

Food & Beverage

LITIGATION UPDATE

Issue 261 • May 16, 2008

Table of Contents

Legislation, Regulations and Standards

- [1] Agencies Defend Bisphenol A and Phthalate Safety Before Senate Subcommittee . .1
- [2] Health Canada Considers Toxicity of Vinyl Acetate1
- [3] Protesters Decry Expected Approval of GM Law2
- [4] Nigerian Food Safety Agency Bans Pesticides After Food Poisoning Incidents2
- [5] Industry Coalition Questions OEHHA Proposal to List 4-MEI Under Prop. 653
- [6] Florida Lawmakers Seek to Prohibit Local Menu Labeling Laws3
- [7] Foie Gras Will Return to Chicago Restaurant Menus3

Litigation

- [8] Federal Appeals Court Hears Argument in BSE-Testing Dispute4

Other Developments

- [9] Advocacy Group Issues Report on Confined Animal Feeding Operations4
- [10] WHO Researchers Urges Governments to Handle Obesity Like Smoking5
- [11] Burger King Fires Employees for Derogatory Blog Postings5
- [12] European Food Publishers Sponsor Annual Food Law Conference6

Scientific/Technical Items

- [13] JAMA Article Examines Low-Calorie Sweeteners' Role in Weight Loss6

**Shook,
Hardy &
Bacon** LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] Agencies Defend Bisphenol A and Phthalate Safety Before Senate Subcommittee

Prompted by press coverage of scientific studies questioning the safety of bisphenol A and phthalates, a U.S. Senate subcommittee held a [hearing](#) on May 14, 2008, to address the use of plastic additives in consumer products such as baby bottles and food containers.

Representatives of the Food and Drug Administration (FDA) and Consumer Product Safety Commission (CPSC) defended their agencies' positions that the additives do not appear to pose risks to children.

According to the FDA's associate commissioner for science, "Although our review is ongoing, at this time we have no reason to recommend that consumers stop using products containing BPA [bisphenol A]." He also apparently defended the FDA's reliance on industry-funded studies in making its determination. Senator Charles Schumer (D-N.Y.), who has introduced legislation to ban the substance from all products for children younger than 7, criticized the FDA for "looking the other way" when it comes to

bisphenol A safety; he added that the law should "err on the side of caution" when it comes to children's health. Senator John Kerry (D-Mass.), who co-sponsored the bill, was quoted as saying, "The FDA could hardly be doing less."

Taking the position that agency studies do not support congressional action to prohibit the additives, a CPSC spokesperson reportedly noted during the hearing that the children's products industry has voluntarily stopped selling products containing some types of phthalates. Consumer advocates countered that the chemical, which is used to add flexibility to plastics, is still used in flooring, furniture, food packaging, toys, and medical equipment such as IV bags. California and the European Union have banned phthalates, which some studies have purportedly linked to cancer and reproductive defects, from children's products. *See Product Liability Law 360* and *Reuters*, May 14, 2008.

Canada

[2] Health Canada Considers Toxicity of Vinyl Acetate

The Canadian government is reportedly considering whether to place vinyl acetate, a fruit-scented liquid used to make chewing gum, on a draft list of toxic substances. The World Health Organization's International Agency for Research on Cancer (IARC) has linked vinyl acetate to cancer in rats, but also



noted that the minimal amounts in chewing gum have not been shown to cause human cancers. Although Health Canada has declined to comment on the draft list in advance of its May 17 publication date, one consumer watchdog has already likened the case against vinyl acetate to the debate over bisphenol A. "It'll be hard to know for sure whether those amounts are enough to be of concern," a consultant for Environmental Defence told the press. "But, it's basically saying that chewing gum is basically plastic and made from something that's potentially cancer-causing. It's definitely cancer-causing in animals."

Chewing gum manufacturers, however, have countered that vinyl acetate is not a direct ingredient. The substance is apparently used to make gum's polymer base, but very little is bound into the end product. "It's not an ingredient in gum. It might be residual to a very small ingredient in gum. It makes it infinitesimal, if at all, at that point," a Cadbury Adams Canada spokesperson was quoted as saying.

