

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Office of the U.S. Trade Representative

[1] Comments Sought on EU Products to Consider for Increased Duty Rates

The Office of U.S. Trade Representative has issued a [request](#) for comments about potential alternative products imported from the European Union (EU) that are under consideration for the imposition of increased duties. The action arises from an ongoing dispute with the EU over its refusal to allow imports of U.S. meat and meat products produced from animals treated with artificial growth hormones.

According to the U.S. Trade Representative, “The [World Trade Organization] found over 10 years ago that the EU’s ban on U.S. beef was not supported by science and was thus inconsistent with WTO rules. When the EU failed to bring its measures into compliance with its WTO obligations, the United States imposed tariffs on certain imports from the EU, as authorized by the WTO. Since that time, we have been trying to resolve this dispute with the EU without changing the composition of tariffs. It is now time to revisit these tariffs to see if modifications would be appropriate.”

Products already on the list and subject to 100 percent *ad valorem* duties include beef and pork

products, cheeses, some vegetables, truffles, and chocolate. Products under consideration include cut flowers; ornamental foliage; some spices; oats; sausages; chicken, turkey, duck, and goose products; chewing gum; cough drops; hair clippers; and motorcycles (including mopeds). Comments must be submitted by December 8, 2008. The U.S. Trade Representative is “particularly interested in comments addressed to the effects on U.S. small- or medium-size businesses or on consumers of imposing higher duties on particular products.” See *Office of U.S. Trade Representative Press Release*, October 31, 2008; *Federal Register*, November 6, 2008.

World Trade Organization (WTO)

[2] Canada Beef and Pork Producers Seek Changes to U.S. COOL Law

The Canadian Cattlemen’s Association and the Canadian Pork Council, representing some 100,000 producers, are reportedly calling on their government to bring legal challenges under the North American Free-Trade Agreement and WTO rules to the new country-of-origin labeling (COOL) law that took effect in the United States on October 1, 2008. According to the beef and pork producers, the law has begun shutting their livestock out of U.S. markets, where domestic and foreign animals must now be segregated in feedlots and packing plants. Origination documentation and disease-free tags are



also apparently adding to producer costs.

The Canadian producers claim that some companies are refusing to import Canadian cattle altogether and others will slaughter them only on certain days, a situation that threatens to cost the Canadian producers some \$800 million annually. In a letter to Canada's prime minister, the Cattlemen's president reportedly said, "Our preliminary estimate is that COOL is reducing the value of Canadian cattle at a rate approaching \$500 million per year. We fear that the next U.S. administration may further tighten the procedures. The worst has likely not yet been seen and we anticipate the costs could grow further. Therefore, we urge you to initiate a trade challenge immediately to seek repeal of this egregious U.S. law." See *The Canadian Press*, November 2, 2008.

European Food Safety Authority (EFSA)

[3] EFSA Approves Two Strains of Genetically Modified Corn

EFSA has reportedly approved two genetically modified (GM) corn strains and ruled against a French ban on another GM corn crop. The agency's scientists cleared Bt-11 corn seed made by Syngenta AG and 1507 corn made by Pioneer Hi-Bred and Dow Agrosciences, while rebuking France for its prohibition on a Monsanto Co. product first accepted by EFSA in 2004. EFSA had also ruled in favor of Bt-11 and 1507 corn crops in 2005, but revisited its opinion after environmental groups charged that the GM products posed a threat to environmental and human health. The GM corn varieties apparently provide improved resistance to insects, including corn borers.

The European Commission must now decide

whether to issue licenses allowing the companies to sell the GM corn seed to farmers in the 27 member states. The possibility has purportedly drawn fire from environmental groups, which also criticized the commission for attempting to override nationwide bans on GM agriculture. "EFSA is becoming the laughing stock of the scientific community. Rubber stamping anything the agro-biotech industry puts forward, with the blessing of the European Commission, is destroying its credibility," opined a Greenpeace spokesperson. See *The Associated Press*, November 1, 2008.

U.K. Food Standards Agency (FSA)

[4] U.K. Food Regulator Advises Pregnant Women to Reduce Caffeine Intake

The U.K. Food Standards Agency (FSA) has advised pregnant women to reduce their daily caffeine consumption to 200 milligrams – or approximately two mugs of coffee. The agency previously suggested a maximum intake of 300 mg, but lowered its recommendation after the *British Medical Journal* published an FSA-funded study concluding that a further reduction would lessen the health risks to unborn children. "This is because too much caffeine might result in a baby having a lower birth weight than it should, which can increase the risk of some health conditions later in life," stated FSA in a November 3, 2008, press release.

