Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Issues Guidance on Whole Grains Statements

The FDA last week issued **draft guidance** that clarifies what the agency deems to be "whole grain" in order to help industry more accurately label their products. The document defines whole grains as those that contain the intact, ground, cracked, or flaked fruit of the grains whose primary components --starchy endosperm, germ and bran -- are present in the same relative amounts as those in the intact grain. Such cereal grains include barley, buckwheat, bulgur, corn, millet, rice, rye, oats, sorghum, wheat, and wild rice. FDA does not consider products derived from legumes such as chickpeas, soybeans, arrowroot, and sunflower seeds to be whole grain. Comments on the draft guidance must be submitted by April 18, 2006. *See Federal Register,* February 17, 2006.

Codex Alimentarius Commission

[2] U.S. Codex Delegates Schedule Meeting to Discuss Food Additives Issues

The U.S. Department of Agriculture, Food and Drug Administration, and Department of Health and Human Services have scheduled a March 6, 2006, **meeting** in College Park, Maryland, to discuss draft positions to be presented at the next meeting of the Codex Committee on Food Additives and Contaminants on April 24-28 in The Hague, Netherlands. The Codex Committee on Food Additives and Contaminants establishes maximum guideline levels for individual food additives, contaminants and naturally occurring toxicants in foodstuffs and animal feed. Issues to be discussed at the March 6 meeting include (i) draft papers on acrylamide, flavoring agent guidelines and polycyclic aromatic hydrocarbon contamination; (ii) a draft code of practice for source-directed measures to reduce dioxin and dioxin-like PCB contamination; and (iii) proposed draft maximum levels for aflatoxin in various nuts. *See Federal Register,* February 13, 2006.

Litigation

Deceptive Trade Practices

[3] Three Lawsuits Follow McDonald's Disclosure of French-Fry Ingredients

Three lawsuits filed in California, Florida and Illinois claim that McDonald's Corp. misled the public prior to the fast-food chain's recent disclosure that the oil used to cook its fries contains wheat and dairy ingredients. In a putative class action filed in California state court, vegan Nadia Sugich alleges that McDonald's previously stated that the fries were wheat- and dairy-free and cooked in 100 percent vegetable oil. Sugich claims to repre-

sent "a class of California consumers, including but not limited to vegans, who (i) have consumed french fries from or at any McDonald's restaurant since February 15, 2002, and (ii) have concerns, objections, or dietary restrictions, whether ethical, moral religious, philosophical, or health-related, with respect to the consumption of dairy or wheat products." ***Sugich v. McDonald's*, No. BC347519 (Superior Court of Los Angeles County) (filed 2/15/06)**. Among other things, she seeks reimbursement for consumers' french-fry purchases and a published "notice of the truth regarding the french fries."

In a separate suit filed February 17 in Palm Beach Circuit Court, Florida parents Mark and Theresa Chimiak claim that their 5-year-old daughter, who has an intolerance to gluten, developed celiac disease, epileptic seizures and stomach ulcers after eating McDonald's fries. Mr. and Mrs. Chimiak "were assured by McDonald's Web site and local restaurant managers that the product was gluten-free," plaintiffs' attorney Brian W. Smith was quoted as saying.

In the third suit, Debra Moffat seeks unspecified damages in a purported class action filed February 17 in Chicago. Moffat's attorney, Thomas Pakenas, reportedly said Moffat's consumption of McDonald's fries exacerbated the gastrointestinal symptoms of her celiac disease and that she wants the company to "make a concerted effort to educate the public about the allergens … and not just change the Web site."

Under the Food Allergen Labeling and Consumer Protection Act of 2004, manufacturers are required starting January 1, 2006, to identify the presence of food product ingredients that contain protein derived from milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, or soybeans. *See The Chicago Tribune* and *Associated Press,* February 17, 2006; *The Wall Street Journal* and *Associated Press*, February 19, 2006.

Youth Marketing Claims

[4] Ohio Federal Court Dismisses Class Action Challenging Alcohol Advertising

The Honorable Donald Nugent of the U.S. District Court for the Northern District of Ohio has dismissed with prejudice an alcohol advertising case because it failed to state a claim upon which relief could be granted. ***Eisenberg v. Anheuser-Busch, Inc. et al.*, No. 1:04 CV 1081 (N.D. Ohio 2/1/06)**. Plaintiffs in the putative class action were parents who claimed their underage children allegedly used family funds to purchase alcoholic beverages and that various brewers, distillers and importers of alcoholic beverages deliberately and recklessly targeted underage consumers in marketing their products. They sought to enjoin defendants from targeting minors in their advertising, disgorgement of all profits purportedly earned from underage drinking since 1982, and repayment of the "monies given by parents to their underage children, or taken by the children without parental consent, which, in turn, have been spent on the illegal purchase of alcoholic beverages."

