Shook, Hardy & Bacon L.L.P.

ISSUE 363 | SEPTEMBER 10, 2010

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Salmonella-Contaminated Egg Outbreak Sparks Investigations and Recriminations

Responding to media reports that workers at the egg facilities linked to a recent nationwide *Salmonella* outbreak complained about food-safety problems, Senator Chuck Grassley (R-Iowa) has written to U.S. Department of Agriculture (USDA) Secretary Tom Vilsack asking whether these complaints were investigated and whether the agency has a process for reporting safety violations. Grassley acknowledges that USDA places only non-food-safety personnel at egg farms to grade the eggs. Still, he asks whether "there is an established process for USDA employees to report food safety concerns to the FDA [Food and Drug Administration, which has the responsibility for food safety] when they fall outside of USDA's jurisdiction?"

According to press reports, two former Wright County Egg facility employees said they told USDA employees that they had observed problems such as leaking manure, rodents and dead chickens at the facilities. They also apparently claimed that USDA employees "would just turn their heads" when told about the problems and advised the egg employees to ignore them. The FDA report that followed its investigation of the outbreak revealed facility conditions that included rodent holes in hen house walls, live rodents, live and dead flies too numerous to count, holes and gaps in doors and walls allowing wildlife access, pigeon roosts in air vents, standing water, leaking manure pits, recordkeeping violations, and numerous sanitation violations.

Former and current Wright County Egg employees reportedly indicated that mouse and fly infestations noted in the FDA report were not new to the facilities and dated back at least 10 years. They also claimed that high ammonia levels caused chronic health issues and that protective and safety equipment was not consistently available. An Iowa State University poultry veterinarian, who said that mice, flies, dead chickens, and ammonia are common in large egg-laying facilities, indicated that they must be controlled and maintained at safe levels. Wright County Egg reportedly released a statement claiming that it uses best practices and regularly monitors for safety issues. "It has been and is our commitment—and our responsibility—to properly operate our farms," a spokesperson said.

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

or

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

Wright County Egg has reportedly suggested that the *Salmonella* contamination could have started in bone meal, a feed ingredient supplied by a different company. That company has responded that it heat processes the bone meal and contends that the meal was uncontaminated when shipped. According to a news source, FDA's criminal division and the Justice Department have joined the ongoing investigation, extending it beyond a focus on farm practices. *See The New York Times,* August 30, 2010; *The Wall Street Journal*, September 1 and 2, 2010; *The Associated Press*, September 3, 2010; *The Des Moines Register*, September 9, 2010.

FTC Subpoenas 48 Food Companies in Follow-Up to Youth Marketing Study

The Federal Trade Commission (FTC) has **ordered** 48 food companies "to file a special report" on their youth marketing practices in an effort "to measure the effect that self-regulation has had over the last three years," according to FTC spokesperson Carol Jennings. The companies have 90 days to respond to the subpoenas, which will assist FTC in compiling a follow-up to its 2008 report titled "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation." Additional information about this ongoing process appears in **Issue 320** of this *Update*. *See Advertising Age,* September 1, 2010.

"We are supportive of industry voluntary efforts to limit their marketing to kids and this will see whether more is needed," stated Jennings, who noted that the commission is "not proposing any regulation" at this time. *See Advertising Age,* September 1, 2010.

FDA Assessment Backs Safety of GE Salmon

The Food and Drug Administration (FDA) has released a briefing **packet** in advance of public meetings to discuss a new animal drug application for genetically engineered (GE) salmon. Produced by AquaBounty Technologies, Inc. (ABT), the AquAdvantage salmon contains genes from Chinook and ocean pout that accelerate maturation. Additional details about the September 19-21, 2010, meetings appear in **Issue 362** of this *Update*.

According to the FDA briefing packet, "[T]here are no material differences in food from ABT salmon and other Atlantic salmon." The assessment therefore concludes that "*triploid* ABT salmon is… as safe as food from conventional salmon," although it recommends further allergenicity studies for diploid salmon because the ones provided were of "low quality." In addition, an environmental impact statement (EIS) has found that the fish "are not expected to have a significant impact on the quality of the human environment." As the EIS summary notes, the probability of AquAdvantage salmon escaping either the egg production or grow-out facility "is extremely small" due to physical containment barriers and inhospitable waters.

