

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

CDC, IOM and NIH Launch "Weight of the Nation" Campaign

The Centers for Disease Control and Prevention (CDC), Institute of Medicine (IOM) and National Institutes of Health (NIH) have joined HBO, Kaiser Permanente and the Michael & Susan Dell Foundation in launching a new national campaign to curb obesity rates. According to a January 13, 2012, IOM [press release](#), "The Weight of the Nation" initiative aims to "shed light on the facts and myths of this urgent public health issue and explore how obesity is impacting our nation and health care system."

The campaign evidently features policy action kits and several media pieces, including a four-part documentary to be aired May 14 and 15, 2012, on HBO, as well as a forthcoming IOM report funded by the Robert Wood Johnson Foundation "that will review progress made so far to implement strategies to curb obesity and recommend selected actions aimed at accelerating progress in the near future." In particular, the IOM report will target "community groups, policymakers, and other concerned individuals and organizations seeking to implement obesity prevention strategies locally and at the national level."

FDA Reiterates That Gulf Seafood Safe Is Safe

A U.S. Food and Drug Administration (FDA) official has declared seafood from the Gulf of Mexico safe for human consumption after 2010's Deepwater Horizon oil spill. In December 2011, eight U.S. Senators urged the agency to "publicly and vigorously" defend the safety of Gulf seafood.

In a January 11, 2012, FDA blog post, Deputy Commissioner for Foods Michael Taylor said that more than 10,000 seafood specimens were tested for polycyclic aromatic hydrocarbons (PAHs) after the spill and that PAH levels were "100 to 1,000 times below the levels which would raise a health concern." Taylor added that FDA feels "confident that the levels that were set are safe and protect the health of anyone who eats seafood, including children and pregnant women."

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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.

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.

California Initiates Voter Petition Seeking Mandatory Labeling on GE Foods

A group of environmentalists is reportedly seeking to qualify a voter initiative in California that would require special labels on foods containing genetically engineered (GE) ingredients. With 504,760 signatures needed by June 4, 2012, to be eligible for the November 6 ballot, the environmentalists claim that the Environmental Protection Agency and other agencies have not adequately regulated GE material.

"After 20 years of biotech bullying and force-feeding unlabeled and hazardous genetically modified foods to animals and humans—aided and abetted by the Clinton, Bush, and Obama administrations—a critical mass of food and health activists have decided it's time to move beyond small skirmishes and losing battles and go on the offensive," asserted Ronnie Cummins, national director of the Organic Consumers Association, one of the organizations supporting the petition. Cummins evidently hopes the initiative will mimic California's Proposition 65, a 1986 voter initiative that requires consumer warnings about exposures to chemicals known to the state to be carcinogens or reproductive toxicants.

According to California Secretary of State Debra Bowen, the proposed initiative would require labeling on "raw or processed food offered for sale to consumers if [the] food or any of its ingredients contain or are made from plants or animals with genetic material that has been changed in specified ways." Exempted foods would be "certified organic; unintentionally produced with genetically engineered material; made from animals fed or injected with genetically engineered material but not genetically engineered themselves; processed with or containing only small amounts of genetically engineered ingredients; administered for treatment of medical conditions; sold for immediate consumption such as in a restaurant; or alcoholic beverages." The initiative could cost state and local governments "several millions of dollars annually" to monitor and enforce its requirements. *See California Secretary of State Press Release, January 5, 2012; Inside Cal/EPA, January 13, 2012.*

LITIGATION

Insurers Must Defend Four Loko Maker in One of Five Lawsuits

A federal court in Illinois has determined that insurers providing coverage to Phusion Projects, Inc., which makes Four Loko, an alcoholic beverage with large amounts of caffeine and other stimulants, do not have a duty to defend the company in lawsuits alleging injury from intoxication. *Netherlands Ins. Co. v. Phusion Projects, Inc.*, No. 11 C 1253 (U.S. Dist. Ct., N.D. Ill., E. Div., decided January 17, 2012). The insurers filed a declaratory judgment action against Phusion claiming that they had no duty to defend or indemnify it in five lawsuits because of an unambiguous exclusion from coverage in the appli-

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cable insurance policies. Phusion brought a counterclaim, arguing that they did have a duty to defend it.

