

Food & Beverage

LITIGATION UPDATE

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Hardy &
Bacon** LLP

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Hearings on Whole Foods, Wild Oats Merger Move Forward

The FTC has issued [orders](#) setting a scheduling conference and requiring a joint case management statement to be filed as the agency begins holding full administrative hearings to consider whether the merger of Whole Foods Market, Inc. and Wild Oats Markets, Inc. violates antitrust laws. The merger was consummated in 2007 while the matter was pending in federal court, but the D.C. Circuit Court of Appeals on July 29, 2008, decided that the district court had erred in denying the FTC's motion for a preliminary injunction to stop the merger. Additional information about the court's decision appears in issue 269 of this Update. The scheduling conference will be held September 8.

The FTC has not reportedly indicated what remedy it would seek now that the \$565 million merger has been completed, but in its court filings, the agency indicated that it could try to stop further integration of the two natural and organic foods grocery chains or require Whole Foods to sell some of its operations. If Whole Foods does not prevail in the administrative proceedings, it can appeal to the

federal courts. The company has not indicated whether it would appeal the D.C. Circuit's July ruling. See *The Wall Street Journal*, August 11, 2008.

U.S. Department of Agriculture (USDA)

[2] USDA Looks to Improve *E. Coli* Testing Protocols After Spate of Ground Beef Recalls

USDA is reportedly considering revisions to its *E. coli* O157:H7 testing protocol after issuing several recalls for ground beef this year. The agency's Food Safety and Inspection Service (FSIS) does not currently focus on the primal cuts, subprimal cuts and bench trim increasingly used by processors and retailers to make ground beef, according to *Meatingplace.com*, which interviewed FSIS Deputy Assistant Administrator Daniel Engeljohn. *Meatingplace* writer Janie Gabbett reported that USDA routinely tests for the presence of *E. coli* in ground beef and carcass trim destined for grinding, but does not sample other cuts that may wind up in ground beef production. "That is a concern to the agency because we don't presently have a focus on those primals and subprimals that are not intended for ground beef production," stated Engeljohn, who noted that more than 70 percent of the plants that USDA surveyed this year acknowledged they sometimes grind primals, subprimals and bench trim. See *Meatingplace.com*, August 13, 2008.



Meanwhile, trial attorney Bill Marler has claimed on his blog that since spring 2007, companies have recalled “39,361,718 pounds of *E. coli* O157:H7 contaminated hamburger.” The latest major recall has involved more than 6 million pounds of meat processed by Omaha-based Nebraska Beef Ltd., which recently added 1.36 million pounds of beef products to the 5.3 million pounds pulled from store shelves in July. Discovered through a joint investigation with FSIS, the Centers for Disease Control and Prevention, and state departments of health and agriculture, the tainted meat has allegedly sickened 31 people in 12 states and Canada. See *Marler Blog*, August 5, 2008; *Meetingplace.com*, August 11 and 12, 2008; *Reuters*, August 15, 2008.

This expanded recall last week prompted several major grocery chains, including Whole Foods Market, to issue renewed consumer warnings for Nebraska Beef products. Whole Foods voluntarily recalled fresh ground beef sold between June 2 and August 6, 2008, in 25 states and Canada after illnesses were linked to products purchased at its stores in Massachusetts and Pennsylvania. Company spokesperson Libby Letton told *The New York Times* that some Whole Foods outlets were receiving their fresh ground products from Coleman Natural Beef, which changed ownership and began using an Omaha-based slaughterhouse that USDA has since implicated in the *E. coli* investigation. The supplier, however, failed to get company approval for the change and retailers did not have adequate procedures in place to check the processing plant codes affixed to beef packages. “We relied on the supplier to follow the rules,” Letton said.

Whole Foods has responded by announcing an overhaul of its supplier approval procedures. The company plans to implement an improved auditing system and *E. coli* testing protocols that go beyond government requirements. “It’s going to mean going back and examining these other things and making sure there aren’t holes, especially in terms of food safety,” Letton was quoted as saying. See *The New York Times*, August 12, 2008; *Meetingplace.com*, August 11 and 13, 2008.

[3] USDA Announces Biotechnology and 21st Century Agriculture Meeting

USDA has [announced](#) the 20th meeting of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21). Slated for August 26-27, 2008, the meeting will continue the committee’s “consideration of governance issues in the oversight of genetically engineering animals, with an emphasis on food animals intended for food or non-food uses.” AC21 includes representatives from the biotechnology industry, farmers, commodity processors and shippers, livestock handlers, environmental and consumer groups, and academic researchers, as well as federal officials from the Departments of Commerce and Health and Human Services; the Environmental Protection Agency; and the Office of the United States Trade Representative. USDA provides additional background information on AC21 at the committee’s [Web site](#).



