

## FOOD & BEVERAGE LITIGATION UPDATE

### CONTENTS

#### Legislation, Regulations and Standards

Science and Technology Advisors Assess Federal Nanotechnology Initiative . . . . .	1
EPA Publishes Action Plan to Address BPA Concerns . . . . .	1
Industry Comments Challenge EPA's Use of Aspartame in Methanol Risk Assessment . . . . .	2
FDA Seeks Comments on Proposed Rule Regarding Bottled Water Standards . . . . .	3

#### Litigation

Federal Appeals Court Finds California Downer Livestock Law Not Preempted . . . . .	4
Federal Court Finds CSPI Lacks Standing to Pursue Consumer Fraud Claims . . . . .	4
Pollution Lawsuit Against Poultry Interests Sparks Legislative Initiative in Maryland . . . . .	5
Meat Processor Sues Spice Suppliers in <i>Salmonella</i> Contamination Outbreak . . . . .	6
Consumer Fraud Action Filed Against Snack Maker over <i>Salmonella</i> Outbreak . . . . .	6
Federal Court Dismisses Melamine-Tainted Milk Litigation Filed by Chinese Citizens . . . . .	7
Wholesaler Sues Chocolate Companies Alleging Price Fixing . . . . .	7

#### Other Developments

Nestle Criticizes Front-of-Package Nutrition Labeling at IOM Meeting . . . . .	8
Corporate Watchdog Launches Campaign to "Retire Ronald McDonald" . . . . .	8
Industry Concerns About Food Fraud Come to Light . . . . .	9
CSPI Calls on FDA, State Attorneys General to Reduce "Slack Fill" in Food Packaging . . . . .	10
Jamie Oliver Debuts New Reality Series in America . . . . .	10

#### Media Coverage

Laura Beil, "Is Your Breakfast Giving You Cancer?" <i>Prevention</i> , March 29, 2010 . . . . .	11
Moby Discusses New Book Critical of Factory Farming . . . . .	11

#### Scientific/Technical Items

Study Compares Overeating to Drug Addiction . . . . .	12
---	----



## LEGISLATION, REGULATIONS AND STANDARDS

### Science and Technology Advisors Assess Federal Nanotechnology Initiative

The President's Council of Advisors on Science and Technology has released a [report](#) to the president and Congress assessing the National Nanotechnology Initiative (NNI), "which coordinates Federal research and development activities involving the manipulation of matter at scales smaller than 100 billionths of [a] meter." The third in a decade-long series of assessments, the report lauds the NNI for making the United States a nanotechnology leader but notes that aggressive competitors "such as China, South Korea, and the European Union," pose a threat to that leadership position.

The report makes a number of recommendations, including increased investment in product commercialization and technology transfer and a strengthened commitment to "explore in more orderly fashion environmental, health, and safety issues." Noting the role that nanotechnology plays in consumer products, including foods, the report also envisions how it can be used in information technology, health care, the development of high-strength materials, energy and the environment, and national security.

In a related development, the U.K. government has reportedly responded to a House of Lords report calling on industry to disclose details about its nanotechnology research by warning that mandatory reporting requirements could deter companies from doing that research in Britain and trigger a research and development exodus. The government also reportedly observed, "It seems doubtful whether existing legal powers could be used to compel U.K. food companies to provide information about their research activities or their plans for future product launches. Introducing a mandatory reporting system would therefore require new legislation." See *FoodProductionDaily.com*, March 31, 2010.

### EPA Publishes Action Plan to Address BPA Concerns

The Environmental Protection Agency (EPA) recently published an [action plan](#) to address concerns over bisphenol A (BPA), which has purportedly "caused reproductive and developmental effects in animal studies and may also affect the endocrine system." Intended to strengthen the agency's chemical management program, the plan focuses on the plasticizer's environmental impact and proposes (i) adding

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

**Mark Anstoetter**  
816-474-6550  
manstoetter@shb.com



or

**Madeleine McDonough**  
816-474-6550  
202-783-8400  
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

BPA to the chemical concern list; (ii) gathering information on BPA concentrations in surface, ground and drinking water; (iii) requiring manufacturers to provide EPA with test data related to long-term effects on growth, reproduction and development in aquatic organisms and wildlife; (iv) using EPA's Design for the Environment program to reduce unnecessary exposures and find acceptable substitutes; and (v) continuing to evaluate "the potential disproportionate impact on children and other sub-populations through exposure from non-food packaging uses." In addition, EPA has pledged to work with the Food and Drug Administration (FDA) and other federal entities to cover BPA exposure cases "that fall outside FDA's reach but within EPA's regulatory authority." See *EPA Press Release, Law360* and *MSNBC.com*, March 29, 2010; *Scientific American*, April 7, 2010.

