Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATIONS, REGULATIONS AND STANDARDS

USDA Proposes New Rules for Snack Foods in Schools

The U.S. Department of Agriculture (USDA) has **proposed** new rules that would regulate the nutritional content of snacks, soft drinks and meals sold in school cafeterias, vending machines and snack bars. According to a USDA news release, the "Smart Snacks in School" proposal draws upon "recommendations from the Institute of Medicine, existing voluntary standards already implemented by thousands of schools around the country, and healthy food and beverage offerings already available in the marketplace." Required under the Healthy, Hunger-Free Kids Act of 2010, the new rules are part of the government's efforts to combat childhood obesity by establishing nutrition standards for all food sold in schools—not just federally subsidized school breakfasts and lunches.

"Parents and teachers work hard to instill healthy eating habits in our kids, and these efforts should be supported when kids walk through the schoolhouse door," said Agriculture Secretary Tom Vilsack. "Good nutrition lays the groundwork for good health and academic success. Providing healthy options throughout school cafeterias, vending machines, and snack bars will complement the gains made with the new, healthy standards for school breakfast and lunch so the healthy choice is the easy choice for our kids." *See USDA News Release*, February 1, 2013.

USDA Proposes Amendments to Organic Crop and Processing Rules

The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) has **proposed** amending the National List of Allowed and Prohibited Substances to change annotations pertaining to the use of peracetic acid in organic crop production and the use of potassium hydroxide, silicon dioxide and beta-carotene extract color in organic handling. Following the recommendation of the National Organic Standards Board, AMS has also proposed removing non-organic annatto extract color from the list of approved substances for organic handling.

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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In particular, AMS has requested comments that (i) "identify any formulated hydrogen peroxide products labeled for agriculture use that contain more than 5% peracetic acid," and (ii) "describe whether product reformulation will be necessary to comply with the proposed amendment for silicon dioxide at section 205.605(b) and the proposed removal of annatto extract color from section 206.606." The agency has requested comments on the proposed amendments by March 7, 2013. *See Federal Register,* February 5, 2013.

FDA Issues Rule on Administrative Detention of Food

The Food and Drug Administration (FDA) has issued a final **rule** that adopts, without change, the interim final rule (IFR) titled "Criteria Used to Order Administrative Detention of Food for Human or Animal Consumption" that was published in the *Federal Register* on May 5, 2011.

Effective February 5, 2013, the final rule affirms IFR's change to the criteria for ordering administrative detention of human or animal food as required by the FDA Food Safety Modernization Act (FSMA). Under the new criteria, "FDA can order an administrative detention if there is reason to believe that an article of food is adulterated or misbranded." *See Federal Register,* February 5, 2013.

European Parliament Votes to Reform Fishing Policy

The European Parliament has **approved** a major reform of the Common Fisheries Policy (CFP) that aims to return fisheries "to sustainable stock levels" by 2020. According to a February 6, 2013, press release, the reforms will prevent member states "from setting quotas that are too high to be sustainable" and compel fishermen "to respect the 'maximum sustainable yield' (MSY), i.e. catch no more than a given stock can reproduce in a given year." The revised CFP will also address how the industry treats "discards," that is, "fish thrown back, usually because they are of an unwanted species or size," by requiring fishing vessels "to land all catches in accordance with a schedule of specific dates for different fisheries, starting from 2014," and by restricting landed catches of undersized fish "to uses other than human consumption."

In addition, the European Parliament has agreed to take a long-term approach to fishery management rather than engage in "yearly quota-haggling" with member states and other governments. "We have shown today that the European Parliament is anything but toothless," said MEP Ulrike Rodust, who serves on the Committee of Fisheries. "We have used our power as a co-legislator, for the first time in fisheries policy, to put a stop to overfishing. Fish stocks should recover by 2020, enabling us to take 15 million tonnes more fish, and create 37,000 new jobs."