France

[3] Protesters Decry Expected Approval of GM Law

With the French National Assembly poised to approve legislation implementing a 2001 EU directive regarding the cultivation of genetically modified (GM) crops, protesters reportedly marched by the hundreds to protest the action. The law will apparently establish restrictions on farmers who grow GM crops, such as limiting pollen dissemination to fields where conventional crops are grown. According to a news source, those in favor of GM crops and foods are also dissatisfied with the

proposal, saying it does not go far enough to allow consumers a full range of choices in their food products. Environmentalists meanwhile contend that the legislation will allow rates of GM dissemination to conventional crops that are too high. Some among their ranks have reportedly attacked fields where GM crops are grown, prompting some seed companies to move their tests to the United States. French Environment Minister Jean-Louis Borloo was quoted as saying that the new law would be the "most protective in the world," and President Nicolas Sarkozy has indicated his interest in keeping the country's options open to limit the defection of seed companies to friendlier locales. *See Reuters*, May 14, 2008.

Africa

[4] Nigerian Food Safety Agency Bans Pesticides After Food Poisoning Incidents

Nigeria's National Agency for Food and Drug Administration and Control has reportedly banned the sale and supply of 30 different pesticide products. Some 112 people were hospitalized and two children died after consuming moi-moi and beans allegedly contaminated with high levels of the chemicals. Laboratory analyses reportedly revealed the presence of organophosphate, carbamates, fenitrothion, chlorpyrifos, lindane, and gemmollin. Apparently, the food crops had been preserved with the chemicals, which can affect the nervous system and allegedly lead to nausea, vomiting, headaches, dizziness, seizure, convulsion, and death at high doses. Gammalin is also apparently used in the country to harvest fish. *See allAfrica.com*, May 14, 2008.



State and Local Governments

[5] Industry Coalition Questions OEHHA Proposal to List 4-MEI Under Prop. 65

Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) has proposed listing 4-methylimidazole (4-MEI) as a chemical known to the state to cause cancer under Proposition 65 (Prop. 65) on the basis of National Toxicology Program research showing that mice consuming the chemical developed cancerous tumors. 4-MEI is apparently found in wine, soy sauce and Worcestershire sauce after cooking. A coalition of industry interests, including the Grocery Manufacturers Association, California Grocers Association and American Beverage Association, are calling for OEHHA to submit the chemical to the state's Carcinogen Identification Committee for further review, challenging the strength of the research. Their May 1, 2008, letter reportedly states that the chemical "is just the latest in a series of near-ubiquitous chemicals created as an unavoidable consequence of heating the natural constituents of foods" and that "listing 4-MEI can be expected to impact a wide swath of foods by producing warnings, changes in cooking methods, changes in diets, litigation and other consequences – intended or otherwise." See *Inside EPA*, May 12, 2008.

[6] Florida Lawmakers Seek to Prohibit Local Menu Labeling Laws

The Florida Legislature has reportedly passed a bill ([S.B. 2016](#)) that would prevent local governments from requiring nutritional information on restaurant menus. The provision is part of legislation that further defines the duties of the Division of Hotels and Restaurants, although some lawmakers

have questioned whether menu labeling falls within the bill's scope. Backed by the Florida Restaurant and Lodging Association (FRLA), the measure aims to ensure uniformity in labeling laws and circumvent a regulatory patchwork detrimental to businesses operating in several locations. The bill apparently attracted little debate in the legislature, where sponsors in both chambers felt state regulation was appropriate to keep local governments from asking restaurants "to jump through extra hoops," according to Representative Chris Dorworth (R-Lake Mary). "It doesn't say we can never have nutritional-labeling mandates," the FRLA chief executive officer told the press. "If we have it, it has to be done at the state level, [and] this ensures consistency." If signed into law by Governor Charlie Crist (R), the legislation would take effect July 1, 2008.

Meanwhile, the Center for Science in the Public Interest and other consumer groups have continued to back menu-labeling laws across the country. "The current way that restaurants are providing information doesn't work," said CSPI Director of Nutritional Policy Margo Wootan. "It's like if we were posting speed limits with little pamphlets along the highway or on the back of speeding tickets. People are not going to see it." See *Orlando Sentinel*, May 10, 2008.

