

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Bill Would End Tax Subsidy for Food and Beverage Youth Marketing

U.S. Sens. Tom Harkin (D-Iowa) and Richard Blumenthal (D-Conn.) have [introduced](#) a bill that would end a tax subsidy for the marketing of food and beverages of poor nutritional quality to children. The "Stop Subsidizing Childhood Obesity Act" would also shift the money saved from eliminating the tax credit to the U.S. Department of Agriculture's Fresh Fruit and Vegetable Program, which provides fruit and vegetable snacks to elementary school students in low-income schools. Under the current tax code, companies can deduct marketing and advertising expenses from their income taxes.

"Our nation is facing a childhood obesity crisis that demands our urgent attention, and one effective way of combating this epidemic is to ensure that our children are not confronted by persistent advertising from soda, snack, and candy makers," said Harkin. "Given the enormous public health costs associated with childhood obesity, our bill promotes healthier lifestyles."

Sen. Blumenthal said, "This measure makes taxpayers allies of health advocates and nutritious eating, rather than aiders and abettors of junk food. By eliminating the nonsensical tax loophole allowing companies to write off the cost of marketing junk food and sugary beverages to children, the Stop Subsidizing Childhood Obesity Act will encourage companies to put their creative talents toward promoting nutritious foods, and bring in revenue that will be put to good use." The senators said that the bill could reduce childhood obesity by 7 percent. See *Sen. Blumenthal News Release*, May 15, 2014.

Senators Question FDA's Use of Draft Guidance

U.S. Sens. Lamar Alexander (R-Tenn.), Richard Burr (R-N.C.), Johnny Isakson (R-Ga.), and Orrin Hatch (R-Utah) have [sent](#) a letter to U.S. Food and Drug Administration (FDA) Commissioner Margaret Hamburg expressing "significant concern" about the agency's use of draft guidance to, in their view, make "substantive policy changes."

Noting that draft guidance is "increasingly becoming default FDA policy" although it is issued for comment purposes only, the letter expresses a number of concerns, including that (i) FDA's Website does not differentiate between draft and final guidance; (ii) draft guidance is not revised, finalized or

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withdrawn in a timely manner; and (iii) the agency issues guidance that “does not take into account, or may even conflict with, the scientific community.”

Specifically, the senators request that FDA provide a list of all Level I draft guidances, including the date issued and the timeline on which the agency plans to withdraw, revise or finalize each guidance, and an update on agency-wide activities to implement best practices to expedite guidance finalization. They also ask (i) whether FDA has implemented the president’s Council of Advisors on Science and Technology recommendation to rely more on the biomedical community to help develop and revise guidances, and if so, whether the agency can provide examples of specific guidances; (ii) how FDA ensures that staff does not follow guidances still in draft form in the absence of any other policy or final guidance; and (iii) what the average amount of time in calendar days FDA took to finalize draft guidances was during the last five years.

FDA Issues Latest Findings in Jerky Dog-Treats Investigation

Despite its seven-year investigation into jerky pet treats that may have killed more than 1,000 dogs and left thousands more ill, the U.S. Food and Drug Administration (FDA) “has still not been able to identify a specific cause for the reported illnesses or deaths.” According to an FDA [news release](#), as of May 1, 2014, the agency had received more than 4,800 complaints of illness in pets that ate jerky treats made of chicken, duck or sweet potato.

In its ongoing efforts to find a cause for the illnesses, FDA has partnered with the Centers for Disease Control and Prevention to conduct a study to determine whether sick dogs eat more jerky treats than healthy dogs do.

Studies of the jerky treats revealed the presence of the antiviral drug amantadine, but “FDA does not believe that amantadine contributed to the illnesses because the known side effects or adverse effects associated with amantadine do not seem to correlate with the symptoms seen in the jerky pet treat-related cases.” Most of the illness-causing treats were made in China, and thus some retailers have pledged to stop selling Chinese-sourced jerky treats. Petco told *USA Today* that about half of the jerky treats it sells now were made in China, down from 90 percent five years ago, but that by the end of the year it would not sell any. Information about a putative class action stemming from allegedly harmful chicken jerky treats made in China may be found in Issue [511](#) of this *Update*. See *FDA News Release*, May 16, 2014.

