

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

FSIS Seeking Comments on Use of "Natural" Claim for Meat and Poultry

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has issued an [advanced notice of proposed rulemaking](#) (ANPR) to solicit public feedback on the conditions under which the agency should permit "natural" labeling claims for meat and poultry. The current FSIS standard states that minimally processed meat and poultry products can use the "natural" label if the product "does not contain any artificial flavor or flavoring, coloring ingredients, chemical preservative, or any other artificial or synthetic ingredient." The agency is now considering whether to define the term "natural" or continue evaluating the claim on a case-by-case basis. It specifically seeks comments on "how best to coordinate FSIS' regulation of 'natural' claims with the Agricultural Marketing Service's (AMS) voluntary 'naturally raised' marketing claim standard." FSIS will accept comments until November 13, 2009. *See FSIS Press Release*, September 11, 2009; *Federal Register*, September 14, 2009.

FDA Opens Reportable Food Registry That Requires 24-Hour Deadline

The Food and Drug Administration (FDA) has opened the [Reportable Food Registry](#) (RFR) as a new way to head off potential cases of foodborne illness. The system requires food companies that manufacture, process or hold food for consumption in the United States to report potentially dangerous products to FDA within 24 hours "if they find a reasonable probability that an article of food will cause severe health problems or death to a person or an animal," according to an agency news release. The reporting requirement applies to all foods and animal feed regulated by FDA except infant formula and dietary supplements, which are covered by other regulatory requirements.

Under rules governing the RFR, the responsible party charged with reporting to FDA must investigate the cause of the adulteration, submit initial information and supplemental reports, and follow up with FDA as needed. The responsible party is not required to report if it found the problem before the food was shipped, corrected the problem or destroyed the food. *See FDA News Release*, September 8, 2009.

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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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California Senator, Consumer Groups Allege Link Between Soft Drink Consumption and Obesity

The chair of the California Senate's Select Committee on Obesity and Diabetes has reportedly announced a November 2009 hearing to discuss the purported link between sweetened beverage consumption and obesity. An author of the state's menu labeling laws, California Senator Alex Padilla (D-San Fernando Valley) issued the September 17, 2009, press release in response to a report published by the California Center for Public Health Advocacy (CCPHA) and UCLA Center for Health Policy Research. Titled *Bubbling Over: Soda Consumption and its Link to Obesity in California*, the study used data from the 2005 California Health Interview Survey to conclude that "41 percent of children (ages 2-11), 62 percent of adolescents (ages 12-17) and 24 percent of adults drink at least one soda or other sugar-sweetened beverage every day." It also apparently found that "adults who drink one or more sodas or other sugar-sweetened beverages every day are 27 percent more likely to be overweight or obese."

CCPHA has called on "cities, counties, businesses, health care providers, religious organizations, the state legislature, and Congress – and each of us as individuals" to take actions calculated to reduce consumption of soda and other sweetened beverages. In particular, the report urges local, state and federal governments to impose a surcharge or tax on these products and to implement marketing restrictions for children younger than 12. "California can and should do more to educate parents. I don't think that most parents truly appreciate the role soda pop has in causing weight gain," Padilla stated. "It is unfortunate that soda is actually cheaper than milk and even bottled water in many instances. People need to know that while soda may be cheaper, the associated health costs can be enormous." See *CCPHA Press Release, Law360 and Reuters, September 17, 2009*.

In a related development, San Francisco Mayor Gavin Newsom (D) has reportedly announced his intention to introduce legislation that would impose a fee on retailers that sell sweetened beverages. Newsom did not elaborate on the specifics of the bill but cited the CCPHA study as motivation for the proposal, which would charge grocery and big-box stores but not restaurants that serve soft drinks. Because it does not include a tax on individual cans, the legislation would require approval from the Board of Supervisors only. "We know we'll be sued," Newsom was quoted as saying. "But I believe this is really important to do."