If approved by FDA, ABT could reportedly bring AquAdvantage salmon to market within two to three years. The company's application, however, has already met opposition from a coalition of consumer groups that have launched a campaign challenging the FDA assessment. "While some materials released today relate to the transfer of the genes and DNA construct, and the chemistry of small samples of the flesh of the GE fish were compared to that of other farmed salmon, no data from long-term clinical feeding trials were required," stated the Center for Food Safety in a September 3, 2010, press release that echoed U.S. Representative Dennis Kucinich's (D-Ohio) call for an extended public comment period. *See The New York Times,* September 3, 2010.

FDA Issues Warning Letters About Green Tea Product Health Claims

The Food and Drug Administration (FDA) has notified the presidents of the Dr. Pepper Snapple Group and Unilever, Inc. warning them that their green tea products are misbranded because they make nutritional or health-related claims in violation of federal law. Specifically, FDA takes issue with antioxidant claims used to promote Canada Dry Sparkling Green Tea Ginger Ale® and the cholesterol-lowering claims used to promote Lipton Green Tea 100% Natural Naturally Decaffeinated®. According to FDA, ginger ale, as a carbonated beverage, is a snack food that may not be fortified, and therapeutic claims make green tea a drug requiring the agency's pre-marketing approval. The letters call for corrective action and a response.

USDA Publishes Handbook to Aid Organic Businesses

The U.S. Department of Agriculture's National Organic Program (NOP) has prepared a handbook that provides guidance and instructions for those who own, manage or certify organic businesses.

In addition to federal regulations and recordkeeping requirements, the first-edition handbook covers topics that include: (i) "the allowance of green waste in organic production systems"; (ii) "approval of liquid fertilizers in organic production"; (iii) "certification of organic yeast"; (iv) "processed animal manures in organic crop production"; (v) "reassessed inert ingredients"; and "the calculation of dry matter intake for NOP's access to pasture requirements." *See USDA Press Release*, September 2, 2010.

In a related development, USDA's Agricultural Marketing Service (AMS) has reportedly issued new NOP enforcement procedures to ensure that "all complaints of alleged violations and civil penalties are consistently handled." NOP will now work with accredited certifying agents to investigate complaints about alleged violations, in addition to handling enforcement. "The changes we are making will ensure that all parties are given due process while increasing the effectiveness of enforcing organic standards," stated NOP Deputy Administrator Miles McEvoy in a September 1, 2010, press release.

Groups Object to Proposed Canadian Organic Aquaculture Standards

A coalition representing more than 40 consumer, environmental and scientific groups has submitted a **comment** to the Canadian General Standards Board Committee (CGSBC), objecting to several provisions in a proposed Canadian Organic Aquaculture Standard. According to a press release, the joint letter alleges that the draft standard "is contrary to the basic principles of organics as it would allow certification of net pen farmed salmon" and other carnivorous finfish.

The signatories take particular umbrage at the sections relating to net pen production that would reportedly permit (i) antibiotic and pesticide use; (ii) "uncontrolled" waste disposal into the ocean; (iii) unlimited use of "sustainable" wild fish in feed; and (iv) feed containing 30 percent or less "non-organic, unsustainable sources" if organic sources are not available. The letter also raises concern about "the spread of disease and parasites lethal to wild fish," as well as the possibility of escaping farm fish and "lethal interactions with marine mammals."

"Consumers deserve clear assurance that their choice of organic products supports a safer and more sustainable environment. Fish labeled as 'organic' that are not fed 100 percent organic feed, come from polluting open net pen systems, or that are contaminated with PCBs fall significantly short of expectations for organic products," stated a spokesperson for Consumers Union, which signed the response to CGSBC. *See Coastal Alliance for Aquaculture Reform Press Release,* August 31, 2010.

