

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

FTC Applies Guidelines on Product Endorsements and Testimonials to Social Media

The Federal Trade Commission (FTC) has updated its [guidelines](#) on product endorsements and testimonials to include those who use social media, such as blogs, Facebook® and Twitter®, to promote products in exchange for payment or free products. The guidelines, effective December 1, 2009, could result in penalties of \$11,000 if violated and will require disclosures of commercial relationships. Even individuals submitting reviews to online stores, such as Amazon.com, will be covered by the new guidelines. Under another change to the guidelines, advertisers will no longer be able to use the safe-harbor disclaimer, "Results not typical," but will instead be required to "clearly disclose the results that consumers can generally expect," if they make a claim about consumer experience with a product or service as typical when this is not the case.

According to FTC, "The Guides are administrative interpretations of the law intended to help advertisers comply with the Federal Trade Commission Act; they are not binding law themselves. In any law enforcement action challenging the allegedly deceptive use of testimonials or endorsements, the Commission would have the burden of proving that the challenged conduct violates the FTC Act." Still, courts generally defer to agency expertise in the interpretation of the laws they are responsible for administering.

Advertisers were expecting the changes, which were published in draft form for public comment at the end of 2008. A spokesperson for the National Advertising Review Council was quoted as saying that the new guidance for social media are "relatively consistent with preexisting principles that have applied to traditional forms of advertising." A representative of a dietary supplement trade group reportedly expressed concern about the "typical results" requirements, saying the group's members will be "wondering what the FTC considers 'typical results.' FTC needs to define what those are . . . the results you see in clinical trials are going to be in some degree different from what you see in the consumer, so what exactly is 'typical?'" See *Advertising Age* and *FTC Press Release*, October 5, 2009; *FoodNavigator-USA.com*, October 6, 2009.

Meanwhile, FTC Director David Vladeck has announced agency plans to focus in coming months on food marketing to adults and children, and "green" advertising claims, among other matters. The agency has reportedly sought approval from the Office of Management and Budget to conduct a major food marketing study that will compare current data to that collected in 2007. FTC is also apparently planning a multimedia ad campaign to educate children about why, where and how commercial messages are

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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constructed and placed. According to Vladeck, "The distinction between ads and other content is often blurred to the point that even older kids may not get when they are being pitched." See *MediaPostNews, MarketingDaily*, October 5, 2009.

LITIGATION

Lawsuit Challenging "100% Natural" Claims for Granola Bars Dismissed

A federal court in California has dismissed without prejudice putative class claims that Nature Valley granola bars were fraudulently promoted as "100% Natural" while containing purportedly non-natural ingredients such as high-fructose corn syrup (HFCS). *Wright v. General Mills, Inc.*, No. 08cv1532 (U.S. Dist. Ct., S.D. Cal., decided September 30, 2009).

The court refused to dismiss the claims as preempted under federal law or under the primary jurisdiction doctrine, which allows courts to stay or dismiss litigation "pending the resolution of an issue within the special competence of an administrative agency." The dismissal was based instead on the plaintiff's failure to plead her claims with sufficient specificity under recent U.S. Supreme Court rulings that have, according to the court, dramatically changed the federal courts' notice-pleading standard.

The court determined that the first amended complaint (FAC) "is based on little more than conclusory and speculative factual content. . . . Plaintiff argues that her FAC alleges economic injury: 'As a direct result of its misleading, deceptive, untrue advertising and its unlawful, unfair and fraudulent business practices related to the "100% Natural" products listed above, Defendant caused Plaintiff and other members of the Class to purchase, purchase more of, or pay more for, these Nature Valley products.'" The court characterized this allegation as "sparse" and found that it did not "meet the *Twombly* [sic] and *Iqbal* pleading standard."

The court also ruled that plaintiff's request for injunctive relief and her allegations of unfair business practices and fraud failed to meet that standard, finding inadequate under *Twombly* allegations "that members of the public were likely to have been deceived and likely made their purchases on the basis that '100% Natural' would not include a highly processed ingredient such as HFCS." The plaintiff has 30 days to amend her complaint.

Canada Seeks WTO Resolution of COOL Dispute with United States

Canada's government has reportedly asked the World Trade Organization (WTO) to establish a dispute settlement panel to hear its claims that U.S. country-of-origin labeling requirements for meat have unfairly reduced demand for Canadian products. U.S. Agriculture Secretary Tom Vilsack and Trade Representative Ron Kirk responded to the request by stating, "We regret that formal consultations have not been successful in resolving Canada's concerns over country of origin labeling (COOL) required by the 2008 Farm Bill for certain agricultural products. We believe that our implementation of COOL provides information to consumers in a manner consistent with our World Trade Organization commitments."

