

Food & Beverage

LITIGATION UPDATE

Issue 73 • March 24, 2004

Table of Contents

Legislation, Regulations and Standards

- [1] House Lawmakers Introduce Bill That Would Repeal Delay in COOL Regulations..... 1
- [2] New House Bills Target BSE Prevention 1
- [3] FDA and EPA Issue New Consumer Advisory on Methylmercury in Fish 1
- [4] Wisconsin Governor Vetoes Obesity Litigation Bill 2

Litigation

- [5] *E. Coli* Claims Against Meat Supplier May Proceed..... 2
- [6] Judge Upholds FDA Ban on Chicken Antibiotic 2

Other Developments

- [7] CSPI Takes Aim at Calorie Content of Flavored Malt Beverages 3
- [8] New WHO Report Addresses Neuroscience of Psychoactive Substance Use and Dependence..... 3
- [9] JIFSAN to Host Acrylamide in Food Workshop 3

Media Coverage

- [10] News Outlets Discuss Impact of Verdict in Popcorn-Flavoring Case..... 4

Scientific/Technical Items

- [11] Moderate Drinking Linked to Reduced Rate of Cardiovascular-Related Death in Men with High Blood Pressure 4

Shook,
Hardy &
Bacon L.L.P.™

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] House Lawmakers Introduce Bill That Would Repeal Delay in COOL Regulations

Representatives Mary Bono (R-Calif.) and Darlene Hooley (D-Ore.) have introduced legislation ([H.R. 3993](#)) that would amend the Agricultural Marketing Act to repeal the recently enacted two-year delay in the implementation of country-of-origin labeling (COOL) on meat and produce products. Referred to the Committee on Agriculture, the bill would restore the September 30, 2004, COOL implementation date established in the Farm Bill of 2002. Similar legislation (H.R. 3732) was introduced by Representatives Dennis Rehberg (R-Mont.) and Colin Peterson (D-Minn.) in late January 2004.

[2] New House Bills Target BSE Prevention

In recent weeks, House lawmakers have addressed food safety issues by introducing two bills related to bovine spongiform encephalopathy, or mad cow disease. [H.R. 3961](#) would direct the agriculture secretary to implement the United States Animal Identification Plan. The plan would apply to (i) all beef and dairy cattle that are at least 30 months old (not later than 60 days after the date of enactment), (ii) all other beef and dairy cattle (not later than 90 days after date of enactment), (iii) all other ruminant livestock (not later than 180 days after date of enactment), and (iv) all other livestock (not later than one year after date of enactment). The bill

mirrors legislation ([S. 2070](#)) introduced by Senator Chuck Hagel (R-Neb.).

[H.R. 4001](#) would authorize the Agricultural Research Service to conduct research regarding prion diseases in livestock. More specifically, the proposal mandates study of “the risks associated with feeding livestock by-products to other animals, such as chickens, turkeys, and hogs, which are subsequently slaughtered and the by-products of which are feed to livestock or whose offspring are slaughtered and the by-products of which are feed to livestock.”

Food and Drug Administration (FDA)

[3] FDA and EPA Issue New Consumer Advisory on Methylmercury in Fish

The FDA and Environmental Protection Agency have issued a joint [consumer advisory](#) on methylmercury in fish and shellfish aimed specifically at reducing the exposure of women who may become pregnant, pregnant women, nursing mothers, and young children. The agencies emphasize the various health benefits of eating fish and shellfish, but recommend that women and young children follow three recommendations to reduce the likelihood of any harmful effects of mercury exposure: (i) not eating shark, swordfish, king mackerel, or tilefish due to their high levels of mercury; (ii) eating up to 12 ounces per week of fish and shellfish lower in mercury, e.g., shrimp, light tuna, salmon; and (iii) checking local advisories about the safety of fish in local lakes, rivers and coastal areas.



State and Local Governments

[4] Wisconsin Governor Vetoes Obesity Litigation Bill

Wisconsin Governor Jim Doyle (D) has vetoed legislation ([A.B. 595](#)) that would have provided civil liability exemption for food manufacturers and others for “claims resulting from a person’s weight gain or obesity or health condition related to weight gain or obesity caused by the consumption of food.” “This legislation is a solution in search of a problem and is not needed,” Doyle was quoted as saying. “There have only been a handful of lawsuits nationwide, all dismissed, and none in Wisconsin,” he said.

