

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Issues Further Data on Benzene in Beverages

Data from FDA's [latest survey](#) of benzene levels in soft drinks and other beverages revealed that five of the more than 100 products sampled contained levels of benzene exceeding the U.S. Environmental Protection Agency's limit of 5 parts per billion (ppb) for safe drinking-water.

Testing was conducted between November 2005 through April 2006 on products from retail outlets in Maryland, Virginia and Michigan. Drinks containing benzene at limits beyond 5 ppb included Safeway's Select Diet Orange, Cadbury Schweppes' Crush Pineapple, Giant's Light Cranberry Juice Cocktail, Meridian Beverage Company's AquaCal Strawberry Flavored Water Beverage, and Kraft's Crystal Light Sunrise Classic Orange. All of the manufacturers have reportedly reformulated the products or are in the process of doing so, and FDA asserts the levels of benzene detected pose no safety risk to consumers. Issuance of the data has

reportedly led plaintiffs' lawyers to add Kraft and Cadbury Schweppes to benzene-related class action complaints in Florida and Massachusetts. *See Reuters*, May 19, 2006; *Food Production Daily*, May 23, 2006.

U.S. Congress

[2] Missouri Lawmaker Introduces Legislation to Increase Agricultural Research

Proposed legislation ([S. 2782](#)) recently introduced by Republican Senator Jim Talent (Mo.) would establish the National Institute of Food and Agriculture. Goals of the new institute would include (i) developing foods that improve health and combat obesity, (ii) increasing the competitiveness of U.S. agriculture in the world marketplace, (iii) improving "food safety and food security by protecting plants and animals in the United States from insects, diseases, and the threat of bioterrorism," and (iv) decreasing dependence on foreign oil by developing bio-based fuels and materials from plants. A director and 24-member Standing Council of Advisors composed of 12 independent scientists and 12 stakeholders would provide oversight of the institute. The proposal has been forwarded to the Committee on Agriculture, Nutrition and Forestry.



Federal Trade Commission (FTC)

[3] SHB Antitrust Partner Submits Comments on Monopolization Standards

The FTC and the U.S. Department of Justice (DOJ) announced at the end of March 2006 plans to convene joint public hearings throughout the second half of this year to “examine whether and when specific types of conduct that potentially implicate Section 2 of the Sherman Antitrust Act are pro-competitive or benign, and when they may harm competition and consumer welfare,” for purposes of law enforcement and to develop guidance for businesses concerning antitrust compliance. In anticipation of the hearings, [Jim Eiszner](#), chair of Shook, Hardy & Bacon’s Antitrust Practice, has submitted [comments](#) to FTC and DOJ proposing aspects of this murky area of the law that the enforcement agencies should clarify to reduce uncertainties that may lead responsible but risk-averse businesses to refrain from pro-competitive and welfare-enhancing conduct and dominant companies that sense a lack of enforcement commitment to engage in anti-competitive conduct.

Among other things, Eiszner proposes that: (1) the FTC provide guidance on whether, and if so when, it might challenge under the FTC Act conduct that it deems to violate the spirit, but which does not transgress the letter, of Section 2 of the Sherman Act; (2) the agencies develop benchmarks for when a firm is likely to be considered to possess, or to be dangerously close to attaining, monopoly power—an essential element of a claim for monopolization or attempted monopolization—and safe harbors for conduct that dominant firms

can undertake without antitrust risk; (3) the agencies consider whether special standards should be used to evaluate under Section 2 of the Sherman Act those categories of conduct that can also be (and more typically are) challenged—using standards that differ from those normally applied to monopolization claims—under Section 1 of the Sherman Act; (4) the agencies clarify who bears the burdens of proof and persuasion as to whether challenged single-firm conduct is unlawfully exclusionary; (5) the agencies add to their agenda, and provide meaningful guidance concerning, when conduct by a dominant buyer—a monopsonist—may risk antitrust liability, in light of the lack of clear or consistent standards currently available to counsel businesses in this emerging area; (6) the agencies articulate standards for evaluating potential exclusionary effects of discount and rebate programs that focus on causation—actual, anticompetitive modifications of customer behavior—rather than (as is often now the case) merely on intent; (7) the agencies bring order to the confusion over the legal analysis of bundled discounts by acknowledging that three antitrust theories potentially apply, by rejecting proposals for some form of “profit-sacrifice test” that would permit price-cutting only where it is above-cost and defensive in nature, and by limiting private claims based on bundled discount programs to those involving either predatory behavior or actual but unsuccessful attempts by a competitor-plaintiff to create its own competing, multi-firm bundled rebate program; and (8) the agencies clarify both the class of products against which an allegedly predatory (i.e., below-cost) price is to be measured and the role of intent in assessing liability for predatory pricing.



United Kingdom

[4] U.K. Agency Seeks Comments on Nanotechnologies in Food Manufacturing

Britain's Food Standards Agency (FSA) is soliciting comments on a [draft report](#) targeting the use of nanotechnologies and the potential presence of nanomaterials in food to identify any gaps in regulation or risk assessment. Authored by the Royal Society and the Royal Academy of Engineering, the independent review identifies no major gaps in relevant regulations, but calls for research on food packaging because "little is known about the impact on chemical migration into food from such applications." Comments on the report must be submitted to FSA by July 14, 2006. See *FSA News Release*, May 24, 2006.

Scientific/Technical Items

Obesity

[5] Weight Gain in Adult Women Linked to Increased Risk of Breast Cancer

Research from the American Cancer Society published this week allegedly indicates that weight gain in women during adulthood increases the lifetime risk of all types of breast cancer. (Feigelson, H., et al., "Adult Weight Gain and Histopathologic Characteristics of Breast Cancer Among Postmenopausal Women," *Cancer* (online publication): May 22, 2006). The research team found that women who gained more than 60 pounds during adulthood were twice as likely to develop ductal type breast tumors than women who gained 20 pounds or less. Breast cancer risk has been linked to increased levels of estrogen, and excess adiposity produces estrogen. The results did not differ among women who had regular screening mammograms.



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