

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

FTC Staff Concludes Online Behavioral Advertising Enforcement Program Not Anticompetitive

The Federal Trade Commission (FTC) has issued a [staff advisory opinion](#) informing the Council of Better Business Bureaus, Inc. (CBBB) that staff does not have any "present intention" to recommend that FTC bring an enforcement action against a CBBB plan to hold companies "engaged in online behavioral advertising" (OBA) accountable for compliance with self-regulatory principles issued in July 2009 and administered by the Digital Advertising Alliance (DAA).

CBBB sought FTC staff's assurance that the accountability program, if implemented, would not be subject to restraint of trade prosecution. According to the August 15, 2011, letter, "the proposed accountability program is intended to increase transparency and consumer control of OBA, which has the potential to increase consumer welfare, and there appears to be little or no potential for competitive harm associated with the proposed accountability program."

The principles require companies that engage in OBA to notify consumers they are doing so and provide consumers with control "over whether data is collected and used or transferred for OBA purposes . . . through easy-to-use consumer choice mechanisms." The principles also impose data security and limited retention requirements. Under the program, companies would be required to pay fees for the use of an "advertising option icon/link" and a listing on DAA's Website. CBBB will evidently police companies engaging in OBA, notify those not in compliance with the principles and recommend steps to bring them into compliance. If uncorrected, non-compliance will be reported to regulatory authorities and "may result in the company's loss of membership in one or more of the trade associations that cooperated through the DAA to establish and implement the Principles."

FTC staff concluded that such action and potential sanctions are "unlikely to unreasonably restrain trade." Still, staff based its determination on information provided by CBBB and further noted that the commission itself is not bound by the opinion and that staff "retains the right to reconsider this opinion, and, with notice to the requesting party, to rescind or revoke it if implementation of the

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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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proposed accountability program appears to result in significant anticompetitive effects."

FSA Seeks Input on Edible Insect Consumption

The U.K. Food Standards Agency (FSA) has issued an August 16, 2011, notice [soliciting](#) information about "the sale and consumption of whole insects and other animals, such as worms," which may eventually require novel food assessment under the European Union's (EU's) food safety laws. Directed at insect suppliers, the Natural History Museum, and various consumer, manufacturer and retailer associations, the request seeks feedback about U.K. insect consumption, including the extent and duration of sales, with the aim of generating "as comprehensive a list as possible of insects and other animals" likely to come under the auspices of EU Novel Food Regulation (EC) 258/97 when it is revisited in 2012. The current food safety regulation apparently omits insects and other whole animals, "largely due to an apparent oversight in the wording of the existing text."

According to FSA, the responses will contribute to "a broader EU-wide investigation into the marketing of edible insects with all 27 EU Member States participating in this activity at a national level." The agency has requested comments by September 2, 2011.

LITIGATION

Ninth Circuit Increases Award to Latino Farm Workers in Washington State

In an unpublished opinion, a divided Ninth Circuit Court of Appeals panel has determined that a district court erred in awarding Latino farm workers less than statutory damages for growers' violations of Washington's Farm Labor Contractors Act (FLCA). [Perez-Farias v. Global Horizons, Inc., No. 10-35397 \(9th Cir., decided August 17, 2011\)](#). The court remanded the case with directions to enter a damages award of nearly \$2 million.

The class claims were reportedly filed on behalf of more than 600 workers who accused two state growers and a farm labor contractor of violating federal labor laws. The plaintiffs claimed that they were illegally and intentionally displaced in 2004 by temporary agricultural workers from Thailand. The federal guestworker program allows labor contractors to bring foreign workers into the United States only if it can prove that workers cannot be found locally. While the lower court agreed that the defendants had violated the law, it awarded the plaintiffs \$237,000.