UK Divvies Up Food Safety Responsibilities

The U.K. Food Standards Agency (FSA) has **announced** that as of September 1, 2010, the agency handed over several responsibilities to the departments of Health (DH) and Environmental, Food and Rural Affairs (Defra). Under the restructuring—which does not currently apply to operations to Scotland, Wales and Northern Ireland—FSA in England will continue to handle the following safety aspects of food labeling: (i) "expert scientific advice on the food safety aspects of date marking"; (ii) "assessment and labeling of ingredients/foods with food safety implications (e.g. allergens, glycols, high caffeine, high glycyrrhizinic acid)"; (iii) "food safety aspects of organic food and of foods controlled by compositional standards"; (iv) "treatments and conditions of use with food safety implications (e.g. quick frozen foods, raw drinking milk and pasteurisation, food contact materials)"; (v) "GM and novel foods (including use of nanotechnology)"; (vi) "animal feed, including Codex Intergovernmental Task Force on Animal Feeding"; (vii) "food safety incidents, including misleading labeling and food fraud with possible food safety implications"; (viii) "EU General Food Law regulation, including traceability of food and feed"; and (ix) "Codex Committees on Food Hygiene, Methods of Analysis and Sampling, Food Additives, [and] Contaminants in Foods."

Meanwhile, Defra will retain oversight for labeling related to "welfare, marketing standards and eco labeling," as well as taking over from FSA as general lead on "food labeling legislation and relevant EU negotiations," such as the EU Food Information proposal, and as lead on the Codex Alimentarius Commission's General Principles and Coordinating Committee for Europe. Defra will also cover (i) "country of origin labeling"; (ii) "food composition standards and labeling such as fruit juice and fruit nectars, jams and bottled water"; (iii) "technical advice on compositional standards for food without specific legislation, such as soft drinks and cereal products"; (iv) "fish labeling"; (v) "use of marketing terms e.g. natural, fresh, clear labeling, vegan and vegetarian labeling"; (vi) "food authenticity program"; (vii) "Codex Committees for: Food Labelling, Processed Fruits and Vegetables, Fresh Fruits and Vegetables, Fats and Oils, Fish and Fishery Products, Europe, [and] General Principles."

DH will address nutritional labeling policy, which includes (i) "nutrition related aspects of the EU food information regulation"; (ii) "front of pack labeling"; (iii) "food for particular nutritional uses (PARNUTS)"; (iv) "infant formula and follow on formula"; (v) "health and nutrition claims"; (vi) "food supplements"; (vii) "calorie information in catering establishments"; and (viii) "[the] Codex Committee on Nutrition and Foods for Special Dietary Uses."

These changes are reportedly a cost-cutting measure enacted by Secretary of State for Health Andrew Lansley and the Conservative-Liberal Democrat coalition government. Additional information appears in Issues 356 and 357 of this *Update*.

Industry Takes Aim at Draft UCSF Report on Nanomaterial Regulation in California

Concerned about regulatory coordination issues, the omission of new environmental data and an apparent failure to recognize collaborative stakeholder efforts, nanotech industry interests have reportedly urged Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) and researchers with the University of California at San Francisco (UCSF) to revise a draft April 2010 report on nanomaterial regulation. Additional information about the report appears in Issue 346 of this *Update*.

The draft report contains broad recommendations for state regulation of nanoscale materials, and industry is apparently concerned that its findings do not account for rapidly emerging developments. According to a letter submitted to the agency in August 2010, the draft report fails to recognize the efforts of industry, government agencies and other stakeholders to address many of the questions raised in the report, nor does it discuss the "virtual explosion of research, information and real progress in addressing these matters over the past several years. Any document focused upon the policy challenges in this arena must take these efforts explicitly into account." An OEHHA spokesperson has reportedly indicated that a revised version of the report, expected to be released in October, will incorporate and consider industry comments. *See Inside Cal/EPA,* September 3, 2010.

In a related development, *The New York Times* has reported that Northwestern University researchers have created edible nanostructures. Using nano-sized bits of sugar, salt and 190-proof grain alcohol, the scientists have apparently made a material that tastes "like a saltine cracker" without salt. Chefs who are experimenting with food to develop new textures and tastes responded favorably to this news, "intrigued by the possibility of inserting stronger flavors in the [nanostructures'] hollow pores." The abstract for a scientific paper to be published in the November issue of *Angwandte Chemie* reportedly states, "Take a spoonful of sugar (gamma-cyclodextrin to be precise), a pinch of salt (most alkali metal salts will suffice), and a swig of alcohol (Everclear fits the bill), and you have a robust, renewable, nanoporous (Langmuir surface area 1,320 square meters per gram) metal-organic framework for breakfast." *See The New York Times*, September 6, 2010.

