

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

Restaurant Industry, Consumer Watchdog Back Bipartisan Compromise on Menu Labeling

The National Restaurant Association (NRA) and the Center for the Science in the Public Interest (CSPI) have reportedly expressed support for a bipartisan compromise on menu-labeling legislation that would require chain establishments with 20 or more outlets nationwide to provide nutrition information on menus or menu boards. The revamped legislation apparently combines elements of the Menu Education and Labeling (MEAL) Act, sponsored by Senator Tom Harkin (D-Iowa), and the Labeling Education and Nutrition (LEAN) Act, sponsored by Senators Tom Carper (D-Del.) and Lisa Murkoski (R-Ark.). The new bill would also exempt small businesses, as well as waive the labeling requirements for custom orders, temporary specials and items like condiments that are not listed on menu boards. In addition, a separate provision would entail "the disclosure of calories for food items on vending machines owned by individuals operating 20 or more vending machines," according to a June 10, 2009, press release issued by Harkin.

"We know the importance of providing customers with the information they want and need in a consistent format no matter where they are across the country," stated the NRA in response to the compromise, which has also been lauded by CSPI. "This legislation would replace varying state and local ordinances with a national standard that empowers consumers to make choices that are best for themselves and their families." See *NRA Press Release* and *Center for Science in the Public Interest Press Release*, June 10, 2009.

CSPI Seeks Change in Bush Policy Prohibiting Use of Federal Funds to Discourage Soft Drink Consumption

The Center for Science in the Public Interest (CSPI) has called on Agriculture Secretary Tom Vilsack to reverse a policy adopted during the Bush administration that precludes states from using federal nutrition education funds to discourage the consumption of sugar-sweetened beverages. In a June 12, 2009, [letter](#), CSPI Executive Director Michael Jacobson, Director of Legal Affairs Bruce Silverglade and Senior Staff Attorney Ilene Ringel Heller take issue with a 2003 U.S. Department of Agriculture (USDA) memorandum telling state officials that they could not use

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For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com



or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

Supplemental Nutrition Assistance Program (SNAP) funds to disparage or criticize any food. It was apparently issued after Maine launched an ad campaign encouraging residents to reduce their soda consumption.

According to CSPI, this policy has been continued under the new administration, appearing in recent SNAP education guidance materials that state, "SNAP-Ed funds may not be used to convey negative written, visual, or verbal expressions about specific foods, beverages or commodities." This apparently includes "[n]utrition education messages which convey negative messages or disparage specific foods, beverages or commodity [sic]" and "messages of belittlement or derogation of such items, as well as any suggestion that such foods, beverages or commodities should never be consumed."

Linking the consumption of soft drinks to obesity, CSPI details various state campaigns encouraging people to think about the sugar they are consuming when they drink soda, which campaigns were either scrapped or cut back due to an inability to use federal funds. The letter also discusses the USDA's own nutritional guidelines, which "repeatedly emphasize the value of limiting the consumption of soft drinks." CSPI concludes, "States should be able to provide accurate dietary advice, using the same effective mechanisms employed by nutrition educators throughout the country without having to worry about offending specific segments of the food industry or violating USDA rules."

USDA Restores Funds for Pesticide-Use Reporting

The U.S. Department of Agriculture (USDA) has apparently resurrected a program that tracks pesticide use on food crops. USDA's National Agricultural Statistics Service (NASS) conducts pesticide-use surveys, which reportedly provide the only free, publicly available data on the agricultural chemicals applied to crops. Government agencies, environmental groups and academic scientists use the data to evaluate the human health and environmental risks posed by pesticides, and compare the amount of pesticides applied to genetically engineered (GE) versus conventional crops.

The Union of Concerned Scientists (UCS) and other groups recently spearheaded a [letter-writing campaign](#) urging USDA to restore the program. NASS plans to gather data on pesticide applications to fruit and nut crops in fall 2009. If Congress approves the full funding specified in President Barack Obama's (D) 2010 budget, the agency will resume data collection for vegetables, major row crops and pesticides applied to crops after harvest. See *Food & Environment Electronic Digest*, June, 2009.

FDA Announces Public Meeting to Assess *Listeria* Prevention in Ready-to-Eat Foods

The Food and Drug Administration (FDA) has [announced](#) a June 23, 2009, public meeting to present the background, approach, scope, and data needed for a recently initiated interagency risk assessment of *Listeria* in some ready-to-eat foods that are sliced, prepared or packaged in retail facilities. Several agencies, including the Food Safety and Inspection Service (FSIS) and the Center for Food Safety and

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Applied Nutrition (CFSAN), are conducting the risk assessment to determine the effects that current practices and potential interventions to prevent *Listeria* have on public health. *See Federal Register*, June 9, 2009.

