

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] Bush Administration Promotes Food Aid Package Encouraging GM Crops

The Bush administration is reportedly seeking congressional approval for a \$770 million food aid package that advocates the use of genetically modified (GM) crops in developmental farming. The proposal responded to an emergency appeal issued earlier this year by the U.N. World Food Program, which blamed a “critical funding gap” on “soaring food and fuel prices.” If passed as part of a larger \$70 billion Iraq war funding measure, the aid package would require the U.S. Agency for International Development to spend \$150 million on agricultural initiatives that include GM crop development.

In addition, the U.N. Food and Agriculture Organization this week sponsored a summit in Rome, where world leaders met to discuss global food shortages and the impact of biofuel production on rising food costs. Although U.S. Agriculture Secretary Ed Schafer estimated that biofuels were responsible for only 2 to 3 percent of the total 43 percent increase in food prices, other countries recommended more research into “second generation biofuels” not derived from food crops. U.N. Secretary-General Ban Ki-moon also told attendees

that aid efforts will require between \$15 billion and \$20 billion each year to boost crop production. “We must focus on the underlying causes – years of neglect in the agricultural sector and lack of investment in increasing productivity,” Ban was quoted as saying. See *The News Record*, June 2, 2008; *The Wall Street Journal* and *Associated Press*, June 4, 2008.

#### U.S. Department of Agriculture (USDA)

#### [2] Agency Orders Chicken Producer to Cease Using Antibiotic-Free Label

According to press reports, the USDA has withdrawn its approval of a qualified antibiotic-free label that Tyson Foods, Inc. was using on its chicken products. The company must stop using the label by June 18, 2008. The company indicated in advance of the agency’s announcement that it was voluntarily dropping the label which has been subject to litigation and an ongoing dispute with USDA’s Food Safety and Inspection Service (FSIS). Tyson has reportedly indicated that the timeframe the agency set is “unrealistic” and characterized the company’s practice of vaccinating eggs with small amounts of antibiotic as “consistent with other ‘raising’ claims.” Nevertheless, it decided to withdraw the label “due to uncertainty and controversy over product-labeling regulations and advertising claims.”

Meanwhile, Tyson has indicated that it has begun destroying and burying 15,000 hens from a flock that tested positive for exposure to a strain of bird flu. The action follows Russian and Japanese



suspension of imports of all chickens processed in Arkansas after routine testing revealed the exposure. The state's Livestock and Poultry Commission reportedly assured the public that the situation did not present a threat to human health, and regulators have decided not to stop U.S. consumers from eating Arkansas-raised chicken. *See Houston Chronicle* and *Product Liability Law* 360, June 3, 2008; *The Wall Street Journal* and *Meatingplace.com*, June 4, 2008.

### [3] Consumer Advocates Urge USDA to Keep Pesticide Reporting Program

A coalition of 44 environmental, agricultural and consumer groups have issued a [letter](#) to USDA Secretary Ed Shafer asking the agency to reconsider the suspension of its pesticide reporting program in 2008. Administered by the National Agricultural Statistics Service (NASS), the program tracks pesticide use on the most chemical-intensive crops and breaks down the data by crop, pesticide and state in its biennial reports. Federal departments like the Environmental Protection Agency also use this information to administer public health directives and regulate chemical applications. USDA has gradually scaled back this program over the last decade, according to the Center for Food Safety (CFS), which noted that the 2007 report will cover cotton and apple crops only. CFS has further claimed that civil society groups and other interested parties cannot afford or depend on data gathered by private firms, which "charge upwards of \$500,000 per year for such information." The program's elimination "will mean farmers will be subjected to conjecture and allegations about their use of chemicals and fertilizer," an American Farm Bureau spokesperson was quoted as saying.

Meanwhile, NASS has stated that the pesticide

reporting program costs approximately \$8 million of its \$160 million annual budget. "Unless new funds are made available there's not much we can do," an acting administrator at NASS told the press. *See CFS Press Release*, May 20, 2008; *Associated Press*, May 22, 2008.

