

Food & Beverage

LITIGATION UPDATE

Issue 199 • January 26, 2007

Table of Contents

Legislation, Regulations and Standards

- [1] Media Task Force to Tackle Childhood Obesity Issue1
- [2] FDA Proposes Rule for “Gluten-Free” Labeling1
- [3] FSIS Institutes Label Change for Raw Poultry Products2
- [4] FSIS Requests Revision to HACCP Information Collection ...2
- [5] FTC Asked to Investigate Ads for Subway Club Sandwiches ...2
- [6] Clinton Era Regulatory Executive Order Revised3
- [7] California Proposal Would Require Labeling for Meat from Cloned Animals3

Litigation

- [8] CSPI Drops Plans to Sue over “All Natural” Ads for 7UP®3
- [9] Animal Rights Activists Sue California Pork Producer4
- [10] McDonald’s Asks Court to Dismiss French Fry Claims4
- [11] WTO Dispute over U.S. Farm Subsidies Heats Up4

Other Developments

- [12] Food Safety Experts Consider Role of Processing in *E. coli* Outbreaks5

Media Coverage

- [13] Andrew Martin, “In Live Bacteria, Food Makers See a Bonanza,” *The New York Times*, January 22, 20075

**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

Federal Communications Commission (FCC)

[1] Media Task Force to Tackle Childhood Obesity Issue

U.S. Senator Sam Brownback (R-Kan.) and FCC Chair Kevin Martin this week announced that the bipartisan task force charged with evaluating the alleged impact of media and advertising on childhood obesity will convene for its first meeting on February 14, 2007. "I'm hopeful that this task force will forge a voluntary, public-private partnership to effectively address the pressing issue of media and child health," Brownback was quoted as saying. Those participating in the task force are expected to include Senators Brownback and Tom Harkin (D-Iowa); FCC Chair Martin and Commissioners Deborah Taylor Tate and Michael Copp; and representatives of consumer advocacy groups, media groups and the food and beverage industry. *See FCC Press Release* and *Advertising Age*, January 23, 2007.

Food and Drug Administration (FDA)

[2] FDA Proposes Rule for "Gluten-Free" Labeling

FDA has proposed a [rule](#) that would define the labeling claim "gluten-free" as a food that does not contain (i) "prohibited grains," such as wheat, rye or barley, or a hybrid of these grains; (ii) any ingredient, such as wheat flour, derived from prohibited grains that have not been processed to remove gluten; (iii) any ingredient, such as wheat starch, derived from prohibited grains and processed to remove gluten, "if the use of that ingredient results in the presence of 20 parts per million (ppm) or more gluten in the food"; or (iv) 20 ppm or more gluten. Under the proposed rule, foods termed "gluten-free" may contain oats, but will be deemed "misbranded" if gluten levels exceed 20 ppm or if the label implies that all oat products are gluten-free. In addition, foods naturally free of gluten, such as milk, could not make label claims without referencing "all foods of that same type (e.g., 'milk, a gluten-free food' or 'all milk is gluten free')."

Created in response to the Food Allergen Labeling and Consumer Protection Act of 2004, the rule aims to protect consumers with food allergies. Comments on the proposal must be submitted by April 23, 2007. *See Reuters*, January 22, 2007; *Federal Register*, January 23, 2007.



U.S. Department of Agriculture (USDA)

[3] FSIS Institutes Label Change for Raw Poultry Products

The Food Safety and Inspection Service (FSIS) has disseminated industry [guidance](#) requiring manufacturers of uncooked, breaded, boneless chicken products to convey in “clear, prominent and concise” terms that the item contains raw poultry and must be cooked to 165 degrees Fahrenheit, as measured by a thermometer. The agency considered the change necessary after inadequate labeling reportedly led consumers to believe raw chicken products had been precooked. Labels must now contain language such as “uncooked,” “raw” or “not ready to eat,” as well as practical cooking instructions deemed appropriate for consumer use. See *Food Navigator USA.com* and *Meatingplace.com*, January 22, 2007.

[4] FSIS Requests Revision to HACCP Information Collection

The Food Safety and Inspection Service (FSIS) recently issued a [notice](#) requesting changes to an information collection on Pathogen Reduction and Hazard Analysis and Critical Control Point (HACCP). To protect against foodborne illnesses, FSIS requires meat and poultry establishments to (i) implement written sanitation standard operating procedures; (ii) conduct regular microbial testing for generic *E. coli*; (iii) institute pathogen-reduction performance standards for *Salmonella*; and (iv) develop “a system of preventive controls designed to improve the safety of their products, known as HACCP.” FSIS has found that it will take respondents “fewer total burden hours,” now estimated at .116 hours, to comply with the Pathogen Reduction and HACCP systems information collection.

