

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Health Advocates Call on President Obama to Combat Obesity with New Commission

President Barack Obama (D) has been urged by health organizations, nutrition experts and physicians to sign an executive order creating a Presidential Commission on Healthy Weights, Healthy Lives to take on the nation's escalating rates of obesity. In a June 22, 2009, letter to the president, signatories suggested that the United Kingdom's anti-obesity campaign could act as a model.

"The increased rates of obesity will negate many of our nation's investments in health care and could actually condemn youths to shorter life spans than their parents," the letter stated. "Each year, obesity causes tens of thousands of premature deaths and tens of billions of dollars in avoidable medical costs. Obesity also leads to heart-wrenching psychosocial problems, such as difficulty making friends, stigmatization, and discrimination in employment."

Groups that signed the letter included the Center for Science in the Public Interest (CSPI), American Diabetes Association, American Public Health Association, National Consumers League, Partnership for Prevention, Shape Up America, Trust for America's Health, United Fresh Produce Association, and Yale University's Rudd Center for Food Policy and Obesity.

Michael Jacobson, executive director of CSPI, which organized the effort, was quoted as saying that Obama and his wife "have been enthusiastic proponents of healthy eating, gardening, and improving school foods, and the administration is sending so many of the right signals with regard to appointments. Their challenge is to harness the new national excitement about nutrition and translate that into government policies that actually promote health."

CSPI contends that obesity leads to \$95 billion per year in medical costs, about half of which are paid by Medicare and Medicaid. See *CSPI News Release*, June 22, 2009.

Proposed Application of Endorsement Guidelines to Blogging Raises Concerns

While the Federal Trade Commission (FTC) considers comments submitted by stakeholders to its proposed advertising endorsement guideline amendments, industry and blogging interests have reportedly expressed concerns about their ambiguity

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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.

and suggested that voluntary ethical standards would best police the practice of "social media marketing."

The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, last updated in 1980, if applied to bloggers who are paid to endorse products or services, would require bloggers to substantiate their product performance claims without specifying the proof needed to satisfy the claim. The amended guidance would also require disclosure of compensation arrangements, ranging from product coupons and cash payments to free products or services and pay-per-click links to sites that sell the product.

According to a news source, if the guideline amendments are adopted later in 2009, violators could face FTC stop orders, restitution to customers or civil penalties. See *The Associated Press*, June 21, 2009; *ABA Journal*, June 22, 2009.

In a related development, a recent survey of 500 marketers found that nearly two-thirds plan to increase their budgets for social media marketing in the second half of 2009. The survey reportedly indicates that marketers believe the ability "to communicate relevant messages within social networks is critical to a business' success in the medium." See *Center for Media Research, Research Brief*, June 24, 2009.

European Ministers Approve Sale of Food from Offspring of Cloned Animals

European agricultural ministers have approved the sale of meat and milk from the direct offspring of cloned animals, but those products reportedly still have to receive the approval of the European Food Safety Authority (EFSA) before they can be sold in the European Union. Meat and milk from cloned animals themselves cannot be sold.

An EFSA report issued in July 2008 apparently concluded that "there is no indication that differences exist in terms of food safety for meat and milk of clones and their progeny compared with those from conventionally bred animals. Such a conclusion is based on the assumption that meat and milk are derived from healthy animals, which are subject to relevant food safety controls." The agency has conceded that the limited number of studies does cast uncertainty on the risks related to consumption of food derived from cloned animals.

In 2008, the [Food and Drug Administration](#) approved the sale of meat and milk from cloned cattle, pigs, goats and their offspring without requiring that the products be labeled as such. See *Deutsche Welle*, June 22, 2009.

LITIGATION

First Lawsuit Filed in *E. coli* Raw Cookie-Dough Outbreak

Food litigation lawyer William Marler has apparently filed the first lawsuit against Nestle USA for injury allegedly caused by *E. coli*-contaminated cookie dough. The outbreak, which has reportedly infected more than 70 people in 30 states since March 2009, has been linked through food surveys to the consumption of raw refrigerated cookie dough, which has been recalled. According to news sources, a

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Nestle facility in Danville, Virginia, has been closed and is being inspected by federal microbiologists and food safety investigators. Samples from batches of the purportedly implicated dough have been tested, and no contamination has apparently been found to date.

