

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

FSIS Issues Video Compliance Guide for Federally Inspected Meat, Poultry Plants

The Food Safety and Inspection Service (FSIS) has announced the [availability](#) of final compliance guidelines for video monitoring at federally inspected establishments, such as meat and poultry plants. The [guidelines](#), which have received Office of Management and Budget approval, stem from a 2008 USDA Office of Inspector General (OIG) recommendation that called for FSIS to determine whether such monitoring would be beneficial for “slaughterhouse establishments.” Additional information about the guidelines appears in [Issue 369](#) of this *Update*.

Although not mandatory, in-plant video monitoring can be used to strengthen food safety and humane animal-handling practices, and to monitor product inventory and building security, according to FSIS. The agency has provided the guide to help those plants choosing this method to create records for maintaining “compliance with [f]ederal regulations, including humane treatment of livestock and the use of good commercial practices in poultry.” It also “provides information on issues establishments should consider if they use this equipment for any other purpose, such as part of their food defense plans.” Clarifying which video records are subject to routine FSIS access, the guide states such records include “HACCP [Hazard Analysis and Critical Control Point] and Sanitation SOP [Sanitation Standard Operating Procedures] and records associated with other programs that are prerequisites to HACCP.” See *Federal Register*, August 31, 2011.

LITIGATION

False Advertising Claims Against Arizona Beverage Dismissed in Part in California; Class Cert. Denied in New Jersey

A federal court in California has granted in part the motion to dismiss filed by Arizona Beverages USA LLC, in a putative class action alleging the violation of

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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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consumer fraud and false advertising laws due to company representations that its products are "Natural," "All Natural" and "100% Natural." *Ries v. Arizona Beverages USA LLC*, No. 10-01139 (U.S. Dist. Ct., N.D. Cal., San Jose Div., decided August 25, 2011). The plaintiffs contend that the products are not natural in that they contain high-fructose corn syrup and an artificially produced citric acid. At issue in the defendants' motion was whether the plaintiffs had adequately pleaded the claims in their first amended complaint under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

According to the court, the complaint adequately pleaded fraud in connection with the plaintiffs' allegations arising out of the product labels. The court concluded, "These allegations are not inherently implausible and are sufficient for purposes of Rule 9(b)." The first amended complaint also included claims relating to Internet advertising and "other promotional" materials, but because the plaintiffs failed to identify any specific ads or materials, the court found these claims insufficient. Dismissing them, the court again gave the plaintiffs leave to amend.

Meanwhile, a federal court in New Jersey has, on reconsideration of its order denying a motion for class certification in similar litigation against Arizona Beverage, again found the plaintiff an inadequate representative of the class. *Coyle v. Hornell Brewing Co.*, No. 08-2797 (U.S. Dist. Ct., D.N.J., decided August 30, 2011). The court concluded that the named representative was inadequate because of credibility problems associated with the date she allegedly purchased the products at issue. In this regard, the court stated, "Without doubt, determining whether this Plaintiff made her purchase of Defendants' product on the date she repeatedly claimed, after she had retained a lawyer to file suit, would become a major focus and quite probably a show-stopper for this class."

Nutella® False Advertising Litigation Survives Motion to Dismiss

A federal court in California has denied the defendant's motion to dismiss the plaintiffs' first amended consolidated complaint in a case involving claims that "Ferrero misleadingly promotes Nutella® spread as healthy and beneficial to children when in fact it contains dangerous levels of fat and sugar." *In re: Ferrero Litig.*, No. 11-205 (U.S. Dist. Ct., S.D. Cal., decided August 29, 2011). According to the court, the plaintiffs sufficiently pleaded exposure to a long-term advertising campaign and reliance on the campaign in making their purchasing decisions to confer standing on them to bring their claims under California's Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act.

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Putative Class Alleges Kashi “Natural” Products Have Mostly Unnatural Ingredients

A Texas resident has filed a putative class action against the Kashi Co. and its parent, the Kellogg Co., in a California federal court, alleging that the company falsely labels and markets its products as “all natural” when they actually contain processed and synthetic ingredients, some of which are not generally recognized as safe by the Food and Drug Administration (FDA). *Bates v. Kashi Co.*, No. 11-1967 (U.S. Dist. Ct., S.D. Cal., filed August 24, 2011).

