

## FOOD & BEVERAGE LITIGATION UPDATE



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### LEGISLATION, REGULATIONS AND STANDARDS

#### FTC Proposes Voluntary Principles for Marketing Food to Children

The Federal Trade Commission (FTC) has released its proposed voluntary [principles](#) for marketing food to children in an effort to encourage “stronger and more meaningful self-regulation by the food industry.” Designed by an FTC-led interagency working group with input from the Food and Drug Administration, Centers for Disease Control and Prevention and U.S. Department of Agriculture, the guidelines seek “to improve the nutritional profiles of foods marketed directly to children ages 2-17 and to tap into the power of advertising and marketing to support healthful choices.”

To this end, the preliminary standards would require that, by 2016, all products marketed to this age group (i) “make a meaningful contribution to a healthful diet” and (ii) “contain limited amounts of nutrients that have a negative impact on health or weight (saturated fats, *trans* fat, added sugars, and sodium).” To meet the first principle, marketed foods must feature “at least one of the following food groups: fruit, vegetable, whole grain, fat-free or low-fat (1%) milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.” With an exception for nutrients that naturally occur in these food groups, the principles would also require marketed foods to limit (i) saturated fat to 1 gram or less per reference amount customarily consumed (RACC) and 15 percent or less of calories; (ii) *trans* fat to 0 grams per RACC; (iii) added sugars to no more than 13 grams per RACC; and (iv) sodium to no more than 210 mg per serving. In addition, the proposal calls for further sodium limits by 2021 and includes “additional recommendations for foods with a small serving size and for main dishes and meals.”

FTC has [requested](#) public comments within 45 days and will hold a May 24, 2011, forum in Washington, D.C., before making its final report to Congress. “To their credit, some of the leading companies are already reformulating products and rethinking marketing strategies to promote healthier foods to kids. But we all have more work to do before we can tip the scales to a healthier generation of children,” said FTC Chair Jon Leibowitz. “This proposal encourages *all* food marketers to expand voluntary efforts to reduce kids’ waistlines.” See *FTC Press Release*, April 28, 2011.

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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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The announcement has drawn praise from consumer advocates like the Center for Science in the Public Interest's director of nutritional policy, Margo Wootan, who helped craft the rules and said the standards "could take us from having self-regulation be a nice idea to having self-regulation actually work." But some marketers have since voiced concern about extending marketing restrictions to teenagers. "Once you've gotten past 12, we believe kids are fully able to understand advertising and to deal with it," one spokesperson for the Association of National Advertisers was quoted as saying. *See Advertising Age* and *NPR*, April 28, 2011.

### FDA Issues Updated Seafood Safety Guidelines

The Food and Drug Administration (FDA) has [announced](#) the availability of updated safety standard guidelines for the seafood industry. The 476-page [document](#) "supports and complements FDA's regulations for the safe and sanitary processing and importing of fish and fishery products using hazard analysis and critical control point (HACCP) methods" required of commercial seafood processors.

The revised guidance provides current information on (i) "potential hazards associated with the known commercial species of vertebrate and invertebrate seafood," (ii) "potential hazards associated with certain processing operations," (iii) "HACCP strategies that may be used to control the potential hazards," and (iv) "other information related to food safety." *See Federal Register*, April 28, 2011.

### China Uncovers More Melamine-Tainted Milk

Chinese authorities have reportedly seized more than 25 tons of melamine-tainted milk powder from Chongqing-based Jixida Food Co. Ltd., detaining three suspects on allegations that the company planned to use the adulterated ingredient in its ice cream. Found in a warehouse, the contaminated stock evidently included some powder purchased approximately one year ago, although officials claimed that none had been used in ice cream production. According to media sources, investigators have traced the milk powder to a trading company in the Guangxi Zhuang Autonomous Region and a dairy in the Inner Mongolia Autonomous Region.

The arrests were apparently part of a 100-day food safety campaign organized by the Chongqing police. In 2008, China faced a widespread scandal involving melamine-tainted milk and infant formula that affected an estimated 300,000 people. *See The Associated Press* and *Global Times*, April 27, 2011.

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### Proposed California Beverage Tax Falls Flat

A proposed California [bill](#) (A.B. 669) that would have levied a state tax on sweetened beverages has reportedly died in a legislative committee. Sponsored by Assembly Member Bill Monning (D-Carmel), the proposed tax of 1 cent per fluid ounce on soft drinks, energy drinks, sweet teas, and other sugary beverages would have raised an estimated \$1.7 billion for health-related programs for children. Monning has vowed to continue supporting the tax, asserting that “the long-term health of California’s children is at risk and we must work together to avoid a future influx of chronically ill adults into our already overstressed health care system.” See *The (San Jose) Mercury News*, April 26, 2011.

## LITIGATION

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### Federal Court Rejects Challenge to *Cy Pres* Distribution in Frosted Mini-Wheats® Suit

A federal court in California recently granted a motion for final approval of a class action settlement in litigation involving allegations that Kellogg Co. fraudulently claimed that its Frosted Mini-Wheats® cereal “was clinically shown to improve children’s attentiveness by nearly 20%.” [Dennis v. Kellogg Co., No. 09-01786 \(U.S. Dist. Ct., S.D. Cal., decided April 5, 2011\)](#). Additional information about the case appears in [Issue 368](#) of this *Update*.

