

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Citing Safety Concerns, Consumer Advocacy Group Urges FDA to Remove Sucralose from the Market

A consumer group “committed to protecting and expanding natural health choices” this week petitioned FDA to revoke its approval of the artificial sweetener sucralose (Splenda). “There were potential health concerns regarding sucralose that were dismissed by the FDA when they first approved this synthetic additive,” a Citizens for Health spokesperson was quoted as saying. “People should also know, however, that there has not been a single human clinical study on the finished product, Splenda.”

Among other things, the group’s petition reportedly asks FDA to (i) review the agency’s approval of sucralose; (ii) require Splenda manufacturer McNeil Nutritionals to eliminate the advertising slogan “Made from sugar, so it tastes like sugar”; (iii) create a mechanism by which to track adverse health effects allegedly related to the sweetener; and (iv) investigate the environmental impacts of the Alabama facility where Splenda is manufactured.

The Calorie Control Council, a trade organization that represents makers of dietary sweeteners, has

refuted the advocacy group’s allegations claiming, “more than 100 studies conducted and evaluated over a 20-year period clearly demonstrate the safety of sucralose.” See *Citizens for Health News Release*, April 3, 2006; *CQ Healthbeat News*, April 4, 2006.

Litigation

Acrylamide

[2] California Superior Court Lifts Stay on Proposition 65 Enforcement Actions Against Fast-Food Companies

A Los Angeles Superior Court judge last week lifted a longstanding stay on consolidated lawsuits filed under California’s Proposition 65 that seek penalties against defendant restaurants and food companies for their alleged failure to warn consumers that their products contain acrylamide, a substance “known” to the state to cause cancer. E.g., *Council for Education and Research on Toxics v. McDonald’s Corp.*, No. BC 280980 (Superior Court, Los Angeles County, California) (filed 9/5/02).

The court issued the stay in 2003, pending regulatory proposals for acrylamide, a chemical byproduct of high-temperature cooking processes, from the California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment. The agency issued three such proposals in 2005 but was forced to withdraw them on March 27, 2006, because it failed to act on the rulemakings



within the one-year statutory deadline. OEHHA expects to issue new regulatory options for acrylamide by June. A status conference on the consolidated cases has reportedly been scheduled for May 23. See *Inside Cal/EPA*, March 31, 2006.

Youth Marketing Claims

[3] Federal Judge Dismisses Proposed Class Action Challenging Alcohol Advertising

The Honorable Frederick Weisberg of the Superior Court of the District of Columbia has dismissed an alcohol advertising case because plaintiff lacked standing to pursue his complaint and failed to state a claim upon which relief could be granted. [*Hakki v. Zima Co., et al., No. 03-9183 \(D.C. Super. Ct. 3/28/06\)*](#). Plaintiff in the purported class action was presumed to be a parent who claimed that his underage child or children allegedly used “family funds” to purchase alcoholic beverages and that various brewers, distillers, and importers of the alcoholic beverages and the Beer Institute deliberately and recklessly targeted underage consumers in marketing their products. Plaintiff sought compensatory damages caused by the allegedly-illegal marketing scheme, disgorgement of profits by which defendants had been unjustly enriched since 1982, statutory damages, punitive damages, attorney’s fees, and costs. In addition, plaintiff sought a variety of equitable remedies, including an injunction against defendants’ engaging in any marketing of alcoholic beverages to underage persons.

The court held that plaintiff failed to establish standing because the complaint did not allege (1) that plaintiff has, or has had, a child; (2) that any such child, when underage, purchased or consumed

the product of any defendant; or (3) that any such child ever saw one of defendants’ advertisements or that he or she was influenced by defendants’ marketing techniques to purchase or consume alcoholic beverages. With respect to the claim of parental injury due to the child’s use of “family funds” to purchase alcohol, Judge Weisberg said the complaint failed to allege that any plaintiff’s child ever spent any funds (the child’s or the family’s) on defendants’ products or that he or she did so in response to defendants’ advertisements. The court further stated that plaintiff could not claim standing as the representative of a class of parents seeking to protect their children. The court explained that even if plaintiff still had a minor child and that his child could allege a legally-cognizable injury, any such claim had to be brought as the parent or next friend on behalf of the child. Furthermore, the court stated, no case law allowed plaintiff to claim parental standing where the claimed injury was that private companies merely created a temptation to which children might have illegally succumbed, making it more difficult for parents to prevent them from doing what they should not do.

The court also held that plaintiff’s complaint failed to state any claim on which relief could be granted. The court specifically discussed the pleading deficiencies of each of the plaintiff’s four claims: (1) violation of the District of Columbia Consumer Protection Procedures Act (CPPA), (2) negligence, (3) unjust enrichment, and (4) rescission. The court concluded that all of plaintiff’s claims boiled down to a complaint that underage drinking is harmful to underage drinkers, their families and society at large, that it is caused at least in part by defendants’ advertising, and that plaintiff should be compensated “even without proof that he suffered any injury as a result of Defendants’



conduct.” The court noted that the court system was not equipped to make the choice of governmental policy to regulate advertising and marketing of alcoholic beverages and that the task of developing that policy belonged to other branches of government.

Bovine Spongiform Encephalopathy (BSE)

[4] Kansas Meatpacker Sues Agriculture Department over BSE Testing

A Kansas meat processor has filed suit against USDA in federal court for the agency’s refusal to allow the company to voluntarily test its cattle for BSE. [Creekstone Farms Premium Beef, L.L.C. v. USDA, No. 1:06-CV-00544-JR \(D.D.C. 3/23/06\)](#). Creekstone Farms is challenging USDA’s authority under the Virus-Serum-Toxin Act to control use of the “test kits” used to perform BSE testing. “This lawsuit really stems from over 24 months of frustration,” said John Stewart, CEO and founder of the Arkansas City, Kansas, company. “We have tried really hard to work with USDA to get them to allow us to do our own universal testing for BSE, but we have been unsuccessful in getting USDA to come to the table,” he said. Creekstone wants to conduct its own BSE testing so that it can resume its formerly robust export trade with Japan. *See Creekstone Farms Press Release, Congress Daily, March 23, 2006.*

Scientific/Technical Items

Cardiovascular Disease

[5] British Researchers Cast Doubt on Cardiovascular Benefits of Omega-3 Fats

New scientific findings in the United Kingdom indicate that omega-3 fats may not act to protect against heart disease or cancer. (L. Hooper, et al., “Risks and Benefits of Omega-3 Fats for Mortality, Cardiovascular Disease, and Cancer: Systematic Review,” *British Medical Journal* (on-line publication): 1-9, March 24, 2006). The authors assessed 89 randomized controlled trials and population studies on omega-3 fatty acid and health outcomes. Previous research has shown that omega-3 fats, found principally in fatty fish, fish oils and some plant oils, might protect against cardiovascular disease by lowering blood pressure and heart rate, reducing serum triglycerides and inflammation, and improving vascular function and insulin sensitivity. Pooled risk estimates from the research reviewed in the new U.K. study, however, showed no strong evidence of a reduced risk for total mortality or cardiovascular events in individuals consuming omega-3 fats.

A spokesman for the British Heart Foundation, Dr. Mike Knapton, said that people should not stop consuming omega-3 fats or eating oily fish as a result of this study. “Until now, medical research has demonstrated a benefit from omega-3 fats in protecting people from heart and circulatory disease,” he said. “This systematic review of numerous studies concludes that there is no clear evidence either way.” *See BBC News, March 24, 2006.*



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