Animal Rights Group Says Food-Label Claims Not Verified

According to a new Animal Welfare Institute (AWI) [report](#) titled “Label Confusion: How ‘Humane’ and ‘Sustainable’ Claims on Meat Packages Deceive Consumers,” the U.S. Department of Agriculture (USDA) fails to verify the accuracy of label claims on most meat and poultry products sold in the United States. The

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report suggests that food label claims used on millions of meat packages lack “any apparent verification,” and AWI has asked USDA to require independent third-party certification.

Noting that the use of animal welfare and sustainability claims has increased dramatically during the past decade as consumers become more aware of—and concerned about—the well-being of animals raised for food and the purported negative impacts of animal agriculture on the environment, AWI contends that the public’s interest in these claims makes them ripe for exploitation.

During the past three years, AWI researched the USDA approval process for 25 animal welfare and environmental claims, such as “humanely raised” and “sustainably farmed,” focusing exclusively on claims that are not third-party certified. The findings apparently revealed that the government “regularly” approves the use of such claims with “little or no supporting evidence” documenting their accuracy. The group also determined that the current label approval process (i) “is inconsistent and lacks transparency,” (ii) “does not meet consumer expectations,” (iii) “leads to misleading and deceptive labeling,” and (iv) “harms farmers who use accurate claims.”

Finding that only two of the claims approved by USDA were substantiated by more than a brief producer statement and more than 80 percent were backed by “no supporting evidence whatsoever,” AWI argues that the lack of government oversight confuses consumers and threatens the livelihoods of higher-welfare farmers who have earned the right to use such claims.

“Until USDA makes significant changes to its approval process,” said report author Dena Jones, “consumers should be wary of any meat products whose label includes an animal welfare or environmental claim that is not accompanied by a statement or logo indicating an independent third party verified the claims.” *See AWI News Release, May 14, 2014.*

EU Member States Criticize “Best Before” Dates

The Netherlands and Sweden have issued a discussion paper arguing that labeling food with “best before” dates results in unnecessary food waste and that European Union (EU) requirements should be adjusted to allow some foods to be sold without them. The paper, which Germany, Denmark, Austria, and Luxembourg also back, echoes a report published in April 2014 by the U.K.’s House of Lords EU Committee urging the development of “aspirational targets for each level of the supply chain” to reduce food waste in Europe. According to the European Commission (EC), up to 100 million metric tons of food are wasted each year in Europe, and a 2013 report from the London-based Institution of Mechanical Engineers found that 30 to 50 percent of food on shelves is wasted, possibly due to poor understanding of “best before” and “use by” dates. The EC said that it is examining possible avenues of action and will publish a policy paper on the issue later this year. *See Reuters, May 16, 2014.*

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WHO Places Obesity in the Spotlight

As the World Health Assembly opened its 67th session in Geneva, World Health Organization (WHO) Director-General Margaret Chan reportedly expressed her deep concern about the increasing incidence worldwide in childhood obesity, stating, "Our children are getting fatter." Chan announced the formation of a high-level Commission on Ending Childhood Obesity. Chaired by Peter Gluckman, the chief science advisor to New Zealand's prime minister, the commission will produce a consensus report detailing measures that would be most effective in addressing the issue in different countries around the world. Its recommendations will be announced during the 2015 World Health Assembly.

Two international membership bodies called on governments convening in Geneva to develop a global convention to address obesity, similar to the legal framework for tobacco control. The World Obesity Federation and Consumers International (CI) have launched their campaign by calling for controls on food marketing, improvements to nutrition information labels, the reformulation of "unhealthy food products," standards for food provided in public institutions, and the use of economic tools to influence consumption patterns.

