

## FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### IOM Workshop to Address Obesity Prevention

The Institute of Medicine (IOM) Food and Nutrition Board's Committee on Accelerating Progress in Obesity Prevention has announced a public information-gathering workshop on measurement strategies to combat the nation's obesity problem. The draft agenda for the March 23-24, 2011, event in Irvine, California, indicates that a panel discussion moderated by Northwestern University Professor [Ellen Wartella](#) will focus on "Marketing and Industry Measures and Evaluations."

A live video recording of the workshop, funded by the Robert Wood Johnson Foundation and the Michael & Susan Dell Foundation, will be available on IOM's Website and a taped version will reportedly be posted later. More information about the event is available [here](#).

### USDA Announces Meeting of Organics Board

The U.S. Department of Agriculture has [announced](#) an April 26-29, 2011, [public meeting](#) of its National Organic Standards Board (NOSB), which will review recommendations pertaining to the National List of Allowed and Prohibited Substances. Under the Organic Foods Production Act, the list governs the synthetic substances that may be used, and the nonsynthetic substances that cannot be used, in organic production and handling operations.

NOSB will consider exemptions and prohibitions for a variety of substances scheduled for sunset review, including ethanol, tetracycline, nickel, sodium nitrate, and newspaper and other recycled papers. It will also discuss animal handling, transit and slaughter recommendations, as well as other NOSB policy and procedure changes. The agency will accept pre-registration for public comments before April 10, 2011. *See Federal Register*, March 4, 2011.

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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.

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### EFSA Confirms Safety of Caramel Coloring

The European Food Safety Authority's (EFSA's) Scientific Panel on Food Additives and Nutrient Sources Added to Food (ANS) "has assessed the safety of a group of caramel colors authorized for use in food in the European Union," **concluding** that all four classes "are neither genotoxic, nor carcinogenic and that there is no evidence to show that they have any adverse effects on human reproduction or for the developing child." The ANS Panel evidently reevaluated the safety of Class I Plain Caramel or Caustic Caramel (E 150a), Class II Caustic Sulfite Caramel (E 150b), Class III Ammonia Caramel (E 150c) and Class IV Sulfite Ammonia Caramel (E 150d), setting a group acceptable daily intake (ADI) of 300 mg per kg body weight per day (mg/kg bw/day). It also set a more restrictive ADI of 100 mg/kg bw/day for caramel E150c. As ANS Panel Chair John Christian Larsen explained, "This means that within the group ADI of 300 mg/kg bw/day established for the four caramel colors, only 100 mg/kg bw/day can be made up by E150c[4]."

The panel also reviewed the scientific literature on 4-methylimidazole (4-MEI), a by-product of caramel colorings processed with ammonia or sulfite ammonia, but found the maximum level established for 4-MEI "to be sufficiently protective." ANS noted, however, that "it would be prudent" for manufacturers to keep the by-products of caramel colors "as low as technologically feasible," and has recommended further research "on the relation between the production of caramel colors and the formation and nature of derived constituents." See *EFSA News Story*, March 8, 2011.

### Mexico Approves Pilot Program for GM Corn

Mexico has reportedly approved its first pilot program to grow genetically modified (GM) corn. Noting that "it is necessary to advance the use of biotechnology to reduce imports and promote national production," the Ministry of Agriculture approved the planting of GM yellow corn on approximately 2.5 acres in the northern state of Tamaulipas.

Since 2009 when it began allowing GM corn on small experimental fields, the Mexican government has evidently received 121 requests for permits and allowed approximately 170 acres. According to the ministry, a pilot program is granted after an experimental field has been deemed safe by government inspectors. Although large commercial farms in northern Mexico have welcomed the GM corn to compete with U.S. imports, smaller farms in southern Mexico have expressed concern that the biotech crops could contaminate native red, blue and yellow corn varieties. See *Reuters*, March 8, 2011.

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### OEHHA to Add Ethanol in Alcoholic Beverages, Chinese-Style Salted Fish to Prop. 65 List

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has issued a [notice](#) of its intent to list ethanol in alcoholic beverages and Chinese-style salted fish to the list of chemicals known to the state to cause cancer (Prop. 65). Inclusion on the list requires that products containing these ingredients include label warnings.

