Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Holds Public Hearing on Functional Foods

"Many so-called 'functional foods' would be more aptly named dysfunctional foods," charged the Center for Science in the Public Interest (CSPI) at an FDA public hearing this week. CSPI, which recently sued several energy food manufacturers, was joined by other consumer groups in urging increased FDA regulation of functional foods. FDA has not formally defined the category that generally includes foods that make health claims beyond basic nutrition. FDA is expected to decide in 2007 whether regulatory measures are necessary. *See CSPI Press Release*, *Associated Press* and *Media Post's Marketing Daily*, December 5, 2006; *Advertising Age*, December 7, 2006.

[2] CSPI Files Petition About "Misleading" Symbols on Food Packaging

The Center for Science in the Public Interest (CSPI) is calling on FDA to standardize the symbols food companies use on packaging to indicate "healthy" products. "The supermarket is teeming with competing 'healthy food' symbols that run the gamut from highly helpful to fatally flawed," CSPI Executive Director Michael Jacobson was quoted as saying. "But a prominent and reliable symbol on the fronts of packages would be a tremendous help to those harried shoppers racing through the supermarket." The consumer watchdog contends that a uniform, science-based system "would bring consistent and reliable information to the marketplace and help consumers choose more healthful diets."

In its **petition**, CSPI points FDA to a voluntary U.K. nutrient labeling system based on traffic lights and a Swedish system that links a symbol to specific nutrition criteria. The group asserts that the "most healthful" foods should contain a daily value of no more than 5 percent of "problematical nutrients" and 20 percent or more of one or more desirable nutrients. The other end of the spectrum would contain "less healthful choices" with a daily value of 20 percent or more of the "problematical" fat, saturated fat, cholesterol, and sodium. The "healthful" ingredients, says CSPI, include dietary fiber, calcium, iron, vitamin A, and vitamin C. The group also suggests that FDA consider accounting for serving size, calories, *trans* fat, and added sugars. *See CSPI News Release*, November 30, 2006.

[3] FDA Issues Final Guidance on Lead in Candy

FDA has released final **guidance** that sets a maximum recommended lead level of 0.1 ppm in candy consumed frequently by children. The guidance, which vacates enforcement levels

established in 1995, maintains the policy regarding lead-based ink used on candy wrappers. FDA considers the new standards "protective of human health and achievable with the use of good manufacturing practices in the production of candy and candy ingredients." *See Federal Register*, November 24, 2006.

Food Safety and Inspection Service (FSIS)

[4] FSIS Announces Forthcoming Guidance on "Natural" Food Claims

In response to a petition from Hormel Foods, FSIS has **announced** a December 12, 2006, public meeting to discuss the voluntary claim "natural," especially as applied to meat and poultry. In 1982, FSIS stated that meat and poultry could be labeled "natural" if the product (i) did not contain any artificial flavors, colors or ingredients, or chemical preservatives; and (ii) underwent only minimal processing, such as freezing or drying, that did not significantly change the raw product. FSIS updated these standards in 2005 to accept sugar, sodium lactate and natural flavorings from plant extracts. The Hormel petition argues, in part, that "exceptions for specific chemical preservatives and synthetic ingredients should not be allowed."

Comments, which must be received by January 11, 2007, should consider (i) whether the minimally processed requirement is still appropriate; (ii) whether new food processing methods conflict with "natural" claims; (iii) data on consumer beliefs regarding "natural" claims; and (iv) whether food safety issues should override minimally processed requirements. *See Federal Register*, December 5, 2006.

State/Local Initiatives

[5] New York City to Become First *Trans* Fat-Free Zone in United States

The New York City Board of Health has voted to eliminate *trans* fat from all city restaurants by July 2008. The **amendment** passed unanimously despite concerns raised by the National Restaurant Association (NRA). The rules will require restaurateurs to phase out *trans* fat over the next 18 months, beginning with frying oils and ultimately to all menu items not served in the manufacturer's original packaging. The board also approved a measure requiring restaurants that make nutritional information publicly available to post calorie content on menus. *See NYC Board of Health Press Releases*, December 5, 2006.