The agency seeks comments by March 26, 2007, on (i) the “practical utility” of the proposed information collection; (ii) whether FSIS’ burden estimate is accurate; (iii) “ways to enhance the quality, utility, and clarity” of the information collected; and (iv) “ways to minimize the burden” of those responding to the information collection. See *Federal Register*, January 23, 2007.

Federal Trade Commission (FTC)

[5] FTC Asked to Investigate Ads for Subway Club Sandwiches

The National Legal and Policy Center has filed a [complaint](#) with the FTC asking the agency to enjoin television advertisements for a Subway Club® sandwich. The ads claim that the foot-long sandwich has “less than half the fat of a McDonald’s Big Mac.” According to the center, which refers to itself as a legal foundation promoting ethics in public life, such ads are deceptive because they fail to disclose that the sandwich has more calories, twice the carbohydrates, more than twice the sodium, and twice the sugar of a Big Mac. Contending that such omissions are material and likely to mislead consumers who are looking for healthier alternatives in their diets, the complaint also notes that the ads’ fine print, shown for only a few seconds, warns that the fat claim depends on consumers not adding cheese or condiments containing fat to the sandwich when it is ordered. The center compares the ads to those for KFC products that were previously sanctioned by the FTC.



Office of Management and Budget (OMB)

[6] Clinton Era Regulatory Executive Order Revised

Executive Order 12866, originally adopted by President Bill Clinton (D) in 1993, has been [amended](#) by the current administration to require regulatory agencies to “identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action.” According to a spokesperson for OMB Watch, an advocacy and oversight nonprofit group, the change means that the presence of *E. Coli* on spinach would not be enough to justify regulatory action, because the government has to identify a specific market failure before acting. The order previously required that an agency identify the failure of a private market or public institution, “where applicable.”

The revised order has also been amended to include guidance documents within its planning and review requirements. Industry interests are reportedly pleased with these changes, claiming that such documents “were often developed in the dark” in the past. In conjunction with this amendment, the Office of Management and Budget (OMB) has released a “Final Bulletin for Agency Good Guidance Practices”; it will become effective 180 days after publication in the *Federal Register*. The [bulletin](#) defines “guidance document” and establishes procedures for agency approval, public access and feedback. An OMB spokesperson reportedly said, “Both the Executive Order and Bulletin will lead to improvements in the way the federal government does business – by increasing the quality,

consistency, accountability, coordination, and transparency of agency guidance documents.” See *BNA U.S. Law Week*, January 23, 2007.

State/Local Initiatives

[7] California Proposal Would Require Labeling for Meat from Cloned Animals

Senator Carole Migden (D-San Francisco) has introduced a [bill](#) (S.B. 63) that would require any meat from cloned animals or their offspring to be clearly labeled as such; failure to comply with the law would constitute a criminal act. “Since every apricot or apple we eat is labeled, we want consistency, and I believe the public wants to know what they’re eating,” Migden was quoted as saying. Further information about the FDA’s latest proposed action on products from cloned animals appears in issue 197 of this Report. See *San Francisco Examiner.com*, January 19, 2007.

Litigation

[8] CSPI Drops Plans to Sue over “All Natural” Ads for 7UP®

The Center for Science in the Public Interest (CSPI) has reportedly dropped plans to sue Cadbury-Schweppes for marketing 7UP® as “all natural” despite the presence of high-fructose corn syrup in its product. The beverage company apparently issued a statement indicating that it will highlight those ingredients “for which there is no debate” over whether they are natural.

CSPI warned the company in May 2006 that it was planning to file a lawsuit and had been in negotiations over the matter. CSPI Litigation Director Steve Gardner was quoted as saying,



“We look forward to seeing exactly which words the company uses to describe its ingredients on labels and on marketing materials, but trust they won’t imply that high-fructose corn syrup is ‘natural.’” CSPI has also announced that the group “may file previously announced lawsuits against Coca-Cola and Nestlé (over Enviga, a deceptively labeled green tea drink positioned as a weight-loss aid) and Kellogg and Viacom (for marketing junk foods to young children).” See *CSPI News Release*, January 12, 2007.