According to the court, the exclusion applies to any case alleging injury arising from intoxication. Because four of the five cases filed against Phusion involve injury attributable to intoxication, the court found that the insurers have no duty to defend the beverage maker in those suits. One of the cases, however, involved a claim that plaintiff Michael Mustica experienced heart problems the day after drinking 2.5 cans of Four Loko and has been under the care of a cardiologist since then. As to this suit, the court stated, "Unlike the other lawsuits, Mustica does not allege an injury caused by intoxication. His claim is that he consumed a dangerous beverage and as a consequence suffered serious health effects." While the court ruled that the insurers must defend this claim, it did not determine whether they must indemnify Phusion because liability has not yet been established.

LEGAL LITERATURE

Margherita Poto, "Food and nano-food within the Chinese regulatory system: no need to have overregulation," *European Journal of Law & Technology*, 2011

University of Turin Law Professor Margherita Poto explores the food-safety laws in the People's Republic of China (PRC) and the Special Administrative Region of Hong Kong to set the stage for discussing how their regulatory systems may be sufficiently advanced to address the potential challenges posed by the use of nanotechnology in the food sciences. Her article appears in a [special edition](#) of the *European Journal of Law & Technology* devoted to nanotechnology issues.

According to Poto, existing risk analysis rules, registration and traceability requirements and premarket approval should adequately ensure the safety of "nano-foods." She contends, "Mainland China and Hong Kong are seriously committed to strengthen their regulatory framework in order to protect consumers from unsafe food and this commitment can involve the field of nano-foods, as an integrant part of the novel foods regulation. The regulatory framework may allow PRC, as well as Western countries, to reach astonishing developments in the field of nano-foods as well."

OTHER DEVELOPMENTS

BBB Advertising Division Recommends Changes to Toddler Food Ad Claims

The National Advertising Division (NAD®) of the Council of Better Business Bureaus has reportedly determined that while Gerber Products Co. can justify certain of its baby food advertising claims, others should be modified or

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discontinued. Competitor Beech-Nut apparently challenged claims pertaining to Gerber's "Graduates" product line before the industry self-regulatory body.

Among other matters, NAD[®] found that "unique and innovative" claims were substantiated, and that Gerber could continue to make two exclusivity claims: "Only Graduates Lil' Entrees is designed just for toddlers, with protein, grains, and a side of veggies . . . [o]f items in the Baby Aisle" and Gerber Graduates Healthy Meals are "The only meals designed for preschoolers with protein and a full serving of veggies."

NAD[®] took issue, however, with "the message conveyed by Gerber's TV commercials for its Fruit & Veggie Melts. This commercial features a voiceover that claims, 'the Gerber generation is making their fruit and veggies disappear,' as whole fruits and vegetables are shown to disappear into a bag of Melts." According to NAD[®], the visual depiction and voiceover "conveyed an unsupported message that Gerber's Melts were nutritionally equivalent to whole fruits and vegetables and recommended that the advertiser discontinue the commercial."

NAD[®] also recommended that "natural" claims be discontinued and that the company either discontinue "immune support" claims on its Website or "modify it by making clear that its immunity-related benefit relates to the products' capacity to ensure or maintain a healthy immune system by maintaining adequate levels of Vitamins A, C, and E." Gerber has apparently agreed to follow the recommendations and expressed its expectation that competitors "similarly support self-regulation and . . . follow the recommendations NAD made in this decision." See *NAD[®] News*, January 17, 2012.

Animal Rights Activists Claim Responsibility for Arson Fire at California Feedlot

Animal rights activists have reportedly claimed responsibility for an arson fire that destroyed 14 cattle trucks and other equipment at Harris Ranch in California's San Joaquin Valley. In an anonymous e-mail message to the media, activists said the January 8, 2012, fire was started to protest "the horrors and injustice of factory farming." The message ended with, "Until next time." Apparently no people or animals were injured in the fire at the farming operation, one of the largest cattle feedlots in California and the 14th largest in the United States. See *Truth About Trade & Technology*, January 17, 2012.

