

Food & Beverage

LITIGATION UPDATE

Issue 117 • March 9, 2005

Table of Contents

Legislation, Regulations and Standards

- [1] Federal Court's Preliminary Injunction Delays Reopening of Canadian Border to Cattle Imports; Senate Backs Joint Resolution to Halt Resumption of Imports; Canadian Cattle Producers Seek Compensation Under NAFTA1
- [2] FAS Seeks Nominations for Individuals to Serve on Trade Committees2
- [3] U.K. Agency Launches Consultation on Transitioning to BSE Testing2
- [4] Expert Committee Advocates Continued Efforts to Reduce Acrylamide Levels in Food2

Litigation

- [5] Parents in New York and Wisconsin File Purported Class Actions Against Alcohol Manufacturers3
- [6] Consumer Advocacy Group Seeks FDA Regulation of Salt as a Food Additive4

Other Developments

- [7] Liquor Industry Trade Group Issues Report on Advertising Complaints4

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

- [1] **Federal Court’s Preliminary Injunction Delays Reopening of Canadian Border to Cattle Imports; Senate Backs Joint Resolution to Halt Resumption of Imports; Canadian Cattle Producers Seek Compensation Under NAFTA**

USDA’s plan to resume Canadian imports of live cattle younger than age 30 months and beef products derived from cattle of the same age on March 7, 2005, has been delayed by a [preliminary injunction](#) issued last week by a federal court in Montana. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture et al.*, No. CV-05-06-BLG-RFC preliminary injunction granted (D. Mont., Billings Div. 3/2/05).

“The facts strongly suggest that the USDA, ignoring its statutory mandate to protect the health and welfare of the people of the United States, established its goal of re-opening the border to the importation of live beef from Canada and thereafter attempted to work backwards to support and justify this goal,” U.S. District Judge Richard Cebull said in a 28-page opinion. The United States prohibited imports of Canadian cattle in May 2003

after tests revealed that a North Alberta downer cow was infected with bovine spongiform encephalopathy (BSE). The temporary injunction will keep the ban in place pending resolution of the case in which a nonprofit group representing cattle producers contends that relaxing import restrictions will expose U.S. consumers to “an increased risk of an invariably fatal disease associated with consumption of BSE-contaminated meat, will increase the risk of invariably fatal BSE infection in cattle in the United States, and will expose U.S. cattle producers to severe economic hardship.”

In a related development, President George W. Bush has reportedly vowed to veto legislation aimed at blocking implementation of the USDA rule that (i) established conditions under which countries with effective BSE prevention and detection measures could be granted minimal-risk status and (ii) designated Canada as the first such minimal-risk region. By a vote of 52-46, the U.S. Senate last week passed a resolution ([S. J. Res. 4](#)) that disapproves the minimal-risk rule and reopening the Canadian border. The House Committee on Agriculture has yet to take action on companion legislation (H.J. Res. 23).

Agriculture Secretary Mike Johanns was reportedly “very disappointed” by both the preliminary injunction and the Senate’s vote to disapprove the minimal-risk rule and reiterated that the agency “remains confident that the requirements of the minimal-risk rule, in combination with the animal and public health measures already in place in the



United States and Canada, provide the utmost protection to both U.S. consumers and livestock.”

Meanwhile, a new [Public Citizen report](#) on Chapter 11 provisions of the North American Free Trade Agreement describes claims brought by Canadian feedlot operators who seek some \$300 million to cover economic losses they have incurred as a result of the beef ban. *See The Seattle Times*, February 22, 2005; *Public Citizen Press Release*, February 23, 2005; *USDA Press Releases*, March 2 and 3, 2005; *CIDRAP News*, March 4, 2005; *R-CALF News Release*, March 7, 2005.

[2] FAS Seeks Nominations for Individuals to Serve on Trade Committees

The agriculture department’s Foreign Agriculture Service (FAS) is [soliciting nominations](#) for persons to serve on the Agricultural Policy Advisory Committee (APAC) for Trade and the six Agricultural Technical Advisory Committees (ATAC) for Trade. Members of each 35-member committee are required to be conversant with agricultural trade as it relates to policy and commodity-specific products. APAC members are charged with providing advice on negotiating objectives and bargaining positions before the United States enters into a trade agreement and the operation of various U.S. trade agreements. Members of the ATAC provide advice on trade issues affecting domestic and foreign production in the following sectors: (i) animals and animal products, (ii) fruits and vegetables, (iii) grains, feed and oilseeds, (iv) processed foods, (v) sweeteners and sweetener products, and (vi) tobacco, cotton, peanuts, and planting seeds. FAS must receive written nominations by March 31, 2005. *See Federal Register*, March 2, 2005.

United Kingdom (U.K.)

[3] U.K. Agency Launches Consultation on Transitioning to BSE Testing

Britain’s Food Standards Agency (FSA) is seeking [public comments](#) on proposals for implementing a managed transition for replacing its Over Thirty Months (OTM) rule to a system of testing cattle for bovine spongiform encephalopathy (BSE). Proposals in the consultation include (i) transitioning from the OTM rule to testing as soon as the testing system is deemed “robust,” (ii) lifting the OTM rule for imported and domestic beef at the same time and (iii) introducing new regulations to enforce the testing regime. One of three primary BSE controls in Britain, the OTM rule was established in 1996 and prohibits older cattle from entering the human food chain. The other controls require the removal of specified risk material and prohibit the feeding of mammalian meat and bone to other animals. Similar consultations have been launched in Scotland, Wales and Northern Ireland. *See FSA Press Release*, March 7, 2005.

