

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

110th Congress

[1] Harkin Expected to Introduce Proposals to Regulate Food Healthfulness Claims and Establish a Food Research Institute

Senator Tom Harkin (D-Iowa), chair of the Senate Agriculture Committee, is reportedly poised to introduce legislation urging the Food and Drug Administration (FDA) to devise a system for classifying the healthfulness of foods on product labels. While FDA has long regulated “health claims” on food labels, manufacturers, marketers and grocers have designed numerous symbols and icons to convey a healthful stamp of approval on a variety of products. The American Heart Association, for example, charges manufacturers a fee to use its “Heart Check” symbol, and the National Dairy Council allows the use of its “3-a-day” emblem on dairy products. A Harvard epidemiology and nutrition professor suggests that some marketing icons promote foods high in salt, saturated fat and sugar because manufacturers are now free to focus on a product’s best attribute. The Center for Science in the Public Interest (CSPI) is apparently behind the move to an FDA-sanctioned certification program. According to CSPI Executive Director Michael Jacobson, the proliferation of symbols, programs and registries is confusing even to consumers who are nutrition-savvy. A prominent and reliable FDA

symbol “would be a tremendous help to those harried shoppers racing through the supermarket,” he contends. *See The Los Angeles Times*, March 19, 2007.

Federal Communications Commission (FCC)

[2] Government Officials Call on Industry to Act on Childhood Obesity

Senator Sam Brownback (R-Kan.) has reportedly convened a private-industry task force, which recently met for the first time with him and FCC officials, who called on marketing and food-industry members to develop a plan of action on childhood obesity by July 2007. Brownback, also a presidential contender, called the obesity epidemic “unacceptable,” and FCC Chair Kevin Martin characterized the issue as a “national crisis.” The task force has no official government role. Members apparently include Walt Disney Co., Telemundo Group, General Mills, and PepsiCo, as well as health and consumer group representatives. *See Advertising Age*, March 21, 2007.

U.S. Department of Agriculture (USDA)

[3] International Agreement Will Combine Resources Against Bird Flu

U.S. Agriculture Secretary Mike Johanns this week signed an agreement with the United Nations’ Food and Agriculture Organization to jointly address global concerns such as chronic hunger, conserva-



tion and animal disease. Approved in 2006, the pact also launched a Crisis Management Center in Rome, Italy, where USDA specialists have been studying highly pathogenic H5N1 avian influenza (AI). “This agreement will facilitate greater international coordination and collaboration on a broad range of agricultural issues and help to protect our agricultural systems,” Johanns said in a [press statement](#), which described the agency’s approach to bird flu as focused on (i) international efforts, (ii) wild bird surveillance, (iii) domestic poultry monitoring, and (iv) research. In addition to conducting workshops and inspections, USDA last year found minimal AI-risk associated with Alaskan waterfowl that mingle with Asian varieties. *See Pork Alert*, March 20, 2007.

In a related development, FDA recently announced its [Pandemic Influenza Preparedness Strategic Plan](#), which includes a study of AI’s potential impact on food safety. FDA will assess contamination risks for poultry-derived foods and ingredients that may come into contact with infected animals or humans. “We know the effect that avian influenza has had on the public perception of food in Europe, where there have been outbreaks,” FDA Assistant Commissioner Boris Lushniak told the press. “We want food and feed safety issues to be answered, in case we were to have avian influenza in this country.” *See Bloomberg News*, March 15, 2007.

Food and Drug Administration (FDA)

[4] FDA Proposes Alternative Temperature-Indicating Devices for Low-Acid Canned Foods

FDA has issued a [proposed rule](#) that would allow manufacturers of low-acid canned foods to replace or supplement mercury-in-glass thermometers (MIGs) with “state of the art” alternative

temperature-indicating devices (TIDs) during heat processing.

The proposed rule would (i) amend regulations for low-acid canned foods such as beans, corn, peas, and potatoes; (ii) clarify recordkeeping requirements; (iii) standardize procedures for gauging temperature; and (iv) include the metric equivalents of *avoirdupois* (U.S.) measurements. FDA will permit manufacturers, on a case-by-case basis, to use TIDs immediately provided the devices and procedures comply with the proposed rule. Comments on the amendment must be submitted by June 12, 2007. *See Federal Register*, March 14, 2007.