Legislation sponsor, Representative Daniel Vrakas (R-Delafield), has reportedly vowed to champion a veto override vote later this year. *See Associated Press*, March 18, 2004.

Litigation

Food Safety

[5] *E. Coli* Claims Against Meat Supplier May Proceed

The U.S. Supreme Court announced Monday that it will not review a tort case in which a meat processor is accused of supplying a restaurant with beef contaminated by *E. coli*. *Excel Corp. v. Estate of Kriefall*, [No. 03-862](#) (U.S. 3/22/04), *denying review of Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 665 N.W.2d 417 (Wis. Ct. App. 2003). The parties will now prepare to try the case in Milwaukee County Circuit Court.

The case began when patrons of a Milwaukee Sizzler claimed they were injured in July 2000 not only because meat supplied to the restaurant by Excel Corp. was contaminated, but also because restaurant

workers spread the contamination by preparing foods for a salad bar after handling the meat. More than 100 people claim injury; the parents of Brianna Kriefall allege that contaminated watermelon caused their 3-year-old daughter’s death.

The trial court granted summary judgment to Excel, holding that the claims against it were preempted by the Federal Meat Inspection Act. But the Wisconsin Court of Appeals reversed after concluding that “federal preemption does not close the doors of Wisconsin’s courts to the claims against Excel; the merits of those claims still have to be determined.” Wisconsin’s Supreme Court declined to review the appellate court’s decision.

Excel, in support of its petition for writ of certiorari to the U.S. Supreme Court, argued that the appeals court’s decision “opens the door to multiple conflicting state standards that would make it virtually impossible to distribute meat without the risk of substantial criminal and civil penalties.” Two groups – the American Meat Institute and the Product Liability Advisory Council, Inc. – filed amicus briefs endorsing Excel’s arguments.

Poultry

[6] Judge Upholds FDA Ban on Chicken Antibiotic

A Food and Drug Administration (FDA) administrative law judge has issued an initial [decision](#) on the Center for Veterinary Medicine’s proposal to withdraw approval of the new animal drug application for enrofloxacin for poultry (brand name Baytril 3.23%), upholding the FDA’s decision to prohibit the Cipro-like antibiotic “because it was making human antibiotics less effective.” According to FDA, “chickens treated with Baytril produce resistant bacteria that cause food poisoning that could not be treated by the related human antibiotics.” ALJ

Daniel Davidson proposed that the drug approval be withdrawn as of the date his initial decision becomes final. The initial decision will become the final decision absent the timely filing of exceptions by any participant and the filing of a notice that the FDA commissioner intends to review the decision. Bayer Corp., the manufacturer of Baytril, and the Animal Health Institute, which represents makers of veterinary drugs, reportedly plan to appeal the decision. "We don't feel that the scientific evidence that supports continued use of Baytril in poultry was fully considered," a Bayer spokesperson was quoted as saying. See *Keep Antibiotics Working Press Release*, *Reuters* and *The Wall Street Journal*, March 16, 2004; *The Washington Post*, March 17, 2004; *Center for Veterinary Medicine Press Release*, March 18, 2004.

Other Developments

[7] CSPI Takes Aim at Calorie Content of Flavored Malt Beverages

The Washington, D.C.-based Center for Science in the Public Interest (CSPI) has launched a series of advertisements in college newspapers at "America's top party" schools warning students that various flavored malt beverages may contain more calories than students think. For example, one ad whose visual provides a photograph of a woman's bulging waistline says: "Beware the side effects of 'alcopops'. Why don't the makers of sweet-tasting 'alcopops,' like Smirnoff Ice, Bacardi Silver, and Skyy Blue, list calorie content on their labels? It's bad enough that those drinks don't even contain the expensive vodka or rum that their brand names imply. But did you know that one 'alcopop' can stuff you with more calories than a Krispy Kreme donut or a Hostess Twinkie? A couple will load you with more calories than a sirloin steak, and putting away three on Friday night gives you the equivalent of a McDonald's Quarter Pounder and a small order

of fries. More calories means more you. So, before you find yourself asking, "Dude, where's my waist?," get the facts: www.cspinet.org/alcopops." See *CSPI Newsroom*, March 18, 2004.