Meanwhile, a September 17 article in *The New York Times* has noted that "the debate over a tax on sugary drinks... is starting to fizz over," pointing to several doctors, scientists and policy makers who have argued that a tax "could be a powerful weapon in efforts to reduce obesity, in the same way that cigarette taxes have helped curb smoking." According to the *Times*, proponents like New York City Health Commissioner Thomas Farley and Arkansas Surgeon General Joseph Thompson have estimated that "a tax of a penny an ounce on sugary beverages would raise \$14.9 billion in its first year, which could be spent on health care initiatives." Presented as part of a research review published in the September 16, 2009, edition of *The New England Journal of Medicine*, these findings have also garnered support from consumer groups such as the Center for Science in the Public Interest (CSPI), despite questions about whether soda taxes would directly affect American health. "I think we should be satisfied that soda taxes would be having a modest effect on consumption but would generate billions of dollars that could be used to mount public health campaigns," CSPI Executive Director Michael Jacobson was quoted as saying.

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The American Beverage Association, however, has disputed the effectiveness of such tactics. "When it comes to losing weight, all calories count, regardless of the food source," Kevin Keane, the association's senior vice president for public affairs, told the *Times*. "The bottom line is that the tax isn't going to make anybody healthier. It's not going to make a dent in a problem as complex and serious as obesity, and we're certainly not going to solve the complexities of the health care system with a tax on soda pop."

California State Assembly Rejects Legislation Banning BPA

California legislators have reportedly rejected a [bill](#) (S.B. 797) that would have required manufacturers to remove by 2011 the chemical bisphenol A (BPA) from food and beverage containers intended for children ages 3 and younger. Unable to garner the 41 votes needed to pass in the Assembly, the bill will reportedly come under reconsideration in 2010.

The bill's sponsor, Senator Fran Pavley, (D-Agoura Hills), has reportedly accused the chemical industry of an "expensive and shamefully deceptive lobbying campaign," alleging that some senators were told that food production plants in their district would close if the bill was passed. "It's a shame that we have failed to protect our most vulnerable citizens," Pavley said.

Despite claims purportedly linking BPA to early onset puberty, obesity, birth defects, and breast cancer, the chemical industry has repeatedly pointed to a global consensus among food safety bodies that the substance is safe for use in food packaging. The American Chemistry Council (ACC) has also denounced Pavley's suggestion that the industry engaged in deception to defeat the bill. "We respect Senator Pavley's passion and her strong commitment to her personal position on these issues," an ACC spokesperson told one media source. "But we categorically reject her characterization. It is simply untrue and does not serve anyone well to make such false and inflammatory charges." See *The Los Angeles Times*, September 12, 2009; *FoodProductionDaily.com*, September 14 and 17, 2009.

OEHHA Announces Public Meeting to Receive Comments on Latest Prop. 65 Proposal

California's Office of Environmental Health Hazard Assessment (OEHHA) has reportedly drawn criticism from both the food industry and environmental groups over a recent draft proposal to amend its Proposition 65 (Prop. 65) regulations governing food chemicals. Prop. 65 requires food and beverage manufacturers and retailers to provide "clear and reasonable warning" to individuals about any substance known to the state to cause cancer, birth defects or other reproductive harms. The amendment to "safe harbor" regulations in Title 27, California Code of Regulations, section 25601, would create a centralized Web database where participating manufacturers could post product-specific warning information for use by retailers and consumers. "These are voluntary actions and all food manufacturers or retailers are still free to provide a warning via another 'safe harbor' method or any other method that provides a clear and reasonable warning," according to OEHHA, which has also announced a September 25 public meeting about the proposal and an October 19, 2009, deadline for written comments.

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The Grocery Manufacturers Association (GMA), however, has apparently stated that the proposal not only reflects “a surprising naïveté about food distribution practices,” but fails to adequately protect manufacturers from litigation if retailers fail to post the necessary warnings. GMA said the draft amendment “ignores nearly two years of effort by food producers to develop a Prop. 65 warning program that would provide useful information to consumers, serve the voters’ intent, and maximize participation in the program at all distribution levels.”

