Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

President Obama Names New FDA Chief to Lead Reform Efforts

President Barack Obama (D) has reportedly tapped former New York City Health Commissioner Margaret Hamburg to lead the Food and Drug Administration (FDA) and Baltimore Health Commissioner Joshua Sharfstein to act as her deputy. A bioterrorism expert and physician, Hamburg previously served as an assistant health secretary in the Clinton administration and helped decrease the rate of drug-resistant tuberculosis during her tenure at the New York City Health Department.

Her selection has drawn praise from consumer watchdogs, food safety advocates and medical groups such as the American Public Health Association, which said both nominations reflect Obama's "commitment to protecting consumer safety." "You've got an organization that's demoralized and one that really wants to enhance its scientific integrity," an association spokesperson was quoted as saying. "[Hamburg's] all about integrity and science. . . . She can be tough when she needs to be, and she's going to need to be real tough in that job."

Obama also announced the creation of a Food Safety Working Group dedicated to upgrading food-safety laws. He has requested an additional $1 billion from Congress to bolster inspection programs and modernize FDA laboratories, faulting the Bush administration for leaving the agency "underfunded and understaffed." Obama noted that the number of foodborne illness outbreaks has increased to 350 per year, from 100 per year during the 1990s. *See MSNBC.com,* March 11, 2009; *The Washington Post,* March 15, 2009.

Government Moves Toward Regulating Food Advertising Aimed at Teens

In a move that has reportedly angered some industry representatives, the U.S. government has set up a working group to study how food is marketed to youth younger than age 18. Currently, food manufacturers are encouraged to abide by industry-imposed rules for food advertising to children younger than 12. The Interagency Working Group on Food Marketed to Children was announced last week with President Barack Obama's 2009 omnibus appropriations bill. The group will examine whether the government should set standards for determining which foods are healthy and appropriate to market to youth as old as 17.

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A Grocery Manufacturers Association spokesperson was quoted as saying, "This proposal is completely unnecessary. Taxpayer dollars and agency time could be made much better use of. Besides, the proposal—the way it is written—not only reinvents the wheel, it does so poorly with broad, misdirected language that goes far beyond marketing to children. Too far."

The working group, which is required to report its findings by July 2010, includes representatives of the Federal Trade Commission, Food and Drug Administration, Centers for Disease Control and Prevention, and Department of Agriculture. *See Advertising Age*, March 11, 2009; *Foodnavigator-usa.com*, March 13, 2009.

Food Health and Safety Issues Continue to Attract Congressional Attention

As members of the 111th Congress actively consider how to address food-safety issues and debate in committee whether splitting the Food and Drug Administration (FDA) in two would best reform federal oversight, new bills addressing food health and safety continue to be introduced. The most recent include:

- H.R. 1324 – Introduced March 5, 2009, by Representative Lynn Woolsey (D-Calif.), this bill would update national school nutrition standards for foods and beverages not included in school meals. The proposed legislation, with 101 co-sponsors, was referred to the House Committee on Education and Labor.
- H.R. 1332 – Introduced March 5, 2009, by Representative Jim Costa (D-Calif.), this measure, titled the "Safe Food Enforcement, Assessment, Standards, and Targeting Act of 2009" or "Safe FEAST Act of 2009," would amend the Federal Food, Drug, and Cosmetic Act by strengthening FDA's authority to inspect records during food-related emergencies, recall contaminated products, accredit food-testing laboratories, and regulate food imports, among other matters. Referred to the Committees on Energy and Commerce, and Agriculture.
- H.R. 1398 – Introduced March 9, 2009, by Representative Jim Matheson (D-Utah), this bill, titled the "Labeling Education and Nutrition Act of 2009" or the "LEAN Act of 2009," would require fast-food restaurants to conspicuously disclose calorie and other nutritional information in their facilities. A companion bill (S. 558) was introduced in the Senate. The House proposal has been referred to the House Committee on Energy and Commerce.
- S. 593 – Introduced March 12, 2009, by Senator Dianne Feinstein (D-Calif.), this measure, titled the "Ban Poisonous Additives Act of 2009," would prohibit the use of bisphenol A (BPA) in food and beverage containers. One-year waivers would be allowed for manufacturers that show they cannot remove the chemical from their products, but such products would have to display prominent warning labels and the manufacturers would be required to submit plans to remove the chemical. Referred to the Senate Committee on Health, Education, Labor, and Pensions.
- S. 619 – Introduced March 17, 2009, by Senator Edward Kennedy (D-Mass.), this bill and its companion (H.R. 1549), titled the "Preservation of Antibiotics for Medical Treatment Act of 2009," link the declining effectiveness of antibiotics in humans to their routine administration in feed to livestock and would limit their use in animal husbandry. The Senate bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions.