## Food and Drug Administration (FDA)

### [4] CSPI Petitions FDA to Ban Artificial Colorings Allegedly Linked to Behavioral Problems

The Center for Science in the Public Interest (CSPI) has [petitioned](#) the Food and Drug Administration (FDA) to ban eight food additives allegedly linked to "hyperactivity and behavior problems in children." CSPI has claimed that, according to "a comprehensive 2004 meta-analysis of the medical literature" and "two recent studies funded by the British government," food colorings known as Yellow 5, Red 40, Blue 1, Blue 2, Green 3, Orange B, Red 3, and Yellow 6 are responsible for disrupting children's behavior. The petition asks FDA to revise the information on its Web site to reflect these purported health risks and to post warnings on products containing these dyes. In addition, several psychiatrists, toxicologists and pediatricians who support CSPI's petition have apparently co-signed a letter to Congress that calls for hearings on artificial food dyes and funding for an Institute of Medicine research project. "The purpose of these chemicals is often to mask the absence of real food, to increase the appeal of a low-nutrition product to children, or both," CSPI Executive Director Michael Jacobson told the press. "Who can tell the parents of kids with behavioral problems that this is truly worth the risk?" *See CSPI Press Release*, June 2, 2008.



A Grocery Manufacturers Association spokesperson, however, has noted that the majority of studies confirm the safety of these colorings. FDA also refutes CSPI's stance on food dyes, stating on its Web site that "Although this hypothesis was popularized in the 1970s, well-controlled studies conducted since then have produced no evidence that food additives cause hyperactivity or learning disabilities in children." *See Associated Press*, June 3, 2008.

#### **[5] Consumer Groups Seek Agency Action on Use of CO in Meat Packaging**

A coalition of six consumer organizations has called on the FDA and the U.S. Department of Agriculture (USDA) to act immediately to prohibit the use of carbon monoxide in meat packaging. In a June 2, 2008, [letter](#), the coalition requests that "the government rescind its 'no objection' to the use of carbon monoxide (CO) in case-ready meat as a GRAS (generally recognized as safe) substance." The groups contend that CO artificially colors meat and masks its true color and freshness, which "poses food safety risks because consumers have historically relied heavily upon color to judge the freshness and safety of meat." According to the letter, the groups first called for action on CO in meat packaging in 2005. Now, they seek a ban and "a thorough legal and scientific review." Food & Water Watch, one of the coalition members, is urging supporters to contact their congressional representatives to require labeling for CO-treated meat. Congress has already begun to investigate the matter and held hearings in 2007; further details can be found in issues 221, 237 and 239 of this Update.

## National Toxicology Program (NTP)

#### **[6] Draft Styrene Document Available for Public Comment**

The NTP has announced the availability of the draft background document for styrene and invited public comments in advance of the expert panel meeting July 21-22, 2008. The deadline to submit written comments is July 7. When the styrene document is completed, the expert panel will recommend the listing status (known or reasonably known to be a human carcinogen or not to list) for styrene in the 12th Edition of the Report on Carcinogens. According to NTP, styrene "is a very important monomer used worldwide in the production of polymers, which are incorporated into products such as rubber, plastic, insulation, fiberglass, pipes, automobile parts, food containers, and carpet backing." Sources of public exposure apparently include ingestion of foods as well as indoor and outdoor air inhalation. *See Federal Register*, May 20, 2008.

## South Korea

#### **[7] Exporters Seek to Ease South Korean Opposition to U.S. Beef**

Several major U.S. beef processors have agreed to label products destined for South Korea by cattle age to assuage the country's fear of mad cow disease. Although the South Korean government recently loosened a four-year restriction on U.S. beef, political opposition has since filed three lawsuits seeking to bar the imports and force Cabinet members to resign. In addition, large public demonstrations have prompted officials to consider banning U.S. cattle older than 30 months at the



time of slaughter. As a result, some beef exporters have offered to label products to indicate whether cattle were older or younger than 30 months when slaughtered. “With this label, the customers can be assured that they can choose, and purchase, the product they want,” stated a joint press release issued by Tyson Foods Inc., Cargill Meat Solutions Corp., JBS Swift & Co., National Beef Packing Co., and Smithfield Beef Group Inc. South Korea represents the third largest export market, behind Canada and Japan, for U.S. beef suppliers. *See Associated Press*, May 30 and June 2, 2008; *Meatingplace.com*, June 3, 3008.

