

Food & Beverage

LITIGATION UPDATE

Issue 219 • June 15, 2007

Table of Contents

Legislation, Regulations and Standards

- [1] Congress Considers Early Implementation of COOL Requirements 1
- [2] USDA Issues Report on Alternative Methods to Influence Consumer Food Choices 1
- [3] FDA Food Safety Center Publishes Stakeholder Report Outlining FY 2007 Priorities 2
- [4] FDA Seeks Nominations for Nonvoting Industry Representatives to Serve on Food Safety Public Advisory Committee 2
- [5] Functional Foods Crackdown Launched; FSA to Issue Food Additives Report ... 2
- [6] California Senate Passes Nutrition Bill for Chain Restaurants 3
- [7] As *Trans* Fat Bans Take Hold in Cities, Consumer Watchdog Blasts Supermarket Foods 3

Litigation

- [8] Court Dismisses Challenge to Chicago's Foie Gras Ban 4

Legal Literature

- [9] William Werner, et al., "The Risk to the American Fast-Food Industry of Obesity Litigation," *Cornell Hotel & Restaurant Admin. Q.*, May 2007 4

Other Developments

- [10] Web Site Discloses Farm Subsidy Recipients 5
- [11] Kellogg Announces Stringent Youth Marketing Guidelines 5

Media Coverage

- [12] *Wall Street Journal* Turns Focus to Patent Laws 6
- [13] Consumer Magazine Weighs Risks and Benefits of Nanotechnology 7

Shook,
Hardy &
Bacon, L.L.P.

GLOBAL PRODUCT LIABILITY
LAW FIRM OF THE YEAR

2005|2006|2007



WHOS WHO LEGAL
The International Who's Who of Business Lawyers

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] Congress Considers Early Implementation of COOL Requirements

Congress is reportedly considering a bill ([S. 404](#)) to implement country-of-origin labeling (COOL) on beef, pork, lamb, fruit, and peanuts by September 30, 2007. Lawmakers had postponed the COOL requirement, originally a 2002 Farm Bill provision, until 2008 after several food industry groups argued that the system was costly and unnecessary. “We consider it an awfully expensive way of going about doing something,” said a Grocery Manufacturers Association spokesperson, who estimated that the program would cost 28,000 retail stores “hundreds of millions of dollars.” COOL opponents have also maintained that the law will not protect consumers from tainted imports. “It’s simply a bad idea,” U.S. Representative Bob Goodlatte (R-Va.) told the media. “It’s not a food safety issue. It’s a marketing issue.”

Critics of the delay, however, allege that some producers are more worried about market impact than consumer safety. “I think that there is a concern, particularly with regard to some of the Mexican cattle,” said the president of R-CALF, a

cattle ranchers’ organization that supports the measure. “There’s a concern that the Mexican label would not be well-received. The same could be true of Canada, which has had ongoing [mad cow] disease problems.” Other farm interests have claimed that a failure to differentiate products by country could damage U.S. businesses in the event of an overseas health issue. “Consumers would just stop buying shrimp,” a Wild American Shrimp Inc. spokesperson was quoted as saying. *See Chicago Tribune*, June 10, 2007.

U.S. Department of Agriculture (USDA)

[2] USDA Issues Report on Alternative Methods to Influence Consumer Food Choices

USDA’s Economic Research Service has issued a [report](#) that explores whether consumer psychology could be put to use to improve consumers’ food choices and thus have an impact on rising obesity rates. The report incorporates findings from behavioral economics, food marketing and psychology. According to the authors, who are economics professors and researchers, “People have problems of self-control when choosing food,” and often make their food decisions based on emotion rather than rational thought. Focusing on the food stamp program, special nutrition programs for women, infants and children, and the national school lunch and breakfast programs, they suggest that some strategies could improve dietary selections.



Among those strategies are (i) allowing program participants to preselect their menu options or preorder groceries by telephone, (ii) making default menu options more healthful, (iii) specifying the amounts of food stamp allotments that must be used to purchase healthful foods, and (iv) making fruits and vegetables more accessible or prominent in school cafeterias. The report also considers factors such as noise, lighting and the size and shape of foods and food packaging that can affect how much people eat. The authors caution that the report is simply an exploration of new ideas and does not represent a recommendation or endorsement of any of them. "A thorough analysis of costs, benefits and potential impacts would be needed before any strategy could be considered as a policy option."

Food and Drug Administration (FDA)

[3] FDA Food Safety Center Publishes Stakeholder Report Outlining FY 2007 Priorities

FDA's Center for Food Safety and Applied Nutrition (CFSAN) has released its [FY 2007 Report to Stakeholders](#). Among other matters, CFSAN plans to hold public meetings on foods marketed as "functional foods" and on the regulatory status and labeling of salt. The agency also expects to publish a proposed rule for gluten-free labeling and will be soliciting comment on updating daily values in nutrition labeling. CFSAN has indicated that it will publish a final guidance for lead levels in candy as well as a draft updated pesticides compliance policy guide. Acting with another federal agency, CFSAN will be measuring pesticide levels in foods.