FDA Announces Delay of Reportable Foods Registry

The Food and Drug Administration (FDA) has [announced](#) the availability of draft industry guidance titled "Questions and Answers Regarding the Reportable Food Registry as Established by the Food and Drug Administration Amendments Act of 2007." The Food Administration Amendments Act of 2007 required FDA to establish within one year of enactment an electronic portal to facilitate the reporting of adulterated foods. FDA has now delayed until September 8, 2009, implementation of the registry "to consider any comments received on the draft guidance and through the agency's planned outreach initiatives, and to allow for further testing of the electronic portal for reportable foods." In the interim, the agency has encouraged industry to continue reporting of adulterated foods through existing channels, such as the relevant FDA district office. *See Federal Register*, June 11, 2009.

EPA Issues Final Rule Regarding Silver Residues in Surface-Sanitizing Solutions

The Environmental Protection Agency (EPA) has issued a [final rule](#) that amends the exemption from the requirement of a tolerance for residues of silver, excluding silver salts, in or on all foods when used in public eating places or applied on dairy- or food-processing equipment that comes into contact with surface-sanitizing solutions. The regulation requires the silver concentration in the solutions not to exceed 50 parts per million. Objections and requests for hearings about the regulation, which took effect June 10, 2009, must be received by August 10. *See Federal Register*, June 10, 2009.

OEHHA Reviews Industry Submission on Draft Prop. 65 Food Warning Regulations

California's Office of Environmental Health Hazard Assessment (OEHHA), which is responsible for implementing the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), is reportedly reviewing a [joint industry proposal](#) submitted in April 2009 with detailed recommendations for a comprehensive food warning system. OEHHA has been conducting meetings with stakeholders to develop a regulation that would provide consumers with point-of-sale warnings about food chemicals known to the state to cause cancer or pose reproductive health hazards.

The California Grocers Association, California Retailers Association, California League of Food Processors, American Beverage Association, and Grocery Manufacturers Association proposal would exempt small retail establishments from regulation and would allow warnings to be provided via (i) signage at a store's entrance, (ii) pamphlets or brochures, or (iii) the backs of cash register receipts. Environmental groups and consumer advocates have reportedly criticized the industry approach, saying that most consumers would remain unaware of which foods contain Prop. 65-listed chemicals. They favor either individual product label warnings or signs placed in specific store aisles or sections.

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According to a news source, OEHHA will release a draft agency regulation in August 2009 and then conduct a “pre-regulatory” public workshop on September 25; the formal regulatory process will begin in early 2010. See *Inside Cal/EPA*, June 12, 2009.

LITIGATION**Consumer Fraud Alleged Against Maker of I Can’t Believe It’s Not Butter!®**

A California resident has sued Unilever United States, Inc. in federal district court, seeking class certification, injunctive relief, restitution, and punitive damages for alleged violations of state consumer protection laws in the sale and marketing of a butter-substitute product known as “I Can’t Believe It’s Not Butter!®” *Rosen v. Unilever U.S., Inc.*, 09-02563 (U.S. Dist. Ct., N.D. Cal., San Jose Div., filed June 9, 2009). According to the complaint, Unilever labels and promotes its product as “Made with a Blend of Nutritious Oils” and “a better nutrition option than butter,” when, in fact, the product contains “a highly unhealthy, non-nutritious oil known as partially hydrogenated oil.”

Claiming that he would not have purchased the product but for reliance on defendant’s purportedly deceptive statements, named plaintiff Amnon Rosen alleges only economic injury, stating that he “suffered injury in that he would not have paid money for the Product had these misrepresentations not been made.” Still, he avers that partially hydrogenated oil “is known to cause a number of health problems, including coronary disease, heart attacks and death.” Rosen seeks to certify a class of California residents who purchased the product since 2004 in reliance on the misleading promotional and labeling statements. He also seeks a court order enjoining future conduct in violation of state consumer protection laws.

The complaint alleges violations of California’s Business and Professions Code and the Consumers Legal Remedies Act (CLRA). While Rosen claims that he does not seek monetary damages “at this point” and will amend his complaint to seek damages under the CLRA after providing the defendant with notice, his prayer for relief does request restitution and disgorgement, compensatory damages, punitive damages, interest, and the costs of suit.