One consumer group has deemed the action "a great example of how states and municipalities can exercise their police power to protect the health and welfare of citizens," although many restaurants have apparently been working to remove *trans* fat for years. Describing the plan as "unworkable," the NRA said the decision "shows an ignorance of the challenges New York's 24,000 restaurants will face in trying to eliminate *trans* fat and may well take a step backward for public health." *See The Chicago Tribune*, December 1, 2006; *Public Health Advocacy Institute Press Release*, *NRA Press Release* and *Associated Press*, December 5, 2006.

Litigation

[6] California Woman Sues Kraft Over Guacamole Content

A woman known for her consumer fraud actions against large corporations has reportedly added to her legacy by filing similar litigation against Kraft Foods Inc., alleging that its guacamole dip is mislabeled because only 2 percent of the product consists of avocado. According to a news source, Brenda Lifsey's lawyer indicated that suits against other "fake guacamole" sellers will also be filed in the near future. A Kraft spokesperson was quoted as saying that most consumers understand that the product is just one of the company's "flavored" dips, and the company is changing its label to make that clear. Lifsey, meanwhile, has requested that the Los Angeles Superior Court stop Kraft from marketing its dip as guacamole and award her attorney's fees and unspecified punitive damages. *See The Los Angeles Times*, November 30, 2006.

Legal Literature

[7] Neal D. Fortin, "The Food Allergen Labeling and Consumer Protection Act: The Requirements Enacted, Challenges Presented, and Strategies Fathomed," 10 *J. Med. & Law* 126 (2006)

This article provides a comprehensive look at the legislation Congress enacted in 2004 to make it easier for consumers to identify potential allergens in foods. Food manufacturers are now required to place information about eight major allergens on food labels, and the food allergen law directs the U.S. Department of Health and Human Services to prepare a report to Congress on food allergens that, among other matters, (i) analyzes how food is unintentionally contaminated with major food allergens, (ii) estimates how common such practices are in the industry, and (iii) provides advice as to whether good manufacturing practices or other means could eliminate cross-contact. The law also requires the Food and Drug Administration to report on numbers of related food inspections and describe compliance rates for handling and labeling major food allergens. According to the author, allergen threshold levels, excessive use of warnings and a lack of definitions for terms such as "highly refined oils" and "tree nuts" pose the greatest challenges to the food industry and consumers. The article concludes by suggesting that once threshold levels are better understood, the new law "should reduce the incidence of allergic reactions and create . . . expanded food choices for allergic consumers."

[8] Academics Address "Legal Liability Regimes" and Agricultural Biotechnology

In this article, academics from Canada and the United States present the case for not developing international legal liability regimes with respect to the products of agricultural biotechnology. Stuart J. Smyth & Drew L. Kershen, "Agricultural Biotechnology: Legal Liability Regimes from Comparative and International Perspectives," *Global Jurist Advances*, Vol. 6 (2006) No. 2, Article 3. They discuss how farmers have tried to hold transgenic seed manufacturers liable for contamination of their crops in both North American countries and contrast how the issue is handled in several European nations. A comprehensive section describes the debates that have occurred under U.N. auspices since the Cartagena Biosafety Protocol was completed in January 2000; Article 27 requires the participants to "adopt a process with respect to the

appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years." The authors contend that developing countries may have problems escaping extreme poverty if an international liability and redress regime is implemented and has the effect of hindering new biotechnologies.

