

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA Defends Use of Carbon Monoxide in Meat Packaging

In response to a flurry of negative media coverage, the director of FDA's Office of Food Additive Safety last week defended the agency's 2004 decision to classify as "generally recognized as safe" the practice of adding small amounts of carbon monoxide to case-ready meat products to retard discoloration. Laura Tarantino was quoted as saying that carbon monoxide "does not reduce the safety of meat."

Natural food extracts manufacturer Kalsec Inc. has asked FDA to ban carbon monoxide-treated meats, claiming the practice "produces an artificially intense, persistent red color in meat that can simulate the look of fresh meat and mask the natural signs of aging and spoilage that consumers depend upon in making safe food choices, including browning and tell-tale odors." In its November 2005 [petition](#) to FDA, the Michigan-based company further contends that because consumers are unable to differentiate between meat packaged with carbon monoxide and "genuinely fresh and wholesome

meat," carbon monoxide "presents serious consumer deception and food safety risks which jeopardize the public health."

According to *The Washington Post*, Tarantino "appeared unacquainted with a significant body of data – some of it generated by the meat industry – indicating that red color is a central cue used by shoppers to determine the freshness of meats," even though Kalsec's petition cites various scientific studies quantifying the importance of color in consumer perceptions of freshness. "If we had evidence that consumers would be misled into buying meat that was spoiled because of the use of this technology, that is something we'd be concerned about," Tarantino said.

Meanwhile, the Kroger Co. has reportedly asked its suppliers to stop using carbon monoxide to treat case-ready meats, and U.S. Representative Edward Markey (D-Mass.) has vowed to introduce legislation prohibiting the practice if FDA fails to change its thinking on the matter. See *The Washington Post*, February 20 and 22, 2006; *The Atlanta Journal-Constitution*, February 23, 2006.

### U.S. Congress

##### [2] Bipartisan Senate Proposal Targets Agricultural Market Conditions

Senators Tom Harkin (D-Iowa), Mike Enzi (R-Wyo.) and Craig Thomas (R-Wyo.) have introduced legislation ([S. 2307](#)) aimed at improving competi-



tion in livestock markets and fairness in the production and sale of agricultural commodities. “We’ve witnessed a widespread failure by USDA in enforcing existing producer protections,” Harkin said, referring to agriculture department enforcement of the Packers and Stockyards Act. “We need to get rid of extra layers of bureaucracy and allow competition issues to be in the forefront, rather than swept under the rug as they currently are,” he said. The Packers and Stockyards Act prohibits unfair, deceptive and fraudulent practices by those involved in the livestock, meatpacking and poultry industries.

As proposed, the Competitive and Fair Agricultural Markets Act of 2006 would establish within USDA an Office of Special Counsel for Competition Matters charged with investigating and prosecuting violations of the Packers and Stockyards Act. The office would also serve as a liaison between the agriculture department and the Department of Justice and the Federal Trade Commission with respect to competition and trade practices in the agricultural sector. Contract-related provisions of the Senate proposal would (i) allow producers at least three days to review or cancel contracts, (ii) prevent confidentiality clauses so that information could be shared with family members or legal counsel and (iii) prevent mandatory arbitration in the case that a producer wanted to challenge a company’s unfair actions.

Meanwhile, the Senate Committee on Agriculture, Nutrition and Forestry has scheduled a hearing for March 9, 2006, to discuss the conclusions of a recent audit report issued by the USDA Office of Inspector General. Requested by Senator Harkin, the audit found various problems with USDA enforcement of the Packers and Stockyards Act. Witnesses at the hearing will include representatives

of the Grain Inspection, Packers and Stockyards Administration, USDA’s Office of Inspector General and the Government Accountability Office.

## Codex Alimentarius Commission

### [3] Codex Rules and Procedures to Be Discussed at Meeting of U.S. Delegates

U.S. Codex delegates are scheduled to meet March 21, 2006, in Washington, D.C., to discuss draft positions to be presented at the April meeting of the Codex Committee on General Principles in Paris, France. The Codex Committee on General Principles defines the purpose and scope of the Commission and the nature of Codex standards. Agenda items for the [March 21 meeting](#) include (i) draft working principles for food safety risk analysis and proposed new definitions of risk analysis terms and (ii) a draft revised code of ethics for international trade in foods. *See Federal Register*, February 27, 2006.

## Litigation

### Youth Marketing Claims

#### [4] Wisconsin State Court Dismisses Putative Class Action Challenging Alcohol Advertising

A Wisconsin state court has dismissed an alcohol advertising case because plaintiff lacked standing to pursue her complaint. [Tomberlin v. Adolph Coors Co., et al., No. 05 CV 545 \(Wis. Cir. Ct. 2/16/06\)](#). Plaintiff in the purported class action was a parent who claimed her underage child allegedly used “family funds” to purchase alcoholic beverages and that various brewers, distillers, importers, and the



Beer Institute deliberately and recklessly targeted underage consumers in marketing their products. Jacquelyn Tomberlin sought compensatory damages caused by the allegedly illegal marketing scheme, disgorgement of profits by which defendants had been unjustly enriched since 1982, statutory and punitive damages, attorney's fees, and costs. She also sought a variety of equitable remedies, including an injunction against defendants' engaging in any marketing of alcoholic beverages to underage persons.

The Honorable Richard Niess found that plaintiff lacked standing to pursue her claims because she suffered no injury to herself and because no underage consumer had been joined as a plaintiff. The court stated that Tomberlin's invocation of "family assets" and "family resources" to demonstrate her personal injury was meaningless because plaintiff's child either spent her own money in response to defendants' advertising, in which case the child would have suffered the injury and owned the claim, or plaintiff spent her own money to purchase the alcohol, in which case there was no sale to an underage person. The court concluded that plaintiff had "no personal stake in this lawsuit in that she allege[d] no injury to a legally protected right caused by defendants' unlawful conduct."

Judge Niess acknowledged that a parent has rights to basic decision-making with respect to her minor child's welfare but found no legal authority protecting these rights from the influences of mass advertising and marketing, legal or otherwise. The court said there was "no authority suggesting that, while parents have a right to make fundamental decisions about a minor child's upbringing, they also have a legal right to prevent other private parties from attempting to influence their children."

Because the standing issue was dispositive, the court declined to address the remaining issues raised in defendants' motions to dismiss.

## Scientific & Technical Items

### Alcoholic Beverages

#### [5] Government Researchers Examine Association Between Drinking Patterns and Diet Quality

People who consume the largest quantities of alcohol also tend to have the poorest quality diets, according to researchers from the USDA and the National Institute on Alcohol Abuse and Alcoholism. (R. Breslow, et al., "Alcohol Drinking Patterns and Diet Quality: The 1990-2000 National Health and Nutrition Examination Survey," *American Journal of Epidemiology* 163: 359-366, 2006). The research team analyzed the diets of individuals who reportedly drank any kind of alcoholic beverage, observing that diet quality was the poorest among those who consumed the highest quantities of alcohol and best among those who drank the least. "Clarifying the relationship between alcohol consumption and diet quality is an important step in determining the extent to which diet influences studies of alcohol and cardiovascular outcomes," said lead author Rosalind Breslow, recommended no more than one drink per day for women and two drinks per day for men. *See NIH News Release*, February 13, 2006.



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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](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.

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