According to CI Director General Amanda Long, "The scale of the impact of unhealthy food on consumer health is comparable to the impact of cigarettes. The food and beverage industry has dragged its feet on meaningful change and governments have felt unable or unwilling to act. The only answer remaining for the global community is a framework convention and we urge governments to seriously consider our recommendations for achieving that. If they do not, we risk decades of obstruction from industry and a repeat of the catastrophic global health crisis caused by smoking." *See internationalsupermarketnews.com*, May 15, 2014; *WHO News Release*, May 19, 2014.

Meanwhile, observing that unhealthy diets pose a greater risk to global health than tobacco and that governments should move fast to tax harmful food products, United Nations (U.N.) Investigator Olivier De Schutter issued a statement at the May 19, 2014, opening of the annual WHO summit, calling for global efforts to address the obesity epidemic. "Just as the world came together to regulate the risks of tobacco, a bold framework convention on adequate diets must now be agreed," De Schutter said.

Considered the U.N.'s leading voice on hunger, De Schutter has asked the international community to support regulations limiting access to and taxing salty, sugary foods that are high in saturated fats and contribute to obesity. In addition to imposing a so-called sin tax, De Schutter supports a crackdown on the marketing of junk foods, an overhaul of agricultural subsidies that purportedly drive down the costs and drive up availability of some unhealthy foods (including sweeteners), and increased support for local food production. *See U.N. Press Release*, May 19, 2014.

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WHO Releases Alcohol Report

The World Health Organization (WHO) has [released](#) a report on the purported harmful effects of alcohol in 194 WHO member states. The agency attributes 3.3 million deaths in 2012 to the harmful use of alcohol, and it found that the 38.3 percent of the world's population that drinks alcohol consumes an average of 17 liters of pure alcohol each year. The report highlighted the need for WHO member states to take action in the form of national alcohol policies, awareness-raising activities and health services for prevention and treatment of alcohol-related diseases. WHO attributes higher risk of developing more than 200 diseases to alcohol use and further notes that harmful use can lead to higher susceptibility to infectious diseases such as tuberculosis and pneumonia. "More needs to be done to protect populations from the negative health consequences of alcohol consumption," said WHO Assistant Director-General for Noncommunicable Diseases and Mental Health Oleg Chestnov.

LITIGATION

Federal Court Reverses ECJ Decision, Citing Primary Jurisdiction

In a putative class action alleging that a food company misled its customers by using the term "evaporated cane juice" (ECJ) instead of "sugar" on its labels, a California federal court has followed the lead of several other courts in recent decisions by dismissing the case without prejudice under the primary jurisdiction doctrine—this time, reversing its previous decision to allow the case to move forward. *Swearingen v. Yucatan Foods LP*, No. 13-3544 (U.S. Dist. Ct., N.D. Cal., order entered May 20, 2014). Guacamole producer Yucatan Foods had argued that the U.S. Food and Drug Administration (FDA) had primary jurisdiction over the matter, but Judge Richard Seeborg initially disagreed, finding that FDA had taken no action on ECJ since 2009 and thus that the agency considered the matter settled.

On March 5, 2014, one month after the *Yucatan* decision was filed, FDA announced that it would reevaluate its previous draft ECJ guidance. Following the announcement, courts began deciding similar cases in favor of ceding primary jurisdiction to FDA and dismissing the cases without prejudice. Additional information about a case decided on similar grounds appears in [Issue 520](#) of this *Update*.

Other recent primary-jurisdiction cases include *Avila v. Redwood Hill Farm & Creamery, Inc.*, No. 13-335 (U.S. Dist. Ct., N.D. Cal., order entered May 19, 2014), and *Swearingen v. Attune Foods Inc.*, No. 13-4541 (U.S. Dist. Ct., N.D. Cal., order entered May 15, 2014). In contrast, a California federal court recently chose to stay the case rather than dismiss it, but the court implied that it would defer to FDA's ECJ ruling. *Swearingen v. Late July Snacks LLC*, No. 13-4324 (U.S. Dist. Ct., N.D. Cal., order entered May 22, 2014).