[4] FDA Seeks Nominations for Nonvoting Industry Representatives to Serve on Food Safety Public Advisory Committee

FDA has [notified](#) food industry organizations that the agency is seeking nonvoting representatives to serve on its Food Advisory Committee for the Center for Food Safety and Applied Nutrition (CFSAN). The committee advises FDA on emerging food safety, nutrition and food-related health issues, and recommends strategies for communicating risk assessments to the public. FDA is specifically seeking nominees experienced in the food production and manufacturing industry, the dietary supplement manufacturing industry, and the agricultural biotechnology manufacturing industry. Interested parties should submit nominations, including self-nominations, by July 11, 2007. Within the subsequent 30 days, FDA will send a list of nominees and relevant materials to food industry organizations, which will have 60 days to select a candidate. Those organizations wishing to participate in the selection process must also submit a letter of interest to FDA by July 11.

European Union (EU)

[5] Functional Foods Crackdown Launched; FSA to Issue Food Additives Report

The EU is reportedly requiring scientific evidence to back food company claims that their products have particular health benefits. Administered by individual member authorities, the new directive has apparently forced some companies to withdraw their "functional food" products from the market. According to a news source, health benefits have been linked by marketers to products ranging from baby foods that purportedly bolster a baby's



immune system to teas that “strengthen veins, protect the liver, maintain healthy bones, improve memory, fight allergies, and support healthy skin.”

Meanwhile, the U.K.’s Food Standards Agency, which will be responsible for enforcing the EU directive in Britain, is reportedly poised to issue a report confirming a link between certain food additives and temper tantrums, poor concentration, asthma, and rashes. And the Food Commission is apparently now calling for warnings to be placed on all products, such as soft drinks, containing artificial colorings and preservatives. Such warnings are already required when the additives are used in medicines. Manufacturers contend that the additives have been ruled safe; they object to any warnings. Representatives of public interest groups would like all such additives to be banned, but welcome “educating parents about ingredients so that they can make an informed choice about what they are giving their children.” See *The Sunday Times*, June 10, 2007; *The Scotsman*, June 12, 2007.

State/Local Initiatives

[6] California Senate Passes Nutrition Bill for Chain Restaurants

The California Senate has approved a bill ([S.B. 120](#)) that would require chains with 10 or more restaurants to post nutritional content on menus. Under the proposed law, menus and menu boards would list the number of calories and amount of carbohydrates, sodium, saturated fat, and *trans* fat for each standard food item. The bill would also require menus to state in “clear and conspicuous” text: “Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium.” In addition, the rule stipu-

lates that restaurants must provide supplemental information at the consumer’s request.

“This is an important step forward in the national fight to curb obesity,” Senator Carole Migden (D-San Francisco) said about the effort, which would make California the first state to impose a nutritional information law on restaurateurs. The California Restaurant Association, however, has argued that obesity rates are not dependent on the availability of nutritional information. “This bill doesn’t make us healthier, it simply imposes a burden on businesses,” Senator David Cox (R-Fair Oaks) was quoted as saying. “It’s one of those nanny government things.” If passed by the Assembly and signed by Governor Arnold Schwarzenegger (R), the legislation would take effect on January 1, 2009. See *The Sacramento Chronicle*, June 1, 2007.

[7] As *Trans* Fat Bans Take Hold in Cities, Consumer Watchdog Blasts Supermarket Foods

Town Meeting members in Brookline, Mass., have reportedly voted to prohibit *trans* fat from restaurants and schools by 2009. Following plans adopted by New York and Philadelphia, the town will require that its 200 restaurants phase out *trans* fat in fried foods by November 30, 2008, and in baked goods by April 30, 2009. While some residents have apparently welcomed the plan as a “great public health step,” others have cautioned against flaws in the inspection process and cited potential difficulties for kosher establishments. See *The Boston Globe*, June 1, 2007.

Meanwhile, the Center for Science in the Public Interest (CSPI) has released a “[limited survey](#)” of supermarket foods that allegedly contain “a whole



day's worth" of *trans* fat. "Everybody is so used to seeing '0g Trans Fat' claims on food labels that it's tempting to think the problem is solved," a CPSI staffer stated in a press release. "While labeling has been a great success, it clearly hasn't been enough to get every company on board for every product." CSPI claims that the *trans* fat level in "150 varieties of pot pies, microwave popcorn, frozen pizzas, pastries, cookies, and convenience foods" exceeds 2 grams, the maximum daily amount considered safe by the American Heart Association. The watchdog has been petitioning FDA since 2004 to revoke the "generally recognized as safe" status for partially hydrogenated oils and limit their uses to "miniscule amounts." See *CSPI Press Release*, June 11, 2007.