FSA Publishes Testing Protocol for Beef Samples

In the wake of a recent investigation conducted by the Food Standards Authority of Ireland that identified horse and pig DNA in beef products, the U.K. Food Standards Agency (FSA) and Department for Environment, Food and Rural Affairs have **published** their own protocol for testing "food authenticity in processed meat products." According to a February 6, 2013, FSA press release, the protocol calls for "specialized analytical techniques to provide information about the possible presence of horse or pig DNA in a range of beef products available to U.K. consumers."

As part of the extended survey, 28 local authorities (LAs) will analyze 224 samples from meat products selected as representative of those on the market. The protocol requires LAs to report screening samples by March 11, 2013, with any confirmatory tests reported by April 8. FSA also intends to identify brand names and describe any formal actions taken when it releases the study's results to the public.

Meanwhile, the agency has already confirmed that beef lasagna products recently recalled by one major brand "tested positive for more than 60% horse meat." FSA has reported that Findus withdrew the beef products "after its French supplier, Comigel, raised concerns about the type of meat used in the lasagne." This latest revelation has evidently prompted FSA to demand that industry begin testing its own products and submit results by February 15. "Following our investigations into Findus products, the FSA is now requiring a more robust response from the food industry in order to demonstrate that the food it sells and serves is what it says it is on the label," said FSA chief executive Catherine Brown. "We are demanding that food businesses conduct authenticity tests on all beef products, such as beef burgers, meatballs and lasagne, and provide the results to the FSA. The tests will be for the presence of significant levels of horse meat." *See FSA Press Release,* February 7, 2013.

Russia Extends Meat Ban to Turkey Products

Russia has reportedly imposed a ban on U.S. turkey imports, effective February 11, 2013, thus extending a ban on pork and beef imports in an ongoing dispute over the use of growth stimulant ractopamine in animal feed. According to a news source, Russia's Federal Service for Veterinary and Phytosanitary Surveillance (VPSS) made the decision after repeated warnings from Russian authorities about continual breaches of Russian rules banning the presence of the chemical—believed to cause health problems in humans—in food. The Codex Alimentarius Commission has apparently determined that the chemical is not harmful to humans when present in meat at low levels, but that has not stopped some countries, such as Russia and China, from banning it.

"Since the violations continue and we are finding ractopamine in meat shipments from the USA, we plan starting February 11 to impose restrictions on the import of this product," VPSS Chief Sergei Dankvert said. The agency also called the development "a crude violation of Russian and the Eurasian Customs Union['s] animal health requirements." According to a recent *Reuters* report, a U.S. poultry trade group says that turkey producers that ship to Russia do not use ractopamine and hope that the situation is a "misunderstanding and that it can be resolved without impacting our turkey exports to Russia." Some claim that the ban is an improper protectionist measure adopted for the benefit of domestic producers who have seen prices fall precipitously since Russia joined the World Trade Organization. *See Reuters,* February 5 and 8, 2013.

LITIGATION

Class Certification Revoked for Pizza Delivery Drivers

The Eighth Circuit Court of Appeals has reversed the grant of class certification for some 1,600 Domino's Pizza delivery drivers in Minnesota, finding that their claims lacked commonality. ***Luiken v. Domino's Pizza, LLC*, No. 12-1216 (8th Cir., decided February 4, 2013)**.

The drivers claimed that Domino's improperly withheld from them a fixed delivery charge imposed on customer orders. They contended that the charge was in the nature of a surcharge or gratuity under Minnesota law and, as such, must be paid to them. According to the court, liability was based on the objective, reasonable person standard, and what is objectively reasonable from the perspective of the customer "depends on the nature and context of the parties' bargain." Because some customers were told by drivers that Domino's retained the charge and was not part of their tip and because the fixed charge was sometimes within the normal range for a tip, "but sometimes well outside it," the certified class did not meet the requirements of commonality under class certification rules.

Federal Court Dismisses Suit Challenging Absence of Bee Pollen in Honey

A federal court in Wisconsin has dismissed as preempted a putative class action alleging that the company which makes Sue Bee Clover Honey® violates a state honey-labeling standard by failing to disclose that the product does not contain bee pollen. *Regan v. Sioux Honey Ass'n Coop.*, No. 12-758 (U.S. Dist. Ct., E.D. Wis., decided January 31, 2013). The court also dismissed an unjust enrichment claim and a cause of action based on an alleged violation of the Food, Drug, and Cosmetic Act (FDCA).