[4] **FSIS Seeks Nominations for National Advisory Committee on Microbiological Criteria for Foods**

FSIS has set a September 7, 2008, deadline for receipt of nominations to its advisory committee on microbiological criteria for foods. The agency is seeking committee members with scientific expertise in epidemiology, food technology, microbiology, risk assessment, infectious disease, biostatistics, and related sciences. This advisory committee provides advice and recommendations to the secretaries of Agriculture and Health and Human Services “on public issues relating to the safety and wholesomeness of the U.S. food supply” and also “formulates positions on the development of microbiological criteria, the review and evaluation of epidemiological and risk assessment data and methodologies for assessing microbiological hazards in foods.” See *FSIS Web site*, August 8, 2008.

U.S. Department of Health and Human Services (HHS)

[5] **HHS Seeks Comments on Developing Healthy People 2020 Initiative**

The U.S. Department of Health and Human Services (HHS) is [seeking](#) written comments on Healthy People 2020, an initiative that “provides science-based, 10-year national objectives for promoting health and preventing disease.” In addition to holding six regional meetings that solicited input from communities and stakeholders, HHS has set up an online public database to obtain feedback on the initiative’s key elements, including “the vision, mission, overarching goals, and framework.” Healthy People 2020 will “reflect assessments of major risks to health and wellness, changing public

health priorities, and emerging issues related to our nation’s health preparedness and prevention,” according to HSS, which will release the project’s “specific objectives with baselines and targets” in January 2010. Comments must be submitted to the Healthy People [Web site](#) by September 2, 2008.

Food & Drug Administration (FDA)

[6] **FDA Seeks Public Input on Food Labeling for Allergens**

FDA has [announced](#) a public hearing slated for September 16, 2008, to discuss the use of allergen advisory labeling on foods. “FDA is developing a long-term strategy to assist manufacturers in using allergen advisory labeling that is truthful and not misleading, conveys a clear and uniform message, and adequately informs food-allergic consumers and their caregivers,” stated the agency in a *Federal Register* notice. In particular, FDA is soliciting comments on (i) “how manufacturers currently use advisory labeling”; (ii) “how consumer interpret different advisory labeling statements”; and (iii) “what wording is likely to be most effective in communicating to consumers the likelihood that an allergen may be present in a food.” To attend the event, members of the public must register with FDA by September 8.

State and Local Governments

[7] **Utah Considers Banning Hormone-Free Dairy Labels**

Utah is reportedly considering whether to impose a ban on labels for dairy products claiming they are free of artificial growth hormones rBST (recombinant bovine somatotropin) or rBGH (recombinant bovine



growth hormone). These products have become increasingly popular in the United States, but the company that makes the hormone has launched state and national campaigns to stop such advertising. The Utah rule would apparently allow hormone-free claims only if they include the disclaimer “No significant difference has been shown between milk derived from cows treated with artificial growth hormones and cows not treated with artificial hormones.” According to a press report, the Utah Food Industry Association supports rBGH-free product labels, saying they are desirable to consumers and should be allowed. *See NaturalNews.com*, August 10, 2008.

[8] NYC Council Member Proposes Warnings About Food Choking Hazards

According to a news source, New York City Council member Domenic Recchia has introduced a bill that would require the proprietors of food shops to warn their customers that foods such as grapes, peanuts, chewing gum, hard candies, and other bite-sized comestibles could pose a danger to children younger than age 5. If the proposal is adopted, shop owners who fail to issue the warnings would be fined up to \$250 for each violation. Critics argue that the proposal puts the burden of good parenting on shop owners who are already having a hard time surviving in a difficult economic climate. Recchia reportedly introduced the legislation after a child in his Brooklyn district died by suffocating on a grape. During an interview, Recchia asked, “Do you know how many parents don’t know that popcorn can choke a child?” Similar legislation has apparently been introduced at the federal and state levels in recent years, but none has been enacted to date. *See The New York Sun*, August 12, 2008.