Meanwhile, FDA has [announced](#) the availability of five documents related to its ongoing assessment of BPA. According to FDA, "These documents do not represent an agency opinion or position on BPA," but "provide perspectives and opinions that are being considered by FDA as it continues its safety assessment of BPA." The agency has specifically solicited public comments on four documents prepared by its Center for Food Safety and Applied Nutrition (CFSAN), which has reviewed information related to (i) low-dose studies; (ii) BPA exposure from the consumption of infant formula, toddler food and adult (canned) food; and (iii) BPA biomonitoring studies. FDA will accept public comments until June 4, 2010. See *Federal Register*, April 5, 2010.

In a related development, the European Food Safety Authority (EFSA) [convened](#) a March 26, 2010, international summit in Parma, Italy, where the regulator outlined its preliminary draft opinion on BPA and received input from 25 scientific experts. The consultation apparently focused on "the design of scientific studies on BPA, toxicological aspects and the strengths and weaknesses of certain individual studies." EFSA later discussed new risk assessments and studies with representatives from FDA, Health Canada, Food Standards Australia New Zealand, the Food Safety Commission of Japan and the World Health Organization during a March 29 teleconference. EFSA's panel on food contact materials reportedly plans to finalize two independent BPA assessments in late May 2010. See *EFSA Press Release*, March 31, 2010.

### Industry Comments Challenge EPA's Use of Aspartame in Methanol Risk Assessment

The Environmental Protection Agency (EPA) published its [toxicological review](#) of methanol in early 2010, and [comments](#) recently filed by food industry interests have criticized the agency for using "surrogate" chemicals, such as formaldehyde and aspartame, an artificial sweetener, to support listing methanol as a likely human carcinogen. They also challenge the agency's reliance on controversial studies suggesting a link between aspartame and increased incidence of lymphoma and leukemia.

EPA apparently used data involving the surrogate chemicals because they are related to methanol as metabolites. According to the Calorie Control Council, which represents companies that make low-calorie and reduced-fat foods, EPA's review "reads like an aspartame report and not a methanol report." Because aspartame's

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

safety has been studied for many years and the chemical additive has been approved for general use in more than 100 countries, the council argues that it should not be included in the methanol report.

The Juice Products Association, noting that “food is the primary source of human methanol exposure,” called on EPA to “state unequivocally that no health hazards have been associated with methanol in doses in the dietary range. Consumption of fruits, vegetables and fruit juices—natural dietary sources of methanol should not be called into question by the absence of a clear statement on the issue.” While EPA says that “normal dietary exposure to aspartame . . . is unlikely to significantly increase blood methanol or formate levels,” the agency expresses concern about the lack of data on such levels in “sensitive populations,” such as those with a limited ability to break down alcohols or marginal folate tissue levels.

The council and Ajinomoto Corporate Services LLC, a leading aspartame manufacturer, both criticized the agency’s use of two European Ramazzini Foundation (ERF) aspartame rat feeding studies in the methanol review, claiming these studies “are inconsistent with the extensive database confirming aspartame’s safety” and “are without any scientific merit.” According to a news source, the ERF aspartame studies have been questioned by U.S. and European authorities, and the Food and Drug Administration concluded that it could not use the studies because ERF refused to share its slides with the agency. See *InsideEPA.com*, April 7, 2010.

### FDA Seeks Comments on Proposed Rule Regarding Bottled Water Standards

The Food and Drug Administration (FDA) has [reopened](#) the comment period for a proposed rule published August 4, 1993, that would amend the quality standard for bottled water. FDA is seeking further comment on finalizing the allowable level for the chemical di(2-ethylhexyl)phthalate (DEHP) in the bottled water quality standard.

