

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Federal Communications Commission (FCC)

[1] Nonprofit Weighs In on Proposed Rules About Product Placements in TV Programming; CSPI Charges Nickelodeon with Failure to Improve Food Advertising

Commercial Alert has submitted [comments](#) to the FCC about its notice of proposed rulemaking on sponsorship identification rules. The organization, a Washington, D.C.-based nonprofit focusing on “excessive commercialism in society,” petitioned the FCC in 2003 to require TV stations to “clearly and conspicuously identify and disclose product placements and product integration” in their programming. The comments continue that theme and discuss the many ways that product placements occur in programs today. Commercial Alert contends that some \$2.9 billion was spent on product placement in 2007; the top broadcast and cable programs feature tens of thousands of product placements annually.

Whether a broadcaster simply shows a branded product in a program scene or actually alters a script to make a product, such as a beverage or food item, a program element, Commercial Alert is asking the FCC to require conspicuous disclosure of the word “advertisement” when a product placement occurs.

According to Commercial Alert, the rapid scrolling that follows many TV programs and contains information about product placements is simply not conspicuous enough for viewers to be fully aware of the commercial sponsorships that have been aired during the preceding program.

The organization also recommends, “Given the evolution of hidden advertisement product integration since our petition, we now believe also that the disclosure at the outset should explain, simply, how a program has been altered to incorporate embedded advertisements. For example, ‘This program contains paid advertising for . . . The script of a scene has been altered to include an in-program advertisement from this advertiser.’

As for product placements in shows viewed by children, the group states that “hidden advertisements must be prohibited from children’s programming altogether,” given their inability to understand disclosures or disclaimers. Not only would Commercial Alert apply this rule to children’s programming, but also to shows, like ‘American Idol’ that attract a youth audience. Thus, the group recommends that “‘hidden advertisements’ . . . be prohibited from all programming airing before 10 PM.”

In a related development, the Center for Science in the Public Interest (CSPI) has re-assessed the food advertisements appearing on the Nickelodeon cable channel and concluded that 79 percent are for “foods of poor nutritional quality,” including sugary cereals, candy and fast-food restaurants. Noting that



Nickelodeon's executive was scheduled to testify before a September 23, 2008, Senate subcommittee hearing and defend its practices, CSPI excoriates the company for not making significant improvements. According to CSPI, 88 percent of the foods Nickelodeon marketed to children in 2005 were "nutritionally poor," and its executive told the Federal Trade Commission that it would use its characters to promote healthy food choices. Yet, "advertisements for those foods are totally absent from the company's airwaves and magazine ads." See *CSPI Press Release*, September 23, 2008.

China

[2] Melamine-Tainted Products from China Infiltrate World Markets

New Zealand authorities this week announced that a popular Chinese candy contains "unacceptably high" levels of melamine, an industrial chemical apparently used by some manufacturers to artificially boost the protein count in diluted milk. The revelation followed reports that thousands of Chinese children experienced kidney stones and renal failure after imbibing melamine-tainted infant formula, which officials have linked to more than 20 leading dairy brands in China. These developments have also prompted Li Changjiang, minister of the General Administration of Quality Supervision, Inspection and Quarantine, to resign his post in an apparent show of accountability "for the supervision default," according to the country's official Xinhau news agency. See *The Wall Street Journal*, September 23, 2008.

Meanwhile, the New Zealand Food Safety Authority has advised consumers to avoid White Rabbit Creamy Candies from the Shanghai Guan

Sheng Yuan Food Co., finding that the milk-based confection contains 180 parts per million of melamine or 1 milligram of melamine per candy. The U.S. Food and Drug Administration (FDA) has also started sampling the candies, as well as other Chinese products made with "milk-derived ingredients and finished food products containing milk," ranging from desserts and baked goods to beverages. Although it has not yet identified any contaminated imports, FDA has cautioned that specialty stores may inadvertently stock melamine-tainted products. At least one West Coast supermarket chain has reportedly pulled White Rabbit candies from its shelves in response to the warning, although the agency has noted that candy from China makes up less than 1 percent of the candy sold in the United States. See *USA Today*, September 24, 2008.

This latest incidence of melamine contamination has further compounded global doubts about the safety of the Chinese food supply. The European Union has since directed regulators to test all imports containing at least 15 percent milk powder amid fears that the recall would spread beyond China's borders. Although the EU does not accept milk derivatives or formula made in China, Europe last year imported 19,500 tons of confectionary products and 1,250 tons of chocolate from other countries that may rely on Chinese milk ingredients. "Children who consume both biscuits and chocolate could potentially exceed the TDI [total daily intake] by up to more than three times," stated EFSA, referring to the agency's melamine safety threshold. The agency warned that small children in particular could be vulnerable to the chemical's cumulative health effects, including kidney stones that can lead to kidney failure. See *The New York Times*, September 26, 2008.



Food Standards Agency (FSA)

[3] Britain's FSA to Hold Public Meeting on Food Allergy Research

The U.K. Food Standards Agency (FSA) has scheduled a November 26, 2008, meeting to discuss plans to investigate "how external factors might impact on the reactions of people allergic to different foods." As part of its efforts to set safety thresholds for common food allergens, FSA has proposed research examining "the effect of factors such as alcohol, exercise or asthma on food allergies." The agency will use its findings to advise food allergic consumers and "improve labeling and allergen control practices used by industry and risk managers."