Seeking to certify a nationwide class of consumers, the plaintiff names in the complaint dozens of ingredients used in Kashi snack, cereal, pizza, fruit bar, waffle, shake, trail mix, cookie, and cracker products, explains how they are produced and indicates whether they or the processes that create them are hazardous or toxic. For example, the plaintiff claims that sodium selenite is a hazardous substance. “The FDA has not declared it generally recognized as safe as a food additive, but it is approved for use as an animal feed additive.” The plaintiff also challenges as false and deceptive health benefit claims made for other Kashi products, as well as claims that particular products are “Naturally Sweetened” or are made with “Real Fruit.”

Alleging primarily economic injury in addition to ingesting harmful substances and unwittingly supporting “an industry that contributes to environmental, ecological, or health damage,” the plaintiff asserts 14 claims including (i) violations of California and Michigan consumer protection laws; (ii) restitution based on quasi-contract or unjust enrichment; (iii) breach of express warranty, implied warranty of fitness for a particular purpose and implied warranty of merchantability under state and federal law; (iv) fraudulent misrepresentation, fraudulent concealment and constructive fraud; (v) negligence and negligent misrepresentation; (vi) strict liability; (vii) assault and battery; and (viii) conspiracy. The plaintiff seeks compensatory damages and damages for “lost expectancy, emotional distress and mental anguish, and medical monitoring,” statutory penalties, restitution, punitive damages, attorney’s fees and costs, interest, an accounting, and declaratory and injunctive relief.

Specifically, the plaintiff asks the court to enjoin the defendants from continuing to make the allegedly false, deceptive and misleading statements, to order an immediate recall of all falsely labeled products and to issue an order requiring the defendants to disclose the truth of their misrepresentations.

Del Monte Announces Intent to Sue Oregon Health Authority in Cantaloupe Flap

According to a news source, Del Monte Fresh Produce NA Inc. has indicated, as part of its campaign to counter allegations that its cantaloupes, imported

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from Guatemala, were tainted with *Salmonella*, that it intends to sue the Oregon Health Authority and a public health official for making “misleading allegations” about its products. Company Vice President Dennis Christou reportedly said, “These statements were made despite the lack of a substantive factual basis for the allegations and the failure to adequately investigate the true source of the contamination.” Information about litigation Del Monte filed against the Food and Drug Administration (FDA), seeking to lift an import alert related to its Guatemalan cantaloupes appears in [Issue 407](#) of this *Update*.

The Center for Science in the Public Interest (CSPI) has criticized the company for taking action against government agencies, stating in a press release, “FDA and Oregon used state-of-the-art techniques to identify the food item, and a lawsuit like Del Monte’s could have a dangerous chilling effect on the willingness of public health officials to recall foods or ban unsafe imports for fear of retaliation in court. Consumers should be outraged that Del Monte is using the courts to fight for its right to sell food that might be tainted.” CSPI’s comments were echoed by former FDA assistant commissioner David Acheson, who said, “If this case is successful from an industry perspective, it will change the attitude of regulators. They will obviously be more reluctant.” See *Law 360*, August 30, 2011; *CSPI News Release* and *CBS News*, August 31, 2011.

LEGAL LITERATURE

Minnesota Legal Journal Publishes Food Advertising and Childhood Obesity Article

The most recent issue of the *Minnesota Journal of Law, Science & Technology* includes an article titled “Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions.” Co-authored by online law instructor Roseann Termini and Widener University School of Law students Thomas Roberto and Shelby Hostetter, the article explores whether food advertising is related to the epidemic of child obesity and what can be done to reduce its purported effects. Contending that government regulation of food advertisements directed at children is necessary because “children lack the cognitive skills to discern actual nutritional information amidst a veil of attention grabbing marketing techniques,” the authors discuss what regulatory options would best police the industry.

