

Food & Beverage

LITIGATION UPDATE

Issue 156 • January 18, 2006

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] **USDA Publishes Interim Final Rule Concerning Sodium Content and “Healthy” Labeling**

Citing the need for additional time to further evaluate what levels of sodium should be associated with use of the term “healthy” on individual meat and poultry products, USDA’s Food Safety and Inspection Service last week [announced](#) that current regulations requiring such products to contain no more than 480 milligrams of sodium will remain in effect until further notice; meal-type products whose labels bear any derivative of the term “health” must continue to contain no more than 600 mg. of sodium. The agency is deferring indefinitely implementation of regulations that would have mandated a limit of 360 mg. of sodium for individual meat and poultry products carrying the “healthy” label and 480 mg. of sodium on similarly labeled meal-type products. Comments on the interim final rule must be received by February 10, 2006. See *Federal Register*, January 11, 2006.

Litigation

Youth Marketing

[2] **Consumer Groups Threaten Kellogg’s and Nickelodeon with \$2 Billion Lawsuit**

Two public health groups today reportedly served a required [30-day notice](#) that they intend to sue the Kellogg Co. and Viacom’s Nickelodeon for what the groups claim is unfair and deceptive marketing of food to children ages 8 and younger. *Advertising Age* reports that the Center for Science in the Public Interest (CSPI), the Campaign for a Commercial-Free Childhood (CCFC) and two Boston-area parents allege that “Nickelodeon and Kellogg engage in business practices that literally sicken our children” and that government has done nothing in response.

“In any other sphere of American life, it would be considered creepy and predatory for adults to propose commercial transactions to toddlers and young children,” Michael Jacobson, CSPI’s executive director, was quoted as saying. “Yet companies like Kellogg, Nickelodeon and others have been doing it with impunity, and government has done nothing for decades. This litigation is truly a last resort and vitally important to children’s health,” he said.

The notice states that the lawsuit would be brought under a Massachusetts consumer protection law that allows private citizens to sue on behalf of that state’s attorney general. The plaintiffs seek



\$25 each time over the past four years a child younger than age 8 viewed any Kellogg's or Nickelodeon ad for "nutritionally poor" products or any Nickelodeon characters (e.g., SpongeBob SquarePants) that promote "nutritionally poor" products. Although the groups ask for \$1 billion from each company, they would reportedly settle for marketing changes that eliminate the advertising of "nutritionally poor" foods during programming where at least 15 percent of the audience is composed of children ages 8 and younger.

CSPI and CCFC claim that advertising makes it nearly impossible for parents to control children's food choices and that all advertising to younger children is unfair because kids "do not understand the persuasive intent of commercials and are particularly vulnerable to the messages."

The notice of intent to sue comes on the heels of a December 2005 Institute of Medicine (IOM) report which concluded that "strong evidence [indicates] that television advertising influences the food and beverage preferences of children ages 2-11 years." IOM advocated congressional action on the issue if public policymakers find fault with industry's voluntary efforts to limit "junk food" advertising during children's TV programming. See *Advertising Age* and *CSPI News Release*, January 18, 2006.

Legal Literature

- [3] "Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation," Brooke Courtney, *Annals of Health Law*, Winter 2006

In concluding that "obesity [litigation] is not automatically destined to become the next tobacco in the near future," this author recommends other

approaches to the issue such as "regulating the food industry, conducting additional empirical research on obesity and its causes, and developing and offering education and prevention programs," particularly with respect to children. Like Richard Daynard and the Public Health Advocacy Institute, she suggests that consumer protection claims may be the most likely to succeed, especially if such claims are "brought by state attorneys general to provide a higher level of legitimacy to the litigation and to avoid the controversies surrounding massive plaintiffs' attorney payouts associated with tobacco litigation." The author holds a master's degree in public health policy from Yale University and is expected to graduate from the University of Maryland School of Law in May 2006.

Other Developments

- [4] **Minnesota Summit Targets Business Planning for Pandemic Influenza**

Ways that businesses can incorporate pandemic influenza continuity planning into their risk assessment and migration plans will be the focus of a two-day meeting in Minneapolis on February 14-15, 2006. Spearheaded in large part by Michael Osterholm, a professor of public health at the University of Minnesota and outspoken advocate of a coordinated international response to the potential threat of a global influenza pandemic, the summit will convene business leaders, government officials and public health experts for discussions of various pandemic-related issues, interrelationships and interdependencies of the business community. Speakers will include senior executives from Hormel Foods Corp. and Cargill; Ann Beauchesne, executive director of homeland security for the U.S. Chamber of Commerce; and HHS Secretary Michael



Leavitt. Specific breakout sessions will address issues and strategies for the agriculture/food and transportation/warehousing sectors. More information about the event is available [here](#).

[5] **Independent Report Advocates Increased Governmental Oversight of Nanotechnology**

“If nothing specific is done to manage nanotechnology’s possible adverse effects, a range of undesirable developments could emerge. The public potentially would be left unprotected, the government would struggle to apply existing laws to a technology for which they were not designed, and industry would be exposed to the possibility of public backlash, loss of markets, and potential financial liabilities,” concludes a [report](#) issued last week by the Project on Emerging Nanotechnologies at the Woodrow Wilson International Center for Scholars, a nonpartisan research arm of the Smithsonian Institution. Nanotechnology involves the use of engineered materials that measure 100 nanometers or smaller; according to the report, 100 nanometers is about 1/800th the width of a human hair and 1/70th the diameter of a red blood cell. Nanotechnology applications with respect to food include packaging, contaminant detection and supply chain tracking.

In the report, author J. Clarence Davies evaluates such statutes as the Federal Food Drug and Cosmetic Act and the Toxic Substances Control Act, suggesting they be coordinated and amended to address nanotechnology’s potential adverse effects. “We know from what happened with agricultural biotechnology and nuclear power that if you don’t have public support, or at least public tolerance, a field’s potential is not going to be realized,” Davies was quoted as saying. “For nanotechnology, I don’t

think existing systems or laws can serve this purpose,” he said. U.S. regulatory agencies reportedly disputed Davies’ assertions, claiming current laws are adequate to cover most nanomaterials until further data on their potential risks are available. *See The Associated Press and The Washington Post*, January 11, 2006.

Scientific/Technical Items

Acrylamide

[6] **U.S. and Swedish Researchers Find No Association Between Acrylamide and Colorectal Cancer in Women**

Using prospective data from the Swedish Mammography Cohort of more than 61,000 women, a team of Harvard School of Public Health and Karolinska Institute researchers have reportedly found no evidence that dietary intake of acrylamide is associated with cancers of the colon or rectum in women. L. Mucci, et al., “Prospective Study of Dietary Acrylamide and Risk of Colorectal Cancer Among Women,” *International Journal of Cancer* 118(1): 169-173, 2006.

The World Health Organization deems the by-product of high-temperature cooking processes a “probable human carcinogen.” The study subjects’ average daily intake of acrylamide (24.6 micrograms) was derived mostly from consumption of coffee, fried potato products and bread. *See Reuters*, January 5, 2006.



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