At the meeting, FSA will solicit (i) background information and guidance on the proposed research plan; (ii) suitable experimental approaches from potential contractors; and (iii) improvements to the study parameters "to make sure it is both fit for the Agency's purposes and reflects what is feasible in the clinical environment." "The nature of the Agency's food intolerance research program means this meeting will be most applicable to allergy clinicians and specialists," according to FSA, which has set a registration deadline of October 8. *See FSA Press Release*, September 22, 2008.

Japan

[4] Japanese Public Interest Groups Campaign to Block GM Sugar Beet Imports

A coalition of 53 Japanese agricultural, consumer and public interest groups has reportedly joined the Center for Food Safety (CFS) in voicing opposition to the cultivation of genetically modified (GM) sugar

beets in the United States. CFS highlighted the movement in a September 23, 2008, press release warning that the commercialization of GM sugar beets would add another major crop to the four – corn, cotton, soy and canola – already grown in the domestic market. The consumer advocacy group also noted that participants in the No! GMO Campaign were actively seeking U.S. suppliers who pledged to abstain from planting or using GM feed crops. "At present, Japan does not produce any GM crops for commercial consumption, although it allows the import of some pre-approved and labeled GM foods," according to CFS.

Meanwhile, the Seikatsu Club Consumer's Cooperative (SCCC), which has spearheaded efforts to block GM foods from Japanese markets, issued a statement purportedly representing "nearly a million Japanese people" who want to prevent an influx of new GM crops. "Our goal is not only to keep Japan but also the world GM free," an SCCC spokesperson was quoted as saying. "We believe that labeling is the best way to inform consumers about non-GM products so that they can make an informed decision whether to eat GM foods or not."

State and Local Governments

[5] Kansas Agriculture Department Announces Hearing on rBST Labeling

The Kansas Department of Agriculture has announced a December 2, 2008, hearing in Topeka to discuss a proposed administrative regulation (K.A.R. 4-7-723) that would "provide guidance to the dairy industry with respect to label claims concerning the use of recombinant bovine somatotropin commonly known as 'rBST.'" Under the proposed regulation, dairy producers wishing to label their products with the statement "this



milk from cows not supplemented with rBST" must verify that their claim is accurate and provide inspectors with a milk producer's affidavit and any other necessary documents to support their contention. The draft rule further specifies that such labels must contain, "in the same label panel immediately after the production claim and in exactly the same font, style, case, size, and color as used in the production claim, the following qualified statement: 'the FDA has determined that no significant difference has been shown between milk derived from rBST-supplemented and non-rBST-supplemented cows.'"

The proposed regulation would also prohibit manufacturers and producers from labeling their products as "Hormone Free," "No Hormone," "rBST Free," "rBGH Free," or "BST Free," as well as prohibit statements "indicating the absence of a compound that is not permitted by the United States' food and drug administration [sic] to be present in the product, including antibiotics and pesticides." The department has estimated that the regulation, which would take effect January 1, 2010, could result in "significant" compliance costs to major manufacturers and those using glass bottles.

See Kansas Department of Agriculture Press Release, September 2, 2008.

Litigation

[6] Justice Department Investigates Price-Fixing Allegations in Egg and Tomato Sectors

Grand jury subpoenas and FBI investigations are apparently in play around the country to determine whether rising food prices are the product of collusion among farmers, food processors and exporters in the egg and tomato industries. While a 1922 law

gives antitrust exemptions to farm groups and cooperatives and was intended to help small farms bargain with big processors, large producers are claiming that their conduct is shielded by the law. Federal prosecutors, reportedly willing to test its limits, convinced a grand jury in California to issue subpoenas in a tomato probe involving processors and six major food company buyers who allegedly agreed to inflate the prices for tomato products.

Meanwhile, a U.S. attorney in Philadelphia reportedly sent subpoenas to the three largest U.S. egg processors in a criminal investigation focusing on the pricing and marketing of egg products, such as liquid and powdered eggs. Egg prices have soared in recent years, and an egg cartel has reportedly urged its members to limit the size of their flocks, going so far as to support state animal-welfare rules increasing the size of hen cages; larger cages mean fewer hens can be kept in the same space. The cartel also cites the 1922 law as a shield to its actions, but some say that the impact on U.S. food prices could lead to a reexamination of the exemptions by Congress and regulators. Federal agencies are also apparently looking into fertilizer, cheese, milk, and citrus-fruit industry practices. *See The Wall Street Journal, September 23, 2008.*

[7] ITC Judge Finds Chinese Manufacturers Did Not Violate Sucralose Patents

According to news sources, an International Trade Commission (ITC) administrative law judge has determined that the Chinese makers and importers of a sucralose sweetener did not violate the manufacturing patents held by Tate & Lyle. The September 22, 2008, ruling will apparently be appealed; a Tate & Lyle spokesperson was quoted as saying, "We would not have proceeded with our ITC case unless we believed we had adequate evidence



to demonstrate that our patents are being infringed.” The artificial sweetener market is reportedly worth \$1.3 billion, and sucralose has a 36 percent share. Analysts contend that the ruling will allow manufacturers to compete against Tate & Lyle for the lucrative sucralose market, and a number of Chinese and Indian flavoring firms that have purportedly developed alternative processes for its production are evidently poised to do so.