## Litigation

### [8] California AG Seeks Acrylamide Documents from FDA

California Attorney General Edmund Brown has filed a complaint for injunctive relief under the Freedom of Information Act (FOIA), seeking acrylamide-related documents that he has twice sought from the Food and Drug Administration (FDA) since late 2007. *Cal. ex rel. Brown v. FDA*, No. 08-02741 (U.S. Dist. Ct., N.D. Cal., San Francisco/Oakland Div., filed May 30, 2008). According to the complaint, the requests, submitted to the FDA in November 2007 and March 2008, “called for the production of all records ‘of any communications [the FDA’s] employees and/or representatives have had from April 19, 2006 to the present relating to the issue of California’s potentially requiring acrylamide warnings for foods under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.’” FDA has allegedly failed to respond within statutory time limitations, and Brown requests that the court order the agency to “prepare and file an itemized index, for all withheld documents and

portions of documents,” and “enjoin FDA from withholding all records or portions of records improperly withheld, and order their immediate disclosure to Plaintiff.”

To provide a context for its FOIA requests, the complaint mentions litigation the attorney general filed in 2005 against the makers and sellers of processed potato products “for violations of Proposition 65 relating to their failure to warn consumers of the presence of acrylamide, a listed carcinogen, in their products.” Additional details about California’s Prop. 65 acrylamide lawsuits, one of which led to a settlement with KFC Corp. requiring the company to post acrylamide warnings in its restaurants, appear in issues 132, 140 and 212 of this Update.

### [9] Lawsuit Contends Applebee’s Misled Consumers About Fat Content of Diet Menu Items

A Washington resident has filed a putative class action lawsuit in a California federal court against the company that franchises and operates Applebee’s Neighborhood Grill & Bar restaurants, alleging that the items on its Weight Watchers® menu actually contain far higher levels of fat than are listed on the menu. *Paskett v. DineEquity, Inc.*, No. 08-03620 (U.S. Dist. Ct., Central Dist., Cal., filed June 3, 2008). Seeking the certification of a class of “all persons who ordered items from the Applebee’s Weight Watchers menu,” the plaintiff alleges violations of California’s Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Statute. She requests “[t]he equitable remedy of unjust enrichment, restitution, and disgorgement of money improperly had and received,” “[a]n order enjoining Defendant’s methods, acts, or practices,” attorney’s fees and costs, as well as pre- and post-



judgment interest.

According to the complaint, the plaintiff ordered items exclusively from Applebee's Weight Watchers menu when she dined there, and she "has been damaged by Defendant's misconduct in that the true nutritional content of the menu items was different than what was represented, she paid for those menu items and the true nutritional content was not disclosed by the Defendant." The plaintiff alleges that independent laboratory tests have shown that "the fat content of the items are sometimes double or even triple the amount shown on the menu" and specifically identifies the "Tortilla Chicken Appetizer," which was found to contain 21.4 grams of fat and not the 13 grams advertised, and the "Garlic Herb Chicken," which purportedly contains 18 grams of fat, rather than the 6 grams advertised.

According to news sources, the healthier choices on menus from a number of different chain restaurants were submitted for testing and many reportedly turned out to contain higher levels of fat and more calories than listed. Apparently, "Scripps television stations bought items off the lowfat/low calorie menus at Macaroni Grill, Chili's, Applebee's, Cheesecake Factory and Taco Bell." The samples were then shipped on ice to Analytical Laboratories, Inc., in Boise, Idaho, where they were tested. Among the items for which results have been [published](#) are the two to which the plaintiff in *Paskett* refers in her complaint.

A Taco Bell spokesperson was quoted as saying that the company "goes to great lengths to provide our customers with complete and truthful nutritional information, and we absolutely stand by the accuracy of our figures as published in our nutritional brochures and on our web site." He further

noted, "there could be many reasons why ABC's test results vary so much from the truthful and representative nutritional information we provide," and suggested that multiple samples from multiple locations should have been tested "to accurately determine representative nutritional information" about its low-fat menu items. Applebee's apparently responded to the study by stating that the company "has extremely high quality compliance standards for all our menu items. Our most recent testing confirmed that our menu items are 94 percent compliant." See *abc2news.com* (Baltimore), May 19, 2008; *newsnet5.com* (Cleveland/Akron), May 21, 2008.

#### **[10] Bisphenol A Lawsuit Filed in Connecticut**

Claiming that studies show toxic effects of bisphenol A (BPA) even at low doses, an Arkansas woman has reportedly filed a putative nationwide class action against Playtex Products in a Connecticut federal court. Ashley Campbell apparently seeks damages for the purchase of plastic bottles containing the chemical. A company spokesperson refused to comment on the litigation but cited a general company statement indicating that U.S. and international regulatory bodies "continue to deem the ingredient safe." Nevertheless, the company is already reportedly converting its product line of baby bottles and liners to BPA-free materials by the end of 2008. See *The Washington Post*, May 29, 2008.

