

Food & Beverage

LITIGATION UPDATE

Issue 176 • July 13, 2006

Table of Contents

Legislation, Regulations and Standards

- [1] House Proposal Would Give FTC Authority to Regulate Youth Marketing 1
- [2] Public Interest Groups Seek Ban on Nicotine Beverage 1
- [3] USDA Issues Updated BSE Risk Assessment, Schedules Public Meetin 2
- [4] Codex Concludes 29th Meeting with New Lead and Cadmium Standards 2

Litigation

- [5] Settlement Reached in Prop. 65 Litigation over Lead in Candy 2

Legal Literature

- [6] Michael Tingey Roberts, "United States Food Law Update," *Journal of Food Law & Policy* (2006) 3
- [7] Alexandra B. Klass, "Common Law and Federalism in the Age of the Regulatory State," *Iowa Law Review* (to be published in 2007) 3

Other Developments

- [8] PHAI to Host Fourth Annual Conference on Legal Approaches to the Obesity Epidemic 3
- [9] Jon Fine, "Polluting the Blogosphere, Bloggers Are Getting Paid to Push Products. Disclosure Optional," *BusinessWeek Online*, July 10, 2006 4

Scientific/Technical Items

- [10] Increasing Degrees of Obesity Linked to Higher Mortality Rates in Women . . . 4

**Shook,
Hardy &
Bacon** L.L.P.®

2005 & 2006
Global Product Liability Law Firm of the Year
WHO'S WHO LEGAL
The International Who's Who of Business Lawyers

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] House Proposal Would Give FTC Authority to Regulate Youth Marketing

A congressional Democrat has introduced legislation ([H.R. 5737](#)) that would give the Federal Trade Commission (FTC) the authority to restrict food and beverage marketing to children under age 18, if the agency “determines that there is evidence that consumption of certain foods and beverages is detrimental to the health of children.”

While introducing the Children’s Health FTC Authority Restoration Act, Representative Eleanor Holmes Norton (D-D.C.) claimed that junk food advertising is “urging our kids to eat themselves into bad health.” She further contended that children of color have been targeted by junk food ads on television and noted that Congress has done little to address the problems of obesity in children.

Congress enacted legislation in 1980 that removed such regulatory authority from the FTC, and Norton’s proposal would strike that part of the agency’s enabling legislation, 15 U.S.C. § 57a(h). The 1980 action was taken in response to industry

litigation against the agency which had been relying on its “unfairness authority” to restrict children’s advertising during the 1970s. The bill has been referred to the House Committee on Energy and Commerce. *See Press Release of Representative Eleanor Holmes Norton*, June 29, 2006.

Food and Drug Administration (FDA)

[2] Public Interest Groups Seek Ban on Nicotine Beverage

Public Citizen’s Health Research Group and the Campaign for Tobacco-Free Kids have [called on](#) FDA to order a firm that markets bottled water containing nicotine to immediately cease marketing the product. They are also urging the agency to determine whether Nico Worldwide should be prosecuted criminally.

According to the public interest groups, the product “Nic Lite” contains in one 8-ounce bottle the equivalent of two cigarettes’ worth of nicotine and has been the subject of FDA attention since at least 2001. The firm that markets the product apparently asserts that it is a dietary supplement, a claim that has been rejected by the FDA, which contends the product is a drug with ingredients similar to those found in smoking cessation products and therefore subjected to clinical trials for safety and effectiveness.



U.S. Department of Agriculture (USDA)

[3] **USDA Issues Updated BSE Risk Assessment, Schedules Public Meeting**

The agriculture department's Food Safety and Inspection Service (FSIS) yesterday announced the availability of an [updated risk assessment model and report](#) for bovine spongiform encephalopathy (BSE). Known as the Harvard Risk Assessment, the report has been revised to evaluate the effectiveness of risk mitigation measures implemented since the December 2003 discovery of a BSE-infected cow in Washington state.

FSIS will hold a public meeting to discuss the updated BSE risk assessment on July 25, 2006, in Washington, D.C., and accept comments on the document until August 11. *See Federal Register*, July 12, 2006.

Codex Alimentarius Commission

[4] **Codex Concludes 29th Meeting with New Lead and Cadmium Standards**

Codex Alimentarius Commission delegates from some 100 countries meeting in Geneva, Switzerland, July 3-7, 2006, reportedly adopted new standards that establish maximum limits for lead in fish; cadmium in rice, marine bivalve mollusks and cephalopods; and aflatoxin in Brazil nuts. Also discussed during the meeting were methods of preventing and reducing dioxin contamination in food and animal feeds. Meeting participants agreed to launch a task force that will assess risks to food safety that are purportedly associated with antimicrobial resistance in food of animal origin.

The commission, which is a joint venture of the United Nations Food and Agriculture and World Health Organizations, sets standards that are often incorporated into the food safety laws of member countries, including the United States. *See Food Production Daily.com*, July 7, 2006.

Litigation Warnings

[5] **Settlement Reached in Prop. 65 Litigation over Lead in Candy**

Three Mexican candy makers, which are subsidiaries of Mars, Inc. and the Hershey Co., have reportedly reached a settlement with California's attorney general over lead in their products. The contamination apparently resulted from manufacturing practices that allowed lead-tainted dirt from dried chili peppers to contaminate the candies and packaging. Under the settlement agreement, the manufacturers will improve their manufacturing processes, conduct independent audits and purchase from suppliers that wash their chilies. The defendants will also pay civil penalties and fund a lead poisoning educational program.