FDA Issues Guidance on Peanut-Derived Ingredients

The Food and Drug Administration (FDA) last week issued **guidance** to the food industry about the risk of *Salmonella* contamination posed by peanuts and peanut-derived products used as food ingredients. The guidance also recommended measures that food manufacturers can take to address that risk from their ingredient suppliers and for the products they themselves produce.

The guidance recommends that manufacturers obtain their peanut-derived ingredients only from suppliers whose production processes have been demonstrated to adequately reduce the presence of *Salmonella* or ensure that their own manufacturing processes would adequately reduce that presence.

Meanwhile, the *Associated Press* reported that the Peanut Corp. of America filed documents in bankruptcy court listing nearly $11.4 million in assets and debts of $4.8 million. Most of the assets will not be available to compensate consumers. Peanut Corp. filed for Chapter 7 bankruptcy in February 2009 amid growing fallout from a national *Salmonella* outbreak, which reportedly sickened more than 650 people and purportedly caused nine deaths. The outbreak led to the recall of more than 2,670 peanut products, according to FDA.

In a related development, the House Energy and Commerce Subcommittee on Oversight and Investigations has held a **hearing** and released new documents from a 2008 food safety audit conducted at Peanut Corp. facilities; the auditor hired by Peanut Corp. failed to find any sanitation issues and issued a "superior" quality certification for the company's Texas facility. Subcommittee Chair, Representative Bart Stupak (D-Mich.) was quoted as saying, "There is an obvious and inherent conflict of interest when an auditor works for the same supplier it is evaluating." *See Associated Press*, March 7, 2009; *Yahoo News*, March 19, 2009.

FDA Allows Soy-Based Foods, Drinks to Be Fortified with Vitamin D

The Food and Drug Administration (FDA) has **amended** its food-additive regulations to allow soy-based foods and drinks to be fortified with vitamin D. The amendment, which was prepared in response to a petition filed by Dean Foods, allows for the addition of crystalline vitamin D2—and not the resin from the vitamin—to soy beverages, soy beverage products, soy-based butter substitute spreads, soy-based cheese substitutes, and soy-based cheese substitute products.

The FDA concluded, "there is a reasonable certainty that no harm will result from the use of vitamin D2 as a nutrient supplement" in the soy products in question. *See Federal Register* and *Foodnavigator-usa.com*, March 16, 2009.

FDA Confirms Effective Date of Color-Additive Labeling Rule

On January 5, 2009, the Food and Drug Administration (FDA) issued a rule ordering food and drink manufacturers that color their products with cochineal extract and carmine to declare the presence of those ingredients on labels. Further details about the rule appear in issue 287 of this Update. Last week, FDA **confirmed** the effective date for full compliance with the rule as January 5, 2011.

FDA revised its requirements for these color additives in response to reports of severe allergic reactions to food containing cochineal extract and food and cosmetics containing carmine. The colorings, derived from the dried bodies of beetles, are used in various products such as ice creams, yogurts, fruit drinks, alcoholic beverages, and candy products. They make the products pink, red or purple.

The coloring agents were previously listed under "artificial color" or "artificial color added" on ingredient labels. Beginning in 2011, FDA will require foods containing cochineal extract or carmine to list the ingredients by their common or usual names, "cochineal extract" or "carmine." *See Federal Register*, March 11, 2009.

