

Food & Beverage

LITIGATION UPDATE

Issue 48 • September 10, 2003

Table of Contents

Legislation, Regulations and Standards

- [1] FTC Issues Report on Alcohol Industry Self-Regulation1
- [2] HHS-Sponsored Report from National Academies Calls for Broad Commitment to Reduce Underage Drinking1
- [3] Dietary Guidelines Advisory Committee to Hold First Meeting.....2
- [4] New House Legislation Targets Antibiotics in Poultry Used by School Programs.....2
- [5] Substance Abuse Inquiry in Australia Culminates in Alcohol Warnings Recommendation2

Litigation

- [6] EU Court Upholds Precautionary Principle; Member States Can Ban GM Foods.....3
- [7] Wisconsin Plaintiff Claims Smuckers Unjustly Enriched for Deceptive Claims About Fruit Spreads.....3
- [8] Kentucky Court Rules Raw Oyster Warning Is Issue for Jury3
- [9] Reactions to Obesity Lawsuit Dismissal Mixed4

Scientific/Technical Items

- [10] Urban Sprawl Purportedly Linked to Health Issues4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Issues Report on Alcohol Industry Self-Regulation

The FTC has issued [a report](#) focusing on the effect on youth of flavored malt beverage (FMB) advertising and whether the alcohol industry has implemented 1999 commission recommendations regarding self-regulation. The investigation was initiated at the request of the House and Senate Appropriations committees. Overall, the investigation concluded that no evidence indicates that FMB advertising has targeted youth and that the industry's self-regulation regarding advertising to minors has improved since 1999, particularly in adopting external review mechanisms to monitor compliance with industry advertising code standards. FTC notes that a comprehensive alcohol policy aimed at reducing underage drinking must also address the ways teens obtain liquor. According to the report, younger minors often obtain liquor from noncommercial sources -- e.g., friends, parents, strangers -- while older teenagers are often able to obtain it at commercial outlets. In light of these findings, FTC recommends changing adult attitudes toward teen drinking through educational programs and calls for public support of various stakeholders' efforts to better enforce minimum-age purchase laws.

Department of Health and Human Services (HHS)

[2] HHS-Sponsored Report from National Academies Calls for Broad Commitment to Reduce Underage Drinking

The National Research Council and Institute of Medicine of the National Academies have released [a congressionally mandated report](#) that recommends a nationwide strategy to reduce underage drinking. The report, *Reducing Underage Drinking: A Collective Responsibility*, calls for increases in excise taxes on alcoholic beverages, especially beer; tougher enforcement of underage drinking laws; strengthened advertising codes; and consideration of content about alcohol use in rating films, among other matters. According to the report, underage drinking costs the nation \$53 billion annually including costs for traffic accidents and violent crimes. While more youth drink than smoke tobacco or use other illegal drugs, government spending to prevent underage drinking is far less than for drug abuse and tobacco prevention, says the report.

The committee that produced the report has concluded that only a sustained and focused effort, which includes "parents and other adults, alcohol producers, wholesalers and retail outlets, restaurants and bars, entertainment media, schools, colleges and universities, the military, landlords, community organizations, and youths themselves," will successfully address the problem. Recommendations range from a national media campaign to an indus-



try-funded foundation “with the sole mission of preventing and reducing underage drinking.”

Regarding alcohol advertising, the report notes “Although the evidence regarding the causal effects of alcohol advertising on underage consumption is inconclusive, it has been amply documented that there is a large underage market for alcohol, that advertising reaches a substantial underage audience, and that many commercial alcohol messages are particularly appealing to youth.” The report calls for changing or establishing audience thresholds for various media where alcohol is advertised to reduce youth exposure and suggests that the industry avoid using cartoons or games that “are unusually attractive to children and teenagers.”

