Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Taco Bell *E. Coli* Investigation Centers Around Lettuce

"There's nothing to implicate green onions right now," an FDA spokesperson told the press about the *E. coli* outbreak linked to Taco Bell restaurants across the Northeast. Last week, Taco Bell named scallions the culprit based on preliminary results, but further testing apparently found no evidence of the *E. coli* strain that sickened 67 people in five states. "Renewed uncertainty about the cause of the outbreak could make it tougher for Taco Bell to persuade customers to return," wrote *Wall Street Journal* reporters covering the chain's "public-relations offensive," which has included newspaper ads and a food-safety expert hired to assist in the investigation. FDA has since concluded by process of elimination that shredded lettuce is the "most likely" suspect, although tests have not confirmed the bacteria's presence. *See FDA Press Release*, December 8 and 13, 2006; *CDC Press Release*, December 12, 2006; *The New York Times*, December 12, 13 and 14, 2006; *The Wall Street Journal,* December 13, 2006.

In a related development, three Taco John's franchises have been implicated in an *E. coli* outbreak in the Midwest. Although not connected to Taco Bell, the restaurant chain has issued a public statement and switched produce vendors as "an extreme precautionary response." *See Taco John Press Release*, December 13, 2006.

Seattle-based plaintiffs' firm Marler Clark has thus far filed lawsuits against Yum! Brands, the parent company of Taco Bell, in U.S. district court in New York and Pennsylvania on behalf of restaurant patrons alleging *E. coli* infections and is expected to file a lawsuit in U.S. district court in Cedar Rapids, Iowa, today on behalf of a 9-year-old girl who was reportedly sickened after eating at a Taco John's in Cedar Rapids.

[2] FDA Issues Baby Formula Warning

FDA has issued a warning **letter** to Nestle S.A., claiming that the company's Good Start Infant Formula with Iron does not contain the required levels of calcium and phosphorus. Accordingly, the FDA charges that the product is adulterated and misbranded. Nestle has 15 days from receipt of the letter, dated November 27, 2006, to take corrective action and prevent a recurrence or indicate what steps it will take to do so. FDA's product analyses measured the calcium content variously at 58.2 and 58.6 mg, which falls below the 60 mg minimum requirement and the company's 64 mg label claim.

Nestle reportedly claimed that it routinely tests its infant formula and that company tests of formula from the same batches tested by the FDA showed that all requirements and claims were met. "We are working with FDA to better understand how issues relating to analytical testing methods might explain the differences noted in these two nutrients," said a company statement. *See The Wall Street Journal*, December 12, 2006.

[3] Seafood Industry Accepts No Imitation for "Crab-Flavored Seafood"

"The word 'imitation' is not as annoying as 'fake,' but we shudder when we hear the word," said a spokesperson for Seattle-based Trident Seafoods Corp., which sells products made from what used to be known as "imitation crab." In the past, FDA required that surimi, a fish paste dyed to look like crab meat, be labeled an imitation product, one that is a "substitute for and resembles another food but is inferior to the food imitated." But after showing that consumers understood the difference between surimi and crabmeat in recent surveys, the seafood industry has apparently persuaded FDA to issue new guidelines. Seafood companies can now label their imitation products as "Crab-flavored seafood, made with surimi, a fully cooked fish protein." *See The Wall Street Journal*, December 13, 2006.

Federal Trade Commission (FTC)

[4] FTC Won't Investigate "Word-of-Mouth" Marketing

The FTC has declined to regulate "word-of-mouth" marketing in a December 7 **letter** to Commercial Alert, a consumer group that censured the use of paid enthusiasts to promote products and services. In a 2005 **petition**, Commercial Alert alleged that "buzz marketers" who conceal paid sponsorships are violating Section 5 of the FTC Act, which states that "an act or practice is deceptive . . . if: 1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and 2) that representation or omission is material to consumers." Granting that some tactics, especially those aimed at children, are potentially problematic, the FTC said it will continue to assess individual cases using existent rules.