OSHA Withdraws Rulemaking Action on Diacetyl

The Occupational Safety and Health Administration (OSHA) has **withdrawn** its Advance Notice of Proposed Rulemaking (ANPRM) on Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl so that a Small Business Advocacy Review Panel can promptly convene to study the effect such a rule would have on small businesses.

According to OSHA's notice, materials submitted before the ANPRM's withdrawal as well as any other information submitted directly to OSHA after the withdrawal, will be placed in the public rulemaking docket and receive equal consideration as a part of the rulemaking record. Several other opportunities for stakeholders to provide information and comment during the rulemaking process will also be available.

Diacetyl is a chemical used in butter flavoring for popcorn and confectionary products that has been linked to bronchiolitis obliterans, an incurable lung disease purportedly diagnosed in a number of workers at U.S. popcorn-manufacturing plants.

Earlier this year, OSHA sought information and comment on issues related to occupational exposure to diacetyl and food flavorings containing diacetyl, including current employee exposures; the relationship between exposure and the development of adverse health effects; methods to evaluate, monitor and control exposure; and related topics. The agency intends to conduct expert peer reviews and continue site visits at workplaces where exposure to diacetyl and food flavorings containing the chemical may occur to collect information on processes and controls that prevent or minimize employee exposure. *See Federal Register,* March 17, 2009.

HHS Announces Meeting to Discuss Draft Positions for Codex Food Labeling Committee

The U.S. Department of Health and Human Services, Department of Agriculture, and Food and Drug Administration have **announced** an April 7, 2009, public meeting to discuss agenda items and draft positions for the Codex Alimentarius Commission's 37th Session of the Codex Committee on Food Labeling (CCFL) slated for May 4-8, 2009, in Calgary, Canada.

The CCFL "drafts provisions on labeling applicable to all foods; considers, amends if necessary, and endorses specific provisions on labeling of draft standards, codes

of practice, and guidelines prepared by other Codex committees; studies specific labeling problems assigned to it by the commission; and studies problems associated with the advertisements of food with particular reference to claims and misleading descriptions."

In particular, the U.S. agencies are seeking public input about (i) draft codex standards for food labeling; (ii) the implementation of the World Health Organization's Global Strategy on Diet, Physical Activity and Health; (iii) guidelines for the production, processing, labeling, and marketing of organic foods; and (iv) the labeling of food derived from genetically modified organisms. *See Federal Register,* March 13, 2009.

LITIGATION

Jury Awards $7.55 Million in Diacetyl Exposure Case

The day after Ronald Kuiper died, a jury reportedly awarded the former popcorn factory worker and his wife $7.55 million in litigation against one of the companies that supplied the flavorings with diacetyl used by his employer. *Kuiper v. Givaudan Flavors Corp.*, No. 06-4009 (U.S. Dist. Ct., N.D. Iowa, verdict rendered March 12, 2009). Kuiper apparently alleged that he contracted broncholitis obliterans from his workplace exposure to the butter-flavoring chemical, and he reportedly died from complications of the disease.

According to a news source, the jury deliberated for six days following the month-long trial and declined to award punitive damages. The Kuipers, who previously settled claims against other flavorings manufacturers for undisclosed amounts, alleged design defect, failure to warn and failure to test. Givaudan reportedly argued, among other matters, that Kuiper's claims were barred by a two-year statute of limitations. *See Product Liability Law 360* and *Mealey's Emerging Toxic Torts*, March 13, 2009.

Class Action Filed in Florida over Yogurt Claims

A Florida resident has filed a putative class action lawsuit against General Mills, Inc., in federal court, alleging that its claims about Yo-Plus® yogurt violate the state's deceptive and unfair trade practices law and constitute a breach of express warranty. *Fitzpatrick v. General Mills, Inc.*, No. 09-60412 (U.S. Dist. Ct., S.D. Fla., filed March 17, 2009). Seeking to certify a class of Florida Yo-Plus® purchasers, the plaintiff alleges that the company cannot substantiate its claims that the yogurt's trademarked "unique blend of live probiotic cultures and natural fiber," referred to in marketing and on product labels as Optibalance™, "helps keep your digestive system right on track."

