

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Public Health Activists and Environmental Groups Urge FDA to Withdraw Approvals for Antibiotics Used as Agricultural Feed Additives; Senators Kennedy and Snowe Introduce Likeminded Legislation

Claiming that their continued use fails to comply with FDA safety criteria and contributes to antibiotic resistance in humans, five public health and environmental groups last week [formally](#) petitioned the FDA to withdraw approvals for seven classes of antibiotics used as agricultural feed additives. “These antibiotic feed additives aren’t used to treat sick animals,” the executive director of the American Public Health Association was quoted as saying. “They are put into feed for non-therapeutic purposes, that is to make animals grow a little faster, and to compensate for the crowded, stressful and often unhygienic conditions at the industrial-style facilities where most food animals in the U.S. are now raised.”

Signatories to the petition include the American Public Health Association, the American Academy of Pediatrics, Environmental Defense, Food Animal Concerns Trust, and the Union of Concerned Scientists. The seven classes of antibiotics the

groups wants FDA to prohibit in chicken, pork and beef production: (i) penicillins (natural penicillins, penase-resistant penicillins, antipseudomonal penicillins, and aminopenicillins); (ii) tetracyclines; (iii) aminoglycosides; (iv) streptogramins; (v) macrolides; (vi) lincomycin; and (vii) sulfonamides. See *The Wall Street Journal* and *The Chicago Tribune*, April 8, 2005.

Meanwhile, Senators Edward Kennedy (D-Mass.) and Olympia Snowe (R-Maine) have introduced the Preservation of Antibiotics for Medical Treatment Act of 2005 ([S. 742](#)). Among other things, the legislation would require FDA to withdraw approvals for non-therapeutic use of the seven classes of antibiotics (or any others used in humans) in food-producing animals after two years, unless drug manufacturers can prove that such use poses no risk to public health. It would also fund research and demonstration programs that reduce the use of antibiotics in livestock and poultry production. Representative Sherrod Brown (D-Ohio) is expected to introduce companion legislation in the House of Representatives.

U.S. Congress

[2] Democratic Lawmakers Reintroduce Legislation That Would Create Single Food Agency

Senator Richard Durbin (D-Ill.) and Representative Rosa DeLauro (D-Conn.) last week reintroduced [comprehensive legislation](#) (S. 729 and H.R. 1507)



aimed at reducing the incidence of foodborne illness by consolidating the responsibilities of various federal agencies under the umbrella of a new Food Safety Administration. Responsibilities of the new agency would include (i) conducting random inspections of *all* food processing facilities, (ii) providing increased oversight of imported foods and (iii) establishing new rules for tracing foods to their points of origin.

U.S. Department of Agriculture (USDA)

[3] USDA Fines Swiss Company \$375,000 for Sale of Unapproved Corn Seed

The agriculture department has reportedly fined Swiss agrichemicals company Syngenta \$375,000 for inadvertently selling unapproved genetically modified corn seed (Bt 10) to U.S. farmers from 2001-2004. "We welcome the settlement with the USDA and the government's conclusion that Syngenta's misidentification of Bt 10 corn, while a regrettable mistake, does not pose any risks to consumers, public health or the environment," a Syngenta spokesperson was quoted as saying. Terms of the settlement also reportedly require Syngenta to establish a training program to prevent similar incidents. The company admitted to inadvertently misidentifying and selling some 14,000 bags of the seed engineered to resist bugs to farmers in the United States, Canada and Argentina, an amount that could have planted an estimated 37,000 acres. Environmentalists apparently contend the unapproved corn could promote resistance to antibiotics. The Environmental Protection Agency is conducting a separate investigation of the incident. *See Associated Press*, April 8, 2005; *The New York Times*, April 9, 2005.

Litigation

Youth Marketing Claims

[4] Two More Purported Class Actions Accuse Alcohol Companies of Targeting Underage Consumers

Two putative class action lawsuits filed March 30, 2005, in Michigan and Florida state courts allege that alcohol manufacturers target underage consumers through product development and marketing. *Alston v. Advanced Brands & Importing Co. et al.*, No. 05-509294 CP (Third Circuit Court, Wayne County, Michigan) and *Konzbauer v. Adolph Coors Co. et al.*, No. 05004873 (Circuit Court of Broward County, Florida).