[3] Dietary Guidelines Advisory Committee to Hold First Meeting

The recently appointed 13-member Dietary Guidelines Advisory Committee (DGAC) will hold its first public meeting September 23-24, 2003, in Washington, D.C. The federal panel is charged with preparing by 2005 the revised Dietary Guidelines for Americans, a report whose findings will affect, among other things, proposed changes to the Food Guide Pyramid. The group is accepting public comments pertinent to its review of the guidelines throughout its deliberations. Shortly after HHS Secretary Tommy Thompson announced appointments to the committee in August, the Center for Science in the Public Interest called for the replacement of seven members of the group, claiming the individuals have “tight affiliations” with the food, drug and dietary-supplement industries. *See Federal Register*, September 4, 2003.

U.S. Congress

[4] New House Legislation Targets Antibiotics in Poultry Used by School Programs

A proposed bill ([H.R. 3022](#)) introduced by Representative Sherrod Brown (D-Ohio) would prohibit national school lunch programs from buying chicken that has been fed or administered fluoroquinolone antibiotics, e.g., ciprofloxacin. The use of certain antibiotic drugs in animal agriculture is believed by many to compromise human health by contributing to the development of antibiotic resistance. Chicken producers Tyson Foods, Perdue and Foster Farms have also evidently reduced their use of medically important antibiotics in healthy poultry. The School Nutrition Antibiotic Safety Act has been referred to the Committee on Education and the Workforce.

Australia

[5] Substance Abuse Inquiry Culminates in Alcohol Warnings Recommendation

The House Standing Committee on Family and Community Affairs has completed its inquiry into substance abuse and submitted [a report](#) to Australia’s Parliament with recommendations for strict policing of laws about supplying alcohol to minors, the regulation of alcohol advertising, inclusion of warning labels on beverage containers, imposing more severe penalties on drunk drivers, fitting all automobiles with alcohol ignition interlocks, and education campaigns. Titled *Road to Recovery*, the report also contains numerous recommendations about tobacco prevention and cessation and drug abuse. Alcohol was reportedly found to cost Australia \$7.6 billion annually in terms of pain, death and suffering, workplace productivity, and police and hospital costs. *See The Herald Sun*, September 8, 2003.



Litigation

Genetically Modified Foods

[6] EU Court Upholds Precautionary Principle; Member States Can Ban GM Foods

According to news sources, the European Union's (EU's) Court of Justice has ruled that while member states have the right to "temporarily restrict or suspend the marketing of [GM] foods in its territory," they must provide detailed evidence of suspected risks to sustain any ban. In so ruling, the court apparently upheld the EU's "precautionary principle," which allows "protective measures to be taken without having to wait until the reality and seriousness of risks become fully apparent, even if a full risk assessment proves impossible because of the inadequate nature of the scientific data available." The case involved Italy's ban in August 2000 of GM corn products made by Monsanto Co., Syngenta AG and Pioneer Hi-Bred International, Inc. An Italian court reportedly sent the case to the EU judges for further guidance after the companies appealed Italy's decision to outlaw their corn seed. See *The Wall Street Journal* and *Associated Press*, September 9, 2003.

Deceptive Trade Practices

[7] Wisconsin Plaintiff Claims Smuckers Unjustly Enriched for Deceptive Claims About Fruit Spreads

A lawsuit filed in a Wisconsin state court reportedly alleges that J.M. Smucker Co. has violated the state's Deceptive Trade Practices Act with its line of "Simply 100% Fruit" products. According to a press report, plaintiff Neal Loeb, who plans to seek class certification, relies on an analysis conducted by the Center for Science in the Public Interest (CSPI)

which found that some of these products actually contain less than 50 percent fruit. For example, the strawberry spread is 30 percent actual strawberries and 70 percent fruit syrup from apples and pineapples, lemon juice concentrate, pectin, red grape juice concentrate, and natural ingredients. CSPI apparently called on the Food and Drug Administration in May 2003 to "crack down on Smucker's false labeling, and to require all food companies to declare the percentages of key ingredients on the label." The lawsuit contends that consumers are paying a premium price for the fruit spreads, which contain less fruit than Smucker's fruit preserves, and the company has been unjustly enriched because it sold the products at an inflated price. Critics contend that CSPI has found only what already appears on the fruit spread labels and question the legitimacy of food-industry lawsuits spawned by other CSPI reports. See *Associated Press*, September 5, 2003; *ConsumerFreedom.com*, September 8, 2003; *CSPI News Release*, May 13, 2003.