According to the court, the Wisconsin honey standard is based on a Codex Alimentarius provision that prohibits the removal of pollen from honey

"except where this is unavoidable in the removal of foreign inorganic or organic matter." Because federal law has no standard of identity for honey, under the Nutrition Labeling and Education Act (NLEA), the label must therefore bear the "common or usual name" of a food contained therein. The court determined that "honey" was the common name for the product and that a state law requiring a different designation was expressly preempted under the NLEA. So ruling, the court rejected a conflict preemption analysis used by a federal court in California considering similar litigation and issues.

The court found the unjust enrichment claim preempted and then ruled that the plaintiff could not bring a private right of action for violation of Wisconsin's Administrative Code based on federal labeling rules under the FDCA, because that statute "creates no private right of action." The court further ruled that even if he could bring the action, the plaintiff failed to state a claim because pollen is not a 'characterizing ingredient or component' of honey—"honey is honey, even in the absence of pollen," the court said.

Olive Oil Trade Group Challenges Capatriti® Brand as Inauthentic

The North American Olive Oil Association has brought an unfair competition and false advertising action against The Gourmet Factory claiming that it sells its Capatriti® brand as "100% Pure Olive Oil" when it is actually made from "leftover olive skins and pits using a combination of chemical solvents and high temperatures." *N. Am. Olive Oil Ass'n v. Kangadis Food Inc., d/b/a The Gourmet Factory*, No. 113-868 (U.S. Dist. Ct., S.D.N.Y., filed February 6, 2013). The process apparently creates a byproduct referred to as "pomace," and the complaint alleges that products containing pomace may not be marketed and labeled as olive oil under "an array of olive-oil making conventions, standard industry practices, international regulations, and federal and state laws."

The association allegedly purchased tins of the defendant's product from store shelves in New York and New Jersey and shipped them to an expert in Italy for testing, which purportedly confirmed the presence of chemicals and constituents indicative of pomace, which can apparently be produced at a fraction of the cost of authentic olive oil. The Gourmet Factory allegedly sells its tins of "100% Pure Olive Oil" at prices one-third to one-half of the prices charged for competitors' authentic products. According to the association, the defendant fought the adoption of purity standards in Connecticut, going so far as to sue to delay their enactment, and thus "clearly was on notice about the relevant standards that distinguish olive oil from Pomace."

Alleging harm to association members who are competitors and consumers who are diverted "away from authentic products" and duped "into purchasing something that is *not* olive oil" thus eroding their confidence in the olive oil market and in food labeling in general, the plaintiff alleges Lanham Act and New York General Business Law violations. The association requests declara-

tory and injunctive relief, an order requiring the defendant to cease and desist immediately from selling mislabeled oils and to take steps to notify retailers and purchasers about the presence of pomace in its products, as well as treble statutory damages, costs, and attorney's fees.

Energy Shot Maker Sued for Making Allegedly False Claims

A California resident has reportedly filed a putative class action against the company that makes 5-Hour Energy® shots, claiming that "no genuine scientific research" and "no scientifically reliable studies" support the company's claims that the product provides "any more additional benefits over a caffeine tablet or a cup of coffee." *Soto v. Innovation Ventures, LLC*, No. 13-591 (U.S. Dist. Ct., C.D. Cal., filed January 28, 2013).

According to a news source, the plaintiff alleges that the company overcharges consumers based on false claims and that some of the product's ingredients may present serious undisclosed health risks. Seeking to represent a nationwide class and statewide subclass of consumers, the plaintiff apparently alleges violations of the California Consumers Legal Remedies Act and Business and Professions Code, breach of express warranty, unjust enrichment, and fraud (intentional misrepresentation and concealment of fact). *See Mealey's Class Actions*, February 1, 2013.

