Drinks in Schools

The Public Health Advocacy Institute (PHAI) and the Center for Science in the Public Interest (CSPI) reportedly plan to sue "Big Soda" in Massachusetts state court sometime during December 2005, according to a feature article in this past Sunday's *Boston Globe Magazine*. "There is something just wrong with continuing to thrust calorie-dense, zero-nutrition sodas into the hands and mouths of schoolchildren," antitobacco lawyer Richard Daynard, founder of the Boston-based PHAI, was quoted as saying. "The evidence is crystal clear that this is making a substantial contribution to the obesity epidemic and the likelihood of developing chronic illness," he said.

In April 2005, a notice posted on the PHAI Web site invited parents of public school children to forward their contact information to the advocacy group, stating that PHAI was "working with community activists, parents and public health organizations ... and private lawyers to stop Coca-Cola, Pepsi and others from engaging in practices that harm kids." CSPI placed like-minded notices in Massachusetts newspapers over the summer. The forthcoming class action will reportedly serve as a model for similar lawsuits CSPI intends to file in various jurisdictions around the nation.



The health advocates will reportedly bring the action under the Massachusetts Consumer Protection Act claiming (i) soft drink companies market their products to children despite numerous studies that allege links between their consumption and such adverse health effects as obesity, tooth decay and Type 2 diabetes; and (ii) school kids are a “captive audience” vulnerable to the companies’ “false advertising” that depicts soft drinks as harmless. Daynard said the lawsuit might also allege that the availability of soft drinks in school facilities represents an “attractive nuisance” similar to a property owner’s unfenced trampoline. “You are dealing with an addictive product sold to kids, where, if not the addiction, at least the taste is acquired at a young age,” Daynard said. “You are dealing with a product that, at least when initially produced, was not understood to be deleterious, yet as the evidence kept coming in, companies kept marketing it and stonewalling.” *See The Boston Globe Magazine*, October 30, 2005.

Other Developments

[8] **Pew Initiative Posts Proceedings of Workshop on G.E. and Cloned Animals**

The Pew Initiative on Food and Biotechnology has posted on its [Web site](#) the proceedings of a January 2005 workshop titled “Exploring the Moral and Ethical Aspects of Genetically Engineered and Cloned Animals.” Event organizers asked participants to discuss whether existing moral and ethical frameworks for humans’ use of animals could also address evolving concerns raised by cloned or transgenic animals. Those participating in the forum included representatives of the National Pork Producers Council, Food Marketing Institute, Consumer Federation of America, Cargill, and various federal agencies.



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 or 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^{LLP}

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.