Plaintiffs alleged they were harmed economically from misuse of family funds and by defendants' "invasion of the parents' right to protect their children from marketing targeted to the children." The court found that plaintiffs failed to plead an injury to themselves because there is no "legal doctrine that recognizes a parent's possessory interest in monies given to and spent by their children." While agreeing that parents "have a general right to make decisions concerning the care, custody, and control of their children," Judge Nugent found "no support

for the proposition that marketing, advertising, or otherwise exposing children to ideas and influences through the marketplace, interferes in any substantial way with this right." He also concluded that parents do not have a legal right to prevent other private parties from trying to influence their children. "Courts in this circuit and across the country have consistently refused to impose a duty on entities who disseminate ideas and messages through the mass media to protect underage consumers from the possible ramifications of those messages," according to the court.

Other Developments

[5] U.K. Group Assesses Effect of Nanotechnology on the Food System

"It seems clear that nanotechnology will have both direct and indirect impacts on the food industry. Most of the anticipated impacts are likely to enhance the choice and quality of foods and, in most of these applications, there would appear to be negligible safety concern," according to an **information statement** issued this month by Britain's Institute of Food Science & Technology (IFST). The information statement reviews (i) current and potential applications for nanotechnology in the food sector; (ii) potential benefits and risks; and (iii) regulatory issues. Nanotechnology applications with respect to food include supply chain tracking, contaminant detection and packaging. IFST is an independent group of food scientists and technologists.

Media Coverage

[6] "Does Advertising Make Us Fat? Yes!" Gary Ruskin, "Does Advertising Make Us Fat? No!" William McLeod, *Brandweek*, February 20, 2006

These opposing editorials focus on the alleged role of food marketing on escalating rates of childhood obesity across the nation. Addressing food manufacturers directly, Gary Ruskin asserts that companies' denials of a link between advertising and children's eating habits is "helping to generate a broad-based movement to restrict advertising to children, and ads in general. … Big Food isn't yet as unpopular as Big Tobacco. But since you're using the same playbook, don't be surprised if you end up where they did. The federal government won't always be a wholly owned subsidiary of Corporate America and its army of influence-peddlers. Pent-up frustration arising from the marketing of tobacco, pharmaceuticals, junk food, alcohol – and to children in general – may well bring legislation or court decisions that put children's health ahead of profits and commercial speech." Ruskin is executive director of the organization **Commercial Alert**.

An opposing editorial suggests that childhood obesity is a societal issue requiring the dedicated involvement of educators, marketers, communities, and governments. According to William McLeod, a former director of the Federal Trade Commission's (FTC's) Bureau of Consumer Protection, "Blaming advertisers is the stock-in-trade of plaintiffs' lawyers, and they have become increasingly willing to see if that stock will sell in court." McLeod opines that courts will reject such cases given the FTC's conclusion that no evidence supports the claim that advertising causes obesity.

Scientific/Technical Items

Colorectal Cancer

[7] British Researchers Link Red Meat Consumption to Increased Risk of Colorectal Cancer

Red meat consumption raises levels of *N*-nitrosamines in the large bowel, which may explain the alleged link between red meat consumption and the risk of colorectal cancer, say researchers at the Medical Research Council's Dunn Human Nutrition Unit in Cambridge. (M. Lewin, et al., "Red Meat Enhances the Colonic Formation of the DNA Adduct O^6-Carboxymethyl Guanine: Implications for Colorectal Cancer Risk," *Cancer Research* 66: 1859-65, February 1, 2006.) The research team analyzed cells from the colon linings of healthy volunteers who consumed high-red meat, vegetarian, or high-red meat/high-fiber diets for 15 days. Team members found significantly higher levels of DNA adducts formed by the combination of *N*-nitrosocompounds and DNA in the colonic cells of individuals who ate a diet of two portions of red or processed meat daily. DNA adducts can lead to mutations when a cell divides and replicates, providing a necessary first step for the development of cancer.

"This latest study, together with the compelling epidemiological evidence published last year [e.g., A. Chao, et al., "Meat Consumption and Risk of Colorectal Cancer," *JAMA* 293(2): 172-182, January 2, 2005] is an important step towards understanding and potentially preventing this common disease," Medical Research Council Chief Executive Colin Blakemore was quoted as saying. *See BBC News,* January 31, 2006; *Reuters*, February 1, 2006.

Mycotoxin Exposure

[8] Corn Toxin Linked to Birth Defects in Texas

Contaminated corn has allegedly **been linked** to birth defects in children born in the Rio Grande Valley of Texas in the early 1990s. (S. Missmer, et al., "Exposure to Fumonisins and the Occurrence of Neural Tube Defects Along the Texas-Mexico Border," *Environmental Health Perspectives* 114: 237-241, 2006). The researchers examined whether maternal exposure to fumonisin, a toxic mold that often contaminates corn, was responsible for the increased prevalence of neural tube defects in the children of Mexican-American women during 1990-1991. They found that women who consumed 300-400 corn tortillas a month during the first trimester of pregnancy had more than twice the risk of having babies with neural tube defects than women who ate fewer than 100 tortillas during the same stage of pregnancy. Neural tube defects are brain and spinal cord abnormalities that can result in spina bifida and anencephaly.

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