E. coli is not typically associated with eggs, which are the only ingredient in the cookie dough that could potentially cause food-borne illness if contaminated with *Salmonella* and consumed raw. Health officials and food producers are reportedly puzzled over how *E. coli*, which lives in cattle intestines, could have ended up in cookie dough. They are analyzing all of the ingredients, testing the factory's equipment and interior, checking the health of Nestle workers, and also considering whether intentional contamination may have occurred. Meanwhile, the Centers for Disease Control and Prevention has posted [information](#) about the outbreak on its Web site.

Nestle has reportedly recalled every variety of Nestle Toll House cookie dough it makes and issued the following statement: "While the *E. coli* strain implicated in this investigation has not been detected in our product, the health and safety of our consumers is paramount so we are initiating this voluntary recall. We have been and will continue to cooperate fully with the Food and Drug Administration and the Centers for Disease Control in this investigation." See *The Washington Post*, June 21, 2009; *Businesswire* and *FoodProductionDaily.com*, June 22, 2009.

Humane Society Lacks Standing to Challenge Foie Gras Rules, Says State Appeals Court

A New York appeals court has dismissed a lawsuit that sought a declaration from the state agricultural department that foie gras is an adulterated food product which poses a risk to human health. *In re: Humane Soc'y of the U.S., Inc. v. Brennan*, No. 506189 (N.Y. App. Div., decided June 18, 2009). According to the court, the plaintiff lacked standing to bring the suit.

The Humane Society and other interested parties had unsuccessfully petitioned the Commissioner of Agriculture and Markets to issue an adulterated food product declaration as to foie gras. A trial court dismissed the plaintiffs' subsequent declaratory judgment action for lack of standing, and they appealed.

According to the appeals court, to establish standing, "petitioners were required to demonstrate that the Commissioner's declination to issue a declaratory ruling caused them an injury-in-fact different from the general public." The court noted that commission declaratory rulings are discretionary and stated, "even assuming that force-feeding ducks caused the birds to become diseased animals, rendering their harvested livers adulterated food products," because the commissioner timely responded to plaintiffs' request, the plaintiffs did not "suffer an injury within the zone of interests protected by" the state's administrative procedure law.

Maker of Energy/Weight Loss Beverage Faces Class Action Claims

A putative class action has been filed in a federal court in California against the company that makes Redline® beverages and supplements, alleging that some of

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the ingredients cause “effects that go beyond the Product’s goal of energy enhancement and weight loss.” *Aaronson v. Vital Pharms., Inc.*, No. 09-1333 (U.S. Dist. Ct., S.D. Cal., filed June 19, 2009).

While the product labels apparently warn consumers about potential effects such as rapid heartbeat, dizziness, headache, and shortness of breath, the named plaintiff contends that the warnings are inadequate. According to the complaint, the defendant markets the product as a drug without having obtained Food and Drug Administration approval.

Alleging violations of California consumer protection laws, fraudulent concealment, breach of express and implied warranties, negligence, and design and manufacturing defects, the plaintiff seeks to certify a nationwide class of product purchasers. The plaintiff also asks the court to enjoin the defendant’s deceptive marketing and award actual and punitive damages.

Ninth Circuit Denies Petition for Panel Rehearing in Roundup Ready® Alfalfa Litigation

In September 2008, a divided panel of the Ninth Circuit Court of Appeals upheld the injunction imposed by a district court on the sale of Monsanto’s Roundup Ready® alfalfa until the U.S. Department of Agriculture (USDA) completes an environmental impact statement under the National Environmental Policy Act. Additional details about the court’s ruling appear in issue 274 of this Update. The appeals court has now issued an amended opinion indicating that the petition for panel rehearing and for rehearing en banc have been denied. [*Geertson Seed Farms v. Johanns, No. 07-16458 \(9th Cir., decided June 24, 2009\).*](#)

Thus, unless the government or Monsanto Co. successfully appeals the matter to the U.S. Supreme Court, the company will be unable to sell its genetically modified seeds until the USDA prepares a study on how the crop could affect neighboring crops. A spokesperson for the Center for Food Safety, one of the plaintiffs in the case, was quoted as saying that the ruling was “a major victory for consumers, for farmers and for the public as far as protecting their rights to sow the crop of their choice and eat the food of their choice.” See *Reuters*, June 24, 2009.

OTHER DEVELOPMENTS

EU Farmers Stage Protest Against Low Milk Prices

European farmers recently staged a demonstration outside a meeting of EU agriculture ministers in Luxembourg City, where protesters blocked traffic with tractors, burned a bale of hay and spilled milk in opposition to softening commodity prices. Led by Copa-Cogeca and the European Milk Board, the protesters called on “the heads of state and government to set clear political guidelines for addressing the crisis in the dairy sector,” according to a June 18, 2009, press release. “We want to draw the public’s attention to how serious the situation is,” stated Copa-Cogeca Secretary General Pekka Pesonen. “Having sustainable food production in Europe is at least as vital as having a strong banking sector.”

