

# Food & Beverage

## LITIGATION UPDATE

Issue 158 • February 1, 2006

### Table of Contents

#### Legislation, Regulations and Standards

- [1] **USDA Inspector General Finds Fault with the Grain Inspection, Packers and Stockyards Administration . . .**1
- [2] **FDA Proposal Would Require Disclosure of Insect-Derived Food Coloring . . .**1
- [3] **U.S. Codex Delegates Schedule Public Meeting to Discuss Dairy Issues . . .**2

#### Litigation

- [4] **Advocacy Groups Petition California Appeals Court to Compel Classification and Regulation of “Alcopops” as Distilled Spirits . . .**2

#### Scientific & Technical Items

- [5] **American Heart Association Rethinks Soy Benefits; NIEHS Study Purportedly Links Genistein to Reproductive Problems . . .**2

Shook,  
Hardy &  
Bacon LLP

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] **USDA Inspector General Finds Fault with the Grain Inspection, Packers and Stockyards Administration**

An Office of Inspector General [audit](#) of the Grain Inspection, Packers and Stockyards Administration's (GIPSA's) management and oversight of the Packers and Stockyards Programs (P & SP) has concluded that P & SP has difficulties "defining and tracking investigations, planning and conducting competition and complex investigations, and making agency policy." P & SP is charged with enforcing the Packers and Stockyards Act of 1921, which bans unfair, deceptive and fraudulent practices by those involved in the livestock, meatpacking and poultry industries.

Senator Tom Harkin, D-Iowa, who requested the report, has called for hearings to discuss the inspector general's findings. "I really think this [GIPSA] requires further investigation," Harkin said, "and quite frankly, I think the Agriculture Committee ought to meet, we ought to subpoena some of these people, put them under oath and find out just what is going on down there." See *Brownfield News*, January 19, 2006; *Press Release of Senator Tom Harkin*, January 20, 2006.

#### Food and Drug Administration (FDA)

##### [2] **FDA Proposal Would Require Disclosure of Insect-Derived Food Coloring**

Responding to adverse event reports from severely allergic consumers and a 1998 petition from the Center for Science in the Public Interest (CSPI), the FDA has [proposed a rule](#) that would require the disclosure of cochineal extract and carmine on the labels of all food and cosmetic products. Orange-colored cochineal and red-colored carmine are dyes derived from dried and ground female bodies of the insect *Dactylopius coccus costa* (*Coccus cacti L.*). Food uses for carmine include strawberry milk products and canned cherries while cochineal extract is found in such products as fruit drinks and yogurt.

CSPI has criticized the proposal because it would not require labeling to declare the "animal (insect)" origins of cochineal extract and carmine. "Why not use a word that people can understand?" CSPI Director Michael Jacobson was quoted as saying. "Sending people scurrying to the dictionary or to Google to figure out what 'carmine' or 'cochineal' means is just plain sneaky. Call these colorings what they are – insect based," he said. Comments on the proposal are due by May 1, 2006. See *CSPI News Release* and *The Wall Street Journal*, January 27, 2006; *Federal Register*, January 30, 2006.



## Codex Alimentarius Commission

### [3] U.S. Codex Delegates Schedule Public Meeting to Discuss Dairy Issues

The U.S. Department of Agriculture, Food and Drug Administration, and Department of Health and Human Services have scheduled a March 14, 2006, [meeting](#) to discuss draft positions to be presented at the Seventh Session of the Codex Committee on Milk and Milk Products in Queenstown, New Zealand, on March 27-April 1. Issues to be discussed at the Queenstown meeting include (i) standards for dairy spreads and processed, individual and whey cheeses; (ii) proposed standards for products in which vegetable fat replaces milk fat; and (iii) discussion papers on fermented milk drinks and the naming of non-standardized dairy products. See *Federal Register*, January 30, 2006.

## Litigation

### Youth Marketing Claims

#### [4] Advocacy Groups Petition California Appeals Court to Compel Classification and Regulation of “Alcopops” as Distilled Spirits

The Alcohol Policy Network and a number of other advocacy groups that “seek solutions to alcohol-related problems” have petitioned the California Court of Appeal to force the Department of Alcoholic Beverage Control to change the classification of flavored malt beverages from beer to distilled spirits. [Kiley et al. v. California Department of Alcoholic Beverage Control, No. A112671 \(Cal. Ct. App.\) \(filed 1/17/06\)](#). The change would place more restrictions on sales of the beverages, referred to in the petition as

“alcopops,” tax them at a higher rate, and prohibit television advertising, according to news reports.

Claiming “the beverages are designed and marketed for entry-level drinkers that an American Medical Association survey shows are being aimed at teenagers, particularly teenage girls,” the advocacy groups contend that, by failing to regulate the beverages as distilled spirits, the Department of Alcoholic Beverage Control “has inexcusably made it easier for California’s children and underage youth to obtain and drink alcopops.” They further allege, “Underage drinking in the United States constitutes a public health crisis. ... Nearly 85% of all Americans begin drinking before the age of 21.”

## Scientific & Technical Items

### Soy Products

#### [5] American Heart Association Rethinks Soy Benefits; NIEHS Study Purportedly Links Genistein to Reproductive Problems

Based on a review of recent studies on soy protein and soy-derived isoflavones, an American Heart Association (AHA) committee has concluded that soy-containing foods and supplements do not significantly lower cholesterol. (F. Sacks, et al., “Soy Protein, Isoflavones, and Cardiovascular Health: An American Heart Association Science Advisory for Professionals From the Nutrition Committee,” *Circulation* 113: 1-11, 2006.) The advisory committee also concluded that soy and isoflavones do not reduce menopausal symptoms and do not appear to prevent breast, uterine or prostate cancers. The group does, however, still maintain that soy products are “heart healthy” because they contain polyunsaturated fats, fiber, vitamins, and



minerals and are low in saturated fat. Its recommendations revise those contained in a similar AHA evaluation from 2000. Press reports speculate that AHA's new conclusions about the health benefits of soy could lead the Food and Drug Administration to reevaluate labeling regulations that allow manufacturers to champion the cholesterol-lowering benefits of soy-based products. *See Associated Press*, January 23, 2006.

Meanwhile, a National Institute of Environmental Health Sciences (NIEHS) study claims that the soy component genistein disrupts the development of ovaries in newborn female mice. (W. Jefferson, et al., "Neonatal Genistein Treatment Alters Ovarian Differentiation in the Mouse: Inhibition of Oocyte Nest Breakdown and Increased Oocyte Survival," *Biology of Reproduction* 74: 161-168, 2006.) Genistein is a phytoestrogen, a naturally occurring estrogen in plants, and can mimic the effects of estrogen in humans.

The NIEHS research team injected female mice with three different doses of genistein during their first five days of life. The researchers later observed, among other things, that the mice treated with the highest dose of genistein (50 mg/kg) were infertile while those given lower doses were "subfertile," meaning they had fewer pups in each litter and fewer pregnancies. "I don't think we can dismiss the possibility that these phytoestrogens are having an effect on the human population," lead author Wendy Jefferson was quoted as saying. "They may not show their effects or be detected until later in life, but chances are they are having an effect. *See NIEHS News Release*, January 10, 2006.



---

# 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](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto: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<sup>LLP</sup>

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.