General Mills Settles Yo-Plus Digestive Health Claims Suits

General Mills has agreed to establish an $8.5-million fund to settle claims that it falsely advertised its Yo-Plus yogurt as a product that helped naturally regulate "digestive health." *Johnson v. General Mills, Inc.*, No. 10-61 (U.S. Dist. Ct., C.D. Cal., S. Div., stipulation of settlement filed February 4, 2013).

If the court approves the agreement, purchasers throughout the United States will be able to seek $4 for each unit of Yo-Plus purchased, and any unclaimed funds will be distributed to the National Consumer Law Center and Mayo Clinic. The company apparently no longer sells the products. The costs of class notice and administration, attorney's fees and incentive awards for plaintiffs in several related class lawsuits will be deducted from the settlement fund.

Recovery will be capped at 13 units of Yo-Plus yogurt per claimant, unless proof of purchase for more units purchased during the class period can be shown. A hearing for preliminary approval of the settlement is scheduled for March 11, 2013.

Court Approves Settlement of Wage Claims Against Japanese Steakhouse Chain

A federal court in California has reportedly approved the settlement of wage-related claims in a class action filed by restaurant managers against Benihana National Corp., which owns and operates a Japanese hibachi steakhouse

chain. *Akaosugi v. Benihana Nat'l Corp.*, No. 11-1272 (U.S. Dist. Ct., N.D. Cal., settlement approved January 24, 2103).

The company has apparently agreed to pay $660,000, including attorney's fees and costs, to settle claims that it forfeited managers' accrued vacation and failed to compensate them for it, forced them to work more than eight hours a day without paying overtime, failed to provide meal and rest breaks, and failed to provide accurate wage statements. *See Mealey's Class Actions*, February 1, 2013.

Emotional Distress Claims Allowed for Uneaten Contaminated Food in Washington

Answering a question certified by the Ninth Circuit Court of Appeals, a divided Washington Supreme Court has determined that a deputy sheriff who was served, but did not consume, a Burger King hamburger contaminated with an employee's spit, may recover under state product liability law for emotional distress, "but only if the emotional distress is a reasonable reaction and manifest by objective symptomatology." ***In re Bylsma v. Burger King Corp., No. 86912-0 (Wash., decided January 31, 2013)***. The deputy had alleged ongoing emotional distress, including vomiting, nausea, food aversion, and sleeplessness, symptoms that purportedly led him to seek treatment from a mental health professional.

So ruling on a matter of first impression, the court majority agreed with the deputy sheriff that the Washington Product Liability Act allows recovery for emotional distress damages absent physical injury. The federal district court which had considered the deputy's claim, dismissed it on the ground that state law did not allow such recovery. According to Washington's high court, the legislature did not adopt the Model Uniform Product Liability Act's definition of "harm," intending instead for the term to be continually developed through case law. Citing cases decided since 1907 allowing such recovery in the negligence context and noting that none of them involved contaminated food, the court states, "each concerned emotionally laden personal interests, and emotional distress was an expected result of the objectionable conduct in each case. Common sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil."

Three dissenting justices would have found no right of recovery under the law, **asserting** that emotional distress damages in the absence of physical injury are not allowed. In this regard, the dissenters state after reviewing analogous case law, "There is simply no logical reason, however, to limit recovery for emotional distress in [negligent infliction of emotional distress] cases where a family member is traumatized by seeing or learning of the death of a loved one, but not in Deputy Bylsma's case, where he claims trauma

from the sight of a contaminated burger he did not even eat." They contend that this "falls short of "'an especially horrendous event" involving conditions analogous to seeing a "crushed body . . . or hearing cries of pain [or] dying words."'" They also suggest that allowing such recovery would lead to the imposition of increased costs on consumers.

OTHER DEVELOPMENTS

New Report Raises Questions About Safety of Nanomaterials in Food and Food Packaging

Advocacy organization As You Sow has issued a **report** titled "Slipping Through the Cracks: An Issue Brief on Nanomaterials in Food" to "inform companies, investors, and consumers about the emerging use of engineered nanomaterials in food and food related products, and to highlight the potential unknown risks of this technology."

