

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Forum to Address Youth Marketing

FTC and the Department of Health and Human Services (HHS) will host a [public forum](#), titled “Weighing In: A Check-Up on Marketing, Self-Regulation, and Childhood Obesity,” on July 18, 2007, in Washington, D.C. The agencies have called on food industry representatives to “report on their progress in implementing initiatives addressing food and beverage marketing to children that respond to the agencies’ recommendations in their 2006 joint report entitled, ‘Perspectives on Marketing, Self-Regulation, and Childhood Obesity.’” FTC and HHS have also invited consumer groups and advertising specialists to participate in the hearings, which will contribute to future policies for youth marketing.

Meanwhile, several major food marketers will reportedly unveil “detailed public pledges” at the FTC forum, according to *Advertising Age*. The group, which in 2006 agreed to an advertising initiative led by the Council of Better Business Bureaus, apparently plans to outline specific measures that will help companies meet the agencies’ goals. In addition, legislators and consumer groups have noted that they expect “dramatic statements” from food companies in light of Kellogg Co.’s recently

announced limit on youth advertising. See *Advertising Age*, July 5, 2007.

In a related development, a U.K. study has alleged that food advertisements cause children to consume more calories than ads for other products. University of Liverpool researchers studied the eating habits of 152 kids ages 5 to 11 after exposing them to 10 food or toy ads followed by a cartoon. After viewing the food ads, the 5-to-7-year-old children apparently consumed 14 to 17 percent more calories than after viewing the toy ads, while the 9-to-11-year-olds consumed 84 to 134 percent more calories. The researchers also concluded that overweight or obese children were more likely to choose sugary or high-fat foods when presented with an array of options. “This suggests that overweight and obese children are more susceptible to the messages they are exposed to through food advertising on television,” one of the study’s co-authors was quoted as saying. See *The Wall Street Journal*, July 10, 2007.

European Union (EU)

[2] Vintners Criticize EU Plans to Reform Wine Sector

The European Commission this month adopted a proposal that would deplete a wine surplus and cut prices to consumers in an effort to stave off global competitors. The Commission last year recommended that farmers “grub up” 988,000 acres of grapes, but has since scaled back to one-half that



amount of acreage. Instead, the new plans would end subsidies to distilleries that turn unsold wine into industrial alcohol and reallocate those funds for crop diversification. The Commission would also set aside \$163 million to promote moderate wine consumption and lift restrictions on successful vineyards to allow “the most efficient producers to optimize the size of their holdings.” “In light of the midterm outlook, for the EU-27 wine sector the non-reform option would lead to increasing surpluses, thereby appearing unsustainable,” stated draft documents, which added that “the current crises would entail a deterioration of prices and thus of farm income.” Some vintners, however, have argued that the changes would substitute the European winery’s regional appeal for “New World” marketing techniques that emphasize grape variety. “It puts into question more than 200 years of history. We need to maintain a strong link with the terroir,” said a spokesperson for Italy’s agricultural certification organization. *See The Parliament Press Release and BusinessWeek*, July 4, 2007; *International Herald Tribune*, July 3, 2007.

China

[3] China’s Food Safety Record Continues to Garner Scrutiny

The Food and Drug Administration (FDA) recently announced broader import controls of all farm-raised Chinese seafood, which has repeatedly failed to meet U.S. standards for minimal drug residues. FDA will detain all Chinese catfish, basa, shrimp, dace, and eel until the shipments are proved free of unapproved antimicrobials, including nitrofurans, malachite green, gentian violet, and fluoroquinolone. Nitrofurans, malachite green and gentian violet are carcinogenic with long-term expo-

sure, and fluoroquinolone use in animals may allegedly lead to antibiotic-resistant infections. The import controls will remain in place as long as necessary, according to FDA. “We’re taking this strong step because of current and continuing evidence that certain Chinese aquaculture products imported into the United States contain illegal substances that are not permitted in seafood sold in the United States,” said David Acheson, FDA’s assistant commissioner for food protection. FDA has not issued a recall for any Chinese seafood products currently on the market. *See FDA Press Release*, June 28, 2007.

Meanwhile, U.S. Senator Charles Schumer (D-N.Y.) has called for the creation of a federal import czar, a Commerce Department position that would oversee all inspections and ensure consumer safety. Schumer said in a [press release](#) that the rise in adulterated Chinese food and cosmetics highlights significant flaws in the federal inspection system. He also noted that 60 percent of the 178 products recalled in 2007 by the Consumer Product Safety Commission were manufactured in China. “The fact that every week we have to frantically pull Chinese goods off store shelves shows that our safeguards are failing,” Schumer concluded, although market analysts have pointed to the difficulty in implementing new regulations. *See The Washington Post*, July 2, 2007.