[9] **Animal Rights Activists Sue California Pork Producer**

A coalition of animal rights activists and three Bay Area residents have sued California’s largest pig farming operation, claiming that CorcPork, Inc., is confining animals in violation of the state’s anti-cruelty laws. The lawsuit also names Farmer John® products, which are sold in local groceries, for allegedly misleading the public about the treatment of pigs. According to one plaintiff, the [Animal Legal Defense Fund](#), “CorcPork, Inc. keeps its roughly 9,000 pregnant and nursing pigs in violation of section 597t of the California Penal Code . . . the sows spend virtually their entire lives crammed into stalls that are often so small that the sows’ bodies are forced into the bars at either end.” The complaint apparently contends that the plaintiffs believed they were paying market value for products raised in accordance with state law; they allege harm from paying for “illegally-produced goods.”

[10] **McDonald’s Asks Court to Dismiss French Fry Claims**

According to a news source, McDonald’s Corp. has filed a motion to dismiss claims that it misled the public by failing to disclose that its french fries and hash browns contain wheat and gluten, which can allegedly trigger allergic reactions in some consumers. A number of lawsuits with similar claims were consolidated and transferred by the Judicial Panel on Multidistrict Litigation to U.S. District Judge Elaine Bucklo in the Northern District of Illinois in August 2006. McDonald’s motion apparently contends that the claims have been brought by “hypersensitive consumers with allergies” and that it did not deceive anyone about its ingredients. See *Chicago Tribune*, January 20, 2007.

[11] **WTO Dispute over U.S. Farm Subsidies Heats Up**

According to a news source, 32 countries from Europe, Central and South America and the Far East have so far joined Canada in a complaint filed with the World Trade Organization (WTO) challenging U.S. corn subsidies and the nation’s overall farm aid program, which purportedly amounts to as much as \$50 billion annually. Other countries may also have joined the complaint before the January 22, 2007, deadline. The case represents global discontent with U.S. farm policy and could factor into upcoming negotiations over the Farm Bill. One legal observer was quoted as saying, “I think Canada has a very good case based on the Brazilian victory in the cotton subsidies case, where many of the issues were the same.” See *Globe & Mail*, January 23, 2007.



Other Developments

[12] Food Safety Experts Consider Role of Processing in *E. coli* Outbreaks

According to a Food and Drug Administration food safety expert, when fresh greens are processed and packaged in a central location, it is more likely that bacterial contamination will be more widespread, because one tainted head of lettuce can be cut up and placed in multiple packages. While there is apparent disagreement over whether field dressing, i.e., coring and removing outer leaves, introduces more or less bacteria into the processing system, all agree that steps must be taken to shore up consumer confidence in the safety of fresh greens.

Some experts, like Michael Doyle, director of the University of Georgia's Center for Food Safety, reportedly insist that bagged produce, which has been triple washed in chlorinated water, is nevertheless not safe to eat. Others, like Jim Gorney, senior vice president for food safety and technology at the United Fresh Produce Association, contend that discarding the core and outer leaves in the field actually brings "a microbiologically cleaner product" into a sterilized plant for processing. A spokesperson for Natural Selection Foods, whose spinach was purportedly linked to an *E. coli* outbreak in 2006, indicated that the industry is "trying to come together to really raise the bar on these food safety protocols." See *The Los Angeles Times*, January 20, 2007.

Media Coverage

[13] Andrew Martin, "In Live Bacteria, Food Makers See a Bonanza," *The New York Times*, January 22, 2007

"Probiotics in food are part of a larger trend toward 'functional foods,' which stress their ability to deliver benefits that have traditionally been the realm of medicine or dietary supplements," writes *Times* reporter Andrew Martin in this piece about the microbes believed to alleviate a host of ills, from digestive woes to allergies. Charting the success of products like Dannon's probiotic-enhanced yogurt, Activia, Martin also notes that critics warn against specious health claims. "[Probiotics] are gaining a reputation as being good for you in some way, and there is element of truth in that," a nutritionist with the Center for Science in the Public Interest told *The Times*. "But it is a very narrow element of truth, in certain very specific diseases where it's proven to be helpful."

In related news, *The Wall Street Journal's* Laura Johannes also reported on functional foods that claim to lower low-density lipoprotein (LDL), or "bad" cholesterol, because they contain plant sterols and stanols. Two industry-backed studies supporting this claim were apparently published last year, although Johannes mentions that "how plant sterols and stanols work in the body isn't fully understood." See *The Wall Street Journal*, January 23, 2007.



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.

**Shook,
Hardy &
Bacon** LLP

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.
