

Food & Beverage

LITIGATION UPDATE

Issue 181 • August 17, 2006

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] Organic Watchdog Group Claims Dairy Producer Fails to Meet Government Standards

The Cornucopia Institute, a Wisconsin-based organic watchdog group, has filed a formal complaint with the U.S. Department of Agriculture claiming that the nation's leading organic brand, Horizon, is producing dairy products from factory operations that do not comply with national organic program regulations. The [complaint](#), which was filed August 9, 2006, contends that Horizon's Idaho and Maryland dairies do not provide pasture to the milk herds, and thus, their products should not be labeled as organic. A spokesperson for the institute was quoted as saying, "These large factory farms, mostly operated in desert-like conditions in the arid West, have allegedly been doing more talking about pasturing their cows than the hard work required to truly produce organic milk." See [cornucopia.org](#), August 10, 2006.

[2] Comments on Codex Fish and Fishery Products Proposals Sought

The U.S. Department of Agriculture, Food and Drug Administration and Department of Health and Human Services are sponsoring a public meeting September 6, 2006, to receive comments on the U.S. position that will be presented during the 28th session of the Codex Committee on Fish and Fishery Products of the Codex Alimentarius Commission. That session will be held in Beijing, China, September 18-22. According to the *Federal Register* [notice](#), the items to be discussed include proposed standards for canned sardines, sturgeon caviar, smoked fish, and quick frozen scallops. Also to be addressed will be a draft code of practice for fish and fishery products; quick frozen fish and fishery products; and processing of salted fish, smoked fish, lobsters, and crabs. Comments can be submitted electronically, and those wishing to attend the meeting must pre-register by September 5. See *Federal Register*, August 15, 2006.



Litigation

Youth Marketing

[3] U.S. District Court Dismisses Putative Class Action Challenging Alcohol Advertising

A federal district court in West Virginia has dismissed with prejudice claims that beer and liquor companies willfully, intentionally, recklessly, and negligently engaged in unfair and deceptive youth marketing efforts. *Bertovich v. Advanced Brands & Imp., Co.*, No. 5:05CV74 (U.S. District Court, Northern District, Virginia) (decided August 14, 2006). In so ruling, Judge Irene Keeley notes that five other courts have rejected similar suits with essentially verbatim allegations. Information about three of these dismissals appears in issues 160, 161 and 165 of this Report, February 22, March 1 and April 5, 2006.

The plaintiffs, purporting to represent a class of similarly situated individuals and the general public, had brought six state causes of action, alleging violations of the West Virginia Consumer Credit and Protection Act and a state code that regulates alcohol advertising, unjust enrichment, negligence, public nuisance, and civil conspiracy. The case was removed to federal court on diversity jurisdiction grounds. According to the court, each claim “fails to establish an actual injury to a legally protected interest.” The only injuries the plaintiffs alleged had been (i) a loss of “family assets” as a result of their children’s illegal purchase of alcohol, (ii) a violation of their parental right to protect their children from certain advertisements, and (iii) an independent claim for the injuries their children sustained as a result of third-party acts. Applying West Virginia law, the court finds that the plaintiffs did not suffer an injury-in-fact.

The court further finds that the complaint “contains no allegation that directly links the Defendants’ actions or omissions to the Bertoviches’ alleged injury. As noted above, any injury to the Bertoviches is derivative of an injury to their children, who are the underage consumers. The Bertoviches’ Amended Complaint contains only general allegations, never once going so far as to indicate an instance where a Defendant’s marketing practice led their underage children to purchase and consume alcohol.” The court also agrees with defendants that the intervening illegal act of minors purchasing alcohol breaks the chain of causation, and thus, that their advertising did not proximately cause any injury to the Bertoviches. The court concludes by suggesting that the advertising issues raised “are more suited to legislative consideration.”

Warnings

[4] Lactose Intolerant Plaintiffs to Appeal Court’s Dismissal of Putative Class Action Suit

Washington, D.C.-area plaintiffs who are seeking lactose intolerant warnings on dairy products are apparently planning to appeal the federal court’s dismissal of their putative class action claims. Further details about the case appear in issues 146 and 180 of this Report. According to the Physicians Committee for Responsible Medicine, which filed the litigation, “we believe the appeals court will overturn this anti-consumer ruling to protect the health of thousands of District residents who are lactose intolerant or allergic to milk.” See *pcrm.org*, August 4, 2006.



Genetic Engineering

[5] USDA Loses Genetic Engineering Lawsuit

A U.S. District Court judge in Hawaii has reportedly ruled that the U.S. Department of Agriculture (USDA) violated environmental laws by approving permits for the cultivation of “biopharmaceutical” crops without conducting environmental studies and called its action “arbitrary and capricious.” The permits were apparently issued in 2001 to grow genetically-engineered crops on 800 acres located on four Hawaiian islands. According to news sources, one of the crop experiments involved sugar cane engineered to produce a human protein for use as a cancer treatment. That experiment was ultimately unsuccessful, because researchers were unable to obtain high enough concentrations of the material sought.

The litigation was brought by an Earthjustice-headed coalition that included the Center for Food Safety, Friends of the Earth, Pesticide Action Network North America, and state environmental alliance Kahea. USDA issued the contested permits to ProdiGene, Monsanto, the Hawaii Agriculture Research Center, and Garst Seed Co. While the court did not rule that human health and safety or the environment had been harmed, a hearing has been scheduled for August 22, 2006, to determine an appropriate remedy.

A Center for Food Safety spokesperson was quoted as saying that “the ruling is a clear victory for Hawaii’s environment. It will help protect the Islands from the illegal field-testing of genetically engineered, drug-producing crops.” Industry representatives apparently disagreed, claiming that the ruling would have no immediate effect given the expiration of all such experiments in 2004.