In related developments, U.S. and Canadian authorities have linked a Chinese-manufactured seasoning to a rare strain of *Salmonella wandsworth* identified in Veggie Booty snack food made by Robert’s American Gourmet. The outbreak has reportedly sickened 54 people in 17 states since March 2007. China has apparently responded to similar reports by instituting a nationwide crackdown on food safety violators, closing hundreds of unlicensed or unhygienic food processors. Chinese officials have also confirmed that in addition to many intentionally adulterated products, the



country's farmers face soil contamination that leaks heavy metals, such as lead and cadmium, into produce consumed by Chinese citizens. "So far it has hasn't been determined the extent to which tainted crops such as rice, fruits and vegetables have been exported to the U.S.," reported *The Wall Street Journal*, which also noted that FDA, unlike German or Japanese regulatory authorities, does not routinely test imports for heavy metals. See *The Wall Street Journal*, July 2, 2007; *The Huffington Post*, July 3, 2007; *Food Navigator USA.com*, July 6, 2007.

These latest food safety breaches have prompted farmers, food processors, and consumer advocates to champion country-of-origin labeling (COOL) and tighter regulatory measures, according to *The New York Times*. Some members of Congress have also used "the Chinese scandal" to call for stricter safety standards and to question China's place in the World Trade Organization. "People believe they have a right to know where their food is from," Senator Kent Conrad (D-N.D.) said. In addition, at least one health food company has started marketing its pet products as "China-free," although other major manufacturers have yet to launch similar promotions. "My guess is that with increased globalization, and the billions of dollars at play, and with the denial of the Chinese that there is even a problem, I had better brush up on my Chinese," plaintiff's lawyer William Marler was quoted as saying. See *Reuters*, July 6, 2007; *The New York Times*, July 8, 2007.

Litigation

[4] *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (S.D.N.Y. 9/19/06)

U.S. District Judge Robert Sweet has entered a protective order in this obesity-related litigation against McDonald's Corp. restricting access to any information, document or material designated as

"confidential" or "confidential – attorneys' eyes only." The order, entered June 27, 2007, and jointly requested by the parties, applies to any "confidential" documents, testimony, information or material that any party "reasonably and in good faith believes contains or discloses sensitive business information, proprietary commercial, financial, or research information, personal information, or information protected from disclosure by contractual obligations with third-party, which has not been released into the public domain, or is otherwise protectable under applicable law." If such materials are included in any court filing, the filing shall be filed and held under seal.

"Confidential -- attorneys' eyes only" information is defined as highly sensitive business information, trade secrets, and "sensitive proprietary commercial, financial, or research information" that could "harm McDonald's competitive position in the marketplace if disclosed." Among the documents in this category are those related to "market and consumer research, including consumer profiles or consumer studies with current or future applicability." If these materials are disclosed to experts, counsel seeking to do so must first forward the expert's curriculum vitae and full employment history to opposing counsel and then wait five days before making the disclosure. If opposing counsel objects, either party may seek a court ruling on the disclosure.

The order further provides that deposition testimony shall be deemed "confidential – attorneys' eyes only" material until the expiration of ten business days after receipt of the transcript. Specific lines, pages or entire transcripts may be designated as containing "confidential" or "confidential – attorneys' eyes only" information at the time of deposition or by written notification. A party objecting to such designation must do so in writing



and the parties must meet and confer to resolve designation differences before seeking a court order. Matters such as inadvertent disclosure of confidential information are also addressed in the order.

Litigation

[5] First Lawsuit Filed in Veggie Booty *Salmonella* Contamination

The parents of a boy who allegedly contracted *Salmonella wandsworth* from Veggie Booty snack food have filed a [complaint](#) in the U.S. District Court for the Eastern District of New York seeking more than \$75,000 in damages for medical expenses and emotional distress from Robert's American Gourmet Food, Inc.. *Allen v. Robert's Am. Gourmet Food, Inc.*, No. n/a (U.S. Dist. Ct., E.D. N.Y., filed July 2, 2007). David and Ashlee Allen have alleged that their son, Xavier Allen, became seriously ill three days after consuming defendant's snack food product, which federal authorities recently linked to a *Salmonella* outbreak affecting 54 people in 17 states.