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South Dakota Supreme Court Allows “Slime” Suit to Proceed

According to news sources, the South Dakota Supreme Court has denied the defendants’ petition seeking review and dismissal of a lawsuit filed by Beef Products, Inc. alleging that the ABC network and news anchor Diane Sawyer, among others, defamed the company by their coverage of the company’s lean, finely textured beef, which has been dubbed “pink slime” by critics. *Beef Prods., Inc. v. Am. Broadcasting Cos., Inc.*, No. 12-292 (Union Cnty. Cir. Ct., S.D., supreme court order entered May 22, 2014). Without discussing the case merits, the court also apparently lifted a stay that had stopped the discovery process in April 2014. Additional details about the lawsuit appear in Issues [519](#) and [453](#) of this *Update*. The plaintiff seeks \$1.2 billion in damages. *See AP*, May 23, 2014.

Fox Escapes D’Lites Ice Cream Libel Suit

A New York state court has granted a motion for summary judgment and dismissed libel claims filed against Fox Television Stations Inc. by a D’Lites ice cream seller. *Prince v. Fox Television Stations Inc.*, No. 107129/2011 (N.Y. S. Ct., order entered May 6, 2014). Matthew Prince filed a libel suit against Fox after a local channel in New York aired a report claiming that the low-calorie ice cream sold in the D’Lites stores Prince would soon be opening in the area contained more than three times as many calories, carbohydrates, total fat, and sugar than the amounts the chain advertised—for example, 148 calories rather than the advertised 50.

The court rejected Fox’s argument that its report had not sufficiently identified Prince, despite that the reporters only visited stores that Prince did not own and the report briefly showed a screenshot of the D’Lites Website listing what cities would soon have a D’Lites store; because Prince owned the store locations referenced in that list, the court held, the report identified him for purposes of meeting the defamation standard. Instead, the court granted the motion dismissing Prince’s libel and product disparagement claims on the basis of the truth of Fox’s report, holding that Fox showed that the report was substantially true with evidence of laboratory reports on tests of the ice cream’s nutritional content.

Anheuser-Busch Cleared in Sex-Bias Suit

After a three-week trial, a jury has reportedly cleared Anheuser-Busch of sex discrimination in a suit brought by former executive Francine Katz, who had alleged that she was paid less than her male counterparts because of her gender. *Katz v. Anheuser-Busch Inc. et al.*, No. 922-CC09513 (St. Louis Circ. Ct., verdict rendered May 16, 2014). Katz worked at Anheuser-Busch as vice president of communications and consumer affairs from 2002 to 2008, when she left following InBev NV’s November 2008 acquisition of the company.

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During the acquisition process, Katz learned that her compensation was lower than the pay received by her male colleagues on the strategy committee, and she filed a suit alleging violations of the Missouri Human Rights Act in 2009. Following the jury's decision, Katz told the media that she hoped she had helped to draw attention to the issue of gender bias in compensation. See *St. Louis Post-Dispatch*, May 17, 2014.

Guilty Pleas Expected in Tainted Egg Outbreak

Federal prosecutors have reportedly filed criminal charges against Iowa-based Quality Egg LLC and two former company executives—Austin “Jack” DeCoster and his son Peter—over a 2010 *Salmonella* outbreak that sickened thousands across the country and resulted in the recall of some 550 million eggs. *United States v. Quality Egg, LLC*, No. 14-cr-3024 (U.S. Dist. Ct., N.D. Iowa, filed May 21, 2014). The charging document, which brings two felony counts of introducing adulterated food into interstate commerce against the company and related misdemeanor charges against the DeCosteres, alleges that the company sold tainted eggs from early 2010 until the August recall. According to news sources, the DeCosteres are expected to enter guilty pleas on June 3, 2014, as part of a plea agreement that ends the four-year investigation.