FSA has since issued guidelines intended to help expectant mothers gauge their caffeine consumption. The agency has calculated that 200 mg is roughly equal to (i) two mugs of instant coffee; (ii) one mug of filtered coffee; (iii) two mugs of tea; (iv) five cans of cola; (v) two cans of energy drink; or



(vi) four bars of plain chocolate. “This new advice doesn’t mean that pregnant women have to cut out caffeine completely, simply that they should be careful and make sure they don’t have too much,” said FSA Chief Scientist Andrew Wadge. “We would emphasize that the risks are likely to be very small and believe our advice, which is based on new research and has been considered by leading independent scientists, is sensible and proportionate.” See *BakeryandSnacks.com*, November 4, 2008.

China

[5] China Initiates Food Safety Crackdown on Melamine-Tainted Animal Feed

The Chinese government has reportedly deployed 369,000 inspectors in a nationwide crackdown on melamine-tainted animal feed. Regulators apparently destroyed more than 3,600 tons of animal feed and shuttered 239 feed operations after food safety tests revealed that eggs in three provinces contained high levels of the industrial plasticizer, which some unscrupulous manufacturers use as an artificial filler in animal feed. In September, melamine-laced infant formula also sickened more than 50,000 infants, prompting an international recall and widespread concerns about Chinese food exports. Nestle SA has since sent 20 research specialists to its Beijing center to strengthen food testing protocols for melamine and other chemicals. “It is illegal for any individual or any enterprise to add melamine into feed, and we will crack down uncompromisingly on melamine,” said Wang Zhicai, director of the animal husbandry and livestock bureau at the Agriculture Ministry. See *Bloomberg.com*, October 31, 2008; *The New York Times*, November 1 and 3, 2008.

State and Local Governments

[6] California Passes Animal Welfare Legislation

California residents this week voted overwhelmingly in favor of Proposition 2 (Prop. 2), an animal welfare measure banning the use of some crates for hens, pregnant pigs and veal calves that do not allow the animals to turn around, lie down or extend their limbs. In addition, the law will require farmers to build pens and cages allowing full range of motion in an effort to eliminate high-density battery cages and reduce *Salmonella* outbreaks. Prop. 2, which takes effect in 2015, also levies fines of \$1,000 or six months in jail for violations.

Because most of the state's pork and veal producers have already prohibited confined cages, some agricultural economists expect Prop. 2 to have a disproportionate impact on the \$323-million egg industry. The industry-backed California for Safe Food group spent \$8.5 million to oppose the measure, as egg farmers expressed concern that the cost of retrofitting their operations will drive them out of business or out of California. Ryan Armstrong, the owner of a medium-sized egg farm in Center Valley, estimated that it would cost \$30 per bird to update his hen housing. “If I ask a banker today for \$12 million, he would say don't bother filling out the application,” he told reporters.

The Humane Society of the United States, however, has called this argument “absurd,” contending that farmers “are going to have to adjust their production strategies to accommodate this demand.” Prop 2 proponents also spent approximately \$8.5 million in support of the measure, which passed by a 2-to-1 margin. The Humane



Society now has plans to take its campaign to other states. "It will force a lot of industrial farmers in other states to sit down and negotiate a phase-out because they don't want to go through what the egg industry went through in this state," said the group's president, Wayne Pacelle. "The egg industry spent eight-and-a-half million bucks and they got a drubbing."

Meanwhile, Daniel Sumner with the University of California, Davis Agricultural Issues Center recently published a study finding that the cost of eggs from both caged and free-range hens will not increase for the consumer, partly because California imports one-third of its shelled eggs from out-of-state producers. He nevertheless admitted that farmers will face steep challenges adapting to the new rules. "The alternative is to lose a million dollars a year," Sumner was quoted as saying. "Growing chickens isn't like growing wine grapes. It's not a romantic business. It doesn't attract a lot of movie stars and Silicon Valley entrepreneurs." See *Capital Press*, November 4, 2008; *Greenwire*, November 5, 2008; *The Los Angeles Times*, November 6, 2008.