Two class members objected to the settlement, challenging the *cy pres* relief, which will provide money remaining from the \$2.75 million settlement fund to “appropriate charities,” as well as donated food items valued at \$5.5 million to charities feeding the indigent. According to the objectors, class counsel owes a fiduciary duty to the class and “[s]omewhere along the way, Class Counsel lost sight of that duty and became an advocate for some unnamed third party charity.” The objectors also argued that the “food donation allows the defendants to settle cheaply while simultaneously inflating the value of the settlement to justify higher attorneys’ fees.” They objected to the lack of an identified *cy pres* recipient.

The court determined that because individual notice to a nationwide class was nearly impossible and because “nationwide saturation notice campaigns would be prohibitively expensive,” *cy pres* distribution was particularly apt. The court also rejected the objectors’ assertions that the claims relief (at a maximum value of three boxes of cereal) would not make all class members completely whole and that attorney’s fees of \$2.4 million, or 19 percent of the settlement fund, were excessive.

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### Native American Discrimination Suit Against USDA Settles

A federal court has reportedly approved a \$760 million government settlement with Native American farmers and ranchers who claimed that the U.S. Department of Agriculture (USDA) discriminated against them by denying them equal access to credit through the agency's Farm Loan Program. *Keepseagle v. Vilsack*, No. 99-03119 (U.S. Dist. Ct., D.D.C., settlement approved April 28, 2011). A final dispute over attorney's fees was resolved in class counsel's favor; they will receive 8 percent of the settlement, or \$60.8 million. The Department of Justice apparently urged the court to halve that amount.

According to a news source, the settlement funds do not require legislative action to be awarded; farmers must file their claims by December 2011. President Barack Obama (D) said, "Today's approval of the settlement will help strengthen our nation to nation relationship with Indian Country and reinforce the idea that all citizens have a right to be treated fairly by their government." Under the settlement, some class members will receive \$50,000 while others, with evidence of economic loss, can recover up to \$250,000. The settlement also includes \$80 million in farm-debt forgiveness.

The settlement also apparently requires that USDA adopt initiatives to alleviate racism in rural farm loan offices. Agriculture Secretary Tom Vilsack reportedly said in this regard, "We are committed to changing the culture that made this settlement necessary, and we believe we are well on the way to doing just that." See *The BLT: The Blog of Legal Times*, April 28, 2011; *The Los Angeles Times* and *The Associated Press*, April 29, 2011.

### Missouri Couple Charged with Fraud in \$3.1 Million Grain Storage Scandal

A federal grand jury has indicted a husband and wife who own a grain storage company in northwestern Missouri, alleging that they conspired to victimize more than 100 farmers at an estimated loss exceeding \$3.1 million by selling grain the farmers owned without paying them and by commingling and embezzling the farmers' money. *United States v. Froman*, No. 11-06005 (U.S. Dist. Ct., W.D. Mo., St. Joseph Div., filed April 21, 2011). The indictment alleges that "grain (primarily corn and soybeans), which was owned by various farmers who contracted with Gallatin Grain, was sold by the Fromans without the farmers' permission and the proceeds of the sale were wrongfully withheld by the Fromans."

Counts of conspiracy, mail fraud and bank fraud have been brought against both Daniel and Pauline Froman. Daniel has also been charged with one count of wire fraud and one count of interstate transportation of stolen property. Prison terms of up to 30 years and fines exceeding \$1 million could be imposed if they are found guilty. Among other matters, the indictment alleges that the couple submitted a fraudulent statement to the Missouri Department of Agriculture, Grain Regulatory Services, overstating their accounts

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receivable and understating their accounts payable. The financial statement allegedly falsely reported an inflated net worth of more than \$662,000 when they actually had a negative net worth of \$936, which would have made them ineligible to maintain their grain dealer or warehouse licenses. *See U.S. Attorney, W.D. Mo., News Release*, April 21, 2011.

### Plaintiff Seeks Motion to Compel in Omega-3 Litigation Against Walnut Company

Contending that Diamond Foods, Inc. has defended its decision to place “heart-healthy” claims on its packaged walnuts on the advice of counsel, and removed them after a Food and Drug Administration (FDA) warning, also on the advice of counsel, the named plaintiff in a putative class action alleging consumer-fraud against the company is seeking the production of attorney-client communications. *Zeisel v. Diamond Foods, Inc.*, No. 10-01192 (U.S. Dist. Ct., N.D. Cal., filed April 26, 2011). Details about a court order denying the defendant’s motion to dismiss appear in [Issue 363](#) of this *Update*.

