

Food & Beverage

LITIGATION UPDATE

Issue 114 • February 16, 2005

Table of Contents

Legislation, Regulations and Standards

- [1] Class Action Reform Expected to Become Law1
- [2] FTC Rejects Request for Product Placement Rule1
- [3] USDA to Reopen Canadian Border to Some Cattle Imports; Bipartisan Senate Coalition Challenges Implementation of the Plan2
- [4] USDA Solicits Comments on Priorities for Intergovernmental Biotechnology Task Force3

Litigation

- [5] McDonald's Settles Two *Trans*-Fats Lawsuits3

Other Developments

- [6] Upcoming Conference to Target Ways That Marketing Allegedly Undermines Children's Health, Values and Behavior3

Media Coverage

- [7] "Food Industry Touts More Healthful Fare, but Is It?" Jennifer Davis, *The San Diego Union-Tribune*, February 13, 20054

Scientific/Technical Items

- [8] Fruit Juices Linked to Weight Gain in Preschoolers ...4

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] Class Action Reform Expected to Become Law

By a vote of 72-26, the U.S. Senate last week passed legislation that would direct more class action lawsuits to federal courts. Business groups have for years sought such legislation, which they view as providing a fair, neutral forum for deciding lawsuits that can often have nationwide implications. The impetus for reform has grown in recent years because class action lawsuits have increasingly been brought before local judges in jurisdictions known as “judicial hellholes.”

“The class action bill will help end the phenomenon that we all recognize known as forum shopping,” said Majority Leader Bill Frist (R-Tenn.) just before the Senate vote. “Aggressive trial lawyers have found that a few counties are lawsuit friendly, and in these select state courts, judges are quick to certify a class action and juries are known to grant extravagant damage awards,” he said. Under current law, plaintiffs’ lawyers could easily avoid federal jurisdiction by naming a nominal in-state defendant or seeking damages of less than \$75,000 per plaintiff.

The Class Action Fairness Act ([S. 5](#)) provides federal courts with jurisdiction over class action lawsuits with more than \$5 million at stake involving plaintiffs and defendants who are residents of different states. State courts could continue to decide claims where a substantial number of class members are state residents and a primary defendant is a resident of that state. The Act also provides a Consumer Class Action Bill of Rights that protects class members from abusive settlements. The House of Representatives is expected to pass the Class Action Fairness Act and send it to the president for his signature later this week.

Federal Trade Commission (FTC)

[2] FTC Rejects Request for Product Placement Rule

The FTC has rejected a consumer rights group’s request for an investigation into product placement practices on television. In its September 2003 [petition](#) to FTC, the organization Commercial Alert asserted that “failure to prominently inform viewers of product placements is unfair and deceptive” and demanded regulations requiring disclosures such as “This program contains paid advertising for” at the beginning of TV programs. The group also wanted “clear and conspicuous” identification of product placements with the word “Advertisement” on the screen in



superscript as placements occurred.

In a February 10, 2005, [response](#) to Commercial Alert, FTC's associate director for advertising practices concluded that even though "there may be instances in which the line between advertising and programming may be blurred," additional regulations are unnecessary because "the existing statutory and regulatory framework provides sufficient tools for challenging any such deceptive acts or practices." Mary Engle said requiring disclosure that an advertiser paid for a product placement was unwarranted because consumers were not misled or deceived by most product placements as long as the products' performance or attributes were not discussed.

With respect to Commercial Alert's allegation that product placements in children's programming result in consumer injury because kids pester their parents to buy unhealthy products, Engle said "product placement seems no different than ordinary advertising. That it may result in children asking their parents to buy products seen on television does not constitute an unfair or deceptive practice in violation of Section 5 of the FTC Act." Engle added that any further agency action on the product placement issue would be evaluated on a case-by-case basis.

Commercial Alert Executive Director Gary Ruskin was reportedly surprised by FTC's decision, charging that the agency had "essentially endorsed deceptive and dishonest practices of the product placement industry and turned its back on children who are suffering from an epidemic of marketing-related diseases." See *Advertising Age*, February 10, 2005; *The Washington Post and Commercial Alert Press Release*, February 11, 2005.

U.S. Department of Agriculture (USDA)

[3] **USDA to Reopen Canadian Border to Some Cattle Imports; Bipartisan Senate Coalition Challenges Implementation of the Plan**

USDA Secretary Mike Johanns announced last week that the agency will resume Canadian imports of live cattle younger than age 30 months and beef products derived from cattle of the same age as of March 7, 2005. USDA will not, however, allow imports of older cattle or beef products derived from older animals. "Our ongoing investigations into the recent finds of BSE in Canada in animals over 30 months are not complete," Johanns said. "Therefore, I feel it is prudent to delay the effective date for allowing imports from animals 30 months and over."

