

Food & Beverage

LITIGATION UPDATE

Issue 186 • September 28, 2006

Table of Contents

Legislation, Regulations and Standards

- [1] **FCC Chair Announces Task Force on Advertising and Children's Health**1
- [2] ***E. Coli* Outbreak Prompts Reexamination of Produce Regulations**1
- [3] **FSIS Schedules Meetings on Risk Issues**2
- [4] **New York City Considers *Trans* Fat Ban**2

Litigation

- [5] ***Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (S.D.N.Y. 9/19/06)**3
- [6] ***EEOC v. Watkins Motor Lines, Inc.*, No. 05-3218 (6th Cir. 9/12/06)**4

Legal Literature

- [7] **Food Allergens and Obesity Litigation Highlighted in Law Journal**4

Other Developments

- [8] **Second Annual Agroterrorism Symposium Draws Hundreds to Kansas City**5
- [9] **Public Perception, Not Necessarily Science, Drives Debate over GM Rice**6

Media Coverage

- [10] **Timothy Martin, "This Spud's Not for You," *The Wall Street Journal*, September 26, 2006**7

**Shook,
Hardy &
Bacon** L.L.P.®

2005 & 2006
Global Product Liability Law Firm of the Year
WHO'S WHO LEGAL
The International Who's Who of Business Lawyers

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Communications Commission (FCC)

[1] FCC Chair Announces Task Force on Advertising and Children's Health

Senator Sam Brownback (R-Kan.) yesterday joined FCC Chair Kevin Martin to announce the formation of a task force to study the effects of advertising and television viewing habits on childhood obesity. Speaking during a press conference, the senator referred to the billions spent annually on children's marketing and advertising, noting that "children 8 and older are exposed to over six hours a day worth of media." He further stated, "I'm pleased that representatives from the public and private sector are coming together to address the rising rate of childhood obesity and its relationship to media and advertising. I hope this task force helps government, parents and the business community define how to address childhood obesity." While more task force members will be added in the future, representatives from the Beverly LaHay Institute, Children Now, Disney, the Parents Television Council, Sesame Workshop, and the Benton Foundation have already joined the initiative. According to FCC Chair Martin's prepared remarks, "When the task force has completed its work, the FCC will issue the task force report to

summarize what we have learned, encourage best practices for industry and continue to educate American parents. We all have a responsibility to promote and protect our children's welfare." See *Associated Press* and *Brownback Press Release*, September 27, 2006.

Food and Drug Administration (FDA)

[2] E. Coli Outbreak Prompts Reexamination of Produce Regulations

In response to the nation's recent *E. coli* outbreak, FDA has extended its [Lettuce Safety Initiative](#) to include spinach. Objectives of the August 2006 initiative include (i) evaluating current industry practices to improve product safety, (ii) quickly notifying consumers of disease outbreaks related to contamination or adulteration, (iii) developing better policies to prevent future disease outbreaks, and (iv) implementing any necessary regulatory changes to ensure product safety. Meant to restore industry confidence in FDA oversight, the safety proposal came after raw produce was identified as an increasingly common source of food-borne illness.

Meanwhile, FDA is reportedly considering a labeling mandate for the spinach industry that would allow consumers to identify spinach produced outside the California counties implicated in the outbreak. "We do not want to deny consumers access to safe spinach, wherever it is grown," said David Acheson of the FDA's Center for



Food Safety and Applied Nutrition. While government officials have yet to pinpoint the source of contamination, the produce industry is reportedly considering additional water and soil testing as well as improved sanitation practices.

In a related development, the *E-coli* outbreak has led an Illinois lawmaker to renew his efforts to consolidate food safety monitoring, inspection and labeling under one federal agency. Senator Richard Durbin (D) is urging Congress to support passage of the Safe Food Act of 2005 ([S.729](#)), a proposal whose provisions would require coding on food products to facilitate disease investigations. Durbin has also called on the Government Accountability Office to evaluate and recommend changes to the current food safety system. *See Press Release of Senator Richard Durbin*, September 22, 2006; *The Wall Street Journal*, September 22 and 23, 2006; *USA Today*, September 24 and 25, 2006; *The Boston Globe*, September 26, 2006.

