

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards U.S. Congress

#### [1] **USDA Officials Face Bipartisan Opposition During Senate Agriculture Committee Hearing on BSE Issues**

Department of Agriculture Secretary Mike Johanns, USