

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] Bush Administration Releases Farm Bill Proposals

Agriculture Secretary Mike Johanns held a press conference on January 31, 2007, to announce the Bush administration's farm bill [proposals](#). While no major changes to the nation's farm subsidy program are contemplated, the administration hopes to reduce farm payments by \$18 billion over the next five years. Most of the savings will apparently come from switching to a revenue-based program that will factor in crop yields when determining crop payments, making changes to how price floors for basic subsidized crops are set, and tightening eligibility standards. Among other matters, the administration is also proposing (i) \$500 million for bio-fuel research and \$210 million to support loan guarantees for cellulosic ethanol projects; and (ii) \$3.2 billion to improve nutrition assistance programs in schools and other venues by increasing the availability of fruits and vegetables to program participants.

[2] Senate Bill Would Require Labels on Cloned Animal Products

Senator Barbara Mikulski (D-Md.) has introduced a bill (S. 414) that would require meat, milk and other food products from cloned animals to be

labeled as such. Introducing the legislation, Mikulski stated, "The public deserves to know if their food comes from a cloned animal. My legislation will help the American public make an informed decision." Her action comes in the wake of the Food and Drug Administration's finding that cloned animal products are safe and need not be labeled. The proposal would require labels to read "THIS PRODUCT IS FROM A CLONED ANIMAL OR ITS PROGENY." *See Press Release of Senator Barbara Mikulski*, January 26, 2007.

[3] British Conservatives Propose Fat, Salt and Sugar Limits and Trades

Characterizing obesity and excessive drinking as "social pollutants," a group of Conservatives in Great Britain has reportedly [proposed](#) tackling the problem with trading schemes similar to those used to reduce carbon emissions. Under the plan, food and beverage manufacturers would have quotas on the amounts of fatty and sugary foods and alcohol they could produce. Producers wanting to exceed their quotas could buy credits from companies willing to produce less. Industry interests apparently reacted strongly to the proposal, arguing that it is unlikely to work, particularly with respect to imported products. They are also concerned that the prices of targeted items could increase dramatically. According to a news source, an industry trade group has suggested instead that responsible corporate behavior be rewarded with lighter regulation and recognized with bronze, silver and gold standard awards. *See The Times*, January 25, 2007.



State/Local Initiatives

[4] More U.S. Municipalities Propose *Trans* Fat Restrictions

Following the lead of New York City, Philadelphia and Los Angeles are now reportedly considering restrictions on *trans* fats. In Philadelphia, the city's public health council has proposed limiting *trans* fat to 0.5. grams per serving at restaurants, although the rule would not impose fines for violations but rather "the possibility of public scorn." Los Angeles, which cannot implement a local ban under state law, has asked restaurants to voluntarily phase out *trans* fat in exchange for health department decals. The two cities join Chicago, New Jersey and Washington state in their efforts to remove *trans* fat from menus. See *Philadelphia Inquirer*, January 26, 2007; *Associated Press*, January 30, 2007.

Meanwhile, McDonald's Corp. recently announced a switch to *trans* fat-free oil made from canola, corn and soybeans, which will first be introduced at undisclosed locations to preserve the brand equity of its famous fries. Lauded by one Center for Science in the Public Interest spokesperson as "very important for public health," the change comes after increasing public pressure to eliminate the substance. In addition to allegedly causing heart disease, *trans* fat has recently been linked to infertility in women by a Harvard School of Public Health study. See *Reuters*, January 18, 2007; *USA Today*, January 30, 2007 .

Litigation

[5] D.C. Circuit Court Finds Internet Survey Unreliable Under *Daubert* and *Kumbo Tire*

A federal court in the District of Columbia has granted summary judgment to the U.S. Department of Agriculture in a case involving a First Amendment

challenge to a law that requires food producers to pay a federal assessment that funds government-sponsored promotional campaigns. *Avocados Plus, Inc. v. Jobanns*, No. 02-1798, 2007 WL 172305 (D.D.C. Jan. 23, 2007). To establish their case, plaintiffs were required to show "that the individual advertisements funded by the government were actually being attributed to the specific [producer] that objected to being associated with the [promotional] message." They attempted to do so on the basis of expert testimony involving an Internet survey which purportedly demonstrated that a significant portion of the general populace attributed the messages to the plaintiffs. Citing U.S. Supreme Court decisions on the reliability of scientific evidence, *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court determined that the evidence was neither reliable nor trustworthy. The court characterized the survey as "fatally flawed" because plaintiffs' own expert admitted that "the ad shown to the survey respondents was not attributed to anyone specifically" and "it was unlikely that any of the respondents would have identified, unaided by the design of the survey, any of the plaintiffs as sponsors of the ad." Plaintiffs had also declined to provide any of the survey's underlying documentation, despite the district court's "grave doubts" about its reliability.