U.S. Department of Agriculture (USDA)

[3] FSIS Schedules Meetings on Risk Issues

USDA's Food Safety and Inspection Service (FSIS) has scheduled public meetings in October 2006 to address risk issues. The first [meeting](#), to be held October 10-11, will focus on a risk-based inspection system that FSIS will develop and use to better allocate resources among meat and poultry facilities that present different levels of risk. Apparently, every establishment is inspected once every shift, "regardless of the particular food safety hazard associated with the produces produced and processes performed at one plant versus another." Written comments and suggestions may be submitted through October 27.

The second [meeting](#), scheduled for October 12-13, will give the National Advisory Committee on Meat and Poultry Inspection the opportunity to discuss "using risk to direct in-plant inspection activities in processing assignments" and "using risk in slaughter operations." According to the notice, members of the public will be required to register before entering the meeting.

State/Local Initiatives

[4] New York City Considers *Trans* Fat Ban

New York City's health department has apparently proposed a ban on using artificial *trans* fatty acids, often labeled partially hydrogenated oil, in any of the city's restaurants. News sources report that the proposal will affect all food service businesses, from small, local establishments to large franchises, but not grocery stores. Under the proposal, restaurants would have six months to change to *trans* fat-free shortenings and oils, and 18 months to effectively eliminate *trans* fat from their menus. A similar ban proposed in Chicago was recently amended to target fast-food chains with revenues exceeding \$20 million a year. Although many health officials reportedly applaud the effort, others in the business feel the plan is impracticable. Chuck Hunt of the New York State Restaurant Association told the press, "Labeling is one thing, but when they totally ban a product, it goes well beyond what we think is prudent and acceptable." *See The Washington Post*, September 27, 2006; *Associated Press*, September 27, 2006.



Litigation

Obesity

[5] *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (S.D.N.Y. 9/19/06)

U.S. District Judge Robert Sweet, ordering McDonald's Corp. to respond to the second amended complaint filed by minors alleging injury from consuming the company's fare, has granted the company a measure of relief by limiting the deceptive advertising case to specific advertisements and striking some parts of the complaint.

The court concluded that (i) plaintiffs would be limited to the 40 specific allegedly deceptive advertisements in the complaint, with leave granted to amend with additional advertisements for good cause shown; (ii) any references to the parents individually as plaintiffs would be stricken because of earlier rulings that their claims were time barred; and (iii) any references to McDonald's representations that its french fries are "cholesterol free" and any references to company statements about its Mighty Kids Meal were also stricken because of previous rulings.

The court disagreed with McDonald's that the second amended complaint failed to provide a brief explanation of how each plaintiff became aware of the company's allegedly deceptive advertisements and failed to describe briefly the injuries each plaintiff allegedly suffered. The court previously ordered plaintiffs to provide a more definite statement of their claims, including "a brief explanation of how the plaintiffs were aware of the acts alleged to be

misleading" and "a brief description of the injuries suffered by each plaintiff by reason of defendant's conduct." The court summarized the complaint's allegations, noting "Plaintiffs were aware of McDonald's deceptive practices through their exposure to the advertisements and statements annexed to their pleading and that such statements were disseminated in the specified fora of: television, radio, internet, magazine, periodical, in-store poster advertisements, and press releases." Plaintiffs also apparently alleged that their beliefs "were affected through their contact and interaction with third parties, i.e., parents, friends, and relatives, who were influenced by McDonald's allegedly misleading nutritional advertisements." According to the court, this information complies with its directive and is sufficient to allow McDonald's to respond.

Similarly, boilerplate allegations on behalf of each named plaintiff state that they were injured in the following respect:

obesity, elevated levels of Low-Density Lipoprotein, or LDL, more commonly known as "bad" cholesterol, significant or substantial increased factors in the development of coronary heart disease, pediatric diabetes, high blood pressure, and/or other detrimental and adverse health effects and/or diseases as medically determined to have been causally connected to the prolonged use of Defendant's products . . .

The court determined that these allegations comply with its order and are sufficient for McDonald's to file an answer.



Americans with Disabilities Act (ADA)

[6] *EEOC v. Watkins Motor Lines, Inc.*, No. 05-3218 (6th Cir. 9/12/06)

In a case involving purported employment discrimination against a 400-pound dockworker, the Sixth Circuit Court of Appeals has determined that the ADA does not protect those whose morbid obesity does not have a physiological cause. Because the Equal Employment Opportunity Commission (EEOC) failed to produce any evidence that the dockworker's morbid obesity had a physiological cause or that morbid obesity, because of its nature, always has a physiological cause, it had not met its burden of showing that morbid obesity is a physical impairment under the ADA. Thus, the court affirmed a district court's grant of the employer's summary judgment motion.