LITIGATION

Federal Court Dismisses False Advertising Claims in Zero *Trans* Fat Suit Against Food Co.

Finding the plaintiffs' state-law claims preempted, a federal court in California has dismissed a putative class action alleging that the Kroger Co. falsely labeled its margarine and graham crackers as "0g Trans Fat per serving" and "a Cholesterol Free Food," when they actually contain various hydrogenated oils. *Red v. The Kroger Co.*, No. 10-01025 (U.S. Dist. Ct., C.D. Cal., decided September 2, 2010). According to the court, the Food and Drug Administration has promulgated specific regulations on the use of these terms, and because the products at issue comply with the requirements under which the terms can be used, the plaintiffs' claims are expressly preempted under the National Labeling and Education Act of 1990.

In the court's words, "Plaintiffs cannot escape the fact that they seek to enjoin exactly what federal law expressly permits." Alleging the violation of California consumer protection statues, the plaintiffs had sought an order compelling the defendant to (i) cease marketing and selling the products using misleading tactics, (ii) conduct a corrective advertising campaign, (iii) restore the amounts by which the company was unjustly enriched, and (iv) destroy all misleading and deceptive materials and products. The court also dismissed plaintiffs' Lanham Act claims, finding that they lacked standing to pursue them, because they had not alleged a "commercial injury" and are not the defendant's competitors.

The court granted the defendant's motion to dismiss without leave for the plaintiffs to amend their complaint.

Federal Court Says Individual Issues Predominate in HFCS Litigation Against Snapple

A federal court in New York recently refused to certify a statewide class of consumers who allege that Snapple Beverage Corp. misled them by marketing its products as "all natural" when they actually contain high-fructose corn syrup (HFCS). *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (U.S. Dist. Ct., S.D.N.Y., order entered August 5, 2010).

The court apparently determined that individual issues, such as causation, injury and damages, would predominate over common ones. According to the court, "Individualized inquiries would be required to determine, for instance whether class members were fully informed about the inclusion of HFCS in Snapple beverages, whether they believed HFCS to be natural, and whether they continued to purchase Snapple despite their beliefs concerning HFCS. Such individual issues would also dwarf any issues of law or fact common to the class."

The court also reportedly determined that the named plaintiffs did not proffer a suitable methodology for establishing causation and injury elements on a class-wide basis. In this regard, the court stated, "Without a reliable methodology, plaintiffs have not shown that they could prove at trial using common evidence that putative class members in fact paid a premium for Snapple beverages as a result of the 'all natural' labeling. And since the issue of damages is bound up with the issue of injury in this case, plaintiffs have likewise failed to show how damages could be proven class-wide." *See Mealey's Food Liability*, September 7, 2010.

Court Refuses to Dismiss Omega-3 Claims Against Walnut Producer

A federal court in California has denied a walnut producer's request to dismiss claims alleging that the company falsely advertises its products by asserting that the omega-3 in walnuts has certain health benefits. *Zeisel v. Diamond Foods, Inc.*, No. 10-01192 (U.S. Dist. Ct., N.D. Cal., filed September 3, 2010) (unpublished). Alleging violations of California consumer protection laws, the plaintiff claims that the "statements are misleading because the Shelled Walnut products do not provide the health benefits claimed on the package labels." The defendant argued that the plaintiff's claims were preempted by the Federal Food, Drug, and Cosmetic Act and Nutrition Labeling and Education Act. The court disagreed, finding neither express nor implied preemption. According to the court, the claims either did not fall within the scope of federal law or state law imposed identical requirements, which are allowed under federal law.

Final Court Approval Accorded to Settlement of *Salmonella* Claims Against Bankrupt Peanut Co.