[7] Foie Gras Will Return to Chicago Restaurant Menus

Chicago's aldermen have reportedly decided to once again allow restaurateurs to offer foie gras to their patrons. In 2006, animal rights advocates, concerned about the treatment of ducks and geese in the production of foie gras, prevailed upon the city to outlaw the sales, a move ridiculed by many, including the city's mayor. According to a news source, the banning and un-banning were the



product of typical Chicago political maneuvering. City aldermen approved the 2006 ban by a nearly unanimous vote when it was part of a larger package of legislative items. Many apparently did not realize they were approving such a ban. A purportedly obscure political rule was used May 14, 2008, to repeal the ban without debate, which prompted one of the ban's proponents to plead and yell to be allowed to speak, to no avail. See *The New York Times*, May 15, 2008.

Litigation

[8] Federal Appeals Court Hears Argument in BSE-Testing Dispute

The U.S. government has reportedly argued before the D.C. Circuit Court of Appeals that a Kansas-based beef supplier should not be allowed to test all of its cattle for bovine spongiform encephalopathy (BSE), otherwise known as mad cow disease. *Creekstone Farms Premium Beef, L.L.C. v. USDA*, No. 07-5199 (D.C. Cir., appeal filed June 2007). In March 2007, a district court ruled that U.S. Department of Agriculture (USDA) rules did not prevent Creekstone Farms Premium Beef from conducting comprehensive testing to ease the fears of its overseas customers. Additional information about that decision appears in issue 209 of this Update.

The company has not been able to launch its testing initiative while the government's appeal has been pending. According to a news source, large meatpackers oppose Creekstone's testing, claiming it would be costly for them to implement and would give the smaller company a competitive advantage. Government lawyers apparently argued that widespread testing cannot guarantee food safety and that

Creekstone wants "to create false assurances." At least one judge on the appeals court panel appeared to agree with the meat company, which argued that the agency lacks authority to prevent the tests; he commented, "All they want to do is create information" and that consumers can decide how the information is interpreted. See *The Washington Post* and *Product Liability 360*, May 9, 2008; *meetingplace.com*, May 12, 2008.

Meanwhile, the Food and Drug Administration announced in April 2008 that it had issued a final regulation that bars the use of certain cattle materials from all animal feed, including pet food. According to the director of the agency's Center for Veterinary Medicine, "This FDA action serves to further protect the U.S. cattle population from the already low risk of BSE. The new rule strengthens existing safeguards." See *FDA Press Release*, April 24, 2008.

Other Developments

[9] Advocacy Group Issues Report on Confined Animal Feeding Operations

The Union of Concerned Scientists, a nonprofit organization of citizens and scientists focused on environmental issues, has issued a [report](#), "CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations," that discusses the purported costs of CAFOs to the economy and the environment. According to the report, subsidies and "other often hidden costs," such as damage from water and air pollution, lower property values in rural areas and harder-to-treat human diseases from excessive antibiotic use, make CAFOs an undesirable way to produce food. The group calls for vigorous enforcement of antitrust laws under the Packers and



Stockyards Act, strong Clean Air Act enforcement and regulations to reduce ammonia and other emissions, replacement of farm bill commodity crop subsidies, and substantial funding for research to improve alternative animal production methods, among other recommendations.

[10] WHO Researcher Urges Governments to Handle Obesity Like Smoking

A public health expert for the World Health Organization has urged governments to curb obesity using tactics similar to anti-smoking campaigns. Boyd Swinburn, a researcher at Deakin University in Australia, told reporters at the 2008 European Congress on Obesity that “The brakes on the obesity epidemic need to be policy-led and governments need to take center stage.” Swinburn apparently argued that “hard-hitting messages” should include restrictions on “junk food” advertising and requirements for schools to serve healthy meals. In addition, he named the food and beverage industry as the primary force behind soaring obesity rates. “Commercial drivers around food have been the biggest influence over the past 30 years,” Swinburn was quoted as saying. “The product, the price, the promotion and the placement has changed dramatically.” *See Reuters*, May 14, 2008.