Other Developments

[6] Ninth Annual Food Safety & Security Summit Slated for March 2007

Food producers, retailers, regulators, and safety experts will gather March 6-8, 2007, in Washington, D.C., for the [Ninth Food Safety & Security Summit](#). The three-day event will cover topics



ranging from manufacturing best practices to protecting the food chain from terrorist attack, with representatives from various agribusiness entities included among the presenters. Shook, Hardy & Bacon Partner [Chris McDonald](#) will participate in a March 8 session targeting the role of ISO 22000 standards in strengthening traditional HACCP programs.

[7] FDLI to Host Food Law Workshop

The Food and Drug Law Institute will hold a [workshop](#) in Washington, D.C., February 22-23, 2007, on the fundamentals of food law and regulation. According to conference materials, “this workshop will provide you with a context for keeping up with current and emerging issues of concern to food manufacturers, regulators and consumers, such as food allergens, *trans* fat and low carb claims, and bioterrorism measures.” The FDLI intends to introduce participants to the agencies with oversight authority and will also focus on the Food and Drug Administration’s Food Safety Initiative, bovine spongiform encephalopathy, “functional foods,” and dietary supplements.

[8] Consumer Group Alleges Deceptive Marketing of Children’s Foods

“Parents drawn to products that seem healthier for their children based on references to fruit on the packaging are being deceived,” charged the lead author of a [report](#) released last week by the Strategic Alliance for Healthy Food and Activity Environments, a California-based advocacy group. In the report, Strategic Alliance alleges that of 37 “aggressively marketed” foods with depictions of fruit on the label, 19 contained no fruit ingredients and six had minimal amounts of fruit juice. The report, which names several cereals and fruit drinks,

recommends that food and beverage companies (i) make “healthy” options more available and affordable than foods high in sugar, fat and sodium; (ii) stop marketing “unhealthy” foods and drinks to children; and (iii) support public policies “designed to bring healthier foods and beverages to schools, workplaces, healthcare settings, and neighborhoods.” See *Strategic Alliance Press Release, San Francisco Chronicle and Los Angeles Times*, January 26, 2006.

[9] U.K. Social Workers Put Obese Kids on Child Protection Registers

According to a news source, British social workers are intervening in families with obese children, in some instances, removing them from their homes and placing them with foster parents. The issue is raising concerns about “fat police,” but physicians and health advocates have supported the initiative, particularly when parents have been advised to take action to protect their children’s health and fail to comply. One child psychologist was quoted as saying, “These are children suffering from sleep apnea and serious health complications from diabetes. Initially, social workers try to help the parents but, in some cases, the parents are the problem.” See *The Sunday Times*, January 28, 2007.

Media Coverage

[10] *Meatingplace* Interviews “Thought Leader” Marion Nestle

Described in last month’s *Meatingplace* magazine as “the go-to gal on the subject of nutrition,” Marion Nestle, Ph.D., told senior editor Pete Hisey that meat “has its place in a healthy diet,” adding that she likes “some of the precooked products when they’re done well.” Hisey writes that Nestle, a



professor in New York University's Department of Nutrition, "sees reason for optimism in the way some sectors of food – the meat industry included – are bringing product to market." In the [interview](#), Nestle praises meat producers for responding to safety and animal treatment concerns, but also objects to marketing allegedly aimed at children. "Stop marketing food to kids. End of discussion," she said when asked about ways to curb the obesity epidemic. See *Meatingplace*, January 2007.

[11] Michael Pollan, "Unhappy Meals," *The New York Times*, January 28, 2007

In this critique of nutrient-based food science, *Times* contributing writer Michael Pollan prescribes the following "rule of thumb: if you're concerned about your health, you should probably avoid food products that make health claims." Pollan argues that "nutritionism" is not a science but an ideology that relies on parsing foods into "good" and "bad" nutrients, thus allegedly allowing the government, food industry, scientists, and journalists to propagate unfounded claims about the optimal American diet. He also charges that the "industrialization" of food production has resulted in less nutritious yields at the expense of unique "food cultures," which have been replaced by fast-food diets that cost modern medicine an alleged \$200 billion annually. Recommending that people eat more "whole foods," Pollan concludes that processed foods should be avoided and that functional foods making health claims should be replaced with home-cooked vegetables, grains and fruits.

[12] Rick Weiss, "Can Food From Cloned Animals Be Called Organic?," *The Washington Post*, January 29, 2007

"It's like putting artificial apples in an apple pie," a Center for Food Safety spokesperson told *Post* reporter Rick Weiss in this article about whether foods derived from "free-range, grass-fed, hormone-free, antibiotic-free" clones could be considered "organic" by the Department of Agriculture (USDA). Experts are reportedly debating the legal language, which excludes gene-engineered animals and clones produced by "cell fusion," but does not expressly deal with clones produced in other ways. While opponents of "organic clones" apparently feel the pairing is unnatural, others in the biotech industry point to organic-labeled animals born as a result of *in vitro* fertilization or artificial insemination, methods that are not unlike cloning in their view. USDA's next meeting to discuss the issue is scheduled for March.



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