The Ninth Circuit split over its interpretation of the FCLA's damages provision, which states, "[I]f the court finds that the respondent has violated this chapter or any rule adopted under this chapter, it may award damages up to and including

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an amount equal to the amount of actual damages, or statutory damages of five hundred dollars per plaintiff per violation, whichever is greater, or other equitable relief.” The two-judge majority ruled that the only discretion given to the court under this provision is to choose between actual damages or statutory damages, “whichever is greater,” and not that the court could choose to award less than \$500 per plaintiff, which the lower court evidently did. The court also remanded the matter for the district court to decide whether to award attorneys’ fees to the plaintiffs as the prevailing party.

One of the lead plaintiffs was quoted as saying, “This is a huge victory for local farm workers in the Yakima Valley. We’ve waited a long time for this day, and we’re glad the court validated these important worker rights.” Counsel for the farm labor contractor reportedly indicated that his client would likely be unable to pay the award. “My clients are now eating at fast-food restaurants and they aren’t getting the large fries,” he said. The company has apparently lost its state operating license for repeated wage and labor law violations and has purportedly been the target of human trafficking charges in Hawaii. See *Associated Press*, August 17, 2011.

JPML Refuses Request to Centralize Lawsuits over Nutella® Ads

The Judicial Panel on Multidistrict Litigation (JPML) has denied a request to transfer three actions pending in two federal district courts alleging that Ferrero U.S.A., Inc. misrepresented its Nutella® spread as a healthy and nutritious food. *In re: Nutella Mktg. & Sales Practices Litig.*, MDL No. 2248 (JPML, decided August 16, 2011). While the parties agreed to centralize the cases for purposes of conducting pre-trial proceedings, they could not agree on whether California or New Jersey would be the appropriate transferee court.

Denying the request to transfer, the JPML stated, “The actions may share some factual questions regarding the common defendant’s marketing practices, but these questions do not appear complicated. Indeed, the parties have not convinced us that any common factual questions are sufficiently complex or numerous to justify Section 1407 transfer at this time.” The JPML opined that “[c]ooperation among the parties and deference among the courts should minimize the possibility of duplicative discovery and inconsistent pretrial rulings.”

Lawsuit Against Cargill Seeks Recovery for Baby Sickened in Salmonella Outbreak

A lawsuit has been filed in an Oregon federal court on behalf of a 10-month-old girl who allegedly became ill and was hospitalized after eating a meatball made with ground turkey contaminated with *Salmonella*. *Lee v. Cargill Meat Solutions Corp.*, No. 11-993 (U.S. Dist. Ct., D. Ore., filed August 16, 2011). Represented by an attorney with food plaintiffs’ firm Marler Clark, the plaintiffs

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allege that the baby spent seven days in the hospital after her parents were advised that “*Salmonella* Heidelberg bacteria she had ingested from the defendants’ ground turkey product had gotten into her bloodstream, and she needed urgent care.”

Seeking damages in excess of \$75,000, the plaintiffs allege strict liability, breach of warranty, negligence, and negligence per se. They claim damages for “general pain and suffering; damages for loss of enjoyment of life, both past and future; medical and medically-related expenses, both past and future; travel and travel-related expenses, past and future; emotional distress, and future emotional distress; pharmaceutical expenses, past and future; related wage and lost earning capacity damages; and all other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.”

In a related development, a coalition of consumer groups has [written](#) to U.S. Department of Agriculture Secretary Tom Vilsack to urge “prompt consideration of a recent petition to declare certain strains of ABR *Salmonella* as adulterants and prevent meat and poultry products contaminated with those strains from being sold to consumers.” The August 11, 2011, letter cites the “recent antibiotic-resistant” outbreak and “resulting recall of 36 million pounds of ground turkey,” to bolster its call for “quick action” on the petition filed in May by the Center for Science in the Public Interest. Additional details about the petition appear in [Issue 396](#) of this *Update*.

