

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] Dingell Calls for Removal of Bisphenol A from Infant Formula Product Packaging

Congressman John Dingell (D-Mich.), who chairs the House Committee on Energy and Commerce, has requested that infant formula manufacturers remove the bisphenol A from their product packaging. By [letter](#) dated May 6, 2008, Dingell refers to the National Toxicology Program draft brief, which raised concern over low-level exposures in fetuses, infants and children, and the consideration being given in Canada to a bisphenol A ban. Sent to four companies that make infant formula, the letter states, “We ask that you voluntarily remove BPA [bisphenol A] from your infant formula packaging. We believe that this measure will help protect developing infants and children from the neural, behavioral, and developmental risks of BPA. We also believe that such action will provide reassurance to concerned parents who might worry that their children will have altered prostate and mammary glands or reach early puberty simply because of their infant formula.”

A written response is requested within two weeks from the date of the letter, and Dingell notes that

after the responses are reviewed, “we may require additional records and/or staff interviews with company officers and/or employees.”

Meanwhile, the EU’s food safety watchdog has reportedly indicated that it may reconsider its opinion on the chemical’s safety. The European Food Safety Authority (EFSA) last conducted a bisphenol A risk assessment in January 2007 and concluded that infants consumed far less of the substance in an average day than was considered harmful. An EFSA spokesperson was quoted as saying, “EFSA is aware of the studies on bisphenol published in the United States and Canada. The agency will examine whether it should review its opinion on this product.” *See AFP*, May 6, 2008.

### State and Local Governments

#### [2] Advocacy Groups Urge State AGs to Stop Use of “Organic” Labeling on Seafood

The Center for Food Safety and Food & Water Watch have asked the attorneys general of 49 states to take immediate action to stop the marketing and labeling of seafood as “organic.” The May 7, 2008, [letters](#) discuss federal laws and regulations relating to organic foods and note that “there are still no regulatory standards for seafood and no organic certification organization can be accredited to certify aquatic animal production as ‘organic.’” Thus, claim the advocacy organizations, any companies marketing their seafood products as “organic” are



deceiving consumers by leading them to believe the seafood “is being produced consistent with current livestock standards or the recent [National Organic Standards Board] recommendations.” Specifically, the letter contends that antibiotics and parasiticides are used in aquatic seafood production, seafood producers are not using certified organic feeds, and the animals’ natural behavior is not being accommodated, all in violation of what are commonly understood to represent “organic” production practices. Claiming that the U.S. Department of Agriculture and the Federal Trade Commission have refused requests to restrict the U.S. marketing and sale of seafood labeled “organic,” the letter demands that the states take action to enforce their own consumer protection laws.

California’s attorney general is not a recipient of the letter, because that state apparently passed a law in 2005 prohibiting the labeling of any seafood as “organic” until federal standards are adopted and implemented. *See Center for Food Safety Press Release, May 7, 2008.*

## European Union (EU)

### [3] Decision on Allowing Genetically Modified Crops Delayed

The EU has reportedly delayed making a final decision about allowing member states’ farmers to grow genetically modified (GM) crops pending the outcome of additional safety tests. The European Commission has apparently directed the European Food Safety Authority (EFSA) to conduct the tests. While the EU has allowed GM crops to be imported, it has not allowed them to be grown for a decade. Its continuing refusal generated litigation by Argentina, Canada and the United States before the

World Court, which has already ruled that the EU illegally delayed approving GM products. The United States and Canada apparently have the option of retaliating against the EU for its policies. Companies that have developed such crops are reportedly frustrated with the latest decision; according to a spokesperson for a company that produces a corn variety engineered to resist insect pests, “Today represents continued procrastination and unnecessary delay.” That company sued the commission in 2007 for delaying approval despite EFSA findings that its corn is safe. The dispute, which is before the European Court of First Instance in Luxembourg, has yet to be resolved. *See The New York Times, May 7, 2008.*

## Litigation

### [4] Bisphenol A Class Claims Brought in Kansas Court

A putative class action has been filed in a Kansas federal court, alleging that the state’s consumers would not have purchased plastic baby bottles, bottle liners and training cups containing bisphenol A if they had known “laboratory studies indicate that BPA [bisphenol A] is associated with health risks.” *Wilson v. Avent Am., Inc.*, No. 08-2201 (U.S. Dist. Ct., D. Kan, filed May 1, 2008). Citing research about bisphenol A leaching into the liquids consumed by infants and children and studies purportedly showing adverse health effects associated with bisphenol A exposure, the named plaintiffs seek to certify a statewide class of all other persons and entities who purchased the products. Defendants are five companies that manufacture and sell baby bottles, bottle liners and training cups. Plaintiffs allege intentional and negligent misrepresentation and violation of the Kansas Consumer



Protection Act. They ask for an award of actual damages, punitive damages, restitution, attorney's fees, costs, and an order "suspending all further sales and advertising by Defendants who do not include a bold face disclosure indicating the contents of Bisphenol-A in the above-described products and that laboratory studies indicate that Bisphenol-A is associated with health risks, and for corrective advertising."