While they note the constitutional issues raised by bans or limitations on commercial advertising, the authors apparently see no impediments to government overseeing and enforcing “the internal policies of food manufacturers,” aggressive enforcement of established youth marketing guidelines, and the elimination of food advertising as an ordinary business expense

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deduction. They also recommend tax incentives for “healthy food selection” messages. The article concludes by recognizing that parents have at least some role in influencing children’s food choices, so the authors call on them to model good behavior and stop watching television during meals. The authors contend, “Without the concerted efforts of parents, caregivers, educators, community, and food advertisers, the need for governmental regulation of food advertisements directed at children will remain constant.”

OTHER DEVELOPMENTS

Anti-Tobacco Law Professor Predicts Opening of Food Litigation Floodgates

George Washington University Law School Professor John Banzhaf, who teaches “public interest” law, has issued a [press release](#) discussing recent class action claims against ConAgra over its “All Natural” cooking oil representations. According to Banzhaf, such litigation could be in the vanguard of many similar lawsuits against food companies that would be targeted by “both money-hungry lawyers and public-interest attorneys.”

He discusses the litigation that he and his students successfully filed against McDonald’s for allegedly misleading consumers about the content of the oil in which it cooks its French fries and notes that many manufacturers claiming to make “all natural” foods could be held liable in consumer fraud actions if the ingredients are genetically engineered or contain high-fructose corn syrup. Banzhaf concludes by suggesting, in light of *Forbes* calling obesity-related litigation “the next tobacco,” that “perhaps ‘all-natural’ is the next fat.”

Banzhaf made a name for himself decades ago by taking on cigarette manufacturers; he succeeded in requiring anti-smoking public-service advertisements on television to counter cigarette ads and imposing restrictions on smoking in airplanes. He prides himself on bringing lawsuits to promote the public interest and turned to obesity-related issues in 2001. In his press release about food litigation, Banzhaf states, “Many state consumer protection laws permit recovery for claims which might be deceptive or misleading even if only to uneducated people, and even if the claims are technically true.” He also observes that large financial recoveries are possible even when plaintiffs cannot show actual harm.

Cities and Health Groups Launch Campaign to Reduce Soft Drink Consumption

The American Diabetes Association, American Heart Association and Center for Science in the Public Interest (CSPI) have joined cities nationwide in a new initiative designed “to reduce diet-related disease” by targeting sugar-sweetened beverage consumption. Dubbed “Life’s Sweeter with Fewer Sugary Drinks,” the campaign seeks to decrease “average consumption of sugary

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drinks to roughly 3 cans per person per week by 2020," a goal reportedly backed by officials in Boston, Los Angeles, Philadelphia, San Antonio, and Seattle, as well as 110 local and national health organizations.

According to an August 31, 2011, CSPI press release, the campaign's [Website](#) urges "individuals and families to take the Life's Sweeter challenge to drink fewer or no sugary drinks," including "fruit-flavored beverages with little or no juice, sweetened iced teas, lemonades, energy drinks, and so-called sports drinks." The groups have also called on employers, hospitals and government agencies "to adopt policies that would reduce soda consumption," such as eliminating these products from cafeterias and vending machines.

"Life's Sweeter's goal is to broaden the battle against sugary drinks from health experts to civic organizations, youth groups, civil rights groups, and others," said CSPI Executive Director Michael Jacobson. "The enormous health and economic benefits that would result from drinking less 'liquid candy' will be supported by a broad cross-section of America. Not since the anti-tobacco campaigns has there been a product so worthy of a national health campaign."

CDC Journal, *Lancet* Focus on Obesity Issues

The September 2011 issue of the Centers for Disease Control and Prevention's research and policy journal, *Preventing Chronic Disease*, features a [special section](#) dedicated to "Ethical Issues in Interventions for Childhood Obesity," where contributors with Public Health Law & Policy, Yale University's Rudd Center for Food Policy & Obesity, and other organizations discuss how best to balance government's public health role with private rights and interests. In particular, the section includes articles that explore (i) strategies to limit youth food marketing in municipal spaces not already regulated by federal agencies; (ii) an ethical framework for evaluating popular policies, such as menu calorie labeling and soft drink taxes; (iii) perspectives from the Arkansas Act 1220 of 2003, "the first comprehensive legislative initiatives to combat childhood obesity"; (iv) ethical family and school interventions; and (v) the economic rationale for government intervention.

