Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Institute of Medicine (IOM)

[1] IOM Committee to Issue Follow-Up Study on Childhood Obesity

The Institute of Medicine will issue its latest study on childhood obesity prevention initiatives, *Progress in Preventing Childhood Obesity: How Do We Measure Up?*, on September 13, 2006. The report will examine progress made by these initiatives over the past two years and recommend action for government, industry, media, communities, schools, and families. Findings will build on the 2005 IOM report titled *Preventing Childhood Obesity: Health in the Balance*, which named industry marketing practices among the alleged causes of childhood obesity and advised that licensed characters be used to market healthy products only. *See IOM Press Release*, September 5, 2006.

State/Local Initiatives

[2] California Health Agency Proposes Perchlorate Limit for Drinking Water

The California Department of Health Services (CDHS) has proposed a maximum contaminant level for perchlorate in drinking water of 6 parts per billion (ppb), a goal set in 2004 by the Office of Environmental Health as the low-risk maximum for public health. Perchlorate is an inorganic chemical used to produce rocket fuel, explosives, fireworks, road flares, and airbag inflation systems. Although some have pointed to a recently adopted perchlorate limit of 2 ppb in Massachusetts, many Californian water officials say the proposal, if passed into law, will have little effect on their operations "because they already treat water down to undetectable levels of perchlorate." CDHS has scheduled a public hearing on the proposal for October 30, 2006, and is accepting public comments until November 3. *See CDHS Press Release*, August 28, 2006.

Litigation

Warnings

[3] Charbroiled Burger Byproduct at Issue in Suit Against Burger King

According to recent news articles, Burger King Holdings Inc. is the defendant in a July 2006 lawsuit over its alleged failure to warn consumers about polycyclic aromatic hydrocarbons (PAHs) in its char-broiled hamburgers. The case, *Leeman v. Burger King Corp., et al.*, was filed under California's Proposition 65, which requires warnings about exposures to carcinogens and reproductive toxins. Burger King apparently discussed the litigation in its annual report to the Securities and Exchange Commission. In its filing, the company indicated

that if it is found liable, the company could be required to pay penalties and be subjected to injunctive relief.

The U.S. Department of Health and Human Services Agency for Toxic Substances and Disease Registry has linked PAHs to reproductive and other health problems in animals. According to the agency's Web site, some people who have been exposed to PAHs for extended periods have developed cancer. The chemical is allegedly formed in hamburgers by the incomplete burning of organic substances. *See The Wall Street Journal Online* and *cattlenetwork.com*, August 31, 2006; *Meatingplace.com*, September 4. 2006.

In a related development, the plaintiff in the Burger King case has reportedly suffered a defeat in litigation filed against her by the American Meat Institute and the National Meat Association. According to a news source, Whitney Leeman sued four meat companies under Proposition 65 in November 2004, and the trade groups then sued her, contending that her claims were preempted under the Federal Meat Inspection Act. Leeman sought to dismiss the trade group's case by arguing that it violated a state law (commonly known as an anti-SLAPP statute) that protects those who participate in a public process from retaliatory litigation. While the California appeals court did not reach the preemption issue, it did find that Leeman's complaint against the meat companies was not protected by the anti-SLAPP statute. The trade associations' case was remanded to the trial court for consideration of the preemption issues. The U.S. Department of Agriculture apparently favors the trade groups' preemption position, while California's attorney general filed an *amicus* brief that supported Leeman, who has filed some 60 cases under Proposition 65. *See Food Safety Network*, September 5, 2006.

Deceptive Trade Practices

[4] California Court Dismisses Farm-Raised Salmon Cases

A California appeals court has dismissed claims that grocery store owners and operators were unlawfully selling farm-raised salmon without disclosing to consumers that the salmon had been fed chemicals to turn their flesh the same color as wild salmon. ***Farm Raised Salmon Cases*, No. B182901 (California Court of Appeals, Second District, Division Three, decided August 31, 2006)**.

Plaintiffs alleged that the practice violated state and federal laws on food labeling and unfair competition and also constituted negligent misrepresentation. The trial court dismissed the claims on federal preemption grounds and because the Federal Food, Drug, and Cosmetic Act (FDCA) explicitly bars a private right of action for unfair competition. The dismissal was without prejudice, and plaintiffs were given leave to amend their complaint. They chose not to do so and challenged instead the trial court's dismissal of their claims.

Discussing the FDCA, the appeals court noted that it prohibits misbranding food in interstate commerce and defines as misbranded a food whose labeling is false or misleading in any particular or "it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact, except to the extent that

compliance" is impracticable. Proceedings to enforce the FDCA must be commenced by and in the name of the United States, or, under certain exceptions, by a state. While the court found that there is no express preemption under the FDCA, its limitation on who can bring an action "precludes a private right of action to enforce the FDCA."