In a final rule published March 26, 1996, FDA deferred final action on DEHP’s proposed allowable level of 0.006 milligrams/liter (mg/L) in response to a comment which “maintained that finalizing the proposed allowable level for DEHP would result in a limit on the level of this chemical in bottled water that conflicts with this chemical’s permitted use under the existing food additive regulation for closures with sealing gaskets, and that taking such action would effectively ban the use of this plasticizer.” The comment further stated that “gaskets containing DEHP are permitted for use in packaging food and bottled water under relevant European national regulations.”

FDA stated in the 1996 final rule that it “was not aware of the potential conflict between the proposed allowable level for DEHP and the existing prior sanction” at the time it published the proposal. The agency is now considering finalizing DEHP’s allowable level of 0.006 mg/L. Comments are due by June 1, 2010. See *Federal Register*, April 1, 2010.

**FOOD & BEVERAGE  
LITIGATION UPDATE**

ISSUE 344 | APRIL 9, 2010

**LITIGATION****Federal Appeals Court Finds California Downer Livestock Law Not Preempted**

The Ninth Circuit Court of Appeals has lifted a preliminary injunction that prevented California from enforcing a law adopted after The Humane Society's video of the mistreatment of downer cattle at a slaughterhouse became public and led to a massive beef recall in 2008. [\*Nat'l Meat Ass'n v. Brown\*, 09-15483 \(9th Cir., decided March 31, 2010\)](#). The National Meat Association challenged California's law, which prohibits slaughterhouses from receiving, processing or selling nonambulatory animals, as preempted by the Federal Meat Inspection Act (FMIA), and the district court agreed. The state law also prohibits moving a nonambulatory animal without a sling or other sled-like or wheeled conveyance.

According to the Ninth Circuit, the federal law, which contains an express preemption provision, prescribes what is to be done with nonambulatory animals to be slaughtered and sold for human consumption; it does not limit states "in their ability to regulate what types of meat may be sold for human consumption in the first place." The district court opined that while states may ban the slaughter of certain species, "once a state allows a species to be slaughtered, it cannot impose further restrictions." The Ninth Circuit characterized this argument as "hogwash," noting that federal law simply regulates the meat inspection process, and "states are free to decide which animals may be turned into meat." The court observed, "Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states, and nothing in the FMIA requires states to make them on a species-wide basis or not at all."

As to the state-law provision prohibiting dragging or pushing downer animals, the court suggested that the National Meat Association "is likely to succeed on its preemption claim," although "it hasn't shown a likelihood of irreparable injury or that the balance of the equities and the public interest tip in its favor for this provision." The court vacated the preliminary injunction, but said its ruling did not preclude the entry of a preliminary injunction as to the state law's humane handling provision "after appropriate findings are made." The court also indicated that other legal theories might support the entry of a preliminary injunction as to the entirety of the California law. Issues that were not addressed by either court include whether the state law violates the dormant commerce clause or is unconstitutionally vague.

**Federal Court Finds CSPI Lacks Standing to Pursue Consumer Fraud Claims**

A federal court in California has dismissed a lawsuit that the Center for Science in the Public Interest (CSPI) filed against a company which claimed its multivitamin supplements supported prostate health or reduced the risk of prostate cancer. *CSPI v. Bayer Corp.*, No. C09-05379 (U.S. Dist. Ct., N.D. Cal., decided March 25, 2010). The court determined that CSPI could not bring claims under California's Unfair Competition Law (UCL) or its Consumers Legal Remedies Act (CLRA) in a representational capacity on behalf of consumers. The court also found that the organization lacked standing to sue on its own behalf.

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

According to CSPI's complaint, the company's conduct interfered with its mission to "provide useful, objective, and safe information to the public." The court found that these allegations of injury were insufficient to demonstrate cognizable injury for the organization to sue on its own behalf under the UCL, which requires an action to be brought by a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition," or under the CLRA, which grants standing to "plaintiffs who are consumers of services for personal, family, or household purposes." Because the court could not rule out the possibility that CSPI could allege facts demonstrating that "it in fact suffered injury to its institutional interests under the UCL," it granted defendant's motion to dismiss the UCL claim with leave for CSPI to amend its complaint, while dismissing the CLRA claim with prejudice.