In addition, environmental groups have purportedly called for more stringent requirements, urging OEHHA to stipulate that food chemical warnings must appear on product packaging rather than on signs posted at retail sites. See *OEHHA Press Release*, August 28, 2009; *InsideEPA.com*, September 4, 2009.

LITIGATION

Plaintiffs Blame Fatal Botulism Case on Faulty Food Processing Equipment

The representatives of a man who died of botulism have filed a lawsuit in federal court against Malo, Inc. and Massmann Enterprises, Inc., claiming that the companies responsible for maintaining food canning equipment at a Atlanta, Georgia, facility failed to warn owner Bumble Bee Foods, LLC about a leaky water valve. *Caffrey et al. v. Malo, Inc. and Massmann Enterprises, Inc.*, No. 1:2009cv00104 (U.S. Dist. Ct., S.D. Ga., Augusta Div., filed September 2, 2009). The complaint alleges that the defendants should have known that the defective equipment would prevent the canning process from achieving the high temperatures and pressures necessary for sterilization. The malfunction purportedly resulted in the distribution of botulism-tainted chili, beef stew and hot dog chili sauce that led to the death of Jeffrey Caffrey in September 2007. The sister and mother of the deceased are reportedly seeking \$13.5 million for negligence, wrongful death, product liability, pain and suffering, and loss of consortium. See *Courthouse News Service*, September 9, 2009.

MEDIA COVERAGE

Michael Pollan, “Big Food vs. Big Insurance,” *The New York Times*, September 10, 2009

“The American way of eating has become the elephant in the room in the debate over health care,” states *Times* writer Michael Pollan in this op-ed piece asserting that “our success in bringing health care costs under control ultimately depends on whether Washington can summon the political will to take and reform a second, even more powerful industry: the food industry.” Pollan predicts that requiring health insurers to “take everyone at the same rates, provide a standard level of coverage and keep people on their rolls regardless of their health” would signify a sea change in the relationship between insurance providers and the food industry. “When health insurers can no longer evade much of the cost of treating the collateral damage of the American diet, the movement to reform the food system – everything from farm policy to food marketing and school lunches – will acquire a powerful and wealthy ally,” Pollan surmises.

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The article focuses on the likelihood that health care reform would prompt insurers to back a soda tax, school lunch programs, regional food systems, and other policies intended to improve the American diet and prevent chronic disease. "In the same way much of the health insurance industry threw its weight behind the campaign against smoking, we can expect it to support, and perhaps even help pay for, public education efforts like New York City's bold new ad campaign against drinking soda," notes Pollan, who anticipates that even the most basic health care bill would "force the industry, and the government, to take a good hard look at the elephant in the room and galvanize a movement to slim it down."

William Neuman, "For Your Health, Froot Loops," *The New York Times*, September 5, 2009

This article examines a new food-labeling campaign called the Smart Choices Program™, which uses the government dietary guidelines to identify "smarter food and beverage choices" for consumers. According to reporter William Neuman, the industry-backed system has apparently provoked the ire of some nutritionists who question the use of the green checkmark on "sugar-laden cereals like Cocoa Krispies and Froot Loops." The Food and Drug Administration and U.S. Department of Agriculture have also warned the program's managers that the agencies will be monitoring the results to see whether the labels "had the effect of encouraging consumers to choose highly processed food and refined grains instead of fruits, vegetables and whole grains." "What we don't want to do is have front-of-package information that in any way is based on cherry-picking the good and not disclosing the components of a product that may be less good," one senior FDA advisor was quoted as saying.

Meanwhile, the Smart Choices Board of Directors has reportedly defended the products endorsed by the program, noting that even sweet cereals might be better than other things parents could choose for their children. "The checkmark means the food item is a 'better for you' product, as opposed to having an X on it saying 'Don't eat this,'" board president Eileen Kennedy told Neuman. "Consumers are smart enough to deduce that if it doesn't have the checkmark, by implication it's not a 'better for you' product. They want to have a choice. They don't want to be told 'You must do this.'"

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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.

