

Food & Beverage

LITIGATION UPDATE

Issue 265 • June 27, 2008

Table of Contents

Legislation, Regulations and Standards

- [1] FCC Looks to Tighten Product Placement Rules1
- [2] NIST Announces Annual Conference on Weights and Measures1
- [3] Guidance on Premarket Submissions for Antimicrobial Food Additives Issued ...2
- [4] Health Commissioner to Recommend Lifting Threshold for GM Contamination ..2
- [5] Border Agency Names Companies that Hire Illegal Workers2
- [6] South Korea Reopens Domestic Market to U.S. Beef3
- [7] Bill to Videotape California Slaughterhouses Dies in Committee3

Litigation

- [8] “Raised Without Antibiotics” Poultry Claims Subject to Additional Consumer Lawsuits4

Other Developments

- [9] HFCS Trade Group Launches PR Campaign4
- [10] CAMY Report Claims Youth Exposure to Alcohol Ads on the Rise5

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Communications Commission (FCC)

[1] FCC Looks to Tighten Product Placement Rules

FCC regulators this week initiated a formal proceeding to revamp rules requiring the disclosure of product placement in television programs. Responding to a reported increase in indirect marketing, the commission will consider whether networks engaged in embedded advertising must issue prominent notices similar to those in political commercials. In addition, FCC officials are investigating product integration in children's programming that may violate current regulations. "You shouldn't need a magnifying glass to know who's pitching you," FCC Commissioner Jonathan Adelstein was quoted as saying. "A crawl at the end of the show shrunk down so small that the human eye can't read it isn't really in the spirit of the law."

The commission has also heard from groups like the Writers Guild of America West, which has suggested contemporaneous on-screen notices to highlight product placement, and public interest coalitions looking to expand oversight to cable and satellite networks. Twenty-three consumer and advocacy groups have [petitioned](#) the FCC to adopt a Notice of Proposed Rulemaking, which would force

action, rather than the non-binding Notice of Inquiry favored by industry associations. The FCC is expected to approve the inquiry and vote on some potential actions, but has agreed to postpone discussions about certain restrictions deemed excessive by advertisers. "The FCC has already taken some significant actions in this area," stated the Association of National Advertisers in response to the coalition's proposals. "If you pay for placement of a product in a program, you have to clearly and conspicuously make that evident." See *BrandWeek*, June 19, 2008; *The Wall Street Journal*, June 23, 2008; *Campaign for a Commercial-Free Childhood Press Release*, June 19, 2008.

National Institute of Standards and Technology (NIST)

[2] NIST Announces Annual Conference on Weights and Measures

NIST recently [announced](#) the annual meeting of the 93rd National Conference on Weights and Measures (NCWM) slated for July 13-17, 2008, in Burlington, Vermont. NCWM is an "organization of state, county and city weights and measures officials, business and industry representatives, Federal Agencies, and other members of the public that come together to, among other things, develop recommendations for standards and test procedures related to weights and measures technology, administration and enforcement." At the meeting, the



NCWM Laws and Regulations Committee will consider a voting item pertaining to the sale of fresh fruits and vegetables. “This proposal contains suggested methods of sale (e.g., weight, dry measure or count) for a wide variety of fruits and vegetables offered for sale in retail stores, farmers markets, and at roadside stands. The intent of the recommendation is to provide consumers with information on the net quantity of content in packages and to facilitate value comparison,” according to the meeting agenda. *See Federal Register*, June 23, 2008.

Food and Drug Administration (FDA)

[3] Guidance on Premarket Submissions for Antimicrobial Food Additives Issued

The FDA has [announced](#) the availability of a guidance document that “explains FDA’s current thinking on a number of microbiological issues unique to the preparation of premarket submissions for antimicrobial food additives.” An earlier draft was published in September 2007 and generated one public comment. The FDA is soliciting additional comments, but notes that the document “does not create or confer any rights for or on any person and does not operate to bind FDA or the public.” Included in the guidance is information about the types of data that should be submitted to the agency to “demonstrate that an antimicrobial agent [to be used as a food additive] achieves its intended technical effect and that the proposed use level is the minimum level necessary to accomplish the intended technical effect.” The guidance applies to the use of radiation as an antimicrobial treatment for food. *See Federal Register*, June 25, 2008.