### Pollution Lawsuit Against Poultry Interests Sparks Legislative Initiative in Maryland

Acting on behalf of environmental interest groups, a University of Maryland School of Law student clinic has filed a lawsuit against a chicken farmer and the company that owns and processes the farm's chickens, alleging that the farm's poultry waste is being discharged into and polluting navigable waters of the United States in violation of the Clean Water Act. *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, No. 10-cv-00487 (U.S. Dist. Ct., D. Md., filed March 1, 2010). The plaintiffs purportedly tested downstream waters and found high levels of fecal *coliform* and *E. coli* bacteria, as well as nitrogen, phosphorus and ammonia. They allege that the water carried from the farm eventually empties into the Chesapeake Bay.

In response to the lawsuit, the Maryland Legislature reportedly approved a measure that requires the clinic to disclose its clients and budgets from the preceding two years. An early version of the bill would have penalized the university by pulling \$250,000 from its budget if the information is not forthcoming. State legislators contend that the clinic should not be able to use taxpayer dollars to bring environmental lawsuits against small farmers. State Senator J. Lowell Stoltzfus (R) was quoted as saying, "Small family farms on the lower Eastern Shore have survived only because of the poultry industry. If we have this harassment in the courts, they're going to go away."

According to a news source, the American Bar Association's (ABA's) president released a statement defending the clinic, claiming that the information demanded is confidential because law clinics are "bound by the same ethical constraints" as law firms. ABA President Carolyn Lamm reportedly said, "The proposed legislation is such an intrusion on the attorney-client relationship because of the information that is required to be revealed that it is not tolerable." Apparently, some 20 percent of law schools had an environmental law clinic in 2008, and a number of them have also faced legislative ire when taking on controversial cases.

The associate law professor who heads the Maryland clinic reportedly said, "I don't think that having an interest in clean air, clean water, safe neighborhoods, a healthy and productive Chesapeake Bay, is a special interest, or somehow at odds with the interest of the states. If the Chesapeake Bay continues to decline . . . then that's going to affect additional fisheries; it's going to affect recreation. Those are economic interests. Should the state be paying for that? Absolutely. We're not doing

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

anything other than trying to make sure that the laws that Congress and our state legislatures passed are actually implemented." She also pointed out that agribusiness giants, and not lawsuits, are forcing small farmers out of business, noting that the lawsuit also named a major chicken processor as a defendant, alleging it should be held responsible for the waste produced by its suppliers.

Maryland's agriculture secretary reportedly issued a statement indicating that the 80,000-bird farm sued by the clinic has gone above and beyond its legal responsibilities, having moved its sludge to a covered location away from the drainage ditch that leads to the bay. He apparently said, "The family finds itself defending against a lawsuit and negative public opinion generated by the waterkeeper's accusations. By suing the Hudsons, the waterkeepers are threatening thousands of small farmers, who are not much different than most working families across Maryland that are trying to make ends meet." See *The BLT: The Blog of Legal Times*, April 1, 2010; *The New York Times*, April 3, 2010; *Greenwire*, April 8, 2010.

### Meat Processor Sues Spice Suppliers in *Salmonella* Contamination Outbreak

A meat manufacturer that recalled more than 1 million pounds of meat products linked to a *Salmonella* outbreak that purportedly sickened more than 250 consumers in 44 states has reportedly sued the companies that supplied the red and black pepper allegedly identified as the source of the contamination. *Daniele Int'l, Inc. v. Wholesome Spice & Seasonings, Inc.*, No. 10-cv-155 (U.S. Dist. Ct., D.R.I., filed March 30, 2010). Seeking compensatory, punitive and exemplary damages, the plaintiff apparently alleges that it recalled more than 1.2 million pounds of meat, including salami, prosciutto and pancetta, refunded more than \$1.5 million to customers, incurred transportation and shipping costs, and lost customers and future profits.

The company reportedly purchased more than 50,000 pounds of pepper from one defendant and more than 40,000 pounds of pepper from the other in 2009. According to a news source, public health officials traced the *Salmonella* strain to the black and crushed red pepper supplied by these defendants. The plaintiff has reportedly indicated that it expects to incur more losses in the future now that a second *Salmonella* strain has been found in some of its products; it is also facing multiple personal injury claims by consumers who purchased or ate its products. The plaintiff alleges strict products liability, breach of warranty, negligence, and indemnification.