EWV Presses Prop. 65 Acrylamide Claims Again

Environmental World Watch, Inc. (EWW) has reportedly filed litigation under California’s Proposition 65 (Prop. 65) against a number of companies that make snack foods. According to the attorneys who litigate as this advocacy organization, the companies fail to warn consumers that their products contain acrylamide, a chemical formed when certain foods such as breads, french fries and potato chips are made; it is included on the state’s list of substances known to cause cancer. Filed in Los Angeles Superior Court, the suit apparently seeks punitive damages for fraudulent concealment and Prop. 65 violations. EWW has previously brought Prop. 65 claims involving acrylamide against fast food restaurants. More information about that litigation appears in issue 5 of this Update. See *CourtHouse News*, June 10, 2009.

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Several Diacetyl Plaintiffs Settle Claims with Mustard Oil Manufacturer

A company that manufactures mustard oil supplied to the employers of food-flavoring workers who alleged they contracted bronchiolitis obliterans from occupational exposure to diacetyl and other chemicals, is seeking court confirmation of its good faith settlement with some of the workers. *Ortiz v. Flavor & Extract Mfrs. Assoc. of the U.S.*, No. BC364831 (Cal. Super Ct., Los Angeles County, motion filed June 2, 2009).

According to Naturex, Inc.'s motion for an order confirming the settlement, its experts were prepared to testify that scientific evidence and published literature do not link mustard oil to bronchiolitis obliterans, a point two of the plaintiffs appeared to concede when they initiated settlement discussions rather than making their expert available for deposition. The settlement agreement would provide these plaintiffs with \$7,500 in exchange for a release and dismissal with prejudice. The motion also indicates that another plaintiff never used mustard oil during his employment. He has apparently agreed to sign a release and dismiss his claims with prejudice in exchange for defendant's waiver of costs.

If the court determines that the settlement was reached in good faith, Naturex will be protected from future contribution or indemnity claims by other parties. Among other matters, Naturex will have to persuade the court that the settlement is not a product of fraud, collusion or tortious conduct and that the settlement amount is not "grossly disproportionate" to its proportionate share of liability.

LEGAL LITERATURE

William McGeeveran, "Disclosure, Endorsement and Identity in Social Marketing," *University of Illinois Law Review*, 2009

University of Minnesota Law School Associate Professor William McGeeveran discusses the problems posed by Internet marketing that collects and disseminates information about individual purchases as a form of product endorsement among the purchaser's friends and acquaintances. The author describes how such marketing has already occurred on social networking platforms and the backlash it created.

The article explains how current legal paradigms, such as privacy, trademark and consumer protection law, may not provide the protection needed for invasion of privacy by "social marketing" and posits that a common theme to the objections to this type of Web 2.0 marketing is the issue of genuine user consent. McGeeveran recommends regulatory best practices to rein in any excesses and theorizes that giving a person control over whether information about her purchase can be used to market a product would go a long way toward resolving some of the concerns that have been raised.

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OTHER DEVELOPMENTS

New Ad Campaign Wonders “Who’s Hogging Our Antibiotics?”

Commuters and visitors in Washington, D.C., metro stations are being asked, “Who’s Hogging Our Antibiotics?” in a new ad campaign featuring pigs in a trough. The series of ads by the Pew Campaign on Human Health and Industrial Farming is apparently part of the project’s national effort to end what it claims is the misuse of antibiotics in food animal production. The campaign asserts that up to 70 percent of human antibiotics are fed to factory-farm animals that aren’t sick, a practice leading medical groups allege promotes development of deadly strains of drug-resistant bacteria that can spread to humans.

“Human antibiotics are routinely misused on industrial farms to compensate for crowded, stressful and unsanitary conditions,” said Laura Rogers, a project director with the Pew Health Group. “The way we are raising our food animals is putting human health at risk.” Versions of the ads will also reportedly appear soon online and in newspapers on Capitol Hill. *See Pew Charitable Trusts News Release*, June 3, 2009.

Documentary Aims to Expose Purported Dangers of Food Industry

A new documentary titled “Food, Inc.” apparently paints a vivid picture of the foods Americans eat—from bigger-breasted chickens fattened artificially, to new strains of deadly *E. coli* bacteria, to a food supply controlled by a handful of corporations. The filmmakers claim these purported dangers create harmful effects on public health, the environment, and worker and animal rights. Robert Kenner, the movie’s director, reportedly called it a “horror film,” and told ABC’s “Good Morning America” on June 9, 2009, “If you visit feed lots, as I have, you lose your appetite for certain kinds of food. Some people are in denial. But, increasingly, people are curious to know the story about their food.”

Food industry trade associations, however, have countered the movie’s claims by creating a number of Web sites, including one led by the American Meat Institute called SafeFoodInc.com., and a campaign that promotes the U.S. food industry as safe, abundant and affordable. “Each sector of the industry that’s named is doing its part to counter a lot of the misinformation in the movie,” said Lisa Katic, a dietician and consultant with an unnamed coalition of trade associations representing the food industry, in published reports. *See Reuters and ABC News.com*, June 9, 2009.