A Commercial Alert spokesperson criticized the decision, calling the FTC "a docile lapdog nestled in the lap of its corporate masters." But the Word of Mouth Marketing Association (WOMMA) apparently agreed with the emphasis on self-regulation. At its recent annual summit, WOMMA introduced an **Ethics Assessment Tool**, including a checklist for campaigns in development, as part of its effort to end "stealth marketing." *See Advertising Age*, December 11, 2006; *The Washington Post*, December 12, 2006; *MediaDailyNews*, December 13, 2006.

National Nanotechnology Coordination Office

[5] Nanotechnology Committee Calls for Public Input, Schedules Meeting

The National Nanotechnology Coordination Office will convene a **public meeting** on January 4, 2007, in Arlington, Virginia, to address research needs related to the environmental, health and safety aspects of engineered nanoscale materials. The focus of the meeting will be public comment on the research needs and prioritization criteria identified in a document released in September 2006 by the Nanoscale Science,

Engineering and Technology Subcommittee of the Committee on Technology, National Science and Technology Council. Comments may be submitted until January 31, 2007. *See Federal Register*, December 8, 2006.

Litigation

[6] Federal Court Finds Corporate Farming Ban Unconstitutional

The Eighth Circuit Court of Appeals has ruled that a voter-approved amendment to Nebraska's constitution violates the U.S. Constitution and has, thus, stricken an impediment to corporate farming that existed in the state since 1982. ***Jones v. Gale*, No. 06-1308 (8th Cir., decided Dec. 13, 2006)**. Initiative 300 prohibited corporations or syndicates from acquiring an interest in "real estate used for farming or ranching in [Nebraska]" or "engag[ing] in farming or ranching" with certain exceptions. Family farms and ranch corporations were permitted where the majority voting stock was held by members of a family, "at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." The provisions were adopted through a ballot initiative process.

The challenge was brought by resident and non-resident farmers who claimed they were unable to form corporate entities for their Nebraska operations and suffered economic losses thereby. The court determined that they had standing to bring the action and affirmed a district court finding that the initiative is per se invalid because, on its face, it favors Nebraska residents and has a discriminatory intent. State officials argued that absentee ownership's negative effects on the social and economic culture of rural Nebraska constituted a legitimate local interest that justified the law. While the court indicated it was not certain what the state meant by social and cultural effects, assuming "that a mere desire to maintain the status quo" was at issue, the court said this "cannot in itself be a 'legitimate local interest.' Indeed, it is that kind of xenophobia that the dormant commerce clause sets its face against." In so ruling, the court declined to address Americans with Disabilities Act issues raised in the case.

[7] Claims About Dairy Ads Dismissed

A U.S. district court in Virginia has dismissed consumer fraud claims brought against dairy producers and marketing groups that promoted the consumption of dairy products as a healthy way to lose weight. *Physicians Comm. for Responsible Med. v. General Mills, Inc.*, No. 1:05cv958 (U.S. District Court, Eastern District, Va., decided Nov. 30, 2006). Originally filed in state court, the case was removed to federal court under the Class Action Fairness Act of 2005. The court dismissed the claims for injunctive relief brought under state law because the statutes at issue do not make such relief available to private individuals. The court further found persuasive the defendants' primary jurisdiction argument, i.e., that the matter was already pending before federal agencies (the Food and Drug Administration and the Federal Trade Commission) and, as such, the court should dismiss the action to avoid inconsistent judgments and defer to the agencies' expertise. Without the claims for injunctive relief, the court was constrained to dismiss the remainder of the claims because they did not meet the jurisdictional requirements for diversity jurisdiction.

Counsel for the woman on whose behalf the suit was filed reportedly vowed to appeal the decision and file similar allegations in a more consumer-

friendly state. Expressing disappointment with the outcome, he was quoted as saying "This will encourage and assist the dairy industry in making this country fatter and sicker." Named plaintiff Catherine Holmes apparently increased her dairy consumption after seeing the dairy ad campaign hoping to lose a few pounds; instead, she gained three pounds. *See The Washington Post*, December 7, 2006.