[9] California County Passes Menu Labeling Laws

San Mateo County, California, supervisors this week voted unanimously in favor of an ordinance that would require chain restaurants with 15 or more locations in the state to post nutritional information on menus and menu boards. The regulation would initially apply to approximately 30 establishments in unincorporated San Mateo County and could be expanded to 450 eateries if other cities in the county also adopt the rule. A second measure must gain approval in September before the law would take effect. “It’s very often that good public policy decisions make someone unhappy and they threaten to sue,” Supervisor Jerry Hill was quoted as saying. “This is about providing nutritional information at the point of purchase so that the public can make conscientious, educated and informed decisions.” *See The San Francisco Chronicle*, August 13, 2008.

Litigation

[10] N.J. High Court Partially Overturns Domestic Livestock Standards

While turning aside a broad facial challenge, the New Jersey Supreme Court has determined that the state Department of Agriculture’s standards for the humane treatment of domestic livestock are arbitrary and capricious in part and has remanded them to the department for further proceedings. [*N.J. Soc. for the Prevention of Cruelty to Animals v. NJDA, No. A-27-07 \(N.J., decided July 30, 2008\)*](#). In its unanimous decision, the court explains how the department failed to determine what techniques are taught “by veterinary schools, land grant colleges, and agricultural extension agents for the benefit of animals” when referring to these entities in its definition for “routine husbandry practices.”



The phrase is used throughout the standard to create a safe harbor for a number of practices. The department will be required to research the matter more thoroughly on remand.

The high court also found wanting the department's decision to allow routine tail docking of cattle. According to the court, "the record in support of the practice is so weak that even the industry trade group, like the Department, 'discourages' it." The court upheld other specific practices, including crating and tethering practices used for swine and veal calves, that animal rights activists had challenged. Yet, because the practices made reference to their performance "in a sanitary manner by a knowledgeable individual and in such a way as to minimize pain," without defining or setting standards for any of these terms, the court "was constrained to conclude that these aspects of the regulations fail to fix a standard that will ensure that the practices are in fact humane and, at the same time, are too vague to establish a standard that is enforceable."

The court was careful to note that the regulations would remain in effect pending the department's reconsideration and would be subject to the law's general constraints on cruelty. The court was also careful in defining the dispute, stating that it "has nothing to do with anyone's love for animals, or with the way in which any of us treats our pets; rather, it requires a balancing of the interests of people and organizations who would zealously safeguard the well-being of all animals, including those born and bred for eventual slaughter, with the equally significant interests of those who make their living in animal husbandry and who contribute, through their effort, to our food supply."

[11] *Amicus* Brief Supports San Francisco Fast-Food Restaurant Calorie-Posting Ordinance

Individuals from Yale University and its Rudd Center for Food Policy and Obesity have submitted an *amicus* [brief](#) in the lawsuit challenging the San Francisco ordinance that requires fast-food restaurants to post calorie and nutrition information on their menu boards. *Cal. Rest. Ass'n v. City and County of San Francisco*, No. 08-3247CW (U.S. Dist. Ct., N.D. Cal.). Filed by Yale Law School Professor and First Amendment scholar Robert Post and Rudd Center Directors Jennifer Pomeranz and Kelly Brownell, the brief supports the city's and county's opposition to the California Restaurant Association motion for declaratory relief and preliminary injunction. Further details about the association's challenge appear in issue 266 of this Update.

According to *amici*, research shows that "consumers presented with calorie content on the menu chose high-calorie items one-third less frequently," and that "consumers are unable to estimate the nutritional composition of prepared foods and beverages." Arguing that a less stringent constitutional standard applies when government compels the disclosure of factual and uncontroversial commercial information, *amici* contend that the ordinance passes constitutional muster because it is reasonably related to an appropriate state interest. They cite a National Bureau of Economic Research study estimating that nutritional information required on food labels "has produced a decrease in body weight that over a 20-year period has generated a total monetary benefit of about \$63-166 billion (in 1991 dollars). This benefit flowed from the fact that two-thirds of adults at least sometimes read nutrition information about calories, fat, or cholesterol listed on a label when they buy a food item for the first time."



During the week of August 11, Garry Trudeau, who creates the "[Doonesbury](#)" cartoon strip, tackled the menu-posting issue; his restaurant patron decided to go ahead and order the high-calorie menu item.