Foreign Companies Look to Expand Presence in China's Dairy Industry

Switzerland-based Nestlé S.A. has announced plans to fund a dairy farming institute in Shuangcheng, China, to help the region's suppliers expand their businesses and source "high quality milk sustainably." According to a January 11, 2012, press release, the new institute "aims to be the country's leading dairy training center, offering teaching courses from national and

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international experts."The company and city of Shuangcheng are reportedly investing 2.5 billion Chinese yuan in the project, which will also guarantee bank loans for purchasing additional cattle and increase the "training and technical assistance already provided to local farmers."

As further noted in a January 13, 2012, *Wall Street Journal* article, Nestlé evidently "hopes to increase its market share in China's dairy industry" and believes larger farms will help "boost production and efficiency while projecting a reputation for safety." Other foreign companies such as Fonterra Co-Operative Group Ltd. have likewise indicated interest in more consolidated farming operations, which would streamline a supply chain plagued by several food safety scandals, including melamine-tainted milk powder. "This new training institute is a continuation of our long-term investment in the future of Shuangcheng to ensure it remains one of China's leading dairy districts," said Nestlé China Chair and CEO Roland Decorvet.

MEDIA COVERAGE

Biologist Criticizes Media "Paranoia" Sowed by Plant MicroRNA Study

A *Slate.com* science writer has penned a January 17, 2012, "Medical Examiner" blog post criticizing media coverage that used recent microRNA (miRNA) research to erroneously suggest a link between genetically modified organisms (GMOs) and human health. According to biologist Emily Willingham, Nanjing University scientists reportedly identified miRNA from rice and other plant foods in human blood and tissues, raising questions about whether the foreign genetic material could inhibit normal protein functions. "The rice results, simply stated, show an effect of one miRNA from one non-GM plant on one protein in live mice and in cultured human liver cancer cells," recounts Willingham, who singles out a January 9 *Atlantic* article by Ari LeVaux for mischaracterizing these findings as evidence of GMO health risks and igniting "a social-media chain reaction" in the process.

In particular, Willingham refutes LeVaux's implication that GM foods contain modified miRNA and thus should come under more stringent federal regulation. As she explains, the class of molecule examined by the Nanjing study "hasn't been altered in GM foods" and is not interchangeable with other forms of RNA cited in LeVaux's argument against "substantial equivalence," the risk assessment tenet that if testing indicates a GM food has the same essential features as a non-GM food... that it should fall under standard food regulations." Adding that humans have evidently ingested plant miRNAs "for a long time," Willingham ultimately concludes that the current framework is more than adequate for assessing the safety of GM foods and flexible enough to address a rapidly evolving biotech industry.

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To this end, Willingham views the *Atlantic* story as a cautionary tale about the perils of science journalism. Originally shared “11,000 times on Facebook alone,” the incorrect article later underwent revisions but “couldn’t outpace the light-speed transmission of misinformation.” The biologist blogger thus urges readers and other researchers not to focus solely on the GMO angle but to ask what role ordinary plant miRNAs might play in development and disease. “That’s the question that shouldn’t get lost amidst the shrapnel of LeVaux’s social-media bombshell,” she opines.

Mobiledia Explores Food Traceability Technology

A January 18, 2012, *Mobiledia* article has highlighted the increasingly sophisticated technology used to trace food back to its source, exploring how QR codes and other tracking devices can help consumers, retailers and regulators follow products from farm to fork. According to *Mobiledia* contributor Janet Maragioglio, systems like IBM’s InfoSphere label products with unique bar codes “at each stage of production and distribution” to identify “farms, slaughterhouses, shipping containers, trucks, grocery stores and other stops along the food supply chain.” As Maragioglio reports, InfoSphere can even tag specific animals so that consumers with smart phones could “theoretically, find out which specific cow their milk came from or which pig provided their bacon.”

Meanwhile, the capabilities of these systems have drawn attention from government agencies interested in accessing information about the entire market. “Federal regulators are imposing increasingly strict requirements on food suppliers, and may soon need them to adopt traceability systems like the ones IBM has developed,” concludes Maragioglio, who notes that IBM has already partnered with “a few government regulators around the world to further adoption of its food traceability technology.”

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

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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.