Analyzing a laches issue that had arisen in the case, the court found specious the employer's argument that it was prejudiced because there had been a loss of relevant documents in the years since the incidents giving rise to the complaint had taken place. The court blamed the employer for any "lost" computer data, noting that "once a defendant is notified of an EEOC enforcement action, the company should preserve its records as a party 'cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim.'"

Legal Literature

[7] **Food Allergens and Obesity Litigation Highlighted in Law Journal**

Three articles on food issues appear in the most recent edition of the *Food and Drug Law Journal*. "Obesity, Food Marketing and Consumer Litigation: Threat or Opportunity?" makes the case for addressing the "obesity epidemic" with flexible regulatory standards that "encourage food industry self-regulation and incentivize the industry's use of nutrition and health messages in ways that are effective in motivating healthy behaviors." According to the authors, who summarize recent food-related lawsuits and litigation threats, an anti-tobacco litigation model will not work for food because of the important differences between food and tobacco. They note, "food litigation activists have been compelled to go to unusual lengths to escape traditional product liability principles . . . Thus, plaintiffs in the recent wave of food cases appear to have favored consumer deception lawsuits in part, perhaps, out of a belief that some state consumer protection statutes may not require proof of impact or injury causation to the full extent in product liability lawsuits. The law in this area is far from clear, however."

In "When Food is Poison: The History, Consequences, and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004," the author discusses the law's provisions and details how the law may not provide all of the protection needed by those afflicted with food sensitivities.



Observing that one of every 23 Americans has a food allergy, the author proposes extending the labeling requirements to additional allergens and to other products, such as alcoholic beverages, meat and meat products, drugs and dietary supplements, and cosmetics.

Lawyers with medical degrees write in "Not the Next Tobacco: Defenses to Obesity Claims" that "the differences between tobacco and food, and between the merits of tobacco cases and obesity cases, are striking, and create serious obstacles to the success of plaintiffs' claims." They discuss, in clinical detail, many of the factors that contribute to obesity and provide a comprehensive overview of addiction to show why the causation element in food-related cases is a significant hurdle for plaintiffs. The authors also contend that such lawsuits will increase costs to food companies and consumers and "will further erode the sense of personal responsibility on which the nation was founded."

Other Developments

[8] Second Annual Agroterrorism Symposium Draws Hundreds to Kansas City

Delegates from across the United States and 21 other countries gathered in Kansas City, Missouri, the week of September 25, 2006, to hear the latest on government/industry efforts to keep the nation's food supply safe. FBI Deputy Director John Pistole opened the proceedings by describing the economic impact of the mad cow scare that arose when a single animal with the disease was identified in the United States. According to Pistole, more than 50 countries banned U.S. beef at a cost of \$3 billion annually. And, while there is no specific communicated terrorist threat to the food supply

now, because agriculture is considered to be a significant part of the nation's infrastructure, it is believed to be at risk. Documents recovered during U.S. missions in Afghanistan revealed that Al Qaeda has specifically considered American agriculture as a target.

A USDA consultant, who discussed potential threats to agriculture during a biosecurity presentation, observed that one of every seven jobs in the United States depends on agriculture. He also pointed out that pathogens to which livestock have no immunity can readily be obtained in other countries and that instructions as to their use can be found on the Internet. He showed how transporting animals creates a "line source" for biological contamination because their exhalations emit thousands of viral or bacterial cells that could infect susceptible animals along the route. He noted that simulation exercises have raised significant issues about infected carcass disposal and reviewed outbreaks occurring around the world in which millions of animals had to be slaughtered. He concluded by stating that reducing the threat is a top USDA priority and noting that the national animal identification tracking system is one component of its efforts.

Another speaker addressed food transportation issues. Chris Gutierrez, who heads a Kansas City-based non profit dedicated to "inland port solutions," discussed how his organization is using Department of Transportation grants to develop technologies that will allow the identification of potentially threatening shipments and credentialing systems for workers in the transportation industry. He reported that 11 million truck crossings occur each year at 100 points on U.S. borders with Canada and Mexico. He also discussed the "animal health corridor" taking shape in Kansas and Missouri that



will attract more research and development on animal health into a region that contains a large percentage of the nation's cattle and swine.