OEHHA is apparently basing its action on the inclusion of these substances in an International Agency for Research on Cancer (IARC) monograph. The agency is requesting comments by April 4, 2011. According to OEHHA, "[b]ecause these are ministerial listings, comments should be limited to the question whether IARC has identified the specific chemical or substance as a known or potential human or animal carcinogen. Under this listing mechanism, OEHHA cannot consider scientific arguments concerning the weight or quality of the evidence considered by IARC when identifying a specific chemical or substance and will not respond to such comments if they are submitted."

### Iowa Legislation Would Make Undercover Slaughterhouse Videos Illegal

Iowa Representative Annette Sweeney (R-Alden) has introduced a [bill](#) (H.F. 431) that would make it illegal to gain employment under false pretenses on farms or slaughterhouse processing facilities and then produce and distribute undercover videos. The Iowa Senate is reportedly expected to consider similar legislation.

Defined in the bill as "animal facility interference," shooting undercover videos at slaughterhouses would be considered anywhere from an aggravated misdemeanor up to a Class D felony, punishable by up to five years in prison and fined as much as \$7,500. Similar penalties would apply to "animal facility fraud," which would occur when a person is convicted of willfully obtaining "access to an animal facility by false pretenses for the purpose of committing an act not authorized by the owner of the animal facility" or "makes a false statement or representation as part of an application to be employed at the animal facility, if the person knows it to be false." See *Meatingplace.com*, March 8, 2011.

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**LITIGATION****Federal Court Certifies Insurance Coverage Question in Meat Recall to State Court**

Finding no clear state precedent, a federal court in Ohio has certified to the state supreme court a question arising in a case involving insurance coverage for *Listeria*-contaminated meats that led to the destruction of 1 million pounds of meat products in 2006. *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.*, No. 08-1686 (U.S. Dist. Ct., N.D. Ohio, W. Div., order entered March 3, 2011). The question certified is as follows:

In light of the Supreme Court of Ohio's opinion in *Anderson v. Highland House Co.*, 93 Ohio St. 3d 547 (2001), does the reasonable-expectations doctrine apply to a commercial general liability "all-risk" insurance policy, so that coverage, which otherwise would be excluded under the terms and conditions of the policy, is afforded, provided the trier of fact determines that the insured reasonably expected, when purchasing the policy, that the policy would cover the loss at issue.

HoneyBaked Foods claimed a loss of approximately \$8 million under its insurance policy with the defendant, after discovering that several production runs of its ham and turkey products were contaminated. The defendant had visited the company's facility before issuing the policy and prepared a risk report which noted that "[t]he most significant and common hazards exposing the food industry are centered on the susceptibility of food products to spoilage and contamination." The company purchased the all-risk policy "mindful of this assessment."

The contamination was traced to a hollow roller in HoneyBaked's conveyor system that was removed, cleaned and further sampled. The company was forced to suspend operations twice, recalled nearly 50,000 pounds of its products and ultimately disposed of almost 1 million pounds. HoneyBaked submitted a claim of loss to its insurer seeking to be reimbursed for the value of the discarded products and losses resulting from business interruption. The insurer denied the claim on the ground that the policy excluded the product loss, and "because 'there is no covered physical loss or damage, any business interruption associated with the *Listeria* contamination is also not covered.'"

The federal court found that the policy expressly excludes a product loss caused by *Listeria* contamination, but also determined that a jury could find that HoneyBaked had a reasonable expectation of coverage for losses due to contamination. The court also observed that a jury could find that the risk of such loss motivated the company's purchase of the policy at issue and that the insurer "knew of HoneyBaked's desire and need for coverage against losses from contamination." According to the court, "[t]he availability of coverage, notwithstanding the exclusion, turns on the question of whether

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Ohio law incorporates the reasonable-expectations doctrine and applies such doctrine to this case.”

The court stayed consideration of defendant’s motion for summary judgment pending final action by the Ohio Supreme Court in response to the order of certification.

### **New Twist in False-Marking Lawsuits Nets \$1.8 Million Judgment Against Tuna Company**

A federal court in California has reportedly fined King Tuna \$1.8 million for marking its products with a patent number despite not following the patented process in preparing its fish. *King Tuna v. Anova Food, Inc.*, No. 07-07451 (U.S. Dist. Ct., C.D. Cal., decided February 24, 2011). The patent apparently related to pre-cooling filtered wood smoke before applying it to tuna. King Tuna sued a competitor alleging that the patent had been infringed; the competitor countersued claiming, among other matters, that King Tuna had falsely advertised and falsely marked its products. While most recent litigation involving the false-marking statute involves expired patents, this case apparently involved a valid patent.