According to a news source, a federal court in Virginia, adopting a magistrate judge's recommendation, has approved a $12 million settlement that will compensate those who became ill or died after consuming products containing *Salmonella*-contaminated peanuts. *In re: Peanut Butter Corp. of Am.*, No. 10-cv-27 (U.S. Dist. Ct., W.D. Va., decided September 2, 2010). Among the 122 eligible

claimants are 45 minors and nine wrongful death claimants. The contaminated peanut butter and peanut paste were used in hundreds of products and led to a massive recall of foods such as candy, crackers and cookies. The outbreak purportedly sickened more than 700 people throughout the country and was linked to nine deaths. The settlement has reportedly been funded by the insurance carrier for the bankrupt peanut company. *See Mealey's Litigation Report: Food Liability*, September 2, 2010.

Meanwhile, *The Associated Press* (AP) has reported that the peanut company's former president is currently employed as an industry consultant. A criminal investigation of allegations that Stewart Parnell ordered employees to distribute the tainted peanut products despite *Salmonella*-positive lab results has apparently dragged on for more than 18 months, leaving him in a "legal limbo." Parnell, who is advising other peanut companies about brokering peanut-making equipment sales, is reportedly anxious to get the incident behind him. According to AP, those purportedly sickened during the outbreak are angry that Parnell is earning a living in the food industry. One was quoted as saying, "I will be a thorn in this guy's rear end until he's in prison." Another reportedly said, "He's still walking the streets almost two years later, whereas my mother is lying 6 feet under. It's just not fair. If the Food and Drug Administration does not go after Stewart Parnell, the message they are sending to the industry is don't worry about it, ship it. He should not be anywhere near the food industry." *See The Associated Press*, September 7, 2010.

Environmental Groups and Farmers Challenge GM Sugar Beet Permits

After the U.S. Department of Agriculture announced that it had begun issuing permits to sugar beet seed producers to plant genetically modified (GM) crops this fall, the Center for Food Safety and a number of other groups filed a lawsuit in federal court challenging the action. When Agriculture Secretary Tom Vilsack announced the agency's "next steps" as to Roundup Ready® sugar beets, he acknowledged the August 2010 federal court ruling that returned GM sugar beets to regulated status until the Animal and Plant Health Inspection Service (APHIS) can complete an environmental impact statement (EIS) about the effects of deregulating the crop.

According to APHIS, producers who have applied for the permits will be allowed to plant GM seedlings immediately but must not allow them to flower, and the agency will make decisions about interim regulatory measures by the end of the year on the seed producer's request to partially deregulate the crop, noting that completion of the EIS will take about two years. The Center for Food Safety contends that this action violates the court's ruling. The organization's executive director was quoted as saying, "The Court has already found that the approval of this engineered crop was illegal. Rather than complying with the court's order, the USDA is once again acting as a rogue agency in illegally allowing these crops to be planted without the required hard look at their environmental dangers."

Among those alleged dangers are increased use of herbicides and accelerated development of herbicide-resistant "super weeds." According to a Center for Food Safety press release, "Although APHIS claims the permits do not allow the crop to flower and spread pollen, the seed crop is expressly intended to flower and create seed next summer. [Environmental laws require] APHIS to first examine the environmental and socioeconomic impacts of the seed crop together with the impacts of the rest of the sugar beet production cycle the seed crop is intended to facilitate."

The plaintiffs have asked a federal district court in California to issue a temporary restraining order and a preliminary injunction to stop the agency from issuing the permits and any planting allowed by them. *See USDA News Release*, September 1, 2010; *Center for Food Safety Press Release*, September 9, 2010.

Restaurateur Alleges Potato Price-Fixing Conspiracy

On behalf of a putative nationwide class of indirect potato purchasers, a San Francisco restaurateur has sued a number of potato industry participants, including co-operatives, growers, packers, and distributors, alleging that they have conspired since 2006 to control and reduce the supply of potatoes in an effort to keep crop prices high. *Florez v. Idahoan Foods, LLC*, No. 10-3984 (U.S. Dist. Ct., N.D. Cal., filed September 3, 2010). The complaint refers to specific meetings of "cartel" members and discusses newspaper articles comparing the cooperative venture to OPEC, the oil-producing country organization that controls output and pricing in that industry. Member growers purportedly reduced their acreage, in some instances plowing under crops already grown, and submitted to audits to confirm that they were complying with production limits.