Bacterial Contamination

[8] Kentucky Court Rules Raw Oyster Warning Is Issue for Jury

While agreeing with a trial court that the presence of *Vibrio* bacteria in raw oysters does not constitute either a manufacturing or a design defect, a Kentucky appeals court has nonetheless reversed a summary judgment ruling in favor of a restaurant owner, finding that allegations about selling the oysters without a warning raised a genuine issue of material fact. *Edwards v. Hop Sin, Inc.*, 2003 WL 22025888 (Kentucky Court of Appeals) (decided August 29, 2003). The *Vibrio* bacterium, a naturally occurring organism commonly found in oysters, allegedly caused plaintiff's septicemia, worsened his bad liver condition, and caused chronic swelling of



his leg and foot. According to the court, *Vibrio* does not pose a serious risk for healthy consumers, but because those with certain medical conditions can be made seriously or terminally ill by ingesting it, “a jury could find that in November 1998 knowledge of this grave risk was available to oyster producers and a reasonable producer would have deemed the risk substantial enough to warn against it.” A statute limiting the potential products liability of retailers was found inapplicable because a jury could find that the restaurant altered the product and forfeited the statutory immunity by failing to pass along to patrons the warnings attached to the oysters by the manufacturer.

Fast Food

[9] Reactions to Obesity Lawsuit Dismissal Mixed

Law professor and food-industry critic John Banzhaf has responded to the court’s dismissal of obesity-related litigation against McDonald’s Corp. by claiming that the ruling would not deter the burgeoning movement, said a news source. Further details about the court’s decision appear in issue 47 of this Update, September 4, 2003. Banzhaf was quoted as saying, “It took us 30 years to get a smoking case to court and over 700 dismissals. There are still many theories that have not been tested.” According to the chief executive of the National Restaurant Association, “these lawsuits are frivolous ... Judge Sweet’s decision and the polling data attest to the fact that personal responsibility plays a significant role in this complex issue.” Center for Science in the Public Interest Executive Director Michael Jacobson reacted to the ruling by calling on trial lawyers and state attorneys general to continue examining “how the courts could be used to promote better health and protect consumers. I hope the

legal system will be used to help rein in junk food ads aimed at kids, junk foods in schools, and chain restaurants that do not list calories on menus, as well as garden variety deceptive ads and labels.” See *The Chicago Tribune* and *PR Newswire*, September 5, 2003; *CSPI News Release*, September 4, 2003.

Scientific/Technical Items

Obesity

[10] Urban Sprawl Purportedly Linked to Health Issues

Adults living in sprawling communities weigh more and are more likely to suffer high blood pressure than their counterparts living in more compact areas, according to new research from the University of Maryland’s National Center for Smart Growth. R. Ewing, et al., “Relationship Between Urban Sprawl and Activity, Obesity, and Morbidity,” *American Journal of Health Promotion* Special Issue Sept/Oct 2003, pp.47-57. Using data from more than 200,000 people surveyed in 1998, 1999 and 2000, researchers examined the relationships between urban sprawl, physical activity, obesity, hypertension, heart disease, and diabetes. Adults living in 448 U.S. counties, all in metropolitan areas, were compared. The researchers found that those living in sprawling counties walked less for leisure, weighed more and were more likely to exhibit high blood pressure. On average, these adults weighed six pounds more than those living in the most compact counties. The researchers note that less leisure time walking did not account fully for the weight differences found and suggest they might, instead, result from driving rather than walking to conduct daily activities. The findings were published as part of topical issues in the *American Journal of Public Health* and the *American Journal of Health Promotion*.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Dale Walker 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 dwalker@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.}TM

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