Plaintiffs request a jury trial on four counts of strict liability, breach of warranty, negligence, and negligence *per se*. "The defendant owed a duty of care to the plaintiffs to design, manufacture, and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria or other substances injurious to human health," according to the complaint.

Robert's American Gourmet Food last month issued a nationwide recall for all Veggie Booty-flavored products after tests reportedly discovered the rare *Salmonella* strain in a spray-on seasoning agent that contained ingredients from China. President and Chief Executive Robert Ehrlich told

reporters that he was unaware of the ingredients' origin because the products were contracted under a separate manufacturer. The company has also stated that it is continuing efforts to locate the source of contamination, which has not affected any additional products. "The parents we've been contacted by believed they were feeding their children a healthy snack, not something that could kill them," opined the Allens' attorney, Seattle-based Bill Marler, in a press release, suggesting that further litigation is likely. See *MarlerBlog Press Release*, June 29 and July 2, 2007; *The Wall Street Journal Law Blog*, July 2, 2007; *The Wall Street Journal and Newsweek*, July 3, 2007.

[6] Lawsuit Contends Snapple Not "Made from the Best Stuff on Earth"

A Morganville, New Jersey, resident has reportedly filed a lawsuit against Cadbury Schweppes Americas Beverages that takes issue with the "all natural" claims on Snapple teas and juices. Originally filed in New Jersey Superior Court before moving to a federal venue, the lawsuit seeks class-action status for New Jersey residents who drank Snapple beverages over the past six years. The complaint apparently argues that Snapple, which contains high-fructose corn syrup, deceived consumers by claiming to be "made from the best stuff on Earth." The suit also alleges that Snapple's Acai Blackberry Juice contains neither acai nor blackberries, despite depicting an acai berry on the label. "The representation that something is all natural, as far as we're concerned, requires the product to be all natural," said the attorney for lead plaintiff Stacy Holk. "And high-fructose corn syrup is not all natural."

Meanwhile, a Cadbury Schweppes spokesperson has deemed the lawsuit "without merit." "Our product and packaging meet all regulatory and legal requirements," he said. A similar lawsuit filed by



the Center for Science in the Public Interest, however, recently caused the beverage company to withdraw “all natural” claims on 7Up soft drinks. See *The Star-Ledger* (NJ), July 6, 2007.

Other Developments

[7] AMA Adopts Policies to Address Factors of Obesity in America

The American Medical Association (AMA) recently adopted policies aimed at reducing the rate of obesity in American consumers. The new policies advocate (i) a reduction in *trans* fats in the American diet and their replacement with healthier oils; (ii) nutritional labeling on the menus and menu boards of fast-food and chain restaurants; and (iii) support for federal and state programs that provide increased access to fruits, vegetables, whole grains, and other healthy foods. AMA estimated that replacing *trans* fat with healthier fats, such as extra virgin olive oil, might prevent 30,000 to 100,000 premature deaths each year. “Making wise food choices and increasing physical activity can benefit everyone,” an AMA board member said. “We hope these new policies will lead to necessary changes within the food industry to make food and beverages healthier for consumers.” See *AMA Press Release*, June 27, 2007.

Media Coverage

[8] Henry Miller, “Don’t Cry Over rBST Milk,” *The New York Times*, June 29, 2007

“Bad-faith efforts by biotechnology opponents to portray rBST as untested or harmful, and to discourage its use, keep society from taking full advantage of a safe and useful product,” argues

Henry Miller, the former head of FDA’s Office of Biotechnology, in this op-ed piece describing the benefits of using recombinant bovine somatotropin (rBST) to boost milk production. Miller contends that as milk prices increase due to strong demand and limited resources, farmers should continue using rBST to meet market requirements and simultaneously conserve feed and water. Bovine growth hormone, which is also produced naturally in the cow’s pituitary gland, primes the animal’s digestive system to work more efficiently at converting feed to milk. “The gene-spliced and natural versions are identical,” Miller writes, adding that “[f]or every million cows treated with rBST each year, 6.6 billion gallons of water (enough to supply 26,000 homes) are conserved.” He also cites survey results supporting his contention that “consumer are apparently happy to drink milk from supplemented cows,” with 80 to 99 percent of buyers focused primarily on price when making purchasing decisions and none mentioning rBST as a concern unless prompted. “Cynical activists have unfairly stigmatized a scientifically proven product that has consistently delivered economic and environmental benefits to dairy farmers and consumers.”



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