Hot Dog Marketing Wars to Play Out in Court

Sara Lee Corp., which makes Ball Park® franks, and Kraft Foods, Inc., which makes Oscar Mayer® hot dogs, have reportedly brought their marketing dispute to a Chicago courtroom where trial recently began on claims each company brought against the other over ad campaigns that sought to distinguish their brands. Stating “let the wiener wars begin,” U.S. District Judge Morton Denlow apparently opened the bench trial on August 15, 2011.

Sara Lee takes issue with Kraft claims that its hot dogs beat Sara Lee’s in a national taste test and that its hot dogs are “100 percent pure beef.” According to Sara Lee, the taste test was flawed because the products were not served with condiments or buns, and hot dogs containing filler and chemicals cannot be called 100 percent pure. Kraft defends its testing and asserts that consumers understand that “pure beef” means that the products do not contain other meats.

Kraft challenges Sara Lee ads claiming that its hot dogs are “America’s Best Franks” and that other hot dogs “aren’t even in the same league.” Sara Lee apparently based its claims on an award bestowed on the company’s Ball Park® franks by leading San Francisco chefs. During the company’s opening statement, the court reportedly questioned how “ten chefs in San Francisco

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know what the best hot dog is when they have never been to Chicago or tasted a Chicago hot dog?"

Expected to last several weeks, the courtroom trial is purportedly rare in an industry that generally resolves its advertising disputes by bringing them before the Better Business Bureau's National Advertising Division. According to some legal commentators, it could help define how comparative testing should be conducted, as well as what types of claims are actionable. *See Chicago Tribune*, August 15, 2011; *Advertising Age*, August 17, 2011.

OTHER DEVELOPMENTS

Foreign Student Guestworkers Complain of Working Conditions and Pay at Hershey Plant

In an August 17, 2011, [letter](#) to the U.S. Department of State filed on behalf of more than 400 foreign guestworkers recruited by the Council for Educational Travel, USA (CETUSA) to work for the Hershey Chocolate Co., the National Guestworker Alliance seeks the revocation of CETUSA's sponsor status as a provider of J-1 visas, which allow foreign students to enter the United States for work, training and internships. According to the Alliance, the university students recruited to work for Hershey paid \$3,000-\$6,000 in pre-employment expenses and expected to receive wages and benefits comparable to U.S. workers and be provided with educational and cultural opportunities. Instead, they were paid \$7.85 to \$8.35 per hour, but after automatic weekly deductions for "above-market rent and other expenses, they net[ted] between \$40 and \$140 per week for 40 hours of work." They were apparently "offered no cultural exchange of any kind."

Some of the students were reportedly forced to lift heavy loads while packing chocolate products in boxes. While moving 50-pound boxes every five seconds, "[n]umerous workers are suffering under the strain of the weight and speed. Workers who have been at the factory longer have reported that the company normally runs the line at a slower speed, but are forcing the students to work faster and that the students are exceeding normal production standards." In response to complaints about their wages and working conditions, the student workers were allegedly forced to attend meetings at which they were threatened with deportation, and their families were contacted. The Alliance cites a number of labor laws CETUSA has allegedly violated to support its call for an investigation into the complaints, a suspension of CETUSA's sponsorship designation and a prohibition on future J-1 student employment by the Hershey Co.

Rudd Center Study Suggests FOP Cereal Box Claims Are Misleading

Yale University's Rudd Center for Food Policy & Obesity has published a [study](#) claiming that parents misinterpret nutrition-related health claims used on

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children's cereal boxes. Jennifer L. Harris, et al., "Nutrition-related claims on children's cereals: what do they mean to parents and do they influence willingness to buy?," *Public Health Nutrition*, August 2, 2011. Researchers asked 306 parents with children between ages 2 and 11 to view images of "box fronts for children's cereals of below-average nutritional quality, as assessed by a validated nutrient profiling model," featuring claims such as "supports your child's immunity," "whole grain," "fibre," "calcium and vitamin D," and "organic." The study authors provided "possible meanings for these claims" and asked participants "to select any that applied with the option to write in additional meanings," as well as "indicate how the claim would affect their willingness to buy the product."