In a related development, Canada's *Globe and Mail* had the contents of a number of canned foods tested for the presence of bisphenol A, and the chemical was reportedly found in every sample at levels hundreds of times above what was found in laboratory studies to affect breast development in female mice. Industry officials pointed out that none



of the levels, which ranged from 1.60 parts per billion (ppb) to 18.21 ppb, exceeded current Health Canada guidelines, although the agency is apparently reconsidering its 1995 exposure guideline. The foods tested apparently included canned soups, tomato sauces, apple juice, beer, creamed corn, and peas and carrots. According to the newspaper, “less than half of cup of tomato sauce or a cup of chicken noodle soup would exceed the lowest dose found in recent research to have an adverse effect on animals.” See *Globe and Mail*, May 29, 2008.

#### **[11] Court Tentatively Allows Challenge to Prop. 65 Chemical Listing Process to Continue**

A California state court has reportedly issued a tentative ruling in litigation involving a challenge to the Office of Environmental Health Hazard Assessment (OEHHA) process for listing chemicals under Proposition 65 (Prop. 65). *Sierra Club v. Schwarzenegger*, No. n/a (Alameda County Super. Ct., Cal., tentative ruling filed May 22, 2008). According to a news source, the court denied OEHHA's request to dismiss the case, which focuses on the agency's decision not to list perfluorooctanoic acid (PFOA), a chemical used in cookware with non-stick and stain-resistant surfaces. The court apparently found that the environmentalist plaintiffs had sufficiently alleged that OEHHA was not listing chemicals defined under the Labor Code as toxic, which is a requirement under Prop. 65, and that OEHHA is unreasonably delaying consideration of chemicals that could be added to the list. The court did agree with OEHHA that it lacks the responsibility to revise and republish the list of carcinogens under Prop. 65. If the tentative ruling is finalized without change, it could force the agency to speed up its review process for carcinogens and reproductive toxicants. See *Inside Cal/EPA*, May 30, 2008.

#### **[12] GM Rice Litigants Await Class Certification Ruling**

A federal judge in Missouri, before whom a number of lawsuits over genetically modified (GM) rice have been consolidated by the Judicial Panel on Multidistrict Litigation, reportedly heard argument in May 2008 about whether to consolidate the claims into a single class action. *In re: Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo.). The litigation involves claims by rice farmers that they suffered economic damage by the release of a GM strain into the food supply in 2006. Foreign countries banned U.S. rice exports temporarily when Liberty Link® was released, action that caused the price for U.S. rice to drop. According to some legal commentators, class certification could have a significant impact on the biotech seed industry because experimental crops are generally grown outdoors. U.S. rice farmers claim that these companies should be held liable for any global market losses if experimental strains contaminate conventional crops. Counsel for defendant reportedly argued that a class of claimants would be unmanageable given uncertainty over which farmers actually suffered losses due to the export bans. See *law.com*, May 23, 2008.

#### **[13] EU Appeals WTO Ruling on Import of Meat Treated with Growth Hormones**

The European Union (EU) has reportedly decided to appeal a World Trade Organization (WTO) ruling that the EU failed to justify a ban on the import of beef treated with hormones and, thus, that the United States and Canada were justified in maintaining duties on many European imports. According to the EU, the WTO “failed to establish the facts correctly” and used experts who were insufficiently impartial. EU countries have banned



hormone-treated beef since the mid-1980s, claiming that it poses health risks and may cause cancer. The United States and Canada challenged the ban in 1997, and the WTO has consistently found since then that it violated international trade rules given the EU's failure to provide adequate scientific evidence to support its action. Nevertheless, the WTO was critical of the United States and Canada for continuing to impose trade duties without first filing a complaint. *See Product Liability Law 360*, May 29, 2008.