Alleging that class members were harmed by paying "supracompetitive prices for potato products during the class period, higher than that which they would have paid in the absence of the contract, combination, and conspiracy," the complaint brings causes of action under the Sherman Act and the California Business and Professions Code and Unfair Competition Law. The plaintiff seeks to certify a class, a declaration that the defendants violated the law, treble damages, costs, attorney's fees, and injunctive relief.

U.S. Files Criminal Charges in Honey Smuggling Operation

Federal officials have indicted executives of a German import company, a Chinese national and a number of companies, charging them with importing honey from China into the United States by illegal means that avoided the payment of duties and allowed product adulterated with antibiotics to enter the country. *U.S. v. Wolff*, No. 08CR417 (U.S. Dist. Ct., N.D. Ill., E. Div., filed August 31, 2010). The honey was purportedly shipped through other countries, such as South Korea, Taiwan, Thailand, India, the Philippines, Indonesia, and Russia, mislabeled and then shipped to the United States, thus avoiding some $78 million in antidumping duties applicable to Chinese-origin honey. The conspiracy allegedly began in early 2002 and ended in early 2009. The indictment includes 44 counts of illegal activity, including falsifying documents and placing into interstate commerce food with unsafe additives, specifically, the antibiotics Norfloxacin and Cirpofloxacin.

Meanwhile, a coalition of honey producers has reportedly called on the industry to question its sources to help correct the problem of illegally traded honey. According to a news source, the group estimates that the United States lost up to $106 million in 2009 in uncollected duties. A spokesperson was quoted as saying, "We need people to ask where the honey they enjoy is coming from—whether it's from the jar or used in a cereal, salad dressing, beverage, power bar or other food product. And we need food manufacturers to examine how they're sourcing honey." The group, known as True Source Honey, has apparently published an online reference guide for food manufacturers to use when checking the origin of their honey supplies. *See FoodNavigator-USA.com*, September 8, 2010.

EEOC Sues Meatpacker for Alleged Discrimination Against Muslim Employees

The Equal Employment Opportunity Commission (EEOC) has reportedly filed lawsuits in Colorado and Nebraska federal courts against a meatpacking company that allegedly "created a hostile work environment for its Somali and Muslim employees due to their race, national origin, and religion." According to the EEOC, the workers' supervisors and co-workers "threw blood, meat, and bones at the Muslim employees and called them offensive names," placed offensive graffiti on restroom walls and made other offensive comments. The company also allegedly failed to accommodate the Muslim employees "by refusing to allow them to pray according to their religious tenets." The complaints further apparently allege retaliation, claiming that the employees were fired when "they requested that their evening break be moved so that they could break their fast and pray at sundown during the month of Ramadan." *See EEOC Press Release*, August 31, 2010.

OTHER DEVELOPMENTS

Heartland Sweeteners Again Asked to Discontinue Artificial Sweetener Health Benefit Claims

For the second time in less than a month, Heartland Sweeteners has apparently been told by an advertising industry self-regulatory body that the company should not promote its Nevella with Probiotics® artificial sweetener with immune system and digestive health claims unless it can support them with "competent and reliable evidence." Information about action taken against the company in August 2010 by the appellate arm of the National Advertising Division (NAD) of the Council of Better Business Bureaus appears in Issue 362 of this *Update*.

NAD apparently took its latest action in response to a challenge filed by Heartland rival McNeil Nutritionals, LLC, which makes Splenda®. Among Heartland's claims were that its product "Provides digestive and immune system health benefits in every packet," "Promotes digestive health" and "Supports a healthy immune system." According to NAD, the company based its claims on studies about the benefits of individual ingredients. "[W]hen the substantiation in the record consists solely of evidence regarding the efficacy of ingredients in a product, but not for the product

itself, the advertising must not suggest or imply that the product provides the claimed benefits," said NAD. " The claims must clearly be expressed as ingredient claims."