European Union (EU)

[4] Health Commissioner to Recommend Lifting Threshold for GM Contamination

EU Health Commissioner Androulla Vassiliou has reportedly indicated that she will recommend relaxing the zero-tolerance policy that currently exists for food and feed imports contaminated with their genetically modified (GM) counterparts. Farmers and the food industry, claiming they must spend millions more for uncontaminated supplies and experience occasional disruptions when an unauthorized GM organism is found in their imports, have been seeking a policy change. The threshold that Vassiliou is expected to recommend is 0.1 percent; while it would not require new legislation, experts from member states would apparently have to agree to the change. The EU food industry reportedly asked to increase the threshold to 0.9 percent, which is the amount of GM allowed in foods without labeling, and the United States sought a 5 percent increase. Environmentalists have apparently criticized the plan. According to a Friends of the Earth spokesperson, “If the EU was serious about listening to its citizens, it would not be quietly weakening GMO laws behind closed doors.” She added, “The EU is falling for the biotech industry’s pro-GM hype. European livestock farmers need real solutions not measures that will simply increase the industry’s control and profits.” *See Financial Times*, June 24, 2008.



United Kingdom (U.K.)

[5] Border Agency Names Companies that Hire Illegal Workers

Beginning June 19, 2008, the U.K. Border Agency started publicizing the names of those businesses found to be employing illegal workers, that is, those third country nationals who lack the appropriate documentation that would allow them to work in the country. According to a [policy](#) appearing on the agency's Web site, the names will also be supplied to the media as part of an effort to "shame" businesses into compliance with the law. Among the violators named to date are numerous eateries. The government is also apparently cracking down on worker exploitation and requires that anyone supplying workers to the agriculture, shellfish gathering and food and drink processing and packaging industries must be licensed or risk prosecution and imprisonment. This initiative has already resulted in the revocation of a license held by a man who was found responsible for exploiting workers supplied to a bread manufacturer and chocolate and bagged salad producers. See *FoodUSANavigator.com*, June 23, 2008.

South Korea

[6] South Korea Reopens Domestic Market to U.S. Beef

South Korea has reportedly pressed ahead with plans to lift an import ban on U.S. beef, despite violent protests and widespread consumer discontent over the decision. The Ministry of Public Administration and Security this week removed the last legal barrier to American beef after the United States agreed to restrict beef exports to cattle under

30 months of age and ban the parts most likely to transmit bovine spongiform encephalopathy (BSE). The accord allows South Korean buyers to request government inspections for U.S. beef imports, which once cleared must be released to warehouses. This development would also free up 5,300 tons of U.S. beef currently held in customs and quarantine storage by the Ministry of Food, Agriculture, Forestry and Fisheries.

Meanwhile, the trade negotiations apparently drew 10,000 protestors to central Seoul, where they clashed with police in an effort to oust President Lee Myung-bak, whose political popularity has waned in light of economic concerns. In addition, the militant Korean Confederation of Trade Unions has threatened to organize a boycott and forcibly block the transportation of U.S. beef across the country. Prior to the ban imposed in 2003, South Korea bought \$800 million worth of American meat per year, making it the third-largest overseas market for U.S. beef exporters. See *The New York Times*, June 26, 2008; *Meatingplace.com*, June 23, 2008.

State and Local Governments

[7] Bill to Videotape California Slaughterhouses Dies in Committee

A bill (S.B. 200) that would have required video surveillance in all slaughterhouses has reportedly died in California's Assembly Agriculture Committee. Introduced by state Senator Dean Florez (D-Shafter), the bill was intended to keep meat and meat products from downer cows out of the food supply. The Senate approved the measure, but farm lobbyists apparently convinced Assembly members that it would set a bad precedent, possibly leading to videotaping in other agricultural estab-



ishments, and could have exposed proprietary information to competitors. Florez has reportedly indicated that he will introduce the bill in the next legislative session. Referring to the massive beef recall linked to a Humane Society slaughterhouse video, he was quoted as saying, “This whole thing started with an undercover surveillance camera. Why not have surveillance cameras that are not undercover that everybody knows are there, and therefore you never try to do anything that’s wrong.” See *Fresno Bee*, June 25, 2008.

Litigation

[8] “Raised Without Antibiotics” Poultry Claims Subject to Additional Consumer Lawsuits

According to a news source, additional false advertising claims have been filed against Tyson Foods, Inc., by consumers from Arkansas, California, Illinois, Missouri, and Texas. The two latest putative class actions join one that was filed in Arkansas early April 2008. Additional information about that lawsuit appears in issue 259 of this Update. One of the most recent suits was brought in a federal court in Maryland and will apparently be heard by U.S. District Court Judge Richard Bennett who previously ordered the chicken producer to cease using a qualified “raised without antibiotics” marketing campaign.

