

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Center for Science in the Public Interest Asks FDA to Regulate Salt as a Food Additive

Renewing its assertion that lowering the sodium content of processed foods would “save tens of thousands of lives annually,” the Center for Science in the Public Interest (CSPI) this week urged the FDA to revoke the regulatory status of salt as a food ingredient that is “generally recognized as safe” (GRAS) and reclassify it as a food additive under the Federal Food, Drug, and Cosmetic Act. “For all the food industry’s rhetoric about the wide range of consumer choices it supposedly provides, it has failed miserably at giving consumers a real choice when it comes to salt,” CSPI Executive Director Michael Jacobson was quoted as saying. CSPI wants food manufacturers to reduce the amount of salt in processed foods by 50 percent within 10 years.

In March 2005, CSPI petitioned the U.S. Court of Appeals for the District of Columbia to compel FDA to complete its review of salt and either affirm its current classification as GRAS or declare it a food additive. The D.C. Circuit, however, rejected the petition for lack of jurisdiction because CSPI “did not seek a remedy from the [agency] or initiate any

proceeding in [the] agency before resorting to this court.” *In Re Center for Science in the Public Interest*, No. 05-1057 (D.C. Cir. 7/14/05).

CSPI’s [current petition](#) asks FDA to initiate a rulemaking that (i) withdraws the GRAS status of salt; (ii) amends any prior sanctions for salt; (iii) requires industry to reduce the sodium content of all processed foods, including those sold in retail venues and those sold to restaurants; (iv) mandates health warnings on retail packaged salt in amounts one-half ounce or larger; and (v) reduces the Daily Value for sodium from 2,400 to 1,500 milligrams. CSPI’s suggested health warning for packaged salt: “Salt promotes heart disease. Use less. Try using half as much salt as called for in recipes.” The Food Products Association reportedly responded to CSPI’s latest petition by stating that “setting a ceiling on sodium in processed foods is not the way to address hypertension or blood pressure. Rather, all Americans should be following sound dietary guidance such as that from the federal government or the American Heart Association.” *See CSPI New Release*, November 8, 2005; *Dow Jones Newswires*, November 9, 2005.

[2] FDA and USDA Seek Stakeholder Input on Jurisdictional Issues Related to Certain Food Products Containing Meat and Poultry

FDA and the agriculture department’s Food Safety and Inspection Service (FSIS) have announced a [public meeting](#) slated for December 15, 2005, in Rosemont, Illinois, to discuss a proposed regulatory



approach for making jurisdictional decisions about certain food categories that contain meat and poultry ingredients. FSIS has authority over all meat and poultry products and processed egg products, while FDA regulates those foods not under FSIS jurisdiction, e.g., dairy, grain products and produce.

The two agencies established a working group charged with recommending a method of making transparent decisions about product categorization and agency jurisdiction after manufacturers deemed inconsistent and confusing case-by-case jurisdictional decisions regarding pepperoni rolls, bagel dogs and wrap-type sandwiches containing meat. Under the working group's proposal, FSIS would regulate food products whose primary ingredients are meat and poultry, e.g., sandwiches, natural casings; FDA would have jurisdiction over those products that use meat and poultry "for the purpose of accentuating flavor only and do not contribute to the identity of the food product," e.g., pizza. The agencies are soliciting public comments on the working group's proposal as well as any potential impacts that jurisdictional changes might have on operational, marketing and labeling costs. *See FDA News Release*, November 3, 2005; *Federal Register*, November 7, 2005.

U.S. Congress

[3] Agriculture Spending Bill Includes Provisions Delaying COOL and Allowing Synthetic Substances in "Organic" Foods

Late last week, the U.S. Senate sent to President George W. Bush (R) a \$100 billion agricultural appropriations bill (H.R. 2744) that would further delay mandatory country-of-origin labeling (COOL) for many commodities and permit small amounts of

nonorganic substances in products bearing the "USDA Organic" seal. The spending measure delays COOL for meat, vegetables, fruit, and peanuts until September 30, 2008; the regulations were mandated in the 2002 farm bill and scheduled for implementation by September 30, 2006. The measure also allows foods bearing the USDA Organic seal to contain small amounts of synthetic ingredients, effectively overturning a January 2005 First Circuit ruling prohibiting most synthetic substances in multi-ingredient products that are labeled organic. *Harvey v. Veneman*, No. 04-1379 (1st Cir. 1/26/05). *See CQ Today*, November 3, 2005; *Associated Press* and *The New York Times*, November 4, 2005.