According to the complaint, the unaware consumer "is led to believe that General Mills' blend of 'probiotic' bacterial strains and small amounts of fiber will, in fact, improve the digestive systems of healthy people. In fact, people's bodies already maintain the proper balance of intestinal bacteria." The plaintiff refers to action taken in December 2008 by the Better Business Bureau's National Advertising

Division (NAD) recommending that General Mills modify or discontinue some of its advertising claims for Yo-Plus®. NAD purportedly found that the company's claims about digestive health were not substantiated and that "no testing of the product was conducted." Additional information about NAD's action appear in issue 285 of this Update.

The plaintiff seeks damages in excess of $5 million, alleging that consumers, misled by the company's product claims, paid premium prices for the yogurt, which has purportedly emerged as "one of the top sellers in the product category." The plaintiff also seeks punitive damages and corrective advertising.

Mercury Warnings on Tuna Under Prop. 65 Not Required

A California appeals court has determined that canned tuna sold in the state does not need a mercury warning label under Proposition 65 (Prop. 65) for reproductive toxicity because the mercury is naturally occurring and thus falls within a Prop. 65 exemption. *People ex rel. Brown v. Tri-Union Seafoods, LLC*, No. A116792 (Cal. Ct. App., 1st App. Div., Div. 4, decided March 11, 2009). A trial court ruled in 2006 that the labels were not required because (i) federal law preempts state action on methyl-mercury in fish; (ii) the trace levels of mercury in canned tuna were too insignificant to require warnings; and (iii) the mercury is naturally occurring. Further information about that ruling appears in issue 170 of this Update.

The appeals court specifically considered and based its ruling on the last basis for decision only, finding that substantial evidence supported the trial court's determination as to the source of mercury contamination in fish. According to the defendants' experts, deemed more credible by the trial court, volcanic activity contributes significantly to the presence of mercury in the environment, and testing has shown that the largest source of mercury in fish is likely coming from deep ocean floor vents.

Because most of its opinion addressed the "battle of the experts" that occurred at trial and involved important public health issues involving a chemical known to cause serious neurotoxic effects in fetuses, the court lamented "whether the truth about complex. threshold scientific issues encompassed within Proposition 65—such as whether methylmercury in fish is naturally occurring—is best derived by application of the substantial evidence rule to the testimony and opinions of dueling experts serving under partisan commitments."

By expressly limiting the basis for its decision, the court suggested that other "potential scenarios" could lead to a viable renewed Prop. 65 claim related to canned tuna. "For example, the Office of Environmental Health Hazard Assessment (OEHHA), the lead agency designated by the Governor to implement the provisions of Proposition 65, could amend the regulations to *except* the presence of methylmercury in canned tuna from the naturally occurring rules. Similarly, the determination of whether methylmercury in tuna is naturally occurring could be lodged with the OEHHA and its scientific advisors, rather than left to dueling expert witnesses in a trial court setting." The court also opined that scientific research, which is not static, "can easily become dated and outmoded as science develops and new research explains the phenomena in question more thoroughly and completely."

Meanwhile, a California TV personality reportedly conducted her own "unscientific" mercury test by eating twenty, 5-ounce cans of albacore tuna over 20 days. At the outset of the experiment, her blood mercury level measured 4 micrograms per liter. Ten days later, it measured 8.9 micrograms per liter; and by day 20, it measured 17.2 micrograms per liter. Her physician reportedly told her to stop the experiment, noting that patients with high blood mercury levels "get body aches, joint pain, muscle aches, head ache, trouble sleeping, troubles with thinking and memory, stomach upset." The reporter did not apparently experience these effects. Dr. Jane Hightower also cautioned that a pregnant woman with levels above 14 or 15 "stands a chance of knocking IQ points off her child's brain." *See cbs5.com*, March 6, 2009.

Court Finds No Compensable "Taking" from Egg Producer

The Federal Circuit Court of Appeals has determined that a U.S. Department of Agriculture (USDA) *Salmonella* rule, which interfered with an egg producer's sales for about two years, was not a compensable taking under the Fifth Amendment. ***Rose Acre Farms, Inc. v. U.S.*, No. 07-5169 (Fed. Cir., decided March 12, 2009)**. The case involved emergency regulations adopted in 1990 that restricted the sale of eggs from farms identified as infected with a type of *Salmonella* bacteria. The regulations diverted the eggs from three of Rose Acre's farms from the table to other uses, such as in cake mixes, for 25 months and thus purportedly reduced the company's profits. The company brought several lawsuits against the government, and the various issues raised were appealed several times.