### Consumer Fraud Action Filed Against Snack Maker over *Salmonella* Outbreak

A California resident has filed a putative class action in federal court against Kellogg Co., alleging that the company misled consumers by claiming its snack products were healthy and nutritious and met "stringent food safety requirements," when in fact they contained *Salmonella*-contaminated peanut paste supplied by the Peanut Corporation of America. *Benavides v. Kellogg Co.*, No. 10-02294 (U.S. Dist. Ct., C.D. Cal., filed March 29, 2010). The Peanut Corp. *Salmonella* outbreak led to a massive recall of food products, including Kellogg's Austin® and Keebler® branded sandwich crackers and cookies. The complaint alleges that Kellogg hired unqualified

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

private inspectors to audit its suppliers' manufacturing plants while claiming that its suppliers met Codex Alimentarius Commission standards.

The plaintiff seeks to certify a nationwide class of consumers with alleged monetary injury. He alleges (i) unlawful business acts and practices in violation of California's Sherman Food, Drug and Cosmetics Law and Consumer Legal Remedies Act; (ii) deceptive marketing and advertising; (iii) fraudulent business acts and practices; (iv) violations of California's Consumer Legal Remedies Act; (v) deceit and negligent misrepresentation; (vi) breach of express warranty, the warranty of merchantability and the implied warranty of fitness for a particular purpose; and (vii) violation of the Magnuson-Moss Act. He asks the court for declaratory relief; compensatory, statutory and punitive damages; interest; and attorney's fees and costs.

### Federal Court Dismisses Melamine-Tainted Milk Litigation Filed by Chinese Citizens

A federal court in Maryland has determined that it is not a convenient forum for the pursuit of claims by Chinese citizens seeking millions in compensation for the injuries allegedly caused by their children's consumption of powdered milk formula and similar products tainted with melamine. *Tang v. Synutra Int'l, Inc.*, No. 09-0088 (U.S. Dist. Ct., D. Md., decided March 29, 2010). The scandal led to a global recall of powdered milk products and resulted in the execution of several milk company officials found responsible for adding melamine to the products, purportedly to increase their protein content. The melamine allegedly caused the deaths of six infants and caused kidney stones and related injury to thousands of others. The government established a compensation program for affected families, but some sought increased damages in Chinese courts.

The defendants filed a motion to dismiss on the ground of *forum non conveniens*, and the court discussed at length whether Chinese courts were adequate to adjudicate the claims. The plaintiffs contended that the courts had been unwilling to accept their complaints and pressured their lawyers to withdraw from representing them, while the defendants countered that at least a handful of the cases have been accepted. The court concluded that the defendants had met their burden of showing that China is an adequate forum. But even if it were not, the court said that the plaintiffs have another remedy available to them, that is, the compensation program. This circumstance also persuaded the court to grant the dismissal without conditions, which can be imposed "as a safeguard against the uncertainty that the alternative forum will exercise jurisdiction over the claims."

### Wholesaler Sues Chocolate Companies Alleging Price Fixing

Supervalu, Inc. has filed an antitrust action against a number of chocolate manufacturers, alleging that they conspired to fix chocolate candy prices and overcharged the plaintiff for these products from 2002 through 2008. *Supervalu, Inc. v. The Hershey Co.*, No. 10-cv-01354 (U.S. Dist. Ct., E.D. Pa., filed March 29, 2010). The complaint outlines the chocolate companies' sales during the relevant time period and details the increases in prices charged for specific products despite a decrease or lack of change in the price for cocoa beans during the same period. The plaintiff also claims that the prices of sugar, milk and labor remained relatively

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

stable throughout the period. Included in the complaint are allegations contained in affidavits filed in connection with an investigation into the companies' conduct by the Canadian Competition Bureau. Seeking treble damages, declaratory and injunctive relief and attorney's fees and costs, the plaintiff alleges a single count of conspiracy to fix prices under the Sherman Act.

### OTHER DEVELOPMENTS

---

#### Nestle Criticizes Front-of-Package Nutrition Labeling at IOM Meeting

The Institute of Medicine (IOM) held an open session on April 9, 2010, to gather information on front-of-package (FOP) nutrition rating systems and symbols. Speakers included representatives from (i) the U.S. Food and Drug Administration (FDA) and U.K. Food Standards Agency, (ii) the American Heart Association, (iii) ConAgra Foods, the General Mills Bell Institute of Health & Nutrition and Unilever, and (iv) Texas A&M University, the University of Maryland, the University of Washington, and the Yale Prevention Research Center. In addition, New York University Professor Marion Nestle addressed concerns about nutrition rating systems and other perspectives on FOP labeling.

According to SHB attorney [Sarah Sunday](#), who attended the meeting, FDA provided an update on its continuing assessment of FOP labeling and indicated that after failing to release guidance as scheduled, the agency intends to complete its consumer research in May. But Nestle registered opposition to the adoption of any FOP scheme. Referencing commentary that she recently published in the *Journal of the American Medical Association (JAMA)*, Nestle recommended eliminating all food labeling claims and providing more comprehensive calorie information. Failing that, she would reportedly favor a traffic light approach to FOP labeling such as the one used in the United Kingdom. Additional information on Nestle's February 2010 *JAMA* article appear in issue 339 of this Update.

Meanwhile, Nestle has also chronicled the development of menu-labeling laws in an [article](#) appearing in the April 7 *New England Journal of Medicine*. Titled "Health Care Reform in Action—Calorie Labeling Goes National," the article reports that past efforts to encourage restaurant chains to reformulate products or reduce portions have failed partly because companies responded by downsizing their largest offerings while bumping up their small sizes. Comprehensive menu labeling, however, "demonstrates that larger portions have more calories," a conclusion that Nestle contends is "not intuitively obvious." She concludes that despite some "logistic problems and modest benefits, calorie labeling is well worth the trouble. Here, at last, is help for explaining the relationship of food energy to body weight."

#### Corporate Watchdog Launches Campaign to "Retire Ronald McDonald"

Comparing fast-food advertising icon Ronald McDonald to Joe Camel, Corporate Accountability International has initiated a campaign calling on McDonald's Corp. to "[Retire Ronald](#)." The campaign is based on a report, "Clowning with Kids' Health," that calls the character "the product of a well-orchestrated and shrewd marketing

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

strategy” that targets those most vulnerable to food-industry marketing—children.

The report traces the development of Ronald McDonald, now claimed to be as recognizable as Santa Claus, and notes how the character is even used on report cards in schools. Decrying the “unhealthy food” that the character promotes and the industrial supply chain fast food supports, the report calls on McDonald’s to stop using celebrities or cartoon characters to promote its products and urges individuals to support local efforts to remove food advertising from schools, libraries and playgrounds.

Corporate Accountability International is a Boston-based corporate watchdog nonprofit whose advisory board includes nutrition professor Marion Nestle, public health lawyer Michele Simon and food expert Frances Moore Lappé. It claims responsibility for changing corporate behavior, including moving General Electric out of nuclear weapons production, and “spearheading grassroots efforts behind the passage of the global tobacco treaty.” The Center for Science in the Public Interest has joined others in calling for individuals to e-mail the McDonald’s president and CEO urging him to retire Ronald McDonald. *See Food Politics*, April 1, 2010; *CSPI Action Alert*, April 5, 2010.

### Industry Concerns About Food Fraud Come to Light

Following a recent American Chemical Society (ACS) meeting at which scientists discussed how wines could be authenticated by measuring carbon isotopes, whose levels varied in the atmosphere during the years nuclear weapons were tested, a number of recent articles discuss the subject of food fraud. Said to affect some 5 to 7 percent of a range of foods from cheeses, fish, honey, and wine to expensive spices such as saffron, the problem has not apparently received the attention required from the Food and Drug Administration (FDA), due to its focus on more pressing food safety concerns and contamination outbreaks. A consultant studying the matter for the Grocery Manufacturers Association was quoted as saying, “[Food fraud is] growing very rapidly, and there’s more of it than you might think.”

Not only shoppers are fooled by mislabeled foods; major companies have been stung as well. Information about major food manufacturers and retailers taken in by suppliers’ tomato paste, pinot noir and catfish scams has been summarized in previous issues of this Update. Today, a number of testing methods are reportedly available to determine a product’s authenticity, but researchers urge caution as some of the tests are not particularly discriminating.