Litigation

Employment Practices

[4] Workers Must Be Compensated for Time Spent Donning Protective Gear, Says U.S. Supreme Court

The U.S. Supreme Court ruled yesterday that meat-processing plants must pay workers who change into and out of protective clothing for the time they spend walking between locker rooms and their work stations but not for the time spent "waiting to don the first piece of gear that marks the beginning of the continuous workday." *IBP, Inc. v. Alvarez*, 546 U.S. ____ (2005) (11/8/05). The Court consolidated two cases that raised similar issues, *IBP, Inc. v. Alvarez*, No. 03-1238, from the Ninth Circuit, and *Tum v. Barber Foods*, 04-66, from the First Circuit.

The principal question before the Supreme Court, which was presented in both cases, was "whether the time employees spend walking



between the changing area and the production area is compensable under the [Fair Labor Standards Act].” The second question, presented only in *Tum v. Barber Foods*, was “whether the time employees spend waiting to put on the protective gear is compensable.” Because the Ninth Circuit said “yes” to the first question and the First Circuit said “no” to both, the Supreme Court agreed to resolve the conflict.

Other Developments

[5] KFC Plans Media Response in the Event of Avian Flu Outbreak

KFC Corp. is reportedly poised to launch a consumer education campaign advising restaurant patrons that avian influenza cannot be contracted by eating cooked chicken. “The message is to reassure consumers that eating cooked chicken is perfectly safe,” Jonathan Blum, a public relations vice president for the chain’s parent company, Yum Brands, said. “As our investors would hope, we are being proactive in preparing the materials in the event we need to use them.” The National Chicken Council reportedly deemed KFC’s anticipatory actions “wise and prudent,” while emphasizing that the possibility of a bird flu outbreak in the United States is “unlikely.” See *Advertising Age*, November 7, 2005; *Associated Press*, November 9, 2005.

[6] Hispanic Youth Overexposed to Alcohol Advertising, Charges CAMY in New Report

Georgetown University’s Center on Alcohol Marketing and Youth (CAMY) has issued a [report](#) claiming that Hispanic youth ages 12 to 20 see and hear more alcohol advertising than their non-Hispanic contemporaries. “The industry knows that Latinos are a young, fast-growing and lucrative

market,” Guillermo Brito, executive director of the National Latino Council on Alcohol and Tobacco Prevention, was quoted as saying. “Industry must also be aware that there is a disparate impact of alcohol ads, as Latino youth are likelier to binge drink and have more problems than black or white youth, and have less access to prevention and treatment,” he said.

According to CAMY, (i) alcohol ads in English-language publications are more likely to be viewed by Hispanic youth than by youth in general; (ii) Hispanic youth in certain radio markets (e.g., New York, San Antonio) hear more alcohol ads per capita than other youth; and (iii) 14 of the 15 most popular TV shows among Hispanic youth were all accompanied by commercials for alcohol products during 2003 and 2004. See *CAMY News Release*, October 26, 2005.

Scientific/Technical Items

Obesity

[7] Obesity and Inactivity Put Nearly 2 Million American Youth at Risk of Diabetes and Heart Disease

Nearly 2 million adolescents in the United States have a pre-diabetic condition associated with obesity that places them at a greater risk of developing Type 2 diabetes and cardiovascular disease (CVD) later in life. (D. Williams, et al., “Prevalence of Impaired Fasting Glucose and Its Relationship with Cardiovascular Disease Risk Factors in U.S. Adolescents, 1999-2000,” *Pediatrics* 116(5): 1122-26, November 2005). Centers for Disease Control and Prevention (CDC) and National Institutes of Health researchers measured impaired fasting



glucose (IFG) in a nationally representative sample of youth ages 12 to 19 and concluded that one in 14 adolescents (7.0%) exhibited abnormally high blood sugar levels. That prevalence, say the researchers, translates to some 2 million children with IFG, some of whom are “already showing signs of insulin resistance and worsened CVD risk factors.” The condition was more prevalent in boys than in girls (10% vs. 4%) and occurred most often among overweight adolescents (1 in 6).

CDC’s recently issued “[National Diabetes Fact Sheet](#)” indicates that 1.5 million Americans ages 20 and older will be diagnosed with diabetes during 2005. “Recent studies have shown that people with pre-diabetes can successfully prevent or delay the onset of diabetes by losing 5 to 7 percent of their body weight,” Frank Vinicor, director of CDC’s diabetes program, was quoted as saying in conjunction with publication of the fact sheet. “This can be accomplished by following a low-calorie, low-fat eating plan, including a diet rich in whole grains and fruits and vegetables.” See *CDC Media Release*, October 26, 2005.



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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.

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