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The European Commission has reportedly reinstated export subsidies and purchasing quotas in an emergency effort to shore up dairy markets, but EU Agriculture Commissioner Mariann Fischer Boel has also urged retailers to explain why plummeting wholesale milk prices have not translated into consumer savings. According to Fischer Boel, the average retail price for milk has declined only 2 percent since it spiked in summer 2008, while producer prices have fallen by 50 percent during the same time period. The commissioner has recommended a "transparent system," as well as a code of conduct, to see "where the added value is disappearing." Fischer Boel was quoted as saying, "If they [retailers] don't find a solution, the ultimate worst-case scenario would be that farmers would stop producing." See *The Guardian*, June 22, 2009; *The Irish Times*, June 23, 2009; *The London Times*, June 24, 2009.

French Market Study Supports Reduction of Alcohol in European Wines

The French National Institute for Agronomic Research has released the results of a market survey reportedly suggesting that European consumers cannot distinguish between wines with 9 to 11 percent alcohol content by volume and those with 12 to 14 percent. Twelve scientific teams have apparently "demonstrated that producers could reduce the alcohol content by up to three percentage points without an ordinary drinker noticing," according to a June 22, 2009, article in *The London Times*. "In blind tastings, the French consumers like quality wines with a reduced alcohol content as much as standard wines," stated the institute's report.

The results have challenged traditional wine mores in Europe, which previously prohibited a method used in the United States and Australia to remove excess alcohol from finished products via osmosis. Wine producers, however, have asked the European Union to approve this process, known as de-alcoholization, in light of slumping wine sales and a rise in anti-drinking campaigns. "It's absolutely absurd for Europe to prohibit this at a time when health officials are trying to persuade people to consume less alcohol," one producer was quoted as saying.

MEDIA COVERAGE

Nicholas D. Kristof, "Lettuce From the Garden, With Worms," *The New York Times*, June 21, 2009

"Over the years... I've become nostalgic for an occasional bug in my salad, for an apple that feels as if it were designed by God rather than by a committee," writes *New York Times* columnist Nicholas Kristof in this op-ed article promoting *Food, Inc.*, "a terrific new documentary" that purportedly offers "a powerful and largely persuasive diagnosis of American agriculture." Kristof rehashes several key arguments made in the film, focusing on genetically modified livestock, conditions at "huge confinement operations" and "the massive routine feeling of antibiotics to farm animals." He also criticizes agribusiness companies for allegedly exerting "huge political influence" and sending industry leaders to fill regulatory posts at the Food and Drug Administration. "We even inflict unhealthy food on children in the school lunch program, and one in three Americans born after 2000 is expected to develop

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diabetes," concludes Kristof, who urges consumers to vote with their wallets to change the current system.

SCIENTIFIC/TECHNICAL ITEMS

Study Links Safe Levels of BPA to Reproductive Health Issues

A recent study has reportedly claimed that exposure to bisphenol A (BPA) at levels currently considered safe for humans can allegedly cause "significant reproductive health effects" in rats. Heather B. Adewale, et al., "Neonatal bisphenol-A exposure alters rat reproductive development and ovarian morphology without impairing activation of gonadotropin releasing hormone neurons," *Biology of Reproduction*, June 17, 2009. Researchers from the National Institute of Environmental Health Sciences (NIEHS) and North Carolina State University reported that female rats experienced early onset puberty when given a BPA dose of 50 micrograms per kilogram of body weight ($\mu\text{g}/\text{kg}$) during the first four days of life, while those exposed to BPA levels of 50 milligrams per kilogram of body weight (mg/kg) "developed significant ovarian malformations and premature loss of their estrus cycle."

According to the lead researcher, "The 50 mg/kg level is important because it is equivalent to the U.S. Environmental Protection Agency's [EPA's] 'Lowest Observable Adverse Effect Level' for BPA. So, by definition, we should not have seen significant effects at or below this level, but we did." The study authors have also noted that 50 $\mu\text{g}/\text{kg}$ is EPA's listed reference dose for BPA, "meaning it is the level of BPA that EPA says a person can be exposed to on a daily basis without expecting any adverse effects after a lifetime of exposure." See *NC State University Press Release*, June 17, 2009; *FoodProductionDaily.com*, June 19, 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.