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Apparently, Canada was able to gain some concessions on the matter from the Bush administration, but regulations adopted after President Barack Obama (D) took office did not provide the flexibility Canadian producers were evidently seeking. Canada's minister of international trade was quoted as saying, "The U.S. COOL requirements are so onerous that they affect the ability of our cattle and hog exporters to compete fairly in the U.S. market. That is why our government has no choice but to request a WTO panel." According to a news source, U.S. meat packers have been unwilling to buy Canadian livestock because of the paperwork burdens COOL has imposed. It is expected that the panel will take up to nine months to issue a final report. See *USDA Statement*, *Financial Post* and *Product Liability Law 360*, October 7, 2009.

OTHER DEVELOPMENTS

More Comparisons of Food and Tobacco Made

Venture capitalist and physician Mitchell Blutt, writing for *Forbes.com*, suggests that the rising cost of health care will lead inexorably to the stigmatization of unhealthy foods as the "new tobacco." According to Blutt, unhealthy food will one day be "publicly identified as an addictive problem and perhaps even some day, deemed a drug." He believes that government will likely impose taxes on unhealthy foods and beverages, described as those high in calories, such as soft drinks and snacks. He calls the "scientific data demonstrating the health hazards of excessively sugared beverages in children" compelling. But, while he acknowledges that "sin taxes" will reduce consumption of unhealthy foods, he does not believe that these trends will reduce the chronic diseases associated with obesity and poor diet. "That's generations off," he concludes. See *Forbes.com*, October 6, 2009.

Groups Launch National Initiative to Fight Obesity

More than 40 retailers, non-governmental organizations, and food and beverage manufacturers have launched a national [initiative](#) to reduce obesity in the United States by 2015, especially among children. The Healthy Weight Commitment Foundation aims to provide tools to help people achieve healthy weights through "energy balance—calories in balance with calories out" in three areas where they spend the most time: the marketplace, workplace and schools.

Founding members have committed \$20 million to the endeavor, which will be independently monitored by organizations that will produce public reports about their findings. The Robert Wood Johnson Foundation (RWJF) will monitor the marketplace component; the National Business Group on Health will assess workplace efforts; and the Center for Weight and Health at the University of California, Berkeley will audit schools.

"If current trends continue, today's young people may be the first generation in American history to live sicker and die younger than their parents' generation," the president and chief executive officer of the RWJF was quoted as saying. "That's simply unacceptable. But the food and beverage manufacturers and retailers who are part of this effort are uniquely positioned to help restore energy balance in children's lives by reducing the excess calories they consume."

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Inaugural foundation partners include the American Council on Fitness & Nutrition Foundation, the American Dietetic Association Foundation, Girl Scouts of the USA, the National Wildlife Federation, and the W.K. Kellogg Foundation. *See Robert Wood Johnson Foundation Web site; FoodNavigator-USA.com, October 5, 2009.*

U.S. Poultry Industry Asks WTO to Examine European Ban on Antimicrobials

The National Chicken Council and several other industry groups have signed a letter to the Office of the U.S. Trade Representative, requesting the initiation of a World Trade Organization (WTO) dispute settlement panel to re-establish poultry exports to Europe. According to the letter, the European Union prohibits four antimicrobials commonly applied in the United States to reduce pathogens on processed poultry. The trade groups have reportedly estimated that U.S. poultry exports could exceed \$300 million if EU regulators permitted the in-plant use of chlorine dioxide, trisodium phosphate, acidified sodium chlorite and peracetic acid in products destined for the European market. "[T]he United States should continue to pursue with the European Union resolution of the issue," stated the letter, which concluded that "it would be most appropriate to take the issue to the next step in the WTO dispute settlement process." *See NCC News Release, October 1, 2009; Law360, October 2, 2009.*

In a related development, the UK Food Standards Agency (FSA) has published a survey identifying *campylobacter* in two-thirds of retail chicken samples. The bacteria sickens approximately 55,000 people annually in Britain, but FSA has thus far been unsuccessful in its efforts to reduce the incidence of *campylobacter* illnesses linked to undercooked chicken and cross-contamination from raw poultry. The agency has noted that soaking poultry in a chlorinated wash before distribution could reduce the infection rate, although the practice is currently outlawed in the European Union. "We need to look at this procedure and see if we can implement it here," FSA Chief Scientist Andrew Wadge was quoted as saying. "It is widely used in the United States. From a public health perspective it's not helpful to limit the tools we've got, and a chlorinated wash would be harmless to consumers." *See FSA Press Release and Times Online, October 6, 2009.*

MEDIA COVERAGE**Michael Moss, "E. Coli Path Shows Flaws in Beef Inspection," *The New York Times*, October 4, 2009**

One hundred three years after Upton Sinclair published his meatpacking industry exposé, *The New York Times* has published an article explaining how current food safety standards may be responsible for the 16 *E. coli*-tainted beef outbreaks that have occurred over the past three years. Revealing how failure to test all the scraps and trimmings and "mash-like product" in hamburger patties in 2007 purportedly led to a 22-year-old dance instructor's illness and subsequent paralysis, the article "shows why eating ground beef is still a gamble." Apparently, no federal rules require grinders to test their ingredients for the pathogen, and processors sample assembled products rather than individual shipments from slaughterhouses, making it difficult to trace the source of contamination.