California's attorney general filed an *amicus* brief in the case, and the court expressly rejected its argument that the FDCA only restricts standing in an action to "directly enforce" the FDCA. According to the court, the plaintiffs' claims were predicated on alleged FDCA violations, and, allowing them to bring a private action, "would conflict with the clear congressional intent to preclude private enforcement of the federal act." Thus, because such action "would interfere with the exclusive prosecutorial discretion of the federal and state governments with respect to FDCA violations," it is preempted.

Contamination

[5] GM Rice Contamination Lawsuit Filed in Arkansas

Alleging that genetically modified rice contamination has dramatically cut prices on the world market for U.S. imports, rice farmers in Arkansas, Missouri, Mississippi, Louisiana, Texas, and California have sued Bayer CropScience in an Arkansas federal court. Details about protective action taken by the European Commission following the U.S. Department of Agriculture's announcement about the contamination appear in issue 182 of this Report. Japan, the largest importer of U.S. rice, has suspended imports of U.S. long-grain rice altogether. The suit reportedly seeks $275,000 in damages for each of the 20 plaintiffs and punitive damages. Counsel for the plaintiffs was quoted as saying, "Our clients feel that Bayer should have taken stricter steps when growing this genetically modified rice to prevent it from contaminating the commercial rice market." *See Reuters*, August 28 and 29, 2006; and *Foodproductiondaily.com*, August 31, 2006.

[6] Indian State Sues PepsiCo. over Pesticides in Soft Drinks

The state of Karnataka in India has reportedly filed suit in a small causes court against PepsiCo. after government testing detected pesticides in Pepsi products. The state has already banned the sale of soft drinks in schools, colleges, hospitals, and government offices. While the state's health minister agreed with the beverage maker that the pesticide entered the water cycle because of agricultural processes, he refused to accept the company's argument that it should not therefore be held responsible. The minister was quoted as saying, "when a consumer pays for a soft drink, it is the obligation of the cola company to ensure that the product is free of contaminants." *See BS Reporter/Bangalore*, August 29, 2006.

Benzene

[7] Soft Drink Companies Reach Settlement in Washington Benzene Lawsuits

According to news sources, the makers of soft drinks marketed to children have eliminated ingredients in their beverages that could form benzene to settle claims filed in Washington state. Atlanta-based Zone Brands Inc. and Preston, Washington-based TalkingRain Beverage Co., while denying that their products caused harm, nevertheless agreed to change their ingredients after suit was filed and

to refund or replace drinks manufactured before the ingredients were switched. Similar litigation is currently pending against other companies in five other states. Further information about the Florida and Massachusetts litigation appears in issue 166 of this Report. The settlement, which required court approval, also involves payment of the plaintiffs' legal costs. The Food and Drug Administration, still conducting benzene tests on soft drinks, has reportedly indicated that there should be no safety concerns because such exposures are low in comparison to those from other sources. *See The New York Times, Foodproductiondaily.com*, and *Associated Press*, August 25, 2006.

Legal Literature

[8] Products Liability Treatise Adds Sections on GMOs

Two sections of a products liability treatise have recently been added to discuss potential issues raised by the use of genetically modified organisms (GMOs) in food production. Authored by environmental lawyer Thomas Redick, the sections address design-defect and failure-to-warn claims. Regarding design-defect claims, the section observes that GMOs "are subject to extensive regulatory review" and that "[t]here are no recorded cases to date that are confirmed to have resulted from the use of genetically modified organisms." The section also notes that manufacturers are developing products liability prevention programs for GM foods.

The section on failure-to-warn of idiosyncratic reaction to GM foods states, "there are no GM foods currently on the market carrying any known toxin or allergen." Thus, the section contends, "[g]iven the absence of a known risk, the question presented in product liability litigation over novel food will revolve around a failure to test for unknown risks and warn sensitive subpopulation[s]." The section suggests that any potential liability will depend on proof of known health risks or, perhaps, a "failure to implement recombinant DNA design for a food product carrying known allergens." The section also discusses case law concerning the "idiosyncratic reaction," i.e., an "unpredictable response of the human immune system." Most courts have apparently refused to impose liability for such reactions. *See Products Liability: Design and Manufacturing Defects* §§ 4:6 and 4:7 (Lewis Bass ed. 2006).