[5] FDA Proposes Survey on Food Safety Advice for Pregnant Women

FDA has proposed a survey of health care professionals on the food safety and nutrition advice offered to pregnant women. The survey will ask gynecologists, nurse practitioners, nurse midwives, physician assistants, and dietitians about their recommendations regarding (i) methyl mercury and seafood, (ii) listeriosis, (iii) weight control and nutrition, (iv) dietary supplements, (v) food allergies, (vi) toxoplasmosis, and (vii) infant feeding practices. FDA will use the collected data to determine the effectiveness of advisories issued in 2004 and 2005 that address these issues. *See Federal Register*, March 20, 2007.

Litigation

[6] Bisphenol A Class Action Filed in California

The father of a 5-year-old boy, who was allegedly born with injury to his genitalia, has filed a putative class-action lawsuit in a California state court



alleging that retailers and manufacturers of plastic baby bottles, toddler cups and breast milk pumps wrongfully marketed the products as safe when they actually contain bisphenol A, a purported toxin.

[*Ganjei v. Ralphs \(Calif. Super. Ct., Los Angeles\) \(filed March 12, 2007\)*](#).

The complaint brings causes of action for intentional and negligent misrepresentation and violations of the state's Business and Professional Code and Consumers Legal Remedies Act. According to plaintiff, numerous scientific studies show a link between exposure to bisphenol A and a host of health problems, including cancer, diabetes, obesity, miscarriage, and chromosome abnormalities. Despite such scientific evidence, plaintiff contends, the retail and manufacturer defendants misrepresented that their products were safe and failed to disclose the presence of bisphenol A. The plaintiff brings the litigation on behalf of infants and children in California who purchased and used defendants' products and is seeking to recover the cost of such products, general and punitive damages, and attorney's fees and costs. Plaintiff is also requesting injunctive relief, i.e., an order suspending all further advertising not containing a boldface disclosure regarding bisphenol A and corrective advertising.

Other Developments

[7] **Banana Supplier Enters Guilty Plea for Making Protection Payments**

Chiquita Brands International, Inc. has reportedly agreed to a plea deal requiring it to pay a \$25 million fine for violating a 1997 law that forbids companies from engaging in transactions with designated Foreign Terrorist Organizations. The company had apparently been paying right- and left-wing

groups in Colombia more than \$1.7 million from 1997 through February 2004 to protect its employees. According to CEO Fernando Aguirre, who joined the company just before the payments ceased, "The payments made by the company were always motivated by our good-faith concern for the safety of our employees. Nevertheless, we recognized and acted upon our legal obligation to inform the DOJ of this admittedly difficult situation. The agreement reached with the Department of Justice today is in the best interests of the company."

The company entered its guilty plea in federal court on March 19, 2007. Senior executives who approved the illegal protection payments were not identified, and none has been charged individually. A sentencing hearing will be held June 1; if the court refuses to accept the plea deal, the company could be exposed to fines as high as \$100 million. Chiquita sold its Colombian operations in June 2004 at a \$9 million loss, according to a news source. Law Professor Carl Tobias was quoted as saying he believed the government was sending a message to other multinational companies with this case, warning them they will be prosecuted if they conduct business deals with terrorists. The group that received most of Chiquita's payments was identified as the United Self-Defense Forces of Colombia, which Secretary of State Colin Powell designated as a Foreign Terrorist Organization in September 2001. *See Cincinnati.com*, March 15, 2007; *The Wall Street Journal*, March 19, 2007.

[8] **Consumer Watchdog Calls for Ban on Cloned Animals in Food Supply**

The Center for Food Safety (CFS) this week issued a [report](#) alleging that the Food and Drug Administration's (FDA's) risk assessment for cloned animals "is based more on faith than on science." Titled *Not Ready for Prime Time: FDA's*



Flawed Approach to Assessing the Safety of Food from Cloned Animals, the report charges that FDA failed to use peer-reviewed studies to support its conclusion that cloned animals and their offspring are safe for human consumption. CFS also contends that FDA contradicts itself when the agency claims, for example, that sick or abnormal clones will never enter the food supply, yet acknowledges that safeguards are not infallible. “FDA’s flawed approach falls far short of providing the kind of rigorous scientific assessment that Americans deserve before these experimental animals are allowed in the food supply,” opined a spokesperson for CSE, which is demanding a mandatory ban on cloned livestock until the technical and ethical issues are resolved to consumers’ satisfaction. See *Center for Food Safety Press Release*, March 22, 2007.

[9] Honeybee Disappearance Threatens Crops Dependent on Pollination

A mysterious phenomenon known as colony collapse disorder (CCD) has devastated U.S. bee colonies this year, risking \$14 billion in pollinated crops and so far affecting commercial beekeepers in 24 states. CCD apparently causes adult bees to abandon hives and uncapped brood, but entomologists can neither find an explanation nor discover what happens to the vanishing insects. “I came to pick up 400 bee colonies and the bees had just flat-out disappeared,” one Pennsylvania beekeeper told reporters. “There were no dead bees, no bees on the ground, just empty boxes.”