According to the study, "the majority of the parents misinterpreted the meaning of the claims" and inferred that the cereals were "more nutritious overall and might provide specific health-related benefits for their children; and these beliefs predicted greater willingness to buy the cereals." For example, 74 percent of the participants believed that the "antioxidants and vitamins' (i.e. immunity) claim meant it might keep their child from getting sick." The study's authors concluded that the findings "indicate that common front-of-package nutrition-related claims are potentially misleading, especially when placed on products with high levels of nutrients to limit (e.g. sugar, sodium) and low levels of other nutrients to encourage (e.g. fibre, protein). Additional regulation is needed to protect consumers in the USA."

MEDIA COVERAGE

NYT's "Room for Debate" Tackles Illegal Farm Labor

The New York Times "Room for Debate" series recently tackled illegal farm labor, with six labor policy and economic experts discussing whether "strict enforcement of immigration laws would drive up prices for fruits and vegetables." According to the commentators, eliminating undocumented workers in the agriculture sector, if possible, would have far-reaching consequences for growers, consumers and other economic sectors. As agricultural and resource economist Michael Roberts explains, the strict enforcement of immigration laws would not only raise domestic fruit and vegetable prices and likely increase cheaper imports, but "the employment effect for citizens could be smaller than some might expect, because illegal immigrants don't just fill jobs; they also buy stuff with the money they earn, spurring demand and creating jobs in other parts of the economy."

Tamar Jacoby, president of ImmigrationWorks USA, also agreed that expelling immigrant farm laborers would affect "whole sectors of the economy," since "every farm job supports three to four others up and downstream in the local economy: from the people who sell fertilizer and farm machinery

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to those who work in trucking, food processing, grocery stores, and restaurants.” And economist Karina Gallardo notes that even if immigrant workers were successfully replaced by domestic ones, “sharply higher labor costs in the U.S. will hurt American growers’ competitiveness” both at home and abroad. “If production costs suddenly increased because of labor shortage or higher wages, consumers would probably shift to similar and less expensive imported fruit,” she writes, adding that China already “dominates” the U.S. apple processing market.

But Lisa García Bedolla, president of the University of California, Berkeley’s Center for Latino Policy Research, not only contends that stricter immigration enforcement would fail to raise farm wages, but raises questions about a food production system that “depends on the exploitation of its labor force.” In particular, she cites economist and fellow debater Philip Martin, who calculates that, “If farm wages rose 40 percent, each household would spend about \$15 more a year, and each seasonal farm worker would be lifted above the federal poverty line.”

“If our lawmakers decide that American farmers should hire only American workers, then we as a country have a lot more work to do than just enforcing the rules against illegal labor,” concludes Hearty Roots Community Farm manager Benjamin Shute. “We need to set a national priority to encourage a new generation of young farmers, and we must adjust our system of agriculture to make farms into places where Americans want to work.”

Food Safety News Examines Honey Trade

“A third or more of all the honey consumed in the U.S. is likely to have been smuggled in from China and may be tainted with illegal antibiotics and heavy metals,” writes reporter Andrew Schneider in an August 15, 2011, *Food Safety News* article investigating the U.S. honey trade. Building on earlier media stories such as a January 5, 2011, *Globe and Mail* exposé covered in [Issue 377](#) of this *Update*, the latest feature includes U.S. Customs import data indicating, for example, that the United States “imported 208 million pounds of honey over the past 18 months,” with almost 60 percent or 123 million pounds coming “from Asian countries—traditional laundering points for Chinese honey,” and “45 million pounds from India alone.”

“This should be a red flag to FDA [the Food and Drug Administration] and the federal investigators. India doesn’t have anywhere near the capacity—enough bees—to produce 45 million pounds of honey. It has to come from China,” claimed one spokesperson for the American Honey Producers Association. Domestic suppliers and other industry insiders also told Schneider that “some of the largest and most established U.S. honey packers are knowingly buying mislabeled, transshipped or possibly altered honey so they can sell it cheaper than those companies who demand safety, quality and rigorously inspected

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honey."The article highlights some of the tactics allegedly used to circumvent FDA inspectors and customs officials, as well legislative, regulatory and industry efforts to curb abuse.