In a suit brought by Tyson’s competitors, Judge Bennett ruled in April that consumers are misled by ads that claim the company’s chickens are raised without antibiotics because Tyson uses an antibiotic in its chicken feed and injects eggs with an antibiotic two to three days before they hatch. A link to the court’s ruling on the competitors’ request for a preliminary injunction can be found in issue 258 of

this Update. The parties have reportedly settled the claims in a confidential agreement; Judge Bennett signed an order dismissing the suit on June 23, and a \$1 million injunction bond has been released. See *Meatingplace.com*, June 24, 2008; *Product Liability Law 360*, June 26, 2008.

In a related development, some legal commentators reportedly believe that it will be more difficult now for any producer to claim that its meat products have been raised without antibiotics. Because the market for such products is apparently quite lucrative, other producers are expected to do so. See *Advertising Age*, June 24, 2008.

Other Developments

[9] HFCS Trade Group Launches PR Campaign

Claiming that “sugars made from corn, such as high-fructose corn syrup” have the “same natural sweeteners as table sugar and honey,” the Corn Refiners Association (CRA) has reportedly mounted an aggressive public relations campaign, seeking to dispel the belief that the substance is to blame for the country’s rising obesity rates. The trade group, which has apparently budgeted \$20 million to \$30 million for an 18-month campaign, will be running full-page ads in major newspapers and placing ads on television and online.

The action follows an American Medical Association investigation that concluded, “high-fructose corn syrup does not contribute to obesity more than other caloric sweeteners.” Previous research showed parallels between expanding waistlines in the United States and the increasing use of HFCS in products ranging from sodas to salad dressings, ketchup and breakfast cereals. In recent years, however, while HFCS consumption was dropping,



obesity and diabetes rates continued to increase. Yet, a number of food producers have tried to take advantage of consumer concerns about the sweetener, removing it from their products to appeal “to health-conscious patrons.”

The Center for Science in the Public Interest (CSPI) blasted the association’s ad campaign as “slick” and “deceptive,” noting that “HFCS consists almost entirely of glucose and fructose, but not a single molecule of sucrose. Sugar is 100 percent sucrose, [while] high-fructose corn syrup just doesn’t exist in nature.” CSPI is apparently calling on the trade group to change the text of the ads; CRA President Audrae Erickson responded by referring to a jointly signed letter that she claimed demonstrated their “common position” that “HFCS, like table sugar and honey, is composed of fructose and glucose, which are found in many other naturally occurring foods.” See *CRA Press Release*, June 19, 2008; *The Wall Street Journal* and *CSPI Press Release*, June 23, 2008; and *FoodUSANavigator.com*, June 25, 2008.

[10] CAMY Report Claims Youth Exposure to Alcohol Ads on the Rise

A [study](#) released by Georgetown University’s Center for Alcohol Marketing & Youth (CAMY) has claimed that from 2001 to 2007, the “number of alcohol advertisements seen in a year by the average television-watching 12-to-20-year-old increased from 216 to 301,” representing a 38 percent rise in youth exposure to TV alcohol commercials. The report further alleges that approximately “two-thirds (63%) of these overexposing ad placements in 2007 were on cable television, which generated 95% of youth exposure to alcohol advertising on television.” In addition, CAMY faulted some alcoholic beverage companies for failing to uphold voluntary industry

guidelines on youth marketing. According to the study, “10 brands stood out, accounting for 41% of youth overexposure and 52% of advertisements placed above the industry’s voluntary standards of 30% maximum for youth in its audiences.”

CAMY also published statistics on the purported “worst offenders” seen most by youth television viewers, as well as rating the “best-performing” brands that minimized commercials during child-friendly programming. The Distilled Spirits Council of the United States, however, has criticized the center’s methodology for undercounting adults. “The Distilled Spirits Council has always disagreed with CAMY’s methodology, and the FTC has pointed out its flaws in its 2003 Report to Congress. Most important, the inflammatory language of the CAMY press release obscures the fact that while advertising on cable TV was up in 2001-2007, underage drinking is down significantly by all major measures during the same period,” stated the council in response to the report, which also calls on industry to reduce its underage audience caps to 15 percent. See *CAMY Press Release* and *Advertising Age*, June 24, 2008.



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** L.L.P.®



Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.