Industry trade associations have long called on FDA to set standards for products such as honey and olive oil, but their requests remain unaddressed. They would reportedly like to be able to sue competitors that sell adulterated products. A chemist who co-chaired the ACS meeting explained that the development of standards will require compiling extensive databases that include profiles from a range of product varieties, geographical origins and production processes. “A Cabernet grown in Europe might have a slightly different chemical profile from a Cabernet grown in Australia or the U.S.,” as a result of differing growing conditions, she said. *See The Washington Post*, March 30, 2010; *Chemical & Engineering News*, April 5, 2010; *Food & Think* (a blog of the *Smithsonian Magazine*), April 7, 2010.

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

### CSPI Calls on FDA, State Attorneys General to Reduce “Slack Fill” in Food Packaging

The Center for Science in the Public Interest (CSPI) is urging the Food and Drug Administration and state attorneys general to crack down on “slack fill” in food packages. Industry apparently defines slack fill as the difference between the capacity of a container and the volume of product inside.

The federal government’s existing regulations are intended to restrict slack fill to situations in which some air in packaging actually helps protect the contents or where some product settling makes slack fill unavoidable. According to CSPI, excessive “nonfunctional” slack fill is illegal, and food manufacturers and their regulators don’t seem “overly concerned” with enforcing the regulations.

“It would be disheartening, even shocking, if it weren’t so commonplace,” CSPI Executive Director Michael Jacobson was quoted as saying. “But as consumers, we’ve almost come to expect that our food packages will be half full of food and half full of air.” See *CSPI Press Release*, April 5, 2010.

### Jamie Oliver Debuts New Reality Series in America

British celebrity chef Jamie Oliver recently debuted his first American network TV show titled *Food Revolution*, a reality series that brings his penchant for school lunch reform and theatrical interventions to cafeterias and homes in Huntington, West Virginia. A health food evangelist, Oliver has drawn both praise and criticism in the United Kingdom for his efforts to harness government power and money for anti-obesity programs. But his latest incursion into American media has apparently attracted the ire of outlets as diverse as *AlterNet* and *Reason*, the latter of which has equated the show with several of the entrepreneur’s more “dubious endeavors.”

According to *Reason*, Oliver received the 2010 TED Prize for his work as “a standard bearer in the fight against obesity” and hopes that *Food Revolution* will secure him an invitation from the White House to contribute to the nation’s childhood obesity initiative. “[It] would be a serious mistake to underestimate Oliver’s present and potential influence here in America,” the article concludes. “Thanks to TED, Oliver already has the ears of heavyweights at Google, YouTube and Amazon.” See *Reason*, March 25, 2010.

Meanwhile, *AlterNet* writer Arun Gupta has also criticized *Food Revolution* for failing to deal with “complexities or systemic issues.” Gupta reports that Oliver’s attempts to reform the school lunch program in Huntington have resulted in fewer participants in the program, a drop in milk consumption and staggering food costs. Moreover, the show does not mitigate what Gupta sees as the true cause of America’s “ever-expanding waistline”: “widespread poverty, sedentary lifestyles, junk-food advertising, a lack of health care, corporate control of the food system, the prevalence of cheap fast food, food designed to be addictive, and subsidies and policies that make meats and sugars cheaper than whole fruits and vegetables.” As Gupta opines, “If Jamie and Co. wanted to make a real difference, they should go after the fast-food industry [...] But this would require a real revolution, not one manufactured for television.”

**FOOD & BEVERAGE  
LITIGATION UPDATE**

ISSUE 344 | APRIL 9, 2010

**MEDIA COVERAGE**

---

**Laura Beil, "Is Your Breakfast Giving You Cancer?," *Prevention*, March 29, 2010**

"If there's a nutrient it's easy to overdose on, it's folic acid," writes *Prevention* columnist Laura Beil in this article citing research allegedly linking the synthetic form of B vitamin folate to colon, lung and prostate cancers. Beil reports that this nutrient is already a staple in most diets, partly because the government requires its inclusion in enriched grains such as white flour and white rice to reduce birth defects. Still, according to Beil, many food manufacturers have taken it further, "giving breakfast cereals, nutrition bars, and beverages a folic acid boost." Noting that women are advised to get 400 micrograms (mcg) of folic acid daily, she registers concern that some consumers who take a multivitamin and eat breakfast are getting "a mega-dose before walking out the door."