Greg Pompelli, who works with USDA's Economic Research Service, addressed how that agency is modeling the economic impact of an attack on the nation's food supply. He noted that France drafted one of the world's first food safety laws in the early 1300s, as he explained that these issues are not new and we can learn much from history. Pompelli also discussed the assumptions that must be incorporated into and the uncertainties that must be acknowledged by assessment models and suggested that the loss of a single food source will not devastate a country, because there are alternatives. He contended that there is a measure of resilience in the market, observing that the U.S. economy has grown by 15 percent since September 11, 2001.

[Chris McDonald](#), a partner in Shook, Hardy & Bacon's Agribusiness and Food Systems Group, addressed civil and criminal litigation issues that might arise in the wake of an agroterrorism attack. Agroterrorism is "not a far-fetched hypothetical," McDonald said, in reviewing deliberate attempts to contaminate the U.S. food supply. He emphasized that all members of the food chain, from farmers to supermarket owners, could be held liable for an attack given the current "probing regulatory climate," when foreseeability and due care considerations are being viewed more critically.

In light of the Bioterrorism Act, McDonald said businesses should protect themselves from an attack and any consequent litigation by (i) exhibiting "impeccable corporate conduct" with regard to regulatory compliance and record keeping, (ii) complying with voluntary guidelines issued by the FDA and USDA, (iii) instituting steps for corrective

or disciplinary action, and (iv) coordinating with the government at all times. Food growers, processors, packagers, and retailers – who could also be held liable by others in the food chain – should educate themselves, their employees and the public about the food supply. "My perspective is that if we have agroterrorism, it's likely to bring about litigation," McDonald concluded, adding that he considers agroterrorism "a real threat" that could have a deep psychological impact on the nation.

[9] Public Perception, Not Necessarily Science, Drives Debate over GM Rice

"[T]he growing economic fallout from LL601's unwanted and illegal appearance – including a handful of lawsuits against Bayer – is a reminder that when it comes to food, public perception is as important as scientific assurances," claims *Washington Post* writer Rick Weiss in a recent article about BayerCorp's genetically modified rice (LLRICE601). Although U.S. and European officials agree that LL601 has no adverse health effect on humans or animals, many countries in Europe and across the globe continue to reject U.S. imports because of "scientific, cultural and economic concerns" regarding biotechnology. As a result, U.S. farmers are apparently beginning to resist GM crops until other countries import them. According to Weiss, rice growers fear that large buyers like Kellogg, Anheuser-Busch and Gerber will also reject rice allegedly contaminated with GM strains to preserve their brand reputations. "In fact," says Weiss, "many experts suspect that pressure from the food industry was a major reason why Bayer mysteriously dropped LL601 five years ago without seeking USDA approval for it."



In a related development, *Food Navigator USA.com* has [reported](#) that the International Service for the Acquisition of Agri-biotech Applications predicts that “the number of countries growing biotech crops will ‘at least double,’ from 21 in 2005 to around 40” by 2015. Speaking at the World Grains Summit, an ISAAA board member emphasized a need for “improved communication with society,” adding that nations should make “knowledge-based decisions” regarding bioengineered crops and deregulate them as evidence continues to suggest they are safe. See *The Washington Post* and *Food Navigator USA.com*, September 21, 2006.

Media Coverage

[10] Timothy Martin, “This Spud’s Not for You,” *The Wall Street Journal*, September 26, 2006

Described by the *Journal’s* Timothy Martin as aspiring “to be to potatoes what OPEC is to oil,” the United Potato Growers of America is reportedly aiming to stop overproduction “by carefully managing supply to keep demand high and constant, resulting in a more stable return for farmers.” Martin reports that United Potato, whose members purportedly hold 60 percent of the potato acreage in the United States, successfully reduced the potato supply in 2005 by destroying excess crops or paying farmers to keep them off the market. The U.S. and Canadian markets apparently lost 6.8 million 100-pound potato sacks – “the equivalent of about 1.3 billion medium orders of french fries at McDonald’s” – thus increasing farmers’ open-market returns by 48.5 percent.

According to Martin, potato farmers have historically spurned national cooperatives. Some, like the french-fry farmers quoted in the article, cannot join because contracts with food companies already determine their production levels and prices. Critics apparently fear that the cooperative will fail if some farmers cut back too much while others, looking to capitalize on higher prices, plant more than their allotted share. Nevertheless, Martin emphasizes, the members of United Potato believe that “this group will last because many large growers across the country have joined, recognizing that food-industry consolidation makes it imperative that growers unite.”



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by
Leo Dreyer 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 ldreyer@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.



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.