In a related development, *U.S. World & News* writer Adam Voiland argues in "No License to Overindulge" that the *trans*-fat free label can mislead consumers into perceiving a food as healthy. "People know *trans* fats are not good for them," the immediate past president of the American Heart Association was quoted as saying. "But they do not understand that replacing them with saturated fat is not a good option." Voiland describes efforts to phase out *trans* fats by replacing them, for example, with fully hydrogenated oils that create stearic acid, a saturated fat. He also points to a recent FDA ruling that allows products with at least an 80 percent unsaturated fat content to claim that "replacing saturated fat with similar amounts of unsaturated fats may reduce the risk of heart disease." Despite the potential for confusion, "Frito-Lay may be shrewd to play up fat's benefits," Voiland concludes. "In fact, most people need to eat more of the good kind." See *U.S. World & News Report*, June 18, 2007.

Litigation

[8] Court Dismisses Challenge to Chicago's Foie Gras Ban

A U.S. district court in Illinois has dismissed a challenge to Chicago's ban on the sale of foie gras, according to a news source, saying that the ban does not violate the constitution. The Illinois Restaurant Association and Allen's New American Café brought the lawsuit, contending that the city lacked the authority to impose a restriction on a legal product made outside the city. As we noted in issue 182 of this Report, plaintiffs claimed that local governments are only empowered in Illinois to deal with local issues. In her June 12, 2007, ruling, Judge Blanche Manning apparently disagreed. Animal rights groups that pushed for the ban, arguing that the process of creating the delicacy constitutes animal abuse, are reportedly celebrating the decision. See *findlaw.com*, June 12, 2007.

Legal Literature

[9] William Werner, et al., "The Risk to the American Fast-Food Industry of Obesity Litigation," *Cornell Hotel & Restaurant Admin. Q.*, May 2007

This article, written by professors with law degrees who teach hospitality-related disciplines, explores the legal issues involved in obesity litigation and the legislation a number of states have adopted to curb such suits against fast-food businesses. The authors conclude that, while obesity lawsuits have not yet been successful and face significant evidentiary obstacles, the industry should take action to avoid the risk of becoming a litigation target. Among the actions recommended are (i)



monitor and support legislation limiting obesity lawsuits; (ii) “avoid unsupportable advertising claims about the healthfulness, ingredients, or other nutritional qualities of food products”; (iii) support research into “the potential addictive or otherwise dangerous nature of fast-food ingredients”; and (iv) promote public health information and the prevention of obesity-related illness. The article discusses *Pelman v. McDonald’s Corp.* at some length and compares the burdens of proving causation in tobacco cases with those in fast-food litigation. The authors warn quick-service restaurant owners and operators “who consider potential obesity litigation improbable if not ridiculous . . . to recall that product liability cases against tobacco companies were also unpopular and unsuccessful at first.”

Other Developments

[10] Web Site Discloses Farm Subsidy Recipients

The Environmental Working Group, a public interest advocacy organization, is behind a new [database](#) that allows searchers to find who is receiving farm and crop subsidy payments under the Farm Bill. According to the Web site, “Tens of thousands of people who have benefited from billions in federal farm subsidy payments have been shielded from public view for decades, behind layers of partnerships, joint ventures, corporations and other business structures that obscured their personal subsidy claims. Not anymore.” The site allows searching by name or by state and has garnered considerable attention among bloggers interested in food-related issues.

In a related development, Canada has reportedly asked the World Trade Organization to establish a dispute-settlement panel in its case against the

United States over farm subsidies. Minister of Trade David Emerson was quoted as saying, “We remain concerned that the U.S. is providing agricultural subsidies in breach of its WTO commitments. Requesting a dispute settlement panel reinforces our efforts in the Doha negotiations toward reducing trade-distorting U.S. subsidies.” The WTO apparently caps U.S. agricultural subsidies at \$19.1 billion annually; Canada alleges that the limit has been exceeded in six of the past eight years by an average of \$5 billion a year. The U.S. Trade Representative contends that Canada’s claims are groundless. In a 2004 cotton subsidies case, the United States lost to Brazil which claimed the subsidies encouraged excess production and reduced prices, thereby distorting international trade. *See The Wall Street Journal*, June 9, 2007.