## Legal Literature

[14] **Tomas Philipson & Richard Posner, "Is the Obesity Epidemic a Public Health Problem? A Decade of Research on the Economics of Obesity," *National Bureau of Economic Research Working Paper*, May 2008**

A public policy studies professor and a U.S. Court of Appeals judge have teamed to discuss the most recent research on the economics of obesity and suggest that government interventions that were effective in reducing smoking rates may not work well for obesity. According to the authors, "The declining price of food and the rising price of exercise . . . have offsetting impacts on food consumption, which is why the twentieth-century data shows [sic] periods of both rising and falling food consumption in spite of continual increases in weight and falling food prices." They note that some have predicted that by 2016 half of the U.S. population will be obese and that government will be spurred to act only where "the population weighs more than is optimal for maximizing health." The article explores some of the cost data underlying claims that obesity costs more, showing that such analyses fail to account for higher mortality rates and, thus, lower Social Security spending. The

authors also examine whether actual or proposed government interventions, including nutrition labels, educational weight loss programs, taxation, and fast-food regulations, are effective. They suggest that regulation of advertising "may affect obesity growth more substantially" than restrictions on vending machines and fast-food restaurants and are concerned about the effects on people of modest means of stiff taxes on food.

## Other Developments

[15] **Federal Regulator Targets Local Brewery for Bottle Cap Slogans**

The U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) has reportedly ordered a brewery located in Weed, California, to change the message on its bottle caps or risk fines and possible legal action. Vaune Dillmann, owner of Mt. Shasta Brewing Co., said his line of Weed Ales carries the slogan "Try Legal Weed: A Friend in Weed Is a Friend Indeed" on its bottle caps to attract consumers in the competitive craft beer market and boost hometown pride. But in February 2008, TTB singled out the drug reference when the agency rejected Dillman's label application for his latest boutique brew. Dillman has since appealed the decision, vowing to fight a long legal battle if necessary. His cause has apparently elicited more than 1,000 letters, e-mails and phone calls in support of the brewery and involved his local congressional representative, Wally Herger (R-Chico), as well as U.S. Senator Barbara Boxer (D-Calif.). "This is ludicrous, bizarre, like meeting Big Brother face-to-face," he told the press, likening his slogan to Budweiser's more well-known catchphrase: This Bud's For You. "They Sell Bud. We Sell Weed. What's the difference?" *See Los Angeles Times*, May 28, 2008.



## Scientific/Technical Items

### [16] New Study Boosts Anti-Aging Claim for Red Wine

A recent study has supported claims that an ingredient in red wine may slow the aging process and extend the human lifespan. Jamie L. Barger, et al., "A Low Dose of Dietary Resveratrol Partially Mimics Caloric Restriction and Retards Aging Parameters in Mice," *Plos One*, June 2008. University of Wisconsin-Madison researchers apparently dosed "middle-aged" mice with resveratrol, a plant polyphenol found in red wine grapes, to monitor the effects on heart genes. The results showed that resveratrol seemed to mimic the effects of a low-calorie diet by reducing changes in heart gene expression as the mice aged. This latest finding has reportedly boosted hopes of harnessing and marketing resveratrol in an anti-aging formula. GlaxoSmithKline, for example, recently acquired the startup company Sirtris, which researches how resveratrol and similar substances can be used to activate sirtuin protein agents in humans. Scientists suspect sirtuins of having a role in controlling age-related disorders. "The upside is so huge that if we are right, the company that dominates the sirtuin space could dominate the pharmaceutical industry and change medicine," the co-founder of Sirtris was quoted as saying. See *BBC News* and *The New York Times*, June 4, 2008.

### [17] Raw Milk Products Linked to Outbreak of Rare Tuberculosis

Researchers at the University of California, San Diego School of Medicine have reportedly linked raw milk products to an outbreak of tuberculosis (TB) cases among Hispanic immigrants in Southern

California. T.C. Rodwell, et al., "*Mycobacterium bovis* tuberculosis in binational communities," *Emerging Infectious Diseases*, June 2008. Published by the Centers for Disease Control and Prevention, the study noted that the rare TB strain *Mycobacterium bovis* has increased in populations frequently exposed to raw-milk cheeses or so-called "bathtub cheeses" made at home. Although this strain is difficult to transmit through human-to-human contact, the study authors warned that *M. bovis* resists standard treatments and carries a higher fatality rate than traditional TB. An estimated 17 percent of Mexican cattle still harbor the disease, which was eradicated in most U.S. herds during the 1990s, according to the study. As a result, California health officials have advised residents not to purchase illegal raw milk products that could contain bovine TB and other deadly bacteria. "*M. bovis* is a disease of antiquity," the lead researcher was quoted as saying. "It is important that it not be allowed to re-emerge as a cause of TB in this country." See *MSNBC.com*, June 4, 2008.



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## LITIGATION UPDATE

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