NAD also observed that as to ingredient claims, "the product must be identical in composition and dosage to the ingredient proven efficacious in the studies." NAD called for the company to discontinue the challenged health benefit claims, due to the absence of sufficient or relevant evidence of product testing. *See NAD News*, September 1, 2010.

Consumer Groups Urge Passage of Food Safety Reform Legislation

Consumer groups recently released a **report** urging the U.S. Senate to pass its version of a food safety bill (S. 510) in light of a recent egg recall linked to foodborne illness. Published by the Center for Science in the Public Interest (CSPI), the U.S. Public Interest Research Group and the Consumer Federation of America, the report examines "85 recalls that have taken place in the year since food safety reform moved to the U.S. Senate." The U.S. House of Representatives passed its food reform bill (H.R. 2749) on July 30, 2009.

"The recalls involved tons of foods, including many name-brand products from more than 150 companies," according to the report, which purportedly found that a majority of the recalls involved *Salmonella* and *Listeria*. "While most of the recalls were not connected to outbreaks, illnesses were associated with nine recalls that together were associated with 1,850 reported illnesses."

"Recalls and outbreaks are the most public consequence of our 'horse and buggy' food safety system," said CSPI Food Safety Director Caroline Smith DeWaal at a September 8, 2010, press conference. "Consumers are sometimes sickened and everyone up and down the chain has to check for, remove, and destroy the contaminated products. Only Congress can fix the underlying problems by passing legislation that has been languishing in the Senate for over a year." *See CSPI Press Release*, September 8, 2010.

Webinar to Address Agricultural Antibiotics

The Institute for Agriculture and Trade Policy's (IATP's) Food and Society Fellows and Healthy Food Action project have **announced** a September 16, 2010, Webinar titled "Superbugs, Super Problems: Agricultural Antibiotics and Emerging Infections." Three presenters who recently testified before Congress will address "[t]he new scientific consensus… that routine, unnecessary use of antibiotics in livestock and poultry contributes significantly to a costly epidemic of antibiotic resistance" in diseases such as *Salmonella, E. coli,* and MRSA. Speakers will include University of Minnesota Professor of Medicine James Johnson; Gail Hensen, a senior officer of the Pew Campaign on Human Health and Industry Farming; and Maryn McKenna, author of *Superbug: The Fatal Menace of MRSA*. To register for the program, please click **here.**

Meanwhile, a coalition of agricultural and consumer groups has reportedly hand-delivered 180,000 letters to the Food and Drug Administration (FDA) in response to the agency's call for comments on the use of agricultural antibiotics. The group includes the Center for Food Safety, which also sent a detailed organization comment; Center for Science in the Public Interest; CREDO Action; FamilyFarmed.org; Farm Aid; Food & Water Watch; Food Democracy Now!; The Humane Society of the United States; Organic Consumers Association; and Union of Concerned Scientists. The coalition implores FDA to "heed the overwhelming scientific evidence… by (1) strengthening the agency's [Veterinary Feed Directive] guidelines and (2) making mandatory, rather than voluntary, its June guidance to ensure that antibiotics only be used under veterinary supervision to treat sick animals, thus protecting human health." *See Center for Food Safety News Release,* August 27, 2010.

ABA-TIPS Teleconference to Examine Farmed Animal Rights, Consumer Labeling Issues

The American Bar Association Tort Trial & Insurance Practice Section's Animal Law Committee will convene a teleconference on September 28, 2010, to discuss farmed animal welfare and related labeling issues. Temple Grandin, a Colorado State University professor well-known for her work in animal science, will be among the panel of experts to discuss (i) "commercial speech and the role of liability for false advertising under federal and state law in the labeling of food products"; (ii) "the movement to promote more detailed labeling regarding animal welfare and to create verifiable compliance"; (iii) "what, if any, legal meanings are ascribed to terms such as 'humane,' 'cage-free,' 'free-range,' 'natural' and 'organic' and how are they used in practice vis a vis animal welfare"; and (iv) "the rapidly shifting world of scientific awareness and consumer perceptions regarding what constitutes satisfactory animal welfare, and its impact on producers' ability to provide accurate labeling."