According to the court, King Tuna’s false advertising and marking “could not have been a mere innocent oversight,” because the company, while claiming that its preservation process involved filtered wood smoke, never pre-cooled the wood smoke “as required by the ‘619 patent.” To determine the fine, which is assessed under the law at up to \$500 for every item falsely marked, the court designated “one pound per article as the metric in determining the penalty and assesse[d] a penalty of \$1.00 per article. King Tuna sold 1,845,522 pounds of [filtered wood smoke] tuna during the relevant period. Hence, the total penalty is \$1,845,522.00.” See *The Wall Street Journal*, March 4, 2011; *Docket Navigator* and *Managing Intellectual Property*, March 7, 2011.

### **False Advertising Lawsuit Against Yogurt Maker to Proceed as Class**

A federal court in California has denied a motion for summary judgment filed by the company that makes YoPlus® probiotic yogurt and certified a class of consumers alleging that it misled them in its product marketing. *Johnson v. General Mills, Inc.*, No. 10-00061 (U.S. Dist. Ct., C.D. Cal., S. Div., summary judgment denied March 3, 2011; class certification granted March 7).

The court disagreed with the company’s attempt to characterize its product statements as “either true or . . . untestable and subjective statements of opinion” or “mere puffing.” According to the court, General Mills sought to “isolate each particular statement or image and divorce it from its full context.” Rather, the court determined that “properly considered in context, General Mills successfully communicated a ‘common message that eating Yo-Plus aids in the promotion of digestive health in ways that eating normal yogurt

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does not.” The court reportedly granted class certification from the bench. See *Law360*, March 8, 2011.

### Federal Prosecutors Claim Veal Companies Cost Industry \$500 Million

U.S. attorneys in New York have filed a complaint against three veal producers for allegedly exporting meat containing vertebral column to Japan, which had just reopened its borders to U.S. imports after a two-year ban over a bovine spongiform encephalopathy (“mad cow”) scare. *United States v. Atl. Veal & Lamb LLC*, No. 11-1034 (U.S. Dist. Ct., E.D.N.Y., filed March 3, 2011). Under U.S.-Japan trade agreements, beef and beef products cannot contain vertebral column, and when Japanese inspectors discovered the breach, it immediately again closed its borders to U.S. beef imports, allegedly costing the U.S. livestock, beef and meat industry “at least \$500 million in losses.” The prosecutors seek to enjoin the defendants from violating U.S. Department of Agriculture regulations and allege that unless enjoined, the companies “will continue to sell and offer for transportation in commerce misbranded meat and meat food products for human consumption abroad that fail to comply with [export verification] program requirements.”

### Cornucopia Institute Complaint Targets Cereal’s “All Natural” Claims

The Cornucopia Institute, a consumer watchdog and proponent of “family-scale farming,” has reportedly filed a complaint with the Federal Trade Commission (FTC), alleging that an Oregon-based cereal maker is misleading consumers with its “all natural” product claims. According to the institute, Hearthside Food Solutions, which makes Peace Cereal, labels its products as “natural” and then states on its Website that “natural foods are foods without pesticides or artificial additives, as well as being minimally processed and preservative-free.” Noting that the federal government has not adopted a definition of or requirements for “natural” food products, the Cornucopia Institute alleges that by using conventionally grown food ingredients, Hearthside is selling products routinely sprayed with pesticides and herbicides.

Peace Cereal was apparently certified organic in the past, but has not been since 2008. Yet, according to the Cornucopia Institute, stores in several states continue to carry “organic” signs on shelves containing non-organic Peace Cereal and mislabel as organic bulk bins with Hearthside’s non-organic granola. Cornucopia’s co-director Mark Kastel said, “We view this company as a ‘bad actor.’ This company is clearly trying to profit from the good name and reputation of organics, and exploiting consumer trust.” The institute calls on FTC to investigate the claims, saying the company is falsely implying to consumers that its products, often higher priced than organics, are organic. Studies have reportedly shown that consumers are confused about the “natural” label. See *Cornucopia Institute Press Release*, February 18, 2011; *Portland Press Herald*, March 8, 2011.