This appeal involved the "takings" issue only and was before the Federal Circuit for the second time. Under the Fifth Amendment, the government must compensate private property owners when their property is "taken" for the public good. The district court twice ruled that Rose Acre was entitled to damages in excess of $8 million. The appeals court determined that the lower court did not rely on the correct economic analysis when it decided that the USDA regulations, by diminishing the company's returns 219 percent, had a significant economic impact on Rose Acre, because the lower court measured lost profits rather than the much smaller diminution in the eggs' value.

The court concluded that its factual findings "require a holding of no compensable taking. First, Rose Acre's economic impact is not severe. Second, although the reasonable investment-backed expectations favor Rose Acre, they are not strong enough to be dispositive. Third, the character of the government's regulations strongly favors a non-taking." As to the latter finding, the court explained that food safety "is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions."

Further noting that the court's objective under the Fifth Amendment is to ascertain whether "it is unfair to force the property owner to bear the cost of the regulatory action," the court found that, given an approximately 10 percent lower market value for Rose Acre's eggs, the regulations properly placed the burden on the company "to bear the costs associated with ensuring that their eggs did not injure the public."

Misbranded Food Conviction Overturned

Judge Richard Posner, writing for a Seventh Circuit Court of Appeals panel, has determined that the government failed to prove that the defendant misbranded food by changing the "best when purchased by" date on bottled salad dressing that he then resold. *U.S. v. Farinella*, Nos. 08-1839, 08-1860 (7th Cir., decided March 12, 2009). A jury convicted the defendant of wire fraud and of introducing into interstate commerce a misbranded food with intent to defraud or mislead, and he was sentenced to five years of probation, including six months of home confinement, and to pay a $75,000 fine and forfeit his gains in excess of $400,000.

According to the court, the defendant bought 1.6 million bottles of Henri's Salad Dressing in May 2003, and they were labeled with "best when purchased by" dates ranging from January to June 2003. The defendant resold the dressing in discount stores, but pasted over the date on each bottle with a new "best when purchased by" date of May or July 2004. The government called these "the dates on which 'the dressing would expire.'" Judge Posner stated, "That is itself false and misleading, and is part of a pattern of improper argumentation in this litigation that does no credit to the Justice Department."

Contending that "[s]alad dressing . . . or at least the type of salad dressing represented by Henri's, is what is called 'shelf stable,'" Judge Posner noted. "It has no expiration date." He also observed, "There is no suggestion that selling salad dressing after the 'best when purchased by' date endangers human health; so far as appears, Henri's Salad Dressing is edible a decade or more after it is manufactured. There is no evidence that the taste of any of the 1.6 million bottles of Henri's Salad Dressing sold by the defendant had deteriorated by the time of trial—four years after the latest original 'best when purchased by' date."

The court observed that no federal agency "defines 'best when purchased by' or forbids a wholesaler (as here) or retailer to change the date," and further noted that nothing in the record showed how consumers interpret the phrase. "Without evidence of that understanding, whether the defendant's redating was misleading cannot be determined." According to the court, "The government wants us to believe that [the phrase] is a synonym for 'expires on' but presented no evidence for this interpretation." The court directed an acquittal on all counts and declined to address the government's sentencing issues "beyond expressing our surprise that the government would complain about the leniency of the sentence for a crime it had failed to prove."

Court Dismisses Complaint About Raw Almond Treatment

A federal court in the District of Columbia has dismissed a lawsuit filed by California almond growers, handlers and grower-handlers against the U.S. Department of Agriculture (USDA) challenging an agency regulation that requires handlers to treat raw almonds grown and sold in the United States to reduce the risk of *Salmonella* contamination. *Koretoff v. Vilsack*, No. 08-1558 (U.S. Dist. Ct., D.D.C., decided March 9, 2009). Without addressing the merits of the complaint, the court granted the USDA's motion to dismiss, finding that the plaintiffs failed to exhaust their administra-

tive remedies, which would have required petitioning the USDA secretary before bringing their action in court, as mandated by statute.