The plaintiff points to instances in responses to interrogatories and deposition questions where the company defended its decision to link the omega-3 fatty acids in walnuts to heart health as a good faith *bona fide* error and indicated that decisions about the labeling were made with legal counsel’s approval. Yet, the company has refused to produce any attorney-client communications on the matter, claiming they are privileged. According to the plaintiff, the company has implicitly waived the privilege by raising a claim “which in fairness requires disclosure of the protected communication.” He cites cases purportedly holding that the privilege is waived “when a defendant uses its attorney’s advice as a shield and a sword.”

### Poultry Farm Cries Foul, Appeals Dismissal of Product Disparagement Suit Against CBS

A Georgia-based poultry farm has reportedly appealed a federal court ruling dismissing libel, slander and product disparagement claims against CBS, which apparently aired a segment on its “60 Minutes” program in 2003 about alleged terrorist money laundering involving dead chickens. *Mar-Jac Poultry, Inc. v. Katz*, No. 03-2422 (U.S. Dist. Ct., D.D.C., dismissal entered March 30, 2011). The D.C. Circuit Court of Appeals has apparently not yet indicated whether it will hear the appeal.

The segment focused on a purported “terrorist hunter” whose actions in ferreting out terrorist activity in the United States apparently led the U.S. government to raid a poultry farm after she claimed that Saudis had purchased it. According to Rita Katz, who appeared on the program in disguise, chicken was the best cover for money laundering because “chicken is one of the things that no one really can track it down. If you say in one year

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that you lost 10 million chickens, no one can prove it. They just died. You can't trace money with chickens." The implication was that money "lost" this way could have funded Hamas or Islamic Jihad or al-Qaida.

The district court dismissed the case, finding that, while the company's name, never spoken aloud during the broadcast, was displayed several times, the broadcast never stated that Mar-Jac was knowingly involved in money laundering. The court also determined that "no reasonable jury could find that Ms. Katz's statements about laundering money through misreporting dead chickens were anything but rank speculation, surmise or hyperbole, engendered, perhaps, by her thrill at being involved in an un[der]cover capacity. Ms. Katz's story was greeted with a fair amount of skepticism by ["60 Minutes" correspondent] Mr. Simon, and nothing suggested she could make knowing statements about slaughtering chickens." Responding to the court's characterization of the statements as hyperbole, Mar-Jac's counsel was quoted as saying, "To the contrary, this program has a reputation for broadcasting facts. This finding by the court poses a dilemma for CBS: can the network let this judgment about one of its premier news program[s] stand?"

The parties dismissed correspondent Bob Simon by agreement, and the district court, finding the challenged statements, even if defamatory, protected by the First Amendment, granted the defendants' joint motion for summary judgment. See *The BLT: The Blog of Legal Times*, April 26, 2011.

### **Workers' Comp Deductibles at Issue in Pork Employees' Neurological Disease**

A Minnesota appeals court has reportedly decided a dispute over workers' compensation deductibles in favor of a pork processing company's insurance carrier in litigation arising from injuries to employees exposed to the mist from pig brain tissue. Quality Pork Processors Inc. is apparently considering whether to appeal the ruling to the state supreme court. According to counsel for the company, the matter involves a contractual dispute and has no effect on benefit payments to those infected while working on or near the line called the "head table." They apparently used compressed air to remove pigs' brains and were diagnosed with an unusual neurological disease that causes symptoms including weakness, fatigue, confusion, and seizures. The pork processor contends that the contract language addressing how deductibles were calculated is ambiguous and disagreed that each accident should be decided separately. See *The Austin Daily Herald*, April 14, 2011.

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## SCIENTIFIC/TECHNICAL ITEMS

### Study Allegedly Links Omega-3s to Aggressive Prostate Cancer

A Fred Hutchinson Cancer Research Center study has reportedly found that men with the highest blood percentages of the omega-3 fatty acid known as docosahexaenoic acid (DHA) “have two-and-a-half-times the risk of developing aggressive, high-grade prostate cancer compared to men with the lowest DHA levels,” according to an April 25, 2011, press release. Theodore Brasky, “Serum Phospholipid Fatty Acids and Prostate Cancer Risk: Results From the Prostate Cancer Prevention Trial,” *American Journal of Epidemiology*, April 2011. Based on data from 3,400 men enrolled in the Prostate Cancer Prevention Trial, the study has also claimed that, contrary to expectations, “men with the highest blood ratios of *trans*-fatty acids... had a 50 percent reduction in the risk of high-grade prostate cancer.”

The findings evidently surprised researchers, who expected that the anti-inflammatory properties of omega-3 fatty acids would reduce prostate cancer risk, while *trans*-fatty acids and the omega-6 fatty acids commonly found in vegetable oils would increase it. Instead, the study authors reported that not only does DHA apparently raise the risk for aggressive prostate cancer and *trans* fatty acids lower it, but that none of the fatty acids appeared to affect low-grade prostate cancer. They also noted that most participants with the highest DHA blood levels ate a diet high in fatty fish, as opposed to taking fish oil supplements.

“We were stunned to see these results and we spent a lot of time making sure the analyses were correct,” said the lead author. “Our findings turn what we know—or rather what we think we know—about diet, inflammation and the development of prostate cancer on its head and shine a light on the complexity of studying the association between nutrition and the risk of various chronic diseases.”

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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.