Other Developments

[9] Beverage Contracts Allegedly a "Raw Deal" for Schools

"Our analysis of school beverage contracts suggests that the marketing of branded beverages to an impressionable, young audience in a captive environment is a major goal of beverage companies in conducting business with schools," contend the Center for Science in the Public Interest (CSPI) and the Public Health Advocacy Institute (PHAI) in ***Raw Deal: School Beverage Contracts Less Lucrative Than They Seem***. The report claims that, excluding non-cash benefits, the average revenue generated by 120 beverage contracts was $18 per student annually, with 67 percent of total beverage sales going to companies. Also referenced is a government study that found replacing sugary drinks with high nutrition ones either improved or had no impact on school revenue.

[10] American Academy of Pediatricians Censures Advertising to Kids

"On TV, of the estimated 40,000 ads per year that young people see, half are for food, especially sugared cereals and high-calorie snacks," claims a new American Academy of Pediatrics (AAP) **policy statement**. Urging regulatory action, AAP asks that Congress (i) halve the commercial airtime allowed during children's programs; (ii) restrict alcohol to "tombstone advertising" without cartoons or attractive women; and (iii) prohibit alleged "junk-food" ads in programs geared toward young children. AAP also recommends convening a government task force to address these issues.

Seen by some as a "a good step towards ending the plague" of marketing, the policy drew criticism from advertisers who said it was redundant considering industry self-regulation and current federal guidelines. *See Advertising Age*, *Associated Press* and *Commercial Alert Press Release*, December 4, 2006; *Reuters*, December 5, 2006.

[11] Most Chickens Are "Dirty Birds," Says Popular Consumer Magazine

"CR's analysis of fresh, whole broilers bought nationwide revealed that 83 percent harbored *campylobacter* or *salmonella*, the leading bacterial causes of foodborne illness," claimed *Consumer Reports* (CR) after testing 525 birds from national, organic and no-antibiotic brands. The magazine reported *campylobacter* in 81 percent of the chickens, *salmonella* in 15 percent, and both in 13 percent. The Food Safety and Inspection Service, however, has described the investigation as "junk science," citing small sample size and flawed methodology. "*Consumer Reports* says what every cook already knows, that fresh poultry may carry naturally occurring bacteria and should be properly handled and cooked," an industry spokesperson told the press. *See Reuters*, December 5, 2006; *Consumer Reports*, January 2007.

[12] Blogger Disparages CDC Failed to Act Quickly in *E. Coli* Outbreak Linked to Spinach,

"If the alert had been received before Monday morning, it is possible that fewer people would have been made sick by the outbreak and perhaps some of those deaths would not have occurred," argues Heidi Turner on the *Lawyers and Settlements* **Web site**, which includes a link to a law firm specializing in foodborne illness litigation. Turner alleges that the Centers for Disease Control and Prevention (CDC) took five days to alert the public after PulseNet, a national database, first reported the outbreak of *E. Coli* linked to bagged fresh spinach. By the time the recall was issued, she writes, one person had already died.

In a related development, Taco Bell has removed scallions from its restaurants after the green onion apparently tested positive for *E. coli*. An investigation commenced after three dozen people were reportedly sickened after eating at Taco Bells in New York, New Jersey and Pennsylvania. "I don't know why they didn't do rush inspections of every other Taco Bell in the area," said a Food Policy Institute spokesperson, who criticized the delay in announcing the outbreak. *See The New York Times*, December 5, 2006; *Associated Press*, December 6, 2006.

Media Coverage

[13] Betsy McKay, "A Soda Maker, Touting Health, Moves to Sugar," *The Wall Street Journal*, December 5, 2006

Seattle-based Jones Soda Co. will reportedly switch to cane sugar to sweeten its products by April 2007, a move that *Journal* reporter Betsy McKay says will "capitalize on the bad publicity surrounding high-fructose corn syrup, which some scientists have linked to rising U.S. obesity rates." Despite new research indicating the two sweeteners are metabolized in the same manner, Jones Soda told McKay that the company is simply responding to consumer demand. Other beverage makers, however, apparently find the tactic misleading. "To say cane sugar is healthier than HFCS just isn't true. Marketing a myth for a competitive advantage is irresponsible and short-sighted," a PepsiCo spokesperson said.

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