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**Energy Drink Lawsuit Filed in California**

A California resident has filed a putative class action against the companies that make, distribute and sell Four Loko®, a 6- to 12-percent alcoholic beverage with caffeine. *Richardson v. Phusion Projects, LLC*, No. 11-0456 (U.S. Dist. Ct., S.D. Cal., filed March 4, 2011). The plaintiff alleges that she purchased Four Loko Fruit Punch at \$3 per can based on its advertising and labeling, which purportedly failed to warn her “of the particular dangers of drinking a caffeinated beverage with high alcoholic content.” She alleges that she was misled into purchasing a dangerous beverage and claims “injury in fact and a loss of money or property in that she has been deprived of the benefit of her bargain and has spent money purchasing Four Loko at a price premium when it actually had significantly less value than was reflected in the price she paid for it.”

The complaint alleges unfair competition, false advertising, violation of the Consumers Legal Remedies Act, and fraudulent concealment. Seeking to certify a nationwide class of consumers and a California consumer subclass, the plaintiff asks for damages, declaratory and injunctive relief, disgorgement, restitution, corrective advertising, attorney’s fees, and costs.

**OTHER DEVELOPMENTS****McDonald’s Shareholder Proposal Seeks Report on Policy Response to Obesity Concerns**

The Sisters of St. Francis of Philadelphia, who hold about \$2,000 of common stock in McDonald’s Corp., joined by nuns from orders in other states, have reportedly submitted a shareholder proposal seeking a report “within six months of the 2011 annual meeting, assessing the company’s policy responses to public concerns regarding linkages of fast food to childhood obesity, diet-related diseases and other impacts on children’s health.” They also want to know how these public concerns potentially affect “the company’s finances and operations.”

The “whereas” clause of the proposal contends that “the contribution of the fast food industry to the global epidemic of childhood obesity and to diet-related disease, such as diabetes, cancer and cardiovascular disease, have become a major public issue,” and cites a number of studies about the incidence and costs of obesity, as well as actions taken by policymakers involving fast food marketing to children and menu-labeling. The shareholders also note that the Center for Science in the Public Interest released a report in 2009 showing that 88 percent of the foods the company markets to children “under the industry’s voluntary marketing initiative, the Children’s Food and Beverage Advertising Initiative, met no third-party nutrition standard.” See *The Wall Street Journal*, March 4, 2011.

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### NCL Files FDA Comment Opposing “Corn Sugar”

The National Consumers League (NCL) recently filed formal comments with the Food and Drug Administration (FDA), opposing a petition to register “corn sugar” as an alternative name for high-fructose corn syrup (HFCS). Claiming that the change “would be inconsistent with longstanding FDA common or usual name regulations,” NCL argues that “permitting HFCS to be called ‘corn sugar’ would allow manufacturers to conceal this ingredient from consumers.”

“HFCS has been the name of the ingredient since FDA’s original GRAS affirmation regulation in 1983,” writes NCL Executive Director Sally Greenberg in a letter warning that the science is still evolving. “If it should turn out that HFCS does contribute to higher caloric intake, and therefore obesity, or other adverse health outcomes, a regulatory decision that would allow manufacturers to hide this ingredient from consumers could come back to haunt FDA.” See *FoodNavigator-USA.com*, March 8, 2011; *NCL Press Release*, February 10, 2011.

### Hungry Caterpillar to Grace Anti-Obesity Campaign

The American Academy of Pediatrics (AAP) and the Alliance for a Healthier Generation have selected Eric Carle’s *The Very Hungry Caterpillar* as literary fodder for their anti-obesity campaign, distributing copies of the best-selling children’s book to 17,500 pediatrician offices across the United States. The iconic story follows a caterpillar’s transformation from larva to butterfly while emphasizing the importance of good nutrition, with the insatiable protagonist experiencing a stomachache after binging on chocolate cake, ice cream and other treats. According to a March 8, 2011, press release, doctors will also receive “growth charts and parent handouts that encourage doctors and parents to have meaningful conversations about the importance of healthy eating.”