In December 2003, CSPI and the National Consumers League proposed a uniform "alcohol facts" label to the Alcohol and Tobacco Tax and Trade Bureau. The two groups urged the agency to require labels containing information about alcohol content, standard serving sizes, calories, and ingredients. Their proposed label would also state that moderate drinking entails no more than one drink per day for women or two drinks daily for men.

[8] New WHO Report Addresses Neuroscience of Psychoactive Substance Use and Dependence

Late last week, the World Health Organization released a [report](#) which concludes that substance abuse is as much a disorder of the brain as any other neurological or psychiatric disorder. "The health and social problems associated with use of and dependence on tobacco, alcohol and illicit substances require greater attention by the public health community and appropriate policy responses are needed to address these problems in different societies," the WHO director-general was quoted as saying. The report summarizes recent findings on ways psychoactive substances mimic the effects of naturally occurring neurotransmitters and interfere with normal brain functioning by altering the storage, release and removal of neurotransmitters. See *WHO Press Release*, March 18, 2004.

[9] JIFSAN to Host Acrylamide in Food Workshop

The Joint Institute for Food Safety and Applied Nutrition (JIFSAN) is hosting a [two-day workshop](#) on acrylamide in food on April 13-15, 2004, in Chicago, Illinois. Acrylamide forms as a byproduct

of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. The event will reportedly focus on current acrylamide research worldwide and identify the needs for research in (i) mechanisms of formation and methods of mitigation of acrylamide in food, (ii) analytical methods of detection, (iii) exposure and biomarkers, (iv) toxicology and metabolic consequences, (v) risk communication, and (vi) risk characterization. JIFSAN is a jointly administered program of the Food and Drug Administration and the University of Maryland.

Media Coverage

[10] News Outlets Discuss Impact of Verdict in Popcorn-Flavoring Case

News outlets have presented varying takes on the impact of last week's decision by a Missouri jury to award \$20 million to a popcorn-plant worker and his wife on their claims that exposure to the butter flavoring used to make microwave popcorn damaged the worker's lungs. See issue 72 of this Update, March 17, 2004.

"Here is the question that investors ought to be considering: With other plaintiffs waiting in the wings, just how much liability could [the flavoring company International Flavors & Fragrances Inc.] be facing?," asked *The Wall Street Journal* in a "Heard on the Street" feature that appeared March 22, 2004. The article went on to state that the "threat of additional liability is real, because the victorious plaintiff is one of dozens who have sued IFF, charging that its butter-flavoring mixture caused irreparable harm to their lungs."

"The food industry is watching for an expected flood of lawsuits, . . . but several industry groups say the case is not on the same level of concern as obesity-related lawsuits," said *The Washington Times*, March 23, 2004.

"EPA is emphasizing that concerns regarding microwave popcorn are centered around workplace, rather than consumer, exposures," said *Inside EPA*, March 19, 2004.

Scientific/Technical Items

Alcoholic Beverages

[11] Moderate Drinking Linked to Reduced Rate of Cardiovascular-Related Death in Men with High Blood Pressure

A new study published in the March 22, 2004, issue of *Archives of Internal Medicine* (M. Gaziano, et al.) reported that moderate alcohol consumption among males with hypertension reduced their risk of death from cardiovascular-related causes by 39 percent compared to those who did not drink. Daily moderate consumption of alcohol reduced the risk by 44 percent. According to press reports, the study is believed to be the largest to date to study the effects of drinking on the health of people with high blood pressure. Heavy drinking has been linked in the past to the development of high blood pressure, and conventional medical advice often suggests that hypertensive patients avoid alcohol altogether. This study suggests that moderate alcohol consumption may not increase the severity of hypertension and may even confer some protective benefit to individuals with high blood pressure.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Mark Cowing 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 mcowing@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.

Shook,
Hardy &
Bacon L.L.P.™

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