## Other Developments

### [5] Industry Interests Contend Pew Commission Report Was Politically Driven

Agricultural interests have released a statement in response to a report issued by the Pew Commission on Industrial Farm Animal Production which called for changes to large-scale animal farming. Further details about the report appear in issue 259 of this Update. According to the American Farm Bureau Federation, Murphy-Brown LLC, National Chicken Council, National Milk Producers Federation, National Pork Producers Council, and National Turkey Federation, the animal agriculture industry's information, experts and views were ignored and the commission's conclusions were based on "preconceived notions about the U.S. livestock industry." The agriculture alliance claims that the commission's report is based on old data and "ignores the fact that antibiotics are used in a safe and responsible manner in the livestock, dairy and poultry industries and that a ban is completely uncalled-for." The organizations call for the commission to meet with them to "engage in an open and transparent discussion that will achieve our shared objective of providing a safe, abundant and affordable food supply." See *Animal Agriculture Alliance Press Release*, April 30, 2008.

## Scientific/Technical Items

### [6] Study Finds Number of Fat Cells Constant Throughout Adulthood

A Swedish study has reportedly found that adults maintain the same number of fat cells throughout life, regardless of overall weight loss or gain. Kirsty L. Spalding, et al., "Dynamics of fat cell turnover in humans," *Nature*, May 4, 2008 (online). Researchers concluded that each year 10 percent of the body's fat cells die and are replaced, attributing weight fluctuations to the amount of fat stored in individual cells. The study drew on a method for dating human cells pioneered by lead author Kirsty Spalding, a neurobiologist at the Karolinska Institute in Sweden. In her examination of fat cells, Spalding applied a method she previously developed for testing cell growth in the cortical and cerebellum regions of the human brain. She discovered that people who underwent weight loss surgery retained the same number of fat cells before and after the procedure, and that the cells underwent a constant renewal process. The Swedish team has stated that future investigations will focus on whether cells grow back after liposuction and what happens in adults who experience substantial weight gain later in life. "The million-dollar question now is, What regulates this process? And where can we intervene?," Spalding told *The New York Times*.

Several U.S. obesity experts have since noted that this discovery may change how scientists view and treat obesity. For example, doctors could potentially control obesity by preventing fat cell accumulation during childhood or slowing fat cell regeneration in adults. Others cautioned, however, that the body manages weight through a complicated system of checks and balances. "I suspect that the body's



regulation of weight is so complex that if you intervene at this site, something else is going to happen to neutralize this intervention,” one obesity researcher was quoted as saying. *See The New York Times*, May 5, 2008.

#### [7] **PCRM Researchers Conclude Milk Does Not Aid Weight Loss**

Researchers affiliated with the Physicians Committee for Responsible Medicine (PCRM) have published a [study](#) on the effects of dairy or calcium supplementation on weight loss or body fat. Amy Joy Lanou & Neal Bernard, “Dairy and Weight Loss Hypothesis: An Evaluation of the Clinical Trials,” *Nutrition Reviews*, May 2008. Reviewing 49 studies conducted from 1966 through August 2007, the researchers found that most showed no effect of dairy consumption on weight loss. Two studies apparently showed that dairy products increased body weight. And, according to PCRM, “The only studies that showed any weight or body fat loss were funded by the dairy industry.”

The organization, which claims to promote preventive medicine, conduct clinical research and encourage higher standards for ethics and effectiveness in research, states that it was successful in 2007 in getting the Federal Trade Commission, the U.S. Department of Agriculture and two national dairy organizations to stop a weight-loss advertising campaign for lack of supporting evidence. PCRM notes, however, that rather than honor the agreement reached, “the dairy industry simply reworded its claims, toning down the message only slightly.” We reported in issue 196 of this Update that a federal district court dismissed PCRM’s claims against dairy producers and marketing groups that were promoting the consumption of dairy products as a healthy way to lose weight. *See PCRM Online*, May 2008.

#### [8] **Study Links Obesity to Increased Risk for Dementia**

Researchers at the John Hopkins Bloomberg School of Public Health have reportedly concluded that obesity may increase the risk of developing adult-onset dementia. Beydoun, M. A., Beydoun, H. A. & Wang, Y., “Obesity and central obesity as risk factors for incident dementia and its subtypes: a systematic review and meta-analysis,” *Obesity Reviews*, May 2008. The authors conducted a meta-analysis of 10 previously published studies examining the relationship between dementia or its subtypes and various measures of body fat. A pooled analysis from seven of these studies indicated that baseline obesity increased the risk of Alzheimer’s disease by 80 percent on average, according to the Bloomberg School of Public Health. In addition, researchers found that underweight participants were also at a greater risk of dementia or related conditions. “Our analysis of the data shows a clear association between obesity and an increased risk for dementia and several clinical subtypes of the disease,” the lead author was quoted as saying. The team further noted that although “more studies are needed to determine optimal weight and biological mechanisms associated with obesity and dementia, these findings could potentially decrease the number of people diagnosed with dementia and lead to an overall better quality of life.” *See Bloomberg School of Public Health Press Release*, May 7, 2008.



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## LITIGATION UPDATE

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