Since September 2007, all domestic almonds intended for sale in the United States must be pasteurized by either proplylene-oxide fumigation or steam heat. Growers and handlers reportedly complain that unpasteurized raw almonds demand higher prices, up to 40 percent more, and that foreign suppliers, who are not subject to the rule have a market advantage. A spokesperson for the Cornucopia Institute, an organization that supports organic farming and organized the litigation, was quoted as saying, "We are not abandoning the fight to return to grocer's shelves an American-grown, highly nutritional raw food that has been eaten with confidence and enjoyment for decades. We believe the fundamental points of our lawsuit are valid and need to be tested." *See Foodnavigator-USA.com*, March 13, 2009.

German Beekeeper Seeks Compensation for GM-Contaminated Honey

German courts in Bavaria have reportedly been considering issues raised in a lawsuit filed by an amateur beekeeper who was forced to destroy his honey after it was found to be contaminated with pollen from a nearby field trial of genetically modified (GM) corn. Beekeeper and handyman Karl Heinz Bablok, aware that his hives were near GM cornfields, apparently had samples of honey tested and found that 7 percent of the pollen was from the GM crops. An Augsburg court ordered him to stop selling or giving away his honey, so he sued the Bavarian State Research Center for Agriculture to recover his costs and lost sales of about US$12,900. Now before a third court, the case reportedly raises significant GM-related issues: if Bablok wins, the GM corn would be discredited; if the court decides that Bablok's honey is not subject to licensing regulations under the European Union food law, biotech companies would, according to a news source, be vindicated. *See Spiegel Online*, March 6, 2009.

OTHER DEVELOPMENTS

Union of Concerned Scientists Criticizes FDA Approval of GE Goats

The Union of Concerned Scientists recently criticized the Food and Drug Administration (FDA) for failing to solicit public and scientific input before it approved "the first commercialization both of a drug from a genetically engineered [GE] animal and of the animal itself." According to the Union, FDA has allowed a Massachusetts company to raise a herd of GE goats capable of producing milk that contains a human protein used to prevent blood clots.

The consumer advocacy group has accused the agency of violating its promise to open a public comment period and to gather feedback from an FDA advisory committee before permitting the company to market the goats. "Under the FDA's process, there were no discussions of the safety or ethical implications of the approval, nor were regulations developed to keep the goats and their milk from contaminating the food supply," opined the Union in its March 2009 *Food & Environ-*

ment Electronic Digest. "The FDA is using drug laws as the basis to regulate all GE animals, even though most GE animals do not produce drugs, and even though the drug laws affirmatively discourage public participation, transparency, and appeal of approvals."

Sunoco Initiates Action to Stop Use of BPA in Products for Children

In a letter to investors, a Sunoco spokesperson reportedly stated that the gas and chemical maker will not sell bisphenol A (BPA) to companies for use in food and beverage containers for children younger than age 3. Referring to the company's plan to require customers to guarantee that BPA will not be used in this way, Sunoco's head of public relations, Thomas Golembeski, was quoted as saying, "We will no longer sell BPA to customers who cannot make this promise." Environmental advocates reportedly called the initiative a "sea change" for a company that once purportedly defended the chemical and appears now to be acknowledging concern about BPA's safety. *See Journal Sentinel*, March 12, 2009.

MEDIA COVERAGE

New York Times Columnist Addresses Purported Link Between Pork Production and MRSA

New York Times columnist Nicholas Kristof recently published two op-ed pieces claiming that high-density pig farms have contributed to an increase in methicilliin-resistant *Staphylococcus aureus* (MRSA) in rural communities. A March 12, 2009, article titled "Our Pigs, Our Food, Our Health" examines the case of a family physician in northwestern Indiana, where patients reportedly began contracting MRSA at unusually high rates. Although the doctor suspected that the town's hog farms were linked to the outbreak, he died of a heart attack or aneurysm—possibly the result of his own exposure to MRSA—before concluding his investigation.