[8] Atkins Diet Lawsuit Dismissed

A U.S. district court in New York has dismissed the lawsuit filed by a Florida man against the company responsible for the Atkins diet. ***Gorran v. Atkins Nutritionals, Inc.*, No. 05 Civ. 10679 (U.S. Dist. Ct., S.D.N.Y., decided Dec. 11, 2006)**. Jody Gorran alleged that the high-protein diet resulted in his "life-threatening" heart disease, and he sued defendants for products liability, negligent misrepresentation and deceptive conduct under Florida law. He sought money damages and an injunction requiring defendants to place warning labels on all Atkins products and the Atkins Nutritionals Web site. Further details about the case appear in issues 84, 121, 102, and 103 of this Report.

The court dismissed the claims finding them meritless and stated in this regard, "Defendants' books and food products are not defective or dangerous products within the meaning of products liability law. Pastrami and cheesecake – large amounts of which Gorran admittedly consumed – may present risks, but these are risks of which consumers are aware." The court added, "the Diet consists of advice and ideas. The concepts may be controversial and the subject of criticism, but they are protected by the First Amendment." In a footnote, the judge proclaims the benefits of running more and eating less.

The court relied on the Restatement (Second) of Torts § 402A cmt. i to conclude that "a food product is not defective because it increases the risk of heart disease," and thus, to the extent that Gorran's claims relied on the consumption of food, they failed. The court also found that, to the extent his product liability claims were based on a book, they were also deficient, because a book is not a product. The court further found that Gorran had failed to allege that defendants owed him a duty of care, a requirement imposed by Florida law on claims for negligent misrepresentation. Assessing the First Amendment dimensions of the case, the court determined that the book at issue was noncommercial speech entitled to full constitutional protection, but found that the Web site contained both commercial and noncommercial speech. Because Gorran's complaint focused on the Web site's general advice and related solely to the site's noncommercial aspects, the court afforded that speech full constitutional protection as well. Analyzing Gorran's consumer fraud claims, the court found that, as the thrust of his complaint related to personal injury and such damages are not recoverable under state law, these claims had to be dismissed.

According to a news source, an attorney with the Physicians Committee for Responsible Medicine, which represented Gorran, has indicated that an appeal will be filed. *See BusinessWeek.com*, December 11, 2006.

Media Coverage

[9] Kim Severson, "New York Gets Ready to Count Calories," *The New York Times*, December 13, 2006

"The idea of a calorie is a very abstract concept," said nutrition expert Marion Nestle in this article about a law that will require some New York City restaurants to list calories on menus. Nestle told *Times* reporter Kim Severson that when it comes to calorie counting, "I can't do it, and I figure if I can't do it no one can do it."

Severson asked several New Yorkers and restaurateurs whether the new law is likely to affect public health as city officials have claimed. Not only did many fast-food patrons dismiss calorie counts as confusing or irrelevant, but chains like Starbucks, which has "87,000 drink combinations," will find it difficult to list calories for all menu items. As a result, many restaurants could opt to withhold nutritional facts, rather than face a law directed only at those voluntarily disclosing such information. "The health department should be concentrating more on the inspection of things like *E. coli*-ridden scallions than the calorie content of food items," argued chef Mario Batali, whose upscale eateries are also exempted.

In related news coverage, Washington state is reportedly considering whether to follow New York City's lead in banning *trans* fat. "You have to start looking at obesity and overweight. This is the next frontier and it happened more quickly than I expected," said the state health official Craig McLaughlin, who also deems obesity the most pressing health issue "now that secondhand smoke has been snuffed out from public places." *See The Seattle Times*, December 13, 2006.

Scientific/Technical Items

[10] U.S. and French Researchers Link "Low Fat" Labels to Over-consumption of Food

Marketing professors in the United States and France have written a paper purportedly showing that "'low fat' nutrition labels increase food intake by (1) increasing perceptions of appropriate serving size and (2) decreasing consumption guilt." B. Wansink and P. Chandon, "Can 'Low Fat' Nutrition Labels Lead to Obesity," *Journal of Marketing Research* 43:3 (forthcoming, Nov. 2006). The authors apparently conducted three studies which showed that "low fat" labels lead all consumers to overeat snack foods and that objective serving size only reduces overeating among guilt-prone normal-weight consumers, but not those who are overweight. The article suggests that food companies help consumers better control their consumption by carefully explaining what "low fat" means and making packaging changes to alter perception of appropriate serving size to "reduce the likelihood of adverse regulations and boycotts [and] help promote more favorable attitudes toward the brand and company."

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