Johanns' decision was met with resistance by a bipartisan group of U.S. senators led by Kent Conrad (D-S.D.), who on Monday introduced a joint "resolution of disapproval" (S.J. Res. 4) that would nullify USDA's designation of Canada as a "minimal risk" region for BSE and halt the March 7 resumption of beef imports. "It is outrageous for USDA to continue pushing forward with this decision to renew cattle trade with Canada – a country known to have mad cow in its herd and a record of failure in its attempts to ban illegal feed," Conrad was quoted as saying. "Instead of taking precautions to protect our markets and our consumers, USDA is playing a game of chance," he said. The United States prohibited imports of Canadian cattle in May 2003 after tests revealed that a North Alberta downer cow was infected with BSE. See *USDA Press Release*, February 9, 2005; *American Meat Institute.com* and *Press Release of Senator Kent Conrad*, February 10, 2005.



Codex Alimentarius Commission

[4] USDA Solicits Comments on Priorities for Intergovernmental Biotechnology Task Force

The U.S. Department of Agriculture (USDA) is [soliciting](#) public comments on priorities for the Codex Alimentarius Commission's newly established ad hoc Intergovernmental Task Force on Food Derived from Biotechnology. The task force is charged with developing standards, guidelines and recommendations for biotech foods or for traits introduced into foods by biotechnology. USDA is hosting a public meeting about the work of the task force on March 3, 2005, in Washington, D.C. See *Federal Register*, February 15, 2005.

Litigation

Deceptive Trade Practices

[5] McDonald's Settles Two *Trans*-Fats Lawsuits

McDonald's Corp. has agreed to pay \$8.5 million to settle a purported class action alleging the company deceived consumers by failing to switch to a lower-*trans*-fat cooking oil by the date mentioned in a 2002 public statement. [Fettke v. McDonald's Corp., No. CVO4-02754-WHA \(U.S. District Court, Northern District, California\) \(filed 7/8/04\)](#). The settlement also resolves an October 2003 lawsuit filed by plaintiffs' lawyer Stephen Joseph on behalf of [BanTransFats.com](#), Inc., an organization he founded. Under terms of the settlement, McDonald's will reportedly donate \$7 million to the American Heart Association to fund public education programs about *trans* fats and spend \$1.5 million on a campaign to keep the

public apprised of the company's progress in switching to non-partially hydrogenated cooking oil. McDonald's will also pay \$7,500 to BanTransFats.com and \$7,500 to plaintiff Katherine Fettke, an amount she says she intends to donate to charity. See *McDonald's Press Release*, February 9, 2005; *BanTransFat.com Press Release and Reuters*, February 11, 2005.

Other Developments

[6] Upcoming Conference to Target Ways That Marketing Allegedly Undermines Children's Health, Values and Behavior

The Campaign for a Commercial-Free Childhood, a Boston-based coalition that "counters the harmful effects of advertising on children" is sponsoring a [three-day summit](#) on March 11-13, 2005, titled "Consuming Kids: How Marketing Undermines Children's Health, Values & Behavior." Sessions at the event will include those focusing on food marketing allegedly aimed at impoverished children, alcohol advertising and buzz marketing. Speakers will include *New York Times Magazine* "Consumed" columnist Rob Walker, author Jean Kilbourne ([Can't Buy My Love: How Advertising Changes the Way We Think and Feel](#)) and Margo Wootan, nutrition policy director for the Center for Science in the Public Interest. The conference will be held on the campus of Howard University in Washington, D.C.



Media Coverage

- [7] **“Food Industry Touts More Healthful Fare, but Is It?”** Jennifer Davis, *The San Diego Union-Tribune*, February 13, 2005

“A lot of companies are trying to paint themselves as part of the solution because they know damn well that they helped create the problem,” says a California-based consumer advocate in this skeptical overview of food manufacturers’ efforts to reformulate products in response to health concerns. “Public perception is critical to making sure that lawsuits don’t go forward and that the government won’t step up its regulation,” Michele Simon, director of the [Center for Informed Food Choices](#), is further quoted as saying. “The real question,” according to the article’s author, “is just how much some restaurants and companies can change with the times” because the bulk of their profits has traditionally come from the success of processed foods.

Scientific/Technical Items

Obesity

- [8] **Fruit Juices Linked to Weight Gain in Preschoolers**

Consumption of sweet drinks, especially fruit juices, could double the risk of many 2- and 3-year-olds of becoming overweight, according to a study in the February 2005 journal *Pediatrics*. (J. Welsh, et al., “Overweight Among Low-Income Preschool

Children Associated with Consumption of Sweet Drinks: Missouri, 1999-2002,” *Pediatrics* 115: 223-229, 2005.) The study followed nearly 11,000 Missouri preschoolers enrolled in a federally funded nutrition program and analyzed the effect of sweet drinks on kids in three groups: (i) normal and underweight, (ii) those at risk of becoming overweight and (iii) overweight. Most of the children consumed more fruit juice than soft drinks or sweetened fruit drinks. Children at risk of being overweight at the beginning of the study were twice as likely to become overweight if they drank one or more sweet drinks daily.

“Juice is only minimally better than soda,” childhood obesity expert David Ludwig, M.D., was quoted as saying in response to the study’s findings. “With the possible exception of milk, children do not need any calorie-containing beverages. What is needed to replace fluid loss and satisfy thirst is the same beverage we’ve been drinking for millions of years, and that’s water,” he said. *See Associated Press*, February 7 and 11, 2005.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by
Mark Cowing 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 mcowing@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^{LLP}

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.