"There are still millions of pounds of transshipped Chinese honey coming into the U.S.A. and it's all coming now from India and Vietnam. Everybody in the industry knows that," said Odem International President Elise Gagnon, who also serves as vice chair of True Source Honey. "We need an origin traceability program, a professional audit of both exporters and the packers so those buying and selling honey can ensure its authenticity and quality."

SCIENTIFIC/TECHNICAL ITEMS

Study Claims Organic Poultry Lower in Drug-Resistant Bacteria

A recent [study](#) has claimed that after adopting organic practices and ceasing the use of antibiotics, large-scale poultry farms had "significantly lower levels" of antibiotic-resistant and multidrug resistant (MDR) *Enterococcus* than their conventional counterparts. Amy Rebecca Sapkot, et al., "Lower Prevalence of Antibiotic-resistant *Enterococci* On U.S. Conventional Poultry Farms That Transitioned to Organic Practices," *Environmental Health Perspectives*, August 2011. Researchers apparently sampled poultry litter, feed and water "from 10 conventional and 10 newly organic poultry houses in 2008," finding that the percentages of resistant *E. faecalis* and resistant *E. faecium* "were significantly lower ($p < 0.05$) among isolates from newly organic versus conventional houses for two (erythromycin and tylosin) and five (ciprofloxacin, gentamicin, nitrofurantoin, penicillin and tetracycline) antimicrobials." They also reported that 42 percent of *E. faecalis* isolates and 84 of *E. faecium* isolates from conventional poultry houses were multidrug resistant, compared to 10 percent of *E. faecalis* isolates and 17 percent of *E. faecium* isolates from newly organic poultry houses.

"We initially thought we would see some differences in on-farm levels of antibiotic-resistant *Enterococci* when poultry farms transitioned to organic practices," said lead author Amy Sapkota in an August 10, 2011, University of Maryland press release. "But we were surprised to see that the differences were so significant across several different classes of antibiotics even in the very first flock of birds that was produced after the transition to organic standards."

Persistent Organic Pollutant Exposure Allegedly Linked to Type 2 Diabetes

A Finnish study has allegedly confirmed an association between adult-only exposure to certain pesticides and type 2 diabetes. Riikka Airaksinen, et al., "Association Between Type 2 Diabetes and Exposure to Persistent Organic

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Pollutants," *Diabetes Care*, August 4, 2011. Researchers reportedly analyzed data from 1,988 adults born in Helsinki during 1934-1940, finding that just over 15 percent had type 2 diabetes. The results evidently indicated that "for participants with the highest exposure to oxychlorane, trans-nonachlor, 1,1-dichloro-2,2-bis-(p-chlorophenyl)-ethylene (p,p'-DDE), and polychlorinated biphenyl 153, the risk of type 2 diabetes was 1.64-2.24 times higher than that among individuals with the lowest exposure." In addition, "the associations between type 2 diabetes and oxychlorane and trans-nonachlor remained significant and were strongest among the overweight participants."

According to the authors, these findings suggest that organochlorine pesticides and body fat "may have a synergistic effect on the risk of type 2 diabetes." Although lead author Riikka Airaksinen also noted that the study does not prove that organochlorine pesticides caused the increased diabetes risk, University of Minnesota epidemiology professor David Jacobs reportedly characterized the assessment as "highly concordant" with past pesticide-diabetes studies. While most persistent organic pollutants have been banned for years, "they are generally all around us in fatty tissues of living organisms," Jacobs said, adding that "a chemical that is bad for the health of one life form—say insects or weeds—is not likely to be good for humans. We need much better and more thorough safety testing for substances that we use in industry and for pest control." See *Reuters*, August 17, 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.