The organization describes how it sought information from major food and food packaging companies about nanomaterials in their products, and of those few responding, most either do not know whether nanomaterials are in their supply chain or were not apparently concerned about the issue. Comprehensive survey results are included in the report. As You Sow also tested a few products and purportedly found nano-sized titanium dioxide in the powered sugar used on a Dunkin' Donut product. The organization is soliciting contributions to allow it to test other products, such as Trident gum and Pop-Tarts.

The report suggests that while initial studies on nano-particle exposures have raised health concerns, little safety testing is underway. As You Sow observes that Europe has taken the lead on studying and regulating nanomaterials in food and expresses concern about the U.S. Food and Drug Administration's (FDA's) apparent failure to establish "parameters, tests, or testing equipment or methodology . . . to identify or decide how to measure exposure, absorption levels, or behaviors of nanoparticles in the human body." According to the report, every company should develop a nanomaterial policy and disclose it to consumers, investors and stakeholders; determine if nanomaterials are in its supply chain and designate someone in the company to assume responsibility for "product safety related to nanomaterials."

According to As You Sow Executive Director Andy Behar, "We're not taking a no nano position. We're saying just show it's safe before you put these things into food or food packaging."

Responding to the report, New York University Nutrition Professor Marion Nestle discussed FDA's position "on how industry should deal with nanoparticles in foods and food packaging," and stated, "the FDA has no idea whether this technology is safe or not and is depending on industry to find out.

Because the FDA does not require labeling of nanomaterials (the European Union does), you have to decide for yourself whether this is something you want to add to your list of food worries." *See The New York Times*, February 5, 2013; *FoodPolitics.com*, February 7, 2013.

Yale Alums Object to Food & Beverage Corporate Sponsorship

A Yale University event for women graduates will feature an address by U.S. Supreme Court Associate Justice Sonia Sotomayor, and some alumnae have reportedly questioned whether she should be participating in a PepsiCo-sponsored event. An architecture graduate apparently called the association "shocking," despite assurances from the Supreme Court's public information officer that "[h]er appearance does not suggest any form of endorsement by PepsiCo."

Public health activist and author Michele Simon, who graduated from Yale with a master's degree in public health, reportedly said, "PepsiCo has its tentacles deep into Yale. It's disgusting. What is this nation's leading educational institution doing participating with this threat to public health?" Details about her report on the relationship between the Academy of Nutrition and Dietetics and the food and beverage industry appear in Issue **468** of this *Update*.

A legal ethics expert opined that Sotomayor's participation did not implicate any judicial ethics concerns, and the university expressed its gratitude for PepsiCo's support of the April event. The company itself cited the important goals of diversity and leadership development when discussing the event. *See The New York Times*, February 6, 2013.

NAD Clears Promotions for Michelob ULTRA Light Cider®

According to a news source, the Council of Better Business Bureau's National Advertising Division (NAD) has determined that Anheuser-Busch promotions for Michelob ULTRA Light Cider® comply with Food and Drug Administration definitions and guidelines. The company apparently claims that the product has one-third fewer calories than its competitors, and the ad industry's self-regulatory investigative unit "determined that the advertiser had provided a reasonable basis for the claim." NAD considered the product's calorie content, the calorie content of other leading hard ciders and their market share, as well as whether the brewer's claim provided "meaningful and accurate information to consumers." The company was reportedly "pleased with NAD's decision." *See Law360*, February 5, 2013.

SCIENTIFIC/TECHNICAL ITEMS

Yale Study Focuses on Food Addiction Stigma

A recent study examining the public stigma around food addiction has concluded that the "food addict" label "was perceived similarly to obesity, but more favorably than other addictions." Jenny DePierre, et al., "A New Stigmatized Identity? Comparisons of a 'Food Addict' Label with Other Stigmatized Health Conditions," *Basic and Applied Social Psychology,* February 2013. To gauge public perceptions of food addiction, researchers at Yale University's Rudd Center for Food Policy & Obesity first asked 659 adults about their responses to individuals "with various health conditions and addictions, including obesity, food addiction, physical disability, mental illness, cocaine addiction, and smoking." A second survey of 570 adults asked them to view only one of three addictions—smoking, alcohol or food—"to specifically compare public perceptions of individuals described as being addicted to food to those with smoking and alcohol addictions."