Yet, Kristof notes that other researchers have documented cases of people developing or carrying MRSA after working on pig farms. He points to a University of Iowa study that apparently found MRSA in 45 percent of pig farmers and 49 percent of pigs tested for the disease. "The larger question is whether we as a nation have moved to a model of agriculture that produces cheap bacon but risks the health of us all," opines Kristof, attributing the uptick in MRSA infections to "the insane overuse" of antibiotics in livestock feed.

A follow-up article, "Pathogens in Our Pork," further lambastes agribusiness companies for adding antibiotics to animal feed despite the known risk of creating "superbugs" resistant to medication. "Public health experts worry that pigs could pass on the infection by direct contact with their handlers, through their wastes leaking into ground water . . . , or through their meat," states the March 15 commentary, which urges legislators to "ban the nontherapeutic use of antibiotics in agriculture."

Citing several studies that identified MRSA in retail pork sold in the United States, Kristof suggests that agricultural interests have thus far stymied efforts to reform the industrial farming system. "It's unconscionable," he concludes, adding that, "for the sake of faster-growing hogs, we're empowering microbes that endanger our food supply and threaten our lives."

Meanwhile, the Pork Producers Council (PPC) has backed the use of livestock antibiotics that undergo a "very rigorous approval process" by the Food and Drug Administration. According to PPC Director of Science and Technology Jennifer Greiner, the FDA approves agricultural antibiotics for therapeutic uses pertaining to treatment, prevention and bacterial control, in addition to growth promotion.

Greiner also notes that countries with bans on sub-therapeutic antibiotics have seen a drastic increase in their use of therapeutic treatments. "We truly believe 'nontherapeutic' is just a bad term," states Greiner in a March 16 press release responding to Kristof's claims. "Any time you use an antibiotic, whether it be a lower dose or a higher dose, that antibiotic is going to kill some kind of bacteria. All antibiotics have some kind of therapeutic value." *See Scripps Howard Foundation Wire,* March 16, 2009.

SCIENTIFIC/TECHNICAL ITEMS

Concerns Raised About PET in Plastic Containers

Mineral-water bottles made with PET, or polyethylene terephthalate, a chemical used in many food and beverage containers, particularly those marked with the number 1 inside a triangle, have been found to leach an unknown estrogen-mimicking chemical. **Martin Wagner & Jörg Oehlmann, "Endocrine Disruptors in Bottled Mineral Water: Total Estrogenic Burden and Migration from Plastic Bottles," *Environmental Science & Pollution Research*, March 10, 2009**. Research from the Johann Wolfgang Goethe University in Frankfurt, Germany, is apparently the first to find consistent contamination from PET bottles, once thought to be a better alternative to plastic bottles containing bisphenol A. The researchers have been unable to identify the substance causing the hormonal activity in exposed snails, but PET evidently contains minute amounts of antimony, which does have estrogenic effects. Mollusks cultured in PET bottles apparently exhibited significantly increased reproductive output. A news source indicates that the study authors are concerned about their findings because the plastic is so widely used with foods and beverages. *See Globe and Mail*, March 12, 2009.

Study Finds Houseflies Near Poultry Farms Spread Drug-Resistant Bacteria

A Johns Hopkins Bloomberg School of Public Health study has reportedly found evidence that houseflies living near poultry operations could contribute to the spread of drug-resistant bacteria among humans. Researchers collected flies and poultry-litter samples from farming operations in the coastal regions of Maryland, Delaware and Virginia, which has "one of the highest densities of broiler chickens per acre in the United States."

Slated for publication in the April 2009 issue of *Science and the Total Environment,* the results showed similar strains of antibiotic-resistant *Enterococci* and *Staphylococci* in both the flies and the litter, leading the study authors to speculate that "flies in intensive production areas could efficiently spread resistance organisms over large distances." "The findings demonstrate another potential link between industrial food animal production and exposures to antibiotic resistant bacteria," states a March 16, 2009, press release issued by the school's Center for a Livable Future.

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FOOD & BEVERAGE LITIGATION UPDATE

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.