The charging document alleges that the company sold products with labels making “the eggs appear to be not as old as they actually were” from 2006 to 2010, and paid bribes to influence a U.S. Department of Agriculture inspector at least twice to approve eggs that had failed to meet federal standards. The company is also reportedly expected to plead guilty. The misdemeanor counts could bring a maximum one-year term of imprisonment and a \$250,000 fine, while the bribery count would trigger forfeiture of property derived from the proceeds of the violation. See *Reuters* and *U.S. News & World Report*, May 21, 2014.

Peanut Co. Executive Seeks to Exclude Victim-Impact Testimony at Trial

Stewart Parnell, former president of the Peanut Corp. of America (PCA), linked to a 2008-2009 nationwide *Salmonella* outbreak that allegedly killed nine who consumed products made with the company's tainted peanut paste and injured some 700 others, has filed a motion asking the court to exclude “all evidence related to any alleged illness or death” during his criminal trial. *United States v. Parnell*, No. 13-cr-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., motion filed May 20, 2014).

Observing that the government's pleaded harm “consists of monetary harm to the customers and individuals named” and that the entire case is “premised on the alleged wrongful conduct of obtaining money by false pretenses,” Parnell argues that victim-impact evidence is irrelevant and would be highly prejudicial. In this regard, he states, “[T]he only purpose for introducing evidence of salmonella-related illness and death is to inflame the jury in an effort to suggest a decision on an improper basis.” According to Parnell, “[t]he

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government cannot link illness or death to PCA products or to anything other than PCA being a 'likely' source." He also contends that this evidence has "little to no bearing" on the charges in the indictment.

Natural Balance Shareholder Accuses Heinz of Adulterating Dog Food

Frank Magliato, "in his capacity as stockholder representative for the former shareholders of Natural Balance Pet Foods," has reportedly filed a lawsuit against H.J. Heinz Co., alleging that the food company knowingly sold processed sheep lungs adulterated with rubber rings to Natural Balance. The complaint alleges that while Heinz knew both that the rubber rings had been lodged in internal organs of the sheep and that the rings could be hazardous to animals, the company did not alert Natural Balance or its customers to the potential danger. According to Magliato, Natural Balance recognized that the food was adulterated before selling the products, but had it not, Heinz's negligence could have exposed the pet food company to litigation and damaged its reputation. Magliato seeks disgorgement of ill-gotten gains, restitution and \$400,000 in damages for strict products liability, breach of express and implied warranty, negligence, unfair business practices and fraud, as well as court costs. See *Courthouse News Service*, May 9, 2014.

Putative Class Action Filed Against Papa John's for Charging Sales Tax on Delivery Fee

A Papa John's customer has filed a putative class action against the pizza company in Illinois state court, alleging that the chain illegally charges sales tax on delivery fees, resulting in each delivery customer overpaying by \$0.16. *Zucker v. Papa John's Int'l, Inc.*, No. 14-668 (Madison Cnty. Ct., filed May 5, 2014). Zachary Tucker argues that Illinois sales tax may be imposed only on the total sales price of tangible property, excluding the delivery fee, so long as the actual cost of delivery is less than the amount of the delivery fee. As a result, the complaint alleges, Papa John's has violated and continues to violate the Uniform Deceptive Trade Practices Act (UDTPA), an Illinois consumer-protection statute. In addition to class certification, Tucker seeks a cease-and-desist ruling to prevent Papa John's from continuing to charge sales tax on delivery fees in Illinois, as well as damages for negligence, breach of contract and UDTPA violations. See *Madison-St. Clair Record*, May 19, 2014.