MEDIA COVERAGE

Denise Grady, "In Feast of Data on BPA Plastic, No Final Answer," *The New York Times,* September 6, 2010

"Where science has left a void, politics and marketing have rushed in," writes Denise Grady in this *New York Times* article detailing the contentious scientific debate over bisphenol A (BPA) and its potential human health effects, including "cancer, obesity, infertility, and behavior problems." Because researchers have not yet reached a consensus, the issue of BPA's safety has become "highly partisan," according to Grady. On the one hand, Democrats and environmental groups have urged regulators to adopt a precautionary, "better-safe-than-sorry approach" similar to the one favored by the European Union. On the other hand, "Republicans, anti-regulation activists and the food-packaging and chemical industries" have insisted that BPA is harmless and "all but indispensible to keeping canned food safe."

Grady attributes much of this rancor to the challenge of reproducing and reconciling study results, which often rely on different methodologies and data sets with varying degrees of integrity. "Animal strains, doses, methods of exposure and the results being measured—as crude as body weight or as delicate as gene expression in the brain—have all varied, making it difficult or impossible to reconcile the findings," she explains, adding that academic researchers tended to find fault with low doses of BPA while regulatory and industry-supported studies did not. "The split occurs because the studies are done differently," Lisa Birnbaum, director of the National Institute of Environmental Health Sciences, reportedly suggested. "Universities 'have moved rapidly ahead with advances in science,' while regulators have used 'older methods.'"

Grady notes, however, that "new, government-financed studies" hope to standardize and alleviate some of these discrepancies over the next two years. In particular, the next generation of research apparently aims to determine (i) whether BPA "can play a role in obesity, diabetes, breast and prostate cancer and disorders of the developing immune, cardiovascular and nervous systems," (ii) "whether low doses… can have lasting, harmful effects in fetuses and young children," and (iii) whether BPA can trigger "epigenetic changes—meaning that the chemicals alter the functioning of genes, turning them on or off, but do not cause mutations, which are changes in the actual structure of the genes."

Meanwhile, the Food and Drug Administration (FDA) has "taken a seemingly paradoxical position," deemphasizing BPA's possible human health impact while urging industry to voluntarily eliminate the substance. On the BPA battlefield, Grady concludes, "Both sides are closely watching the issue unfold, because BPA is widely seen as a test case in an era of mounting worry about household chemicals, pollution and the possible links between illness and environmental exposures, especially in fetuses and young children."

In a related development, the California Senate has voted against a bill (S.B. 797) that sought to ban the sale or manufacture of bottles, cups, and food or liquid containers with BPA if intended for children younger than age 3. Expected to pass its final and second round in the Senate, the legislation evidently stalled because two senators were absent, although environmental groups have publicly blamed industry influence for the defeat. These groups have also reportedly suggested that the state's Department of Toxic Substances Control could respond to BPA with regulatory mechanisms available under its green chemistry program. As one environmentalist told *Inside Cal/EPA,* "The biggest impediment would be that with green chemistry regulations in place, it's another excuse for the legislature not to act, no matter what the state of the program." *See Inside Cal/EPA,* September 3, 2010.

SCIENTIFIC/TECHNICAL ITEMS

Nonstick Cookware Allegedly Linked to High Cholesterol in Children

A recent study purportedly ties compounds in nonstick cookware and waterproof fabrics to higher cholesterol levels in children. Stephanie Frisbee, et al., "Perfluorooctanoic Acid, Perfluorooctanesulfonate, and Serum Lipids in Children

and Adolescents," *Archives of Pediatrics & Adolescent Medicine*, September 2010. Researchers from West Virginia University evaluated 12,476 children and teens in the mid-Ohio River Valley to determine possible connections between their cholesterol levels and the compounds perfluorooctanoic acid (PFOA) and perfluorooctanesulfonate (PFOS).

According to the abstract, researchers determined that the compounds were "significantly associated" with increased total cholesterol and low-density lipoprotein (LDL). Results also apparently indicated that the children with the highest levels of PFOA had total cholesterol levels 4.6 points higher and LDL levels 3.8 points higher than those with the lowest levels. *See Reuters*, September 6, 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