In a related development, a recent study has concluded that obesity rates are “alarmingly” high for most ethnicities in the United States. Gregory L. Burke, et al., “The Impact of Obesity on Cardiovascular Disease Risk Factors and Subclinical Vascular Disease: The Multi-Ethnic Study of Atherosclerosis,” *Archives of Internal Medicine*, May 12, 2008. Researchers reportedly found that of the 6,814 middle-age or older adults enrolled in the Multi-Ethnic Study of Atherosclerosis (MESA), more than two-thirds of white, African American and

Hispanic participants were overweight and one-third to one-half were obese. The study also discovered that only 33 percent of Chinese Americans involved in MESA were overweight and only 5 percent obese. “As the obesity numbers increase further, we will spend an even larger amount of health care dollars just treating risk factors,” said the lead author, adding that the “obesity epidemic has the potential to reduce further gains in U.S. life expectancy, largely through an effect on cardiovascular disease mortality.” *See Reuters*, May 12, 2008.

[11] Burger King Fires Employees for Derogatory Blog Postings

According to news sources, Burger King Corp. has fired two employees after it became known that an executive was secretly posting derogatory blogs about a farmworkers’ advocacy group and the owner of a private investigation firm hired by the company allegedly posed as a student activist to infiltrate the group. The food company has apparently been engaged in a dispute about the wages paid to tomato pickers in Florida and had refused to meet with their supporters to work out a deal similar to those existing with McDonald’s Corp. and Yum Brands Inc., which have agreed to pay more for tomatoes if the growers agree to pass the additional money on to their workers. A Burger King executive was found to be using his daughter’s online pseudonym to claim that farmworker supporters were “reaping millions in cash from unknowing or duped supporters.”

Burger King reportedly announced that it discontinued the services provided by the private investigation firm and indicated that representatives hope to meet with the farmworkers’ supporters to find ways to ensure decent wages and working conditions for Florida’s harvesters. Meanwhile, the



alleged scandal has apparently attracted congressional attention. Senator Bernie Sanders (I-Vt.) is said to be interested in an explanation from the corporation about its purported smear campaign. See *The New York Times*, May 7, 2008; *The Nation*, May 11, 2008; *Law.com*, May 14, 2008; and *Miami Herald*, May 15, 2008.

[12] European Food Publishers Sponsor Annual Food Law Conference

Food labeling and health claims will be the focus of the 17th annual European Food Law [Conference](#) sponsored by the publishers of food-related periodicals. Scheduled for June 25-26, 2008, in Brussels, the conference, which features public officials, corporate executives, health organization and consumer group representatives as speakers, will address such issues as (i) “member state, industry and consumer perspectives on front of pack and nutritional labeling,” (ii) “amending the novel food regulation,” (iii) “perspectives on the health and nutritional claims legislation,” (iv) “the health claims lists: views from member states,” (v) “disease risk reduction and children’s health claims,” and (vi) “the future for nutrient profiling.” A bonus seminar on advertising food to children will follow the conference on June 27.

Scientific/Technical Items

[13] JAMA Article Examines Low-Calorie Sweeteners’ Role in Weight Loss

A recent article in the *Journal of the American Medical Association* (JAMA) reportedly questions the use of low-calorie sweeteners by dieters, citing research that suggests these substances do not promote weight loss and could ultimately cause weight gain. Tracy Hampton, “Sugar substitutes

linked to weight gain,” *Journal of the American Medical Association*, May 14, 2008. Tracy Hampton, Ph.D., wrote the article in response to a 2007 review of laboratory, epidemiological and clinical studies, which she says “presented an unclear picture of [sugar substitute] usefulness.” According to Hampton, a study published in *Neurimage* found that women who consumed sucralose, as opposed to sugar, experienced less feedback from the part of the brain responsible for satiety, thus leading to over-consumption. Hampton further surmises that artificial sweeteners “may blunt the body’s energy expenditure mechanisms and activate taste pathways different than sucrose – findings that might prompt dieters to rethink their weight loss strategies.” She ultimately asserts that while “there is currently no official recommendation about using artificial sweeteners as a tool for weight control,” evidences suggests that “these products also uncouple sweetness and energy, which may disrupt the body’s ability to accurately assess caloric intake.” See *FoodNavigatorUSA.com*, May 14, 2008.



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.

**Shook,
Hardy &
Bacon** L.L.P.®



Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.