Parent [Viola Alston](#) asserts the following causes of action under Michigan law: (i) deceptive trade practices, (ii) nuisance, (iii) unjust enrichment, and (iv) negligence. She seeks 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 sustained by the Plaintiff and the Classes plus treble damages or \$1,500 per violation, whichever is greater, punitive damages, and attorneys' fees, costs of suit, and interest."

Plaintiff [Craig Konhauzer](#), who is presumably a parent or guardian of a child or children under age 21, brings the following causes of action under Florida law: (i) deceptive trade practices, (ii) unjust enrichment, (iii) negligence, (iv) public nuisance, and (v) fraudulent concealment. Similarly, he seeks to disgorge defendants of profits allegedly gained by selling alcohol to minors; to enjoin defendants from marketing to underage consumers; and to award actual damages, costs and interest.



David Boies III is lead plaintiffs' counsel in both cases. Nine marketing-related class actions against alcoholic-beverage manufacturers have been filed since November 2003.

Bovine Spongiform Encephalopathy (BSE)

[5] Canadian Cattle Producers Blame BSE Crisis on Federal Government in Putative Class Action

A legal group claiming to represent some 100,000 farmers across Canada last week reportedly filed suits in courts in Alberta, Saskatchewan, Ontario, and Quebec that accuse Agriculture Canada of negligence for failing to timely implement a ruminant feed ban that could have prevented the infection of Canadian herds with BSE and the subsequent closing of the U.S. border to certain cattle and beef exports. Plaintiffs seek CAN\$7 billion in damages.

According to news reports, the statement of claim alleges that at least 80 of 191 cattle imported from Ireland and the United Kingdom between 1982 and 1990 were rendered into animal feed and that as many as 10 of those animals came from BSE-infected herds in the U.K. "By the government's own admission, one or more of those 80 cattle are the most likely source of BSE in Canada," one of the plaintiffs' counsel was quoted as saying. "Where was the monitoring? Where was the government's concern for the health of Canadians? Why did the government fail so badly in the exercise of its regulatory responsibilities?" The claim also targets Ridley Corp. Ltd., a multinational manufacturer of animal feed, for allegedly failing to realize that its products could be infected with BSE. More information about the class action is available [here](#). See *The (Toronto) Globe and Mail*, April 11, 2005; *The Edmonton Journal*, April 12, 2005.

Patents

[6] Appeals Court Rejects Smucker's Bid to Patent Method of Producing PB & J Sandwich

The U.S. Court of Appeals for the Federal Circuit has reportedly upheld a U.S. Patent and Trademark Office appeals board's decision to reject two additional patents for the process that the J.M. Smucker Co. uses to produce Uncrustables, a sealed, crustless peanut butter and jelly sandwich. Attorneys for Smucker apparently argued that the crimping method used to produce the popular snack fare seals two pieces of bread by compression, but does not "smush" the edges, thereby differentiating the technique from the one commonly used to make raviolis or tarts. One of the three federal judges hearing the case reportedly said he feared that his wife might be infringing on the company's patent because she "often squeezes together the sides of their child's peanut butter and jelly sandwiches to keep the filling from oozing out." See *The Wall Street Journal*, April 7 and 11, 2005; *Associated Press*, April 7, 2005.

Other Developments

[7] Underage Youth Still Overexposed to Alcohol Advertising, New CAMY Report Alleges

American youth saw more magazine advertising for beer and distilled spirits between 2001 and 2003 than readers of legal drinking age, according to a [new report](#) issued by Georgetown University's Center on Alcohol Marketing and Youth (CAMY). The CAMY analysis reportedly included the review of some 10,455 magazine ads and concluded that 56



percent of the ads were positioned in publications with a “disproportionate” audience of underage readers. CAMY acknowledges the 2003 revisions to industry’s code of responsible advertising and marketing that established a 70 percent adult demographic for all ad placements and promotional events, but contends the 30 percent threshold “still does not offer adequate public health protection for our children.” Specific findings in the CAMY report include: (i) distilled spirits magazine ads reached

more than 90 percent of underage consumers ages 12 to 20 between 2001 and 2003; and (ii) beer manufacturers increased ad spending from \$31 million in 2001 to \$55 million in 2003, and underage consumers were exposed to more beer advertising per capita than adults over all three years. *See CAMY News Release, April 7, 2005.*



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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.

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