OTHER DEVELOPMENTS

Virtual Reality World Created for Chickens

Iowa State University Assistant Professor Austin Stewart has developed a virtual reality world that he says could be used to convince caged chickens that they are in a free-range environment. Stewart's project, *Second Livestock*, envisions round skyscrapers filled with chickens wearing virtual-reality headsets and standing on omnidirectional treadmills. If implemented early in a chicken's life,

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a chicken would believe that it is outside, Stewart suggests, and raising chickens in confinement could become more humane. While Stewart admits that his plan would be far too expensive to implement right now, "I had to show that this technology is plausible," he said. *See Ames Tribune*, May 10, 2014.

MEDIA COVERAGE

Katie Couric Documentary Blames Sugar for Obesity Epidemic

"Fed Up," a new documentary produced and narrated by Katie Couric, with appearances by food experts Marion Nestle, Michael Pollan and Michele Simon, among others, chronicles the struggle of obese children who have purportedly become addicted to food. While the film claims that unethical advertising, snack ubiquity, enabling parents, and poor school environments have contributed to America's obesity epidemic, it primarily places the blame on this nation's obsession with sugar and the government's alleged capitulation to the food industry and its lobbyists, referring to them as pushers of "the new tobacco." The film also features scientists Robert Lustig and David Ludwig, as well as real-food advocate Mark Bittman. *See NPR The Salt*, May 19, 2014.

SCIENTIFIC/TECHNICAL

Study Reveals Processed Foods Contain More Food Dye than Previously Thought

A recent [study](#) by Purdue University scientists has purportedly concluded that the amounts of artificial food colors found in many popular U.S. foods are much higher than previously thought, and children—the target market for the most heavily dyed foods—could be consuming 100 to 200 mg of artificial color in a day, well over the 30 mg that has allegedly been shown to contribute to behavioral disorders such as attention deficit hyperactive disorder.

Although manufacturers are required to disclose whether a food contains artificial coloring, the law does not require that they disclose how much of each color is used, and, according to the study, the amounts of artificial coloring in foods has increased more than five-fold since 1950.

"In the 1970s and 1980s, many studies were conducted giving children 26 mg of a mixture of dyes," said study author Laura Stevens. "Only a few children seemed to react to the dyes, so many doctors concluded that a dye-free diet was pointless. Later studies using larger doses showed that a much larger percentage of children reacted. But some researchers considered those doses unrealistically high. It is now clear that even the larger amounts may not have been high enough. The time is long past due for the FDA [U.S. Food and Drug Administration] to get dyes out of the food supply or for companies to do so voluntarily and promptly." *See FoxNews.com*, May 21, 2014.

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Study Finds Candy-Themed “Advergames” Lead to Higher Calorie Consumption in Kids

Researchers in the Netherlands have reportedly identified a link between computer games with food advertisements and higher calorie consumption in children, especially among those identified as impulsive. Frans Folkvord et al., “Impulsivity, ‘Advergames,’ and Food Intake,” *Pediatrics*, May 5, 2014. The study of 261 children aged seven to 10 assessed them for impulsivity, and then they played a matching game with branded content—an “advergame”—of either a candy brand or a toy brand. While the children were allowed to eat candy during play, half of each group playing each game was told that they would be rewarded for refraining from eating. The researchers observed the children for five minutes and measured their food intake.

Overall, the children playing the game with the candy brand ate more than the group playing the toy-branded game, but most of the children who were promised rewards for not eating the candy consumed fewer calories than the group that had received no such promise. The 39 percent of children who had been assessed as impulsive, however, were much more likely to eat the candy if they were playing the food game, regardless of whether they were to be rewarded for not eating. Head researcher Frans Folkvord told *Reuters*, “Impulsive children have insufficient inhibitory behavioral control, and food advertisers try to influence eating behavior, thereby making it more difficult for especially impulsive children to self-regulate their food intake.” Because many food companies appear to host online advergames similar to the ones used in the study, Folkvord suggested that parents explain the advertising angles of these games to make their children think critically about what messages the games send. See *Reuters*, May 6, 2014.

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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.