MEDIA COVERAGE

Maywa Montenegro and Nikki Greenwood, “In Seeds We Trust,” *Seed Magazine*, June 9, 2009

This article examines the global food-security goals of Cary Fowler, executive director of the Global Crop Diversity Trust and “intellectual father” of the Svalbard Seed Vault, which opened in February 2008 as a bomb-proof concrete bunker deep

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inside the sandstone of a remote Norwegian mountain north of the Arctic Circle. The vault, the authors write, was designed to store “copies of seeds currently housed in the more than 1,400 gene banks worldwide, so that should calamity strike any of those gene banks, Svalbard’s seeds would save the collections – and thus humanity – from the jaws of famine.”

But Fowler’s Rome-based Diversity Trust has an equally important project aimed at global food security, the authors write. They explain that because many national and international seed banks are vulnerable to floods, fires, earthquakes, and other natural hazards, as well as war, civil strife and “plain old poor maintenance,” the Diversity Trust has launched an ambitious rescue program for seed stocks. The program provides equipment, labor, training, and supplies for gene banks in some 70 countries to replant their samples, cull fresh seed, and update their records on approximately 100,000 samples. “Without these regeneration efforts,” the authors write, “a seed bank would be little more than a seed museum, a cache of curious but useless specimens.”

The authors report that Fowler and the Global Crop Diversity Fund, which was awarded \$30 million by the Gates Foundation several years ago, is looking forward to a number of projects, including participation in a new central information portal that will eventually link all gene repositories in the world.

SCIENTIFIC/TECHNICAL ITEMS

Study Claims Dioxin Inhibits Mammary Gland Proliferation During Pregnancy

An animal study has reportedly claimed that dioxin “has a profound effect on breast tissue by causing mammary glands to stop their natural cycle of proliferation as early as six days into pregnancy, and lasting through mid-pregnancy.” Betina J. Lew, et al., “Activation of the aryl hydrocarbon receptor (AhR) during different critical windows in pregnancy alters mammary epithelial cell proliferation and differentiation,” *Toxicological Sciences*, June 5, 2009. Researchers with the University of Rochester Medical Center (URMC) apparently found that in mice, dioxin exposure “caused a 50 percent decrease in new epithelial cells,” in addition to altering “the induction of milk-producing genes” and decreasing “the number of ductal branches and mature lobules in the mammary tissue.”

These results built on earlier research led by corresponding author B. Paige Lawrence, who first discovered that when dioxin activates a transcription factor known as aryl hydrocarbon receptor (AhR), it impairs AhR’s ability to fight off infection. According to a June 9, 2009, URMC press release, dioxin is a ubiquitous incineration byproduct that humans ingest “most often through meat, dairy products, fish and shellfish,” after which point the chemical “settles in fatty tissues.”

“We showed definitively that a known and abundant pollutant has an adverse effect on the way mammary glands develop during pregnancy,” Lawrence was quoted as saying. “The best thing people who are concerned about this can do is think about what you eat and where your food comes from. We’re not suggesting that we all become vegans—but we hope this study raises awareness about how our food

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sources can increase the burden of pollutants in the body. Unfortunately, we have very little control over this, except perhaps through the legislative process." See *The Daily Green*, June 10, 2009.

Researchers Allege Link Between Soft Drink Consumption and Low Potassium Levels

Greek scientists have published a study in the *International Journal of Clinical Practice* that reportedly examines six cases of cola-induced potassium deficiency (hypokalemia) involving muscle weakness and paralysis in adults. V. Tsimihodimos, et al., "Cola-induced hypokalemia: pathophysiological mechanisms and clinical implications," *The International Journal of Clinical Practice*, June 2009. Researchers with the University of Ioannina, Greece, have identified six reported occurrences since 1994 of hypokalemia in adults who consumed several liters of soda per day. "Fortunately," stated the lead author, "all patients had a rapid and complete recovery after the discontinuation of cola ingestion and the oral or intravenous supplementation of potassium."

According to a companion editorial by Associate Professor of Medicine C.D. Packer of the Case Western Reserve University School of Medicine, the study authors "make a compelling argument that potassium depletion should be added to the long list of soft drink-related health problems." The editorial encourages internists to start asking adult patients about their soft drink consumption, especially if the patient has symptoms of cardiovascular disease. "One might argue that people who drink 3-10 liters of cola per day are outliers, and that excessive soft drink consumption at this level is so rare that it is not a public health issue," writes Packer. "The problem is that we have every reason to think that it is not rare." See *Reuters*, June 5, 2009.

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