World Health Organization (WHO)

[4] Expert Committee Advocates Continued Efforts to Reduce Acrylamide Levels in Food

A [report](#) issued late last week by the Joint Food and Agriculture Organization/World Health Organization Committee on Food Additives and Contaminants encourages food manufacturers to continue to evaluate ways of reducing acrylamide levels in food because animal studies have purportedly shown that ingesting high doses of the chemical can result in reproductive problems



and cancer. Acrylamide is a byproduct that forms when certain carbohydrate-rich foods are fried, baked or roasted at high temperatures. The committee's other recommendations include (i) using PBPK modeling to better link human biomarker data with exposure assessments and toxicological effects in experimental animals and (ii) collecting occurrence data from developing countries. The Food and Drug Administration is conducting an ongoing survey of the chemical as part of its action plan for acrylamide in food. See *Reuters* and *FAO Press Release*, March 4, 2005.

Litigation

Youth-Marketing Claims

[5] Parents in New York and Wisconsin File Purported Class Actions Against Alcohol Manufacturers

Parents in Albany County, New York, and Dane County, Wisconsin, filed purported class actions against alcohol companies in February 2005. Similar to other cases filed across the country, the complaints allegedly arise "from a long-running, sophisticated, and deceptive scheme ... to market alcoholic beverages to children and minors."

Sciocchetti v. Advanced Brands & Importing Co., et al. No. 102205 (Supreme Court of New York, Albany County) (complaint filed 2/16/05) and *Tomberlin v. Adolph Coors Co.*, No. 05CV0545 (Circuit Court of Dane County, Wisconsin) (complaint filed 2/23/05).

Both complaints allege that each defendant "willfully, intentionally, recklessly and negligently engages in extensive unfair and deceptive marketing efforts directed at underage consumers" and that

each has "made false, unfair, and deceptive representations that its advertising and marketing efforts are in compliance with" industry codes. The complaints also allege that defendants conspired to create "a false and deceptive public image of self-regulation and responsibility."

The [*Sciocchetti complaint*](#) asserts the following causes of action under New York law: (1) deceptive trade practices; (2) unjust enrichment; (3) negligence; and (4) fraudulent concealment. Plaintiffs seek to disgorge defendants of unjustly gained profits, including interest and costs, to enjoin defendants from marketing alcoholic beverages to underage consumers, and to award actual damages, costs of investigation and attorney's fees.

The [*Tomberlin complaint*](#) brings the following causes of action under Wisconsin law: (1) deceptive trade practices; (2) unjust enrichment; (3) negligence per se; (4) negligence; (5) public nuisance; and (6) fraudulent concealment. Similarly, plaintiffs seek to disgorge defendants' profits allegedly gained by selling alcohol to underage consumers, to enjoin defendants from marketing to underage consumers, and award "actual damages sustained by the Plaintiff Classes plus treble damages or \$1,500 per violation, whichever is greater, punitive damages, and attorneys fees, costs of suit, and interest."

Other lawsuits against alcohol manufacturers that contain youth marketing allegations are pending in Ohio, the District of Columbia, Colorado, and North Carolina.



Food Ingredients

[6] Consumer Advocacy Group Seeks FDA Regulation of Salt as a Food Additive

Claiming that “reducing per capita salt consumption in the United States could save tens of thousands of lives each year,” the Center for Science in the Public Interest (CSPI) has [petitioned](#) the U.S. Court of Appeals for the District of Columbia to compel the Food and Drug Administration (FDA) to complete its review of the regulatory status of salt and either affirm its current status as “generally recognized as safe” (GRAS) or declare it a food additive. “There is no way the FDA can look at the science and say with a straight face that salt is ‘generally recognized as safe,’” CSPI Director Michael Jacobson was quoted as saying. “In fact, salt is generally recognized as unsafe because it is a major cause of heart attacks and stroke. The federal government should require food manufacturers to gradually lower their sodium levels,” Jacobson said.

Among other things, CSPI asks the court to issue a writ of mandamus directing FDA “to publish within 180 days of the Court’s order, a notice (1) stating its decision either to affirm or revoke the GRAS status of salt, and (2) if FDA revokes salt’s GRAS status, proposing guidelines for adding salt to processed foods, such as limits on amounts per serving and special labeling, and providing an opportunity for the public to comment on the proposal.” In addition to filing its lawsuit, CSPI has also issued a report titled [Salt: The Forgotten Killer](#). See *Reuters and CSPI News Release*, February 24, 2005.

Other Developments

[7] Liquor Industry Trade Group Issues Report on Advertising Complaints

The Distilled Spirits Council of the United States (DISCUS) yesterday issued a [report](#) describing alleged violations of the industry’s code of responsible alcohol advertising and marketing during 2004. “This [report] demonstrates our industry’s strong commitment to responsibility,” DISCUS President Peter Cressy was quoted as saying. “The issuance of public reports will make the spirits industry’s self-regulatory process more visible, transparent and understandable to the public,” he said. The biannual report includes summaries of 15 complaints about the content or placement of specific print advertisements, marketing and Web site materials; the Code Review Board’s decision; and the advertisers’ subsequent actions. Most of the complaints focused on print ads in publications whose readership age brackets did not meet industry code standards. Revisions to the code in 2003 established a 70 percent adult demographic for all advertising placements and promotional events. See *DISCUS Press Release, Ad Age and The New York Times*, March 8, 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.