Other Developments

[9] Defense Bar to Hold Food Liability Conference in November 2006

The Defense Research Institute has scheduled a **conference** that will provide litigators and food industry managers with the most up-to-date information on food liability issues. Titled "Food Liability – New Issues, New Strategies," the conference will be held in Chicago, Illinois, November 9-10, 2006.

Shook, Hardy & Bacon Partner **Madeleine McDonough**, who is presenting a litigation and legislation update, will join government officials, consultants and food company representatives to address topics such as (i) food labeling and allergen issues, (ii) handling small litigation cases and class actions, (iii) consumer marketing, (iv) dealing with product recalls, (v) placing a value on a food-related litigation claim, and (vi) understanding juror attitudes.

[10] Health Group Issues Report on Obesity Policies in America

Trust for America's Health (TFAH), a non-profit working to make disease prevention a national priority, has published its August 2006 **issue report** on obesity, *F as in Fat: How Obesity Policies Are Failing in America*. In addition to analyzing national health statistics, the report reviews local and federal obesity policies as they pertain to children, adults and built communities, then offers a 20-step action plan to address the epidemic. According to TFAH, recent anti-obesity trends include attempts to limit the marketing of less nutritious foods to children and new laws that prevent individuals from filing liability lawsuits against the food industry. TFAH notes that a 2006 Institute of Medicine (IOM) report urges the food and beverage industries to promote healthier diets in children through advertising. As TFAH elaborates, the IOM "also suggests that government should use taxes, incentives, and subsidies to encourage better marketing practices among these industries, and that if self-regulation does not produce adequate change, legislation and regulation should be used."

Regarding liability laws, TFAH recommends that governments, legislators and state health departments re-examine current policies. Although proponents of liability limitations see the central issue as personal responsibility, TFAH claims that "Opponents of limited liability laws support the position that 'it's impossible for consumers to exercise personal responsibility when businesses are concealing important information about their products.'" In TFAH's view, the food and beverage industry should provide consistent nutritional labeling to consumers and establish marketing practices through consultation with parents and other community members.

Media Coverage

[11] Salon.com Author Discusses Starbucks Marketing

An **article** by Katharine Mieszkowski on Salon.com suggests that that an increasing array of sweetened drinks and a "see-and be-seen" atmosphere at Starbucks has attracted pre-teens and teens to its coffeehouses nationwide. According to Mieszkowski, youths are savvy enough to recognize their growing "addiction" but still enjoy frequenting places and drinking beverages that they see as grown-up, a trend Starbucks has purportedly encouraged by providing hassle-free seating, contemporary music and a more palatable coffee culture. She claims, however, that what has dieticians worried is not so much the increase in youths' caffeine consumption but their tendency to substitute Frappuccinos for meals. An adolescent medicine specialist was quoted as saying teenage patients "use coffee so they don't have to eat because they believe that it is going to decrease their appetite." Starbucks officially states that its "overall marketing, advertising and event sponsorship efforts are not directed at children or youth."

[12] "One Thing to Do About Food:" Activists Address the Global Food Industry

A **forum** first posted on *The Nation's* Web site and reprinted in its September 11, 2006, issue compiles the responses of food writers and environmental activists to questions raised about global agribusiness and the commoditization of food. While all contributors urged a renewed public awareness of where food comes from, several also faulted the legislative efforts and marketing tactics used by the food and beverage industry to "keep consumers in the dark." Eric Schlosser, author of *Fast Food Nation*, said that if the National Uniformity for Food Act is passed, it would prevent state labeling requirements from surpassing those of the federal government and eliminate "State laws that keep lead out of children's candy and warn pregnant women about dangerous ingredients." Similarly, International Slow Food founder Michael Pollan criticized "the farm bill," a piece of legislation that determines which crops the government will subsidize on a five-year basis. According to Pollan, the bill effectively erodes the health of children and adults alike because it makes empty-calorie food additives – like high-fructose corn syrup – the most affordable option for schools and individuals.

Other writers, such as environmental activist Winona LaDuke and *Food Politics* author Marion Nestle, primarily questioned the marketing practices of processors and distributors. LaDuke censured what she termed America's cultural and agricultural "monocrop," especially the push to genetically engineer and patent crops like wild rice and taro, which are currently cultivated by native peoples in Minnesota and Hawaii. "We need to recover relationship," LaDuke argued, favoring an approach to "keep it wild" by protecting traditional agricultural practices. Nestle made an even broader statement in her piece on childhood obesity, locating the root cause of the epidemic in farm subsidies, tariffs and trade agreements, which she believes have led to an overabundant food economy and cutthroat competition among food producers. "Government regulations are essential" where companies cannot be expected to self-regulate, Nestle concluded, reiterating that "all forms of marketing foods to kids" must be stopped.

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