Meanwhile, beekeepers are reportedly claiming that pesticides have compounded the problem, along with influxes of parasitic mites and fungal infections. Some researchers suggest a new virus or genetics may be responsible and have advised beekeepers not to mix equipment or bees from colonies affected by CCD. Others speculate that bees bred to require shorter off-seasons are

succumbing to the stresses of migratory beekeeping companies, which routinely truck hives cross-country for pollination seasons. California’s \$1.4 billion almond crop, which covers 580,000 acres in the Central Valley region, is entirely dependant on honeybees and requires more than one-half of the nation’s colonies during the February bloom. “It would be nice to know that we have a dependable source of honeybees,” one almond grower said. “But at this point I don’t know that we have that for the amount of acres we have got.” See *National Geographic*, February 23, 2007; *The New York Times*, February 27, 2007; *The National Academies News*, March 8, 2007.

[10] Center for Food Integrity Formed to Build Consumer Trust

Several U.S. food industry groups this week unveiled a new initiative designed to restore consumer confidence in the nation’s food supply. “The Center for Food Integrity will be a resource where consumers and other stakeholders can find information about the food system and discuss important issues,” the Indiana State Department of Agriculture director said in support of the non-profit, which unites the Grow America Project and Best Food Nation under one banner. With members that reportedly include the American Egg Board, National Milk Producers Federation and National Pork Board, the center plans to address health and nutrition, food safety, the environment, worker’s issues, and animal welfare. See *Meatingplace and Food Navigator USA.com*, March 20, 2007.

[11] Law Professor Plans Food & Agriculture Casebook

University of Arkansas Law Professor Susan Schneider, who also serves as director of the Graduate Agricultural Law Program, has [announced](#) that she is preparing a casebook on issues in the law



of food and agriculture. Schneider is hoping “this book will encourage professors to wade into the waters of teaching agricultural law, food law, or most appropriately, the law of food and agriculture. She is also apparently considering making the book available electronically through a Web site to allow the use of hot links throughout the material.

Scientific/Technical Items

[12] Spanish Study Reports Mechanism for Link Between HFCS and Obesity

A recent study in *Hepatology* reportedly demonstrates that fructose-syrup consumption by rats changes fat metabolism in the liver and leads to a reduction in the liver’s ability to process the sweetener. Núria Roglans, et al., “Impairment of Hepatic Stat-3 Activation and Reduction of PPAR α Activity in Fructose-Fed Rats,” *Hepatology*, February 26, 2007. University of Barcelona researchers suggest that this observed mechanism could explain the alleged link between rising obesity rates and the consumption of beverages sweetened with high-fructose corn syrup (HFCS). They state, “Because PPAR α activity is lower in human than in rodent liver, fructose ingestion in humans should cause even worse effects, which would partly explain the link between increased consumption of fructose and widening epidemics of obesity and metabolic syndrome.”

The Corn Refiners Association responded to the study by noting the differences between fructose and HFCS, claiming that because the 50 percent level of glucose in HFCS “acts as a moderator to fructose,” feeding rats fructose beyond what is consumed in a normal diet will produce the results seen in the Barcelona study. An association spokesperson also pointed to a new study in *Nutrition* which showed that “when fructose is

consumed in the form of HFCS, the measured metabolic responses do not differ from sucrose in lean women.” See *Food Navigator USA.com*, March 20, 2007.

[13] Yale Researchers Allege “Clear Association” Between Soft Drinks and Obesity

A review of scientific literature purportedly reveals “a clear association between soft drink consumption and nutrition and health outcomes,” according to Yale University researchers who analyzed 88 articles on sugar-sweetened beverages. Lenny Vartanian, et al., “Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-Analysis,” *American Journal of Public Health*, March 2007. Funded in part by the Rudd Foundation, the review alleges that soft drink intake leads to (i) increased body weight, (ii) increased risk of Type II diabetes, and (iii) decreased intake of milk, calcium and other nutrients. The authors also conclude that research supported by the beverage industry “reported significantly smaller effects than non-industry funded studies.”

“Nobody claims there is a single cause to the obesity problem, but the existing science certainly puts soft drinks in the list of leading contributors,” said co-author Kelly Brownell, Ph.D., who also directs the Rudd Center for Food Policy and Obesity. Meanwhile, the American Beverage Association has apparently questioned the reviewed studies and their methodologies, which the Yale researchers have acknowledged are greatly varied. See *Medical News Today*, March 9, 2007.



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