Litigation against the manufacturers was brought in 2004 under Proposition 65, a state law that requires warnings about exposures to carcinogens and reproductive toxins. Lead has been listed in California as a chemical known to cause reproductive harm and birth defects since 1987 and has been listed as known to cause cancer since 1992. The attorney general's office reportedly tested the candies at issue in the case and found lead levels as



high as 0.3 ppm in some chili-candy. Because there are some two dozen manufacturers involved in the litigation, the lawsuit will continue against the non-settling defendants. See *Office of the California Attorney General Press Release*, June 29, 2006.

Legal Literature

- [6] **Michael Tingey Roberts**, “United States Food Law Update,” *Journal of Food Law & Policy* (2006)

University of Arkansas School of Law Professor Michael Roberts has pulled together information about food-related litigation, legislation and regulations in this [article](#). Among other matters, he discusses obesity litigation filed against McDonald’s Corp., legislative proposals that would prohibit such litigation, organic food labeling regulations, *trans* fat litigation settlements, and BSE and country-of-origin labeling rules.

- [7] **Alexandra B. Klass**, “Common Law and Federalism in the Age of the Regulatory State,” *Iowa Law Review* (to be published in 2007)

University of Minnesota Law School Professor Alexandra Klass suggests in this [article](#) that state courts should look to federal laws and regulations to inform the principles and standards they will apply to common law causes of action. She traces the legal theories espoused by such luminaries as Oliver Wendell Holmes, Jr., Roscoe Pound and Benjamin Cardozo to lay the foundation for the courts’ authority to transform the common law over time in light of “the current day’s sense of justice and social welfare.”

According to Klass, as the federal courts continue to limit congressional reach over matters traditionally within state purview, state courts have an excellent opportunity to use the scientific and other work done by federal agencies as they fashion remedies within the context of state common law. The article uses environmental regulation and litigation to demonstrate how the courts have already, in some respects, applied federal standards to protect the environment.

Meanwhile, in a [paper](#) also due out in 2007 in the *DePaul Law Review*, Columbia Law School Professor Catherine Sharkey discusses how federal agencies are incorporating preambles into their regulations that purport to preempt conflicting or contrary state law, a form of backdoor federalization of products liability. Using regulations recently adopted by the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Traffic Safety Administration, the author examines the tension between agencies that are attempting to restrict state common-law regulation of companies and products within their bailiwick and the continuing existence of private rights of action.

Other Developments

- [8] **PHAI to Host Fourth Annual Conference on Legal Approaches to the Obesity Epidemic**

The Public Health Advocacy Institute (PHAI) will host its [fourth annual conference](#) on legal approaches to the obesity epidemic on November 3-5, 2006, at the Northeastern University School of Law in Boston. Preliminary information about the



event indicates that its overall theme will focus on the food industry's alleged targeting of children, with specific sessions on the American Beverage Association/Clinton Foundation school beverage policy, potential litigation, legislative efforts, and "building a national movement for effective public health policy around obesity."

PHAI was established in 2003 with a core grant from the Washington, D.C.-based Bauman Foundation, which has also provided significant grants to the Institute for Agriculture and Trade Policy, Center for Science in the Public Interest and the National Resources Defense Council. PHAI's board of directors includes long-time antitobacco attorney Richard Daynard, who created and chaired the Tobacco Products Liability Project.

[9] Jon Fine, "Polluting the Blogosphere, Bloggers Are Getting Paid to Push Products. Disclosure Optional," *BusinessWeek Online*, July 10, 2006

According to blogger Jon Fine, corporations are paying agencies to place their brands on Internet blogs, and the bloggers who make references to a particular brand often do not disclose that they have been paid to do so. "Heavily trafficked blogs may command premium rates," states Fine. Claiming that "shilling without disclosure is a bad idea," Fine observes that an undisclosed paid placement "on a little-seen blog isn't the most egregious thing out there, but it's far from honest."

Scientific/Technical Items

Obesity

[10] Increasing Degrees of Obesity Linked to Higher Mortality Rates in Women

A study of American women reported last week that mortality rates for "extremely obese" women are 86 percent higher than rates for women of normal weight. (K. McTigue, et al., "Mortality and Cardiac and Vascular Outcomes in Extremely Obese Women," *Journal of the American Medical Association* 296(1): 79-86, July 5, 2006). The study assessed all-cause mortality in 90,000 women over a period of seven years. Researchers found that the risk of death increased for women who were classified as overweight, obese and "extremely obese," although the risk was significantly increased only for those deemed obese or extremely obese. Obesity-related mortality and coronary heart disease risk in the study were attributed to diabetes, hypertension and high cholesterol levels. Government figures indicate that obesity rates among U.S. adults have increased some 30 percent over the past 20 years, with more than 60 million Americans now classified as obese and 9 million "extremely obese." Overweight and obesity has more than tripled among young people over the past 25 years. See *University of Pittsburgh Press Release*, July 5, 2006; *Reuters*, July 6, 2006.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by
Leo Dreyer 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 ldreyer@shb.com or 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.



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.