Other Developments

[12] Genetically Modified Crops Generating Action Around the World

News sources reported this week that environmental interests from the United Kingdom to New Zealand were weighing in on whether genetically modified (GM) crops should be grown in their countries. The Supreme Court in New Delhi, India, asked the government to respond to an application filed by an environmental activist seeking an order directing the government to establish an independent body to adopt international accreditation standards "for all aspects of work connected to GM organisms, including risk assessment and testing for contamination." A government committee has apparently approved four varieties of GM cotton for commercial production and five GM food crops for field trials. Questions about environmental contamination by the crops have apparently been raised; the court will resume hearings in the case in September. See *livemint.com*, August 13, 2008.

Meanwhile, in the United Kingdom, Prince Charles has reportedly issued environmental disaster warnings over GM crops and been roundly criticized for his views. During a press interview, the prince, who has an organic farm in Gloucestershire, apparently claimed that multinational corporations that are developing GM foods are engaging in a "gigantic experiment with nature and the whole of humanity which has gone seriously wrong."

He contends that relying on the mass production of GM food "will be guaranteed to cause the biggest disaster environmentally of all time." An anti-monarchy group was quoted as saying in response, "Prince Charles is quickly making his position as heir to the throne untenable with his meddling in politics." Others opined, "His lack of scientific understanding and his willingness to condemn millions of people to starvation in areas like sub-Saharan Africa is absolutely bewildering." According to a plant biotechnology professor, the prince was exaggerating the consequences. "I don't think the evidence base is there for the conclusions he's reached," the professor stated. See *BBC News*, August 13, 2008; *The Financial Times*, August 14, 2008.

And in a related development, hearings are reportedly ongoing, under heavy security, in Christchurch, New Zealand, over whether to allow a 10-year, 2.5-hectare field trial of GM onions, shallots, leeks, and garlic. Other similar field trials in the area have apparently been sabotaged. The crops have purportedly been altered to improve flavor, health benefits and pest resistance, and the GM onions are said to be "tearless." According to environmentalists, "There are few public health benefits, with risks distributed unfairly. The risks of creeping damage to New Zealand's clean, green natural reputation in food are real." The company proposing the field trials, Crop and Food Research (CFR), promises major benefits in food production and reported that one-fifth of the world's crop market is already developed through genetic modification. Federated Farmers expressed concerns about the spread of GM pollen to conventional crops and wildlife, but a CFR scientist said the vegetables would be confined in mesh cages, making them inaccessible even to insects. See *The New Zealand Herald*, August 13, 2008.



Scientific/Technical Items

[13] Researchers to Investigate Effects of Dairy and Gluten Products on Autism

Researchers at the University of Texas Medical School will reportedly spend several weeks altering the diets of children with autism to see if the consumption of food products with gluten or dairy change their behavior. Anecdotal evidence from parents of autistic children apparently suggests that avoiding such foods can improve their behavior. The study will reportedly last four weeks and involve 38 children, between ages 3 and 9, who have been diagnosed with autism. Gluten and dairy products will be eliminated from their diets before the study begins, and researchers will test intestinal permeability through urine collection and behavior responses through psychometric testing. A U.K.-based charity, the National Autistic Society, has reportedly welcomed news about the research, noting an insufficiency of evidence about the impact of diet on autism. Dairy interests claim that studies to date have not been well-controlled and reiterated that gluten or dairy dietary recommendations for autistic children have “not been approved by the medical community.” See *FoodUSAnavigator.com*, August 11, 2008.

[14] Study Claims Hormone in Soy Foods May Affect Male Fertility

A recent [study](#) has apparently claimed that men who regularly consume soy-based foods have a lower sperm concentration than those who avoided soy products. Jorge E. Chavarro, et al., “Soy food and isoflavone intake in relation to semen quality parameters among men from an infertility clinic,” *Human Reproduction*, July 23, 2008. The results

reportedly suggested that plant-derived female sex hormones known as isoflavones, which are found in soy products, could affect sperm production in human males.

Harvard School of Public Health researchers asked 99 fertility clinic patients about their soy intake during the three months before reproductive testing. Men who reported eating the most soy-based products—approximately “one cup of soy milk or one serving of tofu, tempura or soy burgers every other day”—had 41 million sperm per milliliter less than patients who consumed no soy foods, according to lead researcher Dr. Jorge Chavarro. In addition, the study found that the effect was more pronounced in overweight men. “Men who are overweight or obese have higher levels of androgen-produced estrogen. They are converting a male hormone into a female hormone in their fat. The more body fat you have, the more estrogen you produce in your fat,” Chavarro said, adding that larger, more comprehensive studies were necessary to determine whether soy intake directly affects human fertility. See *MSNBC.com*, July 24, 2008.



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