Beil focuses on studies that have purportedly linked these high folic acid doses to an increase in hospitalization rates for colon cancer. She avers that in Canada, Chile and the United States, these rates, "following years of steady decline," increased "around the time our food was being fortified." She also highlights two studies claiming that supplementation with 800 mcg of folic acid daily for more than three years increased the risk of developing lung cancer by 21 percent, while men who consumed 1,000 mcg daily had more than twice the risk of prostate cancer.

Beil ultimately recommends that her readers (i) avoid cereals and certain beverages, like sports drinks, that contain excess folic acid, (ii) switch to non-instant oatmeal, which is usually not fortified, (iii) choose whole grain flour, bread, pasta, and rice, and (iv) reassess their need for multivitamins. "Extra folic acid might make sense for all adults (and not just women of childbearing age) if it kept common problems like heart attacks, stroke or age-related memory decline at bay," concludes Beil. "However, these hoped-for benefits are still in question."

**Moby Discusses New Book Critical of Factory Farming**

*AlterNet* recently interviewed musician Moby on the publication of his new book, *Gristle: From Factory Farms to Food Safety (Thinking Twice About the Meat We Eat)*, edited with food policy activist Miyun Park. According to the March 31, 2010, interview, the vegan manifesto is "a medley of anti-industrial meat memes written by an eclectic mix of advocates, experts and others who offer 10 compelling reasons for eliminating factory-farmed animal products from our diet." The popular DJ touted his tome as "more factual and informative than most other animal-oriented books," decrying what he described as the deliberate deception of agribusiness firms, "which maintain a PR ethos of egregious obfuscation."

Dismissing claims that *Gristle* contributes to a spate of "glitzy celebrity propaganda campaigns," Moby pointedly declined to quibble with the term "conscientious carnivore" and conceded that "[a] carnivore who eats local chickens and is loving and nice to everyone around him is probably a bit higher up on the ethical scale than a vegan who is a sociopath."

## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 344 | APRIL 9, 2010

## SCIENTIFIC/TECHNICAL ITEMS

### Study Compares Overeating to Drug Addiction

A recent study has reportedly likened overeating to a drug addiction, concluding that rats given access to high-fat food exhibited a neurochemical dependency similar to the "reward homeostasis induced by cocaine or heroin." Paul Johnson and Paul Kenny, "Dopamine D2 Receptors in Addiction-Like Reward Dysfunction and Compulsive Eating in Obese Rats," *Nature Neuroscience*, March 28, 2010. Researchers monitored the brains of rats divided into three groups: the first allowed unlimited access to high-fat foods; the second given access to high-fat fare for only one hour per day; and the third fed rat chow only. While the rats in the second group acquired a pattern of compulsive binge eating, consuming 66 percent of their daily calories during the one hour when high-fat food was available, the rats with extended access not only grew obese but also displayed "a progressively worsening deficit in neural reward responses." The obese rats gradually developed an increased tolerance that required them to consume more and more food to achieve the same level of pleasure and satiety.

According to the authors, "These data demonstrate that overconsumption of palatable food triggers addiction-like neuroadaptive responses in brain reward circuits and drives the development of compulsive eating. Common hedonic mechanisms may therefore underlie obesity and drug addiction." They also noted that their results could reflect on overweight individuals who "express a desire to limit their food consumption, yet struggle to control their intake and repeatedly consume beyond their energy requirements." See *Health.com*, *Scientific American*, March 28, 2010; *Time*, April 3, 2010.

### OFFICE LOCATIONS

**Geneva, Switzerland**  
+41-22-787-2000

**Houston, Texas**  
+1-713-227-8008

**Irvine, California**  
+1-949-475-1500

**Kansas City, Missouri**  
+1-816-474-6550

**London, England**  
+44-207-332-4500

**Miami, Florida**  
+1-305-358-5171

**San Francisco, California**  
+1-415-544-1900

**Tampa, Florida**  
+1-813-202-7100

**Washington, D.C.**  
+1-202-783-8400

### 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.