"During the past decade, people throughout the country—from rural communities to the White House—have joined efforts to promote change. The growth of the movement to prevent childhood obesity is impressive and inspiring, but we still have far to go," writes Robert Wood Johnson Foundation Senior Program Officer John Govea in the issue introduction, which notes a surge in recent local, state and federal efforts to tackle childhood obesity. "The articles presented in this collection address a selection of the most important and understudied aspects of childhood obesity interventions, the ethical implications of what we recommend or implement."

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Meanwhile, the *Lancet* has also released a [four-part series](#) focused on “the global obesity pandemic: its drivers, its economic and health burden, the physiology behind weight control and maintenance, and what science tells us about the kind of actions that are needed to change our obesogenic environment.” To this end, the final paper identifies “several cost-effective policies that governments should prioritize,” such as improvements to the food and built environments, cross-cutting leadership and monitoring actions, and increased funding for prevention programs. “Increased investment in population obesity monitoring would improve the accuracy of forecasts and evaluations,” conclude the paper authors. “The integration of actions within existing systems into both health and non-health sectors (trade, agriculture, transport, urban planning, and development) can greatly increase the influence and sustainability of policies. We call for a sustained worldwide effort to monitor, prevent, and control obesity.”

Japanese Research Institute Claims BPA Poses “Very Small” Risk to Human Health

A Japanese research institute recently issued an [updated hazard assessment](#) of bisphenol A (BPA) suggesting that the chemical poses minimal or no risk to human health. The Research Institute of Science and Sustainability (RISS), which is part of Japan’s National Institute of Advanced Industrial Science and Technology, examined BPA data “from 2005 onwards” to assess its general toxicity as well as its reproductive toxicity in the next generation.

According to the assessment’s abstract, “no toxic effects on the reproductive potential of the next generation except for a slight prolongation of gestational length of F1/F2 at 300 mg/kg bw, and a no-observed-adverse-effect level (NOAEL) of 50 mg/kg bw have been noted.” It also said that BPA carcinogenicity by “oral administration has already been determined to be negative from bioassays.” The abstract added, “with regard to skin irritation, skin sensitization, skin photo-irritability, and photo-sensitization due to BPA, it was believed that there is almost no need for concern because these were found to be negative in animal testings at a practical dose level.” Using BPA exposure estimates in Japanese individuals and no-observed-adverse-effect level from animal testings for their hazard assessment, the researchers concluded, “the risk of BPA with regard to human health was believed to be very small.”

SCIENTIFIC/TECHNICAL ITEMS

New Study Alleges Link Between Gout and Obesity

A recent study has suggested that the rising prevalence of gout, which now reportedly affects 4 percent of Americans, “may be associated” with greater frequency of obesity and hypertension. Yanyan Zhu, et al., “Prevalence of Gout

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and Hyperuricemia in the US General Population," *Arthritis & Rheumatism*, July 28, 2011. Researchers compared data from 5,707 participants in the 2007-2008 U.S. National Health and Nutrition Examination Survey (NHANES) to NHANES data from 1988-1994. The latest survey also asked participants about their history of gout as diagnosed by a health care professional, with hyperuricemia or elevated uric acid levels defined as a serum urate level greater than 7.0 mg/dL in men and 5.7 mg/dL in women.

According to a Boston University Medical Campus press release, when compared to earlier NHANES data, the prevalence of gout and hyperuricemia "was 1% and 3% higher, respectively." In addition, "further analysis revealed that gout prevalence was higher in men (6%) compared to women (2%)," while "hyperuricemia occurred in 21.2% of men and 21.6% of women."

Lead author Hyon Choi said that gout and hyperuricemia continue to be "substantial" in the U.S. adult population. "Improvements in managing modifiable risk factors, such as obesity and hypertension, could help prevent further escalation of gout and hyperuricemia among Americans," he was quoted as saying. See *Boston University Medical Campus Press Release*, July 29, 2011.

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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.