They also contend that similar research will be permissible in the future after regulators follow the proper procedures. See *Honolulu Advertiser*, *Greenwire*, *Reuters*, and *AP*, August 15, 2006.

Legal Literature

[6] Symposium Focuses on Food Marketing to Children

The latest *Loyola of Los Angeles Law Review* has published symposium articles by 15 legal scholars and practitioners that address “junk-food marketing to children,” past regulatory attempts to deal with the problem and currently available legal strategies, and critiques of accepted legal doctrine that propose entirely new regulatory strategies. The live event for which the papers were written took place in October 2005, and a [video](#) is available online.

Defense lawyers Joseph Price and Rachel Bond contend in “Litigation as a Tool in Food Advertising: Consumer Protection Statutes,” that litigation is not the best way to address the “broad public policy questions” raised by food advertising to children. Stephen Gardner, director of the Center for Science in the Public Interest’s Litigation Project, responds to their thesis in “Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint,” by arguing that private litigation is the only way to stop food marketers from getting “kids to eat even more junk food” due to the “near-complete failure of federal consumer protection.”

Other symposium articles claim that junk-food advertising bans would be constitutional if the U.S. Supreme Court would apply social sciences theory to commercial speech doctrine and that tobacco-control lessons can be applied to junk-food marketing. The symposium introduction comments



that this proposal “may seem overly broad and thus only worthy as an academic exercise,” but that “we should remember that just thirty-five years ago, tobacco was advertised on television.”

In “Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control,” the authors recommend that First Amendment jurisprudence would not be at issue if governments were to regulate “nonexpressive conduct” such as prohibiting toy give-aways and “the sale of complete ‘meals’ that exceed a maximum level of unhealthful components.” They also suggest that health advocates and governments “use enforceable contracts and voluntary agreements to achieve public health goals that may not be achievable through regulation.” They further caution public-health advocates to be wary of industry attempts to enact preemptive laws that would remove regulatory authority from state and local governing authorities. *See Loy. L.A. L. Rev.* May 2006.

Other Developments

[7] **National Food Policy Conference to Target Food Marketing to Children, Alleged Link Between Farm Subsidies and Obesity**

Discussions of the effects of food marketing to children and the alleged link between farm subsidies and obesity will highlight next month’s 29th Annual National Food Policy Conference. Sponsored by the Consumer Federation of America, the two-day event will be held September 14-15, 2006, at the National Press Club in Washington, D.C. Speakers will include Food and Drug Administration Acting Commissioner Andrew von Eschenbach, New York

University’s Marion Nestle and representatives of the Center for Science in the Public Interest. More information about the event is available [here](#).

Media Coverage

[8] **Kristina Peterson, “Had a Few Too Many School Dinners, Jamie?” *Daily Mail*, August 16, 2006**

Food TV’s “Naked Chef” Jamie Oliver apparently put on a fat suit recently to promote a follow-up to his “School Dinners” series and promptly destroyed a motor scooter that he climbed aboard while clutching an armful of burgers. Oliver, who claims that the average British school menu has a shocking lack of healthy food, has launched various initiatives to encourage healthier eating, including a petition campaign that was joined by 270,000 signatories. His latest endeavor, titled “Back to School Dinners,” will reportedly show the changes among children who have started eating healthier lunches.

Scientific/Technical Items

Obesity

[9] **Researchers Link Soft Drink Consumption to Rise in Obesity**

According to researchers from Harvard University and a German nutrition institute, “[t]he weight of epidemiologic and experimental evidence indicates that a greater consumption of SSBs [sugar-sweetened beverages] is associated with weight gain and obesity.” (V.S. Malik, et al., “Intake of sugar-sweetened beverages and weight gain: a systematic review,” *The American Journal of Clinical Nutrition*: 84, 274-88, August 9, 2006).



The researchers suggest that discouraging the consumption of such beverages should be part of a public health strategy to promote a healthy lifestyle. The authors caution, however, that additional research from large prospective cohort studies with long follow-up and repeated measures of diet and weight are “needed to provide more convergence in the data.” According to the article, the “likely mechanism” by which sugary drinks may lead to weight gain “is the low satiety of liquid carbohydrates and the resulting incomplete compensation of energy at subsequent meals.”

The American Beverage Association claims that the article contains no new research and that the authors “chose to ignore critical articles and studies that contradict their hypothesis.” The association points to specific studies omitted from the review and notes that calories from any source “can lead to weight gain when not properly balanced with increased physical activity.” Boston pediatrician David Ludwig, M.D., who has long advocated curbs on sweetened beverages, reportedly claims that blaming other factors misses the point, because it makes no sense to ignore the contribution of one factor when there are many that cause a particular disease.

Walter Olson, senior fellow at the Manhattan Institute, entered the dispute over obesity and soft drinks on his blog by quoting from articles that claim soda consumption has been decreasing over the past decade. See www.ameribev.org and AP, August 9, 2006; www.overlawyered.com, August 14, 2006.

And in a related development, a clinical pediatrics professor has concluded that the high-calorie, low-fiber Western diet promotes hormonal imbalances that encourage children to overeat.

(R. Lustig, “Childhood obesity: behavioral aberration or biochemical drive? Reinterpreting the First Law of Thermodynamics,” *Nature Clinical Practice Endocrinology & Metabolism*: 2, 447-58, August 2006).

According to Robert Lustig, M.D., food manufacturing processes have created a “toxic environment” that places children at risk for becoming overweight. “Fructose (too much) and fiber (not enough) appear to be cornerstones of the obesity epidemic through their effects on insulin,” he contends. Lustig also notes that the concept of personal responsibility “is not tenable in children” and that no child chooses to be obese. See foodproductiondaily.com, August 14, 2006.



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