While the results of the first online survey allegedly showed that "a food addict label added to the stigma of obesity," the second survey failed to support this finding, raising questions among the study's authors about whether gender or other health conditions mitigated participants' responses to the "food addict" label. In addition, both surveys reported that "food addiction was rated more favorably when compared to other addictions…, indicating that it may not be perceived as a 'real' addiction." Those individuals labeled as "food addicts," for example, "generated more empathy, less disgust, and less anger than those with alcohol and tobacco addictions," and were "blamed less for the addiction compared to those labeled with smoking and alcohol addictions," according to a February 5, 2013, *Yale News* article.

"[T]his research provides the first evidence of public perceptions about food addiction, suggesting that it may be viewed favorably compared to other addictions and that it may not add necessarily add to the stigma of obesity," concludes the study. "An important next step for research is to identify the causal attributions of food addiction, which may have different implications for stigma."

Researchers Examine Parallels Between Food and Drug Addiction

A recent article published in *Biological Psychiatry* reviews the research examining the neurological basis for food addiction and its relation to obesity. Nora Volkow, et al., "The Addictive Dimensionality of Obesity," *Biological Psychiatry,* February 2013. Co-authored by National Institute on Drug Abuse Director Nora Volkow, the article proposes that drug and food addiction "share

neurobiological processes that, when disrupted, can result in compulsive consumption, while also involving unique neurobiological processes." In particular, the authors argue not that obesity is the result of food addiction, "but rather that food reward plays a critical role in overeating and obesity, referring to it as the dimensional component of obesity."

To this end, the article describes how drug and food addiction allegedly share genetic, molecular, neurobiological, and behavioral mechanisms that, when coupled with environmental triggers, have "the potential to facilitate or exacerbate the establishment of uncontrolled behaviors." The authors also speculate that exposure to obesogenic foods can trigger what is known as "the dark side of addiction," "the transition that drug-addicted individuals experience between the initial, pleasurable use of drugs to the one that, with repeated use, results in drug consumption to relieve negative emotional states."

"Thus, strategies that borrow from successful prevention and treatment strategies in addiction might be beneficial in obesity," suggest the authors. "Future research in this area should include social and policy strategies to decrease the availability of obesogenic food (restricting its sales, increasing their costs), increase access to alternative reinforcers (healthy food that can compete in price for high-calorie food and access to physical activity), and develop education (taking advantage of schools, families, and communities)." Additional details about Volkow's food addiction research appear in Issue **456** of this *Update*.

Meanwhile, the latest volume of Academic Press's *Vitamins and Hormones* series includes a chapter outlining the potential role of the gastric peptide ghrelin in obesity and food addiction. Harriët Schellekens, et al., "Ghrelin at the Interface of Obesity and Reward," *Obesity (Vitamins and Hormones),* February 2013. Published in the first edition of *Obesity,* the chapter discusses ghrelin "as the only orexigenic hormone from the periphery to act in the hypothalamus to stimulate food intake," describing "a role for ghrelin and its receptor at the interface between homeostatic control of appetite and reward circuitries modulating the hedonic aspects of food."

Focusing on ghrelin-mediated appetite signaling, the chapter specifically argues that "nonhomeostatic factors such as the rewarding and motivational value of food, which increase with food palatability and caloric content, can override homeostatic control of food intake" and can lead to overconsumption. Relying in part on research conducted by Volkow, the article also posits that "[t]he repeated overconsumption of palatable (i.e., pleasurable) foods shares many characteristics with addictive behaviors" and is accompanied by "neuroadaptive changes within the central reward circuitries, such as altered

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gene expression and altered brain responsivity to food, similar to those occurring upon drug dependence." As a result of these findings, the authors ultimately conclude that future food addiction research and treatments may focus on "novel therapeutics" designed to target "the ghrelin-mediated reinforcing effects of palatable foods and drugs of abuse."

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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.