[7] Effort to List Bisphenol A Under Prop. 65 Slows Due to Staffing Shortages

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has reportedly delayed a decision about whether to list bisphenol A (BPA) under Proposition 65 because it lacks sufficient staff to complete needed research. OEHHA's Developmental & Reproductive Toxicant Identification Committee (DART) was apparently scheduled to decide whether to include BPA on the list of chemicals known to the state to be reproductive toxicants at a November 20, 2008, meeting, but the chemical, which is used in plastic bottles and to

line metal cans, was removed from the agenda and will be addressed at "the earliest possible meeting date following the meeting on Nov. 20." This may occur a year from now because the DART committee meets annually. See *Inside Cal/EPA*, October 31, 2008.

Meanwhile, the Environmental Working Group, a Washington, D.C.-based nonprofit consumer and environmental advocacy organization, has apparently called on major food companies and infant formula manufacturers to "immediately phase out the use of BPA" in their product lines. The October 31, 2008, letters to corporate CEOs cite National Toxicology Program concerns about babies' exposure to the chemical and refer to recent criticism leveled by an advisory panel against the Food and Drug Administration's draft BPA risk assessment. More details about the advisory panel's draft peer review appear in issue 280 of this Update. See *Environmental Working Group Press Release*, October 31, 2008.

[8] Second Workshop on Added Nutrients Scheduled in California

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has scheduled a [workshop](#) for December 12, 2008, to discuss possible regulatory language that would apply to foods or crops with added nutrients that exceed levels considered safe under Proposition 65. According to OEHHA's notice, "this set of regulations, if adopted, will only apply to chemicals that are already on the Proposition 65 list, or that are added to the list in the future. The exposure level established in these potential regulations for a listed chemical would not limit the amount of the chemical that can be added to any particular product and would not restrict the sale or availability of any food



product or supplement. Instead, these levels could be used by businesses subject to the [Safe Drinking Water and Toxic Enforcement] Act to determine when a warning is required for an exposure to the listed chemicals in question in a food product.”

Written comments may be submitted until January 5, 2009. OEHHA notes that significant changes to its regulatory proposal occurred after an April 2008 pre-regulatory workshop. Following review of the comments, the agency decided that “the levels established in the regulations for individual chemicals will be based on a chemical-by-chemical evaluation, rather than by relying on a Recommended Dietary Allowance (RDA) or a percentage of the Tolerable Upper Intake Level for a given chemical. Another change is that rather than proposing one regulatory concept that would cover both human and plant nutrients, OEHHA is proposing separate concepts for exposure to human nutrients in food and for exposures to plant nutrients in food.”

Litigation

[9] Food Poisoning Verdict Reinstated in California

A California appeals court has determined that a misreading of prior case law led a trial court judge to erroneously overturn a jury verdict in favor of a plaintiff who alleged that she was made ill from exposure to *campylobacter* at defendant’s restaurant. *Sarti v. Salt Creek Ltd.*, No. G037818 (Cal. Ct. App., 4th App. Dist., Div. 3, decided October 27, 2008). So ruling, the court reinstated \$725,000 in economic damages and \$2.5 million in non-economic damages and allowed the plaintiff to recover her costs on appeal. The trial court granted

the defendant’s motion for judgment notwithstanding the verdict, after determining, under a heightened causation standard, that reasonable inferences alone cannot prove a food poisoning case.

The appeals court exhaustively analyzes the court’s reasoning in *Minder v. Cielito Lindo Restaurant*, 67 Cal.App.3d 1003 (1977), and shows how the court in that case misread prior case law “to preclude the use of reasonable inferences to show causation in food poisoning cases.” According to the court, California law has always allowed reasonable inferences in these cases to provide the necessary proof of causation. In this case, plaintiff’s expert “expressly” made the link between *campylobacter*, the food poisoning experienced by the plaintiff, and the unsanitary conditions found at the restaurant. The court also rejected defendant’s assertion that the plaintiff was required, as a matter of law, to exclude all possibilities of food poisoning other than the meal she had at the restaurant.

[10] More Lawsuits Filed in China over Melamine-Contaminated Milk

According to a news source, nine families whose babies developed kidney problems allegedly as a result of drinking milk tainted with melamine have filed individual lawsuits against the Sanlu Group, one of China’s largest milk companies. Each child developed kidney stones, and six reportedly remain hospitalized. The families are seeking the equivalent of US\$2,000 for each child as compensation. Even though the families live in different provinces, the lawsuits were all filed in the northern city of Shijiazhuang, where the company is based. No judge has yet agreed to hear any of the milk cases in court, and a number of lawyers have apparently been pressured by government officials not to



represent families seeking damages. *See The New York Times*, October 31, 2008.