“Parents and doctors both play an enormously important role in ensuring children develop healthy eating habits early on in life,” said President Bill Clinton on behalf of the William J. Clinton Foundation, which founded the Alliance for a Healthier Generation with the American Heart Association. “By joining with [AAP] and the classic children’s brand *The Very Hungry Caterpillar*, we are starting a dialogue between parents and doctors that will go beyond the waiting room and into the home, enabling 21 million children to make more nutritious choices and lead healthier lives.”

### UK Pig Farmers Protest Falling Profits

The U.K. pork industry has reportedly staged a protest at Whitehall, claiming that retailer price cuts and increased feed costs have driven the sector “to the brink of collapse.” Backed by the Agriculture and Horticulture Development

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Board's British Pig Executive (BPEX) and the National Pig Association (NPA), the "Pigs Are *Still* Worth It" campaign has criticized supermarkets for reaping "record profits" while domestic feed prices have soared 30 percent, cutting into producer margins. "We need retailers to remind their buyers of the importance of supporting British pigmeat production with its high welfare and quality assurance standards," stated NPA Chair Stewart Houston in an open letter, which highlighted a similar crisis in 2007 and 2008.

In addition to meeting with government representatives, the groups have circulated a [petition](#) asking retailers "to pay pig producers a fair price—before it's too late." They have also reportedly urged consumers to avoid some large grocery chains selling imported pork raised and processed in allegedly substandard conditions. "We're hoping the government will stand behind farmers and say to the supermarkets, give us a bit of a fairer deal," one pig farmer was quoted saying. "At the moment pig farmers are losing £12 million a month, while the supermarkets are making £64 million. They need to pass a little bit more back to producers." *See Farmers Guardian*, March 3, 2011; *BBC News Berkshire*, March 3, 2011.

### **Baby Gaga Ice Cream Deemed Fit for Consumption; Lady Gaga Threatens Lawsuit**

The London shop that sells ice cream made with donated breast milk has reportedly been cleared to continue selling the product after government tests determined it was fit for human consumption. Additional details about the investigation into Baby Gaga ice cream appear in [Issue 384](#) of this *Update*. The owner of Icecreamists, the store that sells the product, is apparently considering legal action against the Westminster Council, which confiscated the product for quality-control tests. Owner Matt O'Connor was quoted as saying, "They should have waited until they got the tests back before saying our product could have been a risk to the public."

Meanwhile, attorneys for pop superstar Lady Gaga have sent a cease and desist letter to the ice cream store, accusing it of unfairly cashing in on her name and image and demanding that it stop using the Baby Gaga name. They reportedly called the ice cream "nausea-inducing," and threatened to sue for trademark infringement and "passing off." O'Connor has responded, "She claims we have 'ridden the coattails' of her reputation. As someone who has plagiarized and recycled on an industrial scale, the entire back catalogue of pop-culture to create her look, music and videos, she might want to re-consider this allegation." The ice cream is sold for about \$22 a serving and is presented to customers by a blonde woman in a tight, sparkling outfit, according to a news source. *See Yahoo! News*, March 5, 2011; *NPR*, March 9, 2011; *Toronto Sun*, March 10, 2011.

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### MEDIA COVERAGE

#### FDF Members Change Recycled Packaging to Reduce Mineral Oil Risk

Individual members of the U.K. Food and Drink Federation (FDF) have reportedly announced plans to reconfigure their packaging after recent studies showed mineral oils from recycled cardboard leaching into food items. According to a March 8, 2011, *BBC News* article, which cited government researchers in Switzerland, the chemicals are used in printing inks “and have been linked to inflammation of internal organs and cancers.” At least one study evidently demonstrated that mineral oils could pass “easily” through many of the inner linings used in recycled cardboard boxes, with only 30 out of 119 sampled products deemed free of mineral oil.

“For the others they all exceeded the limit, and most exceeded it more than 10 times, and we calculated that in the long run they would probably exceed the limit 50 times on average and many will exceed it several hundred times,” one researcher was quoted as saying.

As a result, some cereal companies have already started investing in alternative packaging, while FDF has pledged to work with regulators on the issue. “The Food Standards Agency has indicated that there is not a need for immediate action. It is carrying out a survey of food packaging materials including recycled cardboard and will report back in the summer,” said FDF Director Barbara Gallani in a March 8, 2011, statement. “In the meantime FDF has revised guidance for food manufacturers on recycled carton board in food packaging.”

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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.