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Parts of the article were reportedly read on the floor of House, and its revelations prompted a response from the U.S. Department of Agriculture and the company that made the beef patties the dance instructor consumed. Agriculture Secretary Tom Vilsack released a statement calling the story “unacceptable and tragic.” Vilsack said the agency has (i) launched “stepped-up meat facility inspections involving greater use of sampling,” (ii) “[i]ssued draft guidelines for industry to further reduce the risk” of contamination, and (iii) “[s]tarted testing additional components of ground beef, including bench trim.” Vilsack also said the agency is “looking at ways to enhance traceback methods and will initiate a rulemaking in the near future to require all grinders, including establishments and retail stores, to keep accurate records of the sources of each lot of ground beef.” He has reportedly called for mandatory food recall authority.

Meanwhile, a 2007 tainted-beef recall involving Topps Meat Co. has reportedly led to litigation filed September 24, 2009, in a District of Columbia federal court. The putative class claimants have limited their damages claims to the extent of available insurance proceeds, but they seek to recover what they paid for the product, \$75,000 for each plaintiff for pain and suffering, attorney’s fees, and costs. The Topps Meat outbreak resulted in the recall of 21 million pounds of frozen ground beef products and purportedly sickened 29 people.

In a related development, giant retailer Costco, said to be one of the few meat processors that tests ingredients for *E. coli* when they arrive at its facility, has reportedly entered an agreement with a major beef producer that allows Costco, before mixing, to test the trimmings that the producer supplies. According to a news source, the supplier had previously refused to sell to Costco, citing its ingredient testing program. See *USDA Statement*, October 5, 2009; *Mealey’s Food Liability*, October 6, 2009; and *The New York Times*, October 8, 2009.

Maddow Skewers PR Man and Lobbyist for Not Revealing Funding Sources

Rachel Maddow brought Rick Berman to her MSNBC-TV program on October 6, 2009, to find out how he funds the Web sites and other public relations initiatives he undertakes to challenge the science on issues ranging from *trans* fats and mercury in fish to high-fructose corn syrup. Berman claimed that his practice of nondisclosure, which is legal, is no different from what other groups do, no matter where they lie on the political spectrum. He contended that the information he posts on Web sites such as MercuryFacts.com or FishScam.com is based on science. Maddow, however, pointed out that one of his research directors, who provided written testimony to the Food and Drug Administration challenging studies purportedly showing a link between sweetened beverages and childhood obesity, has a degree in music and once produced a talk radio program.

SCIENTIFIC/TECHNICAL ITEMS

Prenatal BPA Exposure Allegedly Linked to Behavioral Problems in Girls

A new [study](#) claims that prenatal exposure to bisphenol A (BPA) may make girls more aggressive and exhibit hyperactive behavior. Joe M. Braun, et al., “Prenatal Bisphenol A Exposure and Early Childhood Behavior,” *Environmental Health Perspectives* (October 2009). Researchers at the University of North Carolina and British Columbia’s Simon Fraser University conducted the study, purportedly believed to be the first to link prenatal BPA

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exposure to behavioral problems in children, by measuring BPA levels in urine samples of 249 pregnant women in Cincinnati, Ohio, at 16 and 26 weeks of pregnancy, and again at birth. The children were assessed for behavioral problems when they reached age 2 through questionnaires completed by their parents.

Researchers claim BPA exposure between 13 and 16 weeks of pregnancy was most strongly associated with behavioral problems in girls, although boys were apparently also affected. "The girls showed a definite difference in temperaments," said one of the study's researchers. "Their behavior was actually much more like boys at the same age." The children will continue to be monitored to see if the changes in temperament persist as they grow older.

A spokesman for the American Chemistry Council reportedly called the study flawed, saying it had "significant potential" to be misconstrued. "The results of this preliminary, and severely limited, study cannot be considered meaningful for human health unless the findings are replicated in a more robust study," he said. See *FoodProductionDaily.com*, October 6 and 7, 2009.

CONFERENCES AND SEMINARS

SHB Partners to Address GMA Food Claims and Litigation Conference

GMA will conduct a conference in Austin, Texas, February 23-25, 2010, titled "2010 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Among those scheduled to speak are Shook, Hardy & Bacon Partners [Amy Crouch](#), [Greg Fowler](#), [Paul La Scala](#), and [Frank Rothrock](#). Crouch and Fowler will discuss "Trends in Global Food Litigation: Class Actions and Collective Redress," while La Scala and Rothrock will focus on "Mass Tort 911: The Company's Been Sued! Now What." Shook, Hardy & Bacon is among the firms sponsoring the conference, which is intended to give those in the food industry practical "how-to" product litigation management strategies.

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