In a related development, a recent peer-reviewed study by Duke University researchers alleges that rats fed sucralose for 12 weeks experienced “numerous adverse effects,” including a reduction in beneficial fecal microflora and significant increases in body weight. Mohamed B. Abou-Donia, et al., “Splenda Alters Gut Microflora and Increases Intestinal P-Glycoprotein and Cytochrome P-450 in Male Rats,” *Journal of Toxicology and Environmental Health, Part A*, 2008. These effects could also apparently affect the absorption of nutrients and pharmaceuticals. McNeil Nutritionals, which makes Splenda, reportedly questioned the researchers’ methodology and conclusions, noting that the Sugar Association funded the study.

Advocacy group Citizens for Health is citing results of the Duke study to renew its call on FDA to require warning labels on Splenda. “The new study makes it clear that Splenda can cause you to gain weight and lose the benefits of medications designed to improve and protect your health,” James Turner, chair of the non-profit group, was quoted as saying. “The FDA should not continue to turn a blind eye to this health threat.” According to a news release, Citizens for Health is scheduled to testify at an October 3, 2008, hearing of the California Assembly Committee on Health. The committee is evaluating whether Proposition 65, the California law that requires warnings on products

containing substances known to the state to be carcinogens or reproductive toxicants, should apply to artificial sweeteners. *See Reuters*, May 28, 2008; *PRNewswire* and Citizens for Health Press Release, September 22, 2008; *BBC News*, September 23, 2008; and *FoodUSANavigator.com*, September 25, 2008.

Other Developments

[8] Johns Hopkins Study Claims Major Media Outlets Have Overlooked Food System’s Role in Climate Change

A recent study by the Johns Hopkins Bloomberg School of Public Health asserts that “the nation’s top newspapers have largely overlooked the food system as one of the more important contributors to global climate change,” according to a September 23, 2008, press release. Led by Roni Neff, research director for the Johns Hopkins Center for a Livable Future, researchers examined “16 leading U.S. newspapers based on circulation between September 2005 and January 2008.” The sample identified 4,582 articles that contained the words “climate change” or “global warming” in the headline or first paragraph; of these, “109 connected climate change to the contributions of food systems;” “only 20 (0.4 percent) devoted three or more paragraphs to food and climate change;” and “45 spent less than a paragraph on the subject.”

The researchers concluded that “only 2.4 percent of climate change articles” mentioned food production as a source of greenhouse gas emissions (GHG), despite a 2007 U.N. Intergovernmental Panel on Climate Change report linking “31 percent of greenhouse gas emissions” to “agriculture and



deforestation (with much of the latter representing deforestation for food production)." In addition, the study authors noted that 0.5 percent of climate change articles attributed GHG emissions to livestock and meat production. They hypothesized that the paucity of coverage stemmed, in part, from (i) a "relative lack of quantifiable information on the food systems contributions"; (ii) "the framing of food-related issues as individual rather than a social concern"; and (iii) "initial lack of advocate interest." Neff and her colleagues also contended that the U.S. food industry "has not been involved in the climate change discussion until recently." "Greater public awareness could lead to consumer demand for food with lower greenhouse gas emissions," Neff was quoted as saying. "Greater action could also spur action from policy makers and the food and agriculture sectors toward reducing food and agriculture-related emissions."

Upcoming Conferences and Seminars

American Conference Institute, Scottsdale, Arizona – October 28, 2008 – "Positioning the Class Action Defense for Early Success." Joining a faculty that includes federal and state judges, SHB Partner Gary Long will participate in a panel discussion titled "Foregoing Settlement and Taking the Class Action to Trial."

American Bar Association, New York, New York – November 7, 2008 – "12th Annual National Institute on Class Actions." SHB Partners Laurel Harbour and Jim Muehlberger will join panels addressing the latest developments in class action law. Harbour will discuss "Class Actions Sans Frontières," while Muehlberger will explore the "Rigorous Analysis" standard that courts apply when evaluating whether to certify a class.

American Conference Institute, Scottsdale, Arizona – December 4-5, 2008 – "2nd National Forum on Food-Borne Illness Litigation: Advanced Strategies for Assessing, Managing and Defending Claims of Food Contamination." SHB Partner Paul La Scala will participate in a discussion about "Deceptive Trade Practices Claims: Strategies for Responding to a Growing Trend."

GMA, -- February 24-26, 2009 – "2009 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." SHB Partners Paul La Scala and Frank Rothrock will address "Country-of-Origin-Labeling: A Legal Mandate for Some, a Marketing Opportunity for Others, and a Litigation Risk for All." SHB Partner Laura Fey and Associate Amy Crouch will present on "Pre-Litigation Risk Management for Consumer Products Companies."



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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.

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