[11] Kellogg Announces Stringent Youth Marketing Guidelines

Kellogg Co. this week announced plans to end youth advertising for any of its brands that do not meet strict nutritional requirements. Kellogg has pledged to reformulate its most popular products, from Pop-Tarts to Fruit Loops, so that a single serving contains: (i) no more than 200 calories; (ii) 0 grams *trans* fat; (iii) fewer than 2 grams of saturated fat; (iv) no more than 230 milligrams of sodium; and (v) no more than 12 grams of sugar, excluding sugar from dairy, fruit and vegetables. If it cannot satisfactorily reformulate a product, the company will reportedly stop marketing the food in all TV, radio, print, and Web site ads aimed at audiences ages 12 and younger. In addition, Kellogg will not (i) advertise foods in schools with children younger than 12; (ii) sponsor product placements in any media directed at children younger than 12; (iii) use licensed characters in ads directed at chil-



dren younger than 12 or on the front labels of food packages unless those foods meet nutrition standards; and (iv) use branded toys in connection with foods that do not meet the nutrition standards. “It means we have a lot of work to do,” Chief Executive David Mackay said about the measure, which will take effect by 2008. “If we can’t make those products taste just as good as they do today and make them as appealing, then we won’t reformulate them and we won’t advertise them.” The company has estimated that at least 50 percent of its kid-friendly products do not currently comply with the nutrition guidelines.

In response to Kellogg’s announcement, the Center for Science in the Public Interest (CSPI) and the Campaign for a Commercial-Free Childhood (CCFC) dropped a pending lawsuit against the company. In 2006, the two consumer groups filed an intent to sue Kellogg and the Nickelodeon TV network under a Massachusetts law to prevent their continued marketing of alleged junk food. “This important agreement represents a rising tide that should lift all boats,” a CSPI spokesperson said. “I hope other companies adopt commitments that are at least equal to what Kellogg is announcing today.” See *CSPI Press Release, Associated Press* and *The New York Times*, June 14, 2007; *Associated Press*, June 13 2007.

Media Coverage

[12] *Wall Street Journal* Turns Focus to Patent Laws

Noting that U.S. businesses invest as much in intellectual property and other intangible assets as they do in equipment, factories and physical investments, Nick Timiraos discusses why different

industrial sectors are squaring off over making changes to the laws that protect patent holders. The hi-tech industry is looking to change the laws to make them more flexible. Greater flexibility would advance the pace of technological innovation, because new inventions frequently build upon past advances and include hundreds of potentially patentable technologies. According to Timiraos, “The industry has become the target of what critics say is excessive patent litigation.”

On the other hand, pharmaceutical interests oppose any weakening of the patent system, concerned that weakened protection would undermine their investment and discourage expensive research. Their share of the patents granted is decreasing, while technology’s share has increased dramatically since 1990, constituting about 40 percent of those issued annually. Congress is currently debating changes to the nation’s patent laws. Among the provisions being considered are limitations on the damages that could be awarded in infringement cases and the creation of a new mechanism for third parties to challenge patents before a three-judge panel after the U.S. Patent and Trademark Office approves them.

The article includes a number of patent facts, including that “Firms lose about 0.5% of their stock market value when sued for patent infringement.” A sidebar identifies the companies that are lining up on either side of the recent legislative and legal patent battles; biotech companies are listed as favoring strong patent protection. Patent lawsuits have apparently risen dramatically since 1990 and tend to settle out of court more often than other civil cases. Critics contend that the current system is too expensive and constitutes an “innovation tax.” See *The Wall Street Journal*, June 9, 2007.



[13] Consumer Magazine Weighs Risks and Benefits of Nanotechnology

“The same qualities that make nanomaterials so promising also create the potential to do harm in unexpected ways,” opines *Consumer Reports* in “Nanotechnology: Untold promise, unknown risk,” which explores the applications of materials “as small as a nanometer, or about one-hundredth-thousandth the width of a human hair.” In addition to discussing developments such as nanosensors that can detect *E. coli*, avian influenza and other food-borne illnesses, *Consumer Reports* canvasses scientists who worry that elements “harmful in conventional form can become more dangerous as nanoparticles.” These critics assert that not only are small particles more easily absorbed into the skin and other organs, but that their hollow structure makes them likely to react with other chemicals. Ken Donaldson, a respiratory toxicology professor at the University of Edinburgh, also argues that “‘smallness in and of itself’ can transform normally benign substances into harmful ones,” thus contradicting the claims of one food packaging company cited by *Consumer Reports*. Consumers Union, which publishes the magazine, ultimately recommends that the U.S. government monitor nanotechnologies through: (i) increased FDA oversight; (ii) mandatory labeling; (iii) government agency funding for risk research and regulation; and (iv) safety legislation. See *Consumer Reports*, July 2007.

In a related development, the Grocery Manufacturers Association (GMA) has joined the Project on Emerging Nanotechnologies (PEN) in sponsoring case studies on the use of nanoscale materials in food and food packaging materials. “Engineered nanoscale materials could have some

very promising applications for our industry, but before we can take advantage of these applications, we must have better insights into the commercialization and regulation of these materials,” a GMA spokesperson said. Experts have reported that the worldwide nanotechnology food market will be \$20.4 billion by 2010, according to PEN. See *Nanowerk News*, June 7, 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.