Other Developments

[11] Federal Regulators to Present Perspectives on Third Party Audits at D.C. Conference

The Grocery Manufacturers Association, American National Standards Institute and other organizations are co-sponsoring a [conference](#) titled “Bolstering Consumer Confidence: Identifying Essential Third Party Food Safety Audit Criteria,” December 2-3, 2008, in Washington, D.C. Among the conference speakers is the administrator of the U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS), who will discuss “his agency’s perspective on third party audits and the issue of country equivalency.” Other sessions will address Food and Drug Administration requirements for a comprehensive third party audit, harmonizing the global food safety system, and World Trade Organization concerns about private standards and third party certification.

Media Coverage

[12] Andrew Martin, "Budgets Squeezed, Some Families Bypass Organics," *The New York Times*, Nov. 1, 2008

This article examines the effect of “shaky consumer spending” on the organic industry, which is “starting to show signs that a decades-long sales boom may be coming to an end.” *New York Times* reporter Andrew Martin states that, according to the Nielsen Co., organics sales growth has declined from 20 percent per year in recent years to 4 percent in the latest four-week period ending October 4. “If a slowdown continues,” he writes, “it

could have broad implications beyond the organic industry, whose success has spawned a growing number of products with values-based marketing claims, from fair trade coffee to hormone-free beef to humanely raised chickens.”

Industry experts apparently anticipate that as organics begin to lose less committed consumers, products marketed to children will nevertheless “continue to thrive because they appeal to parents’ concerns about health.” In addition, shoppers have become more selective about their purchases, “buying four or five products instead of seven or eight.” “Such consumer attitudes have compounded problems for Whole Foods Market,” notes Martin, who estimates that the company’s stock “has dropped by more than 70 percent since the first of the year.”

Other organic manufacturers and retailers, however, have expressed optimism that sales would recover as consumers prepare more meals inside the home. “People aren’t going on vacation, they aren’t going to buy a car, so maybe they’ll buy a luxury item that is affordable,” a spokesperson for Equal Exchange was quoted as saying. “Right now, we aren’t seeing a slowdown, but it’s a concern.”

Scientific/Technical Items

[13] Study Shows Increasing Rates of Medication Use in Children

Researchers in Kansas and Missouri report that chronic medication use in children increased over a three-year period across all therapies studied, with the prevalence rate for type 2 antidiabetic agents doubling. Emily Cox, et al., “Trends in the Prevalence of Chronic Medication Use in Children: 2002-2005,” *Pediatrics*, November 2008. The study



involved a sampling of commercially insured children, ages 5 to 19, and medications for asthma, attention-deficit disorder, depression, diabetes, high blood pressure, and high cholesterol. The researchers suggest that the increasing use of type 2 antidiabetic drugs was driven by 166 percent and 135 percent increases in prevalence among girls aged 10 to 14 and 15 to 19, respectively. Type 2 diabetes was once known as adult-onset diabetes, because it is linked to obesity, but it is appearing more in children. The study concludes with a call for more research into the factors responsible for the trends, “including growth in chronic disease risk factors, greater awareness and screening, and greater affinity toward early use of drug therapy in children.”

[14] Nanotechnology Offers Hope of Rapid and Reliable BSE Test

Cornell University researchers have reportedly developed a nanoscale application that could lead to rapid testing for bovine spongiform encephalopathy (BSE). The U.S. Department of Agriculture’s Cooperative State Research, Education and Extension Service (CSREES), which partly funded the project, recently highlighted the National Research Initiative (NRI) as a step toward improving the safety of the food supply. “A better method of prion detection is necessary to allay public fears, ensure the safety of the nation’s food supply, and enhance international trade,” stated a CSREES press release.

The preliminary testing device is based on a nanotechnology device known as a resonator created by Harold Craighead and his colleagues at Cornell University in conjunction with Richard Montagna at Innovative Biotechnologies International, Inc. “When prions bind to the

resonator’s silicon sensor, it changes the vibrational resonant frequency of the device,” according to CSREES. This sensor is able to detect prions in saline solution “at concentrations as low as two nanograms per millimeter, the smallest levels measured to date.” “At the moment we only test cows when they fall over, but that is a late stage of the disease,” Craighead noted. “It would be ideal to test cows a lot earlier. Resonators could be one path to doing this.” See *CSREES Press Release*, October 9, 2008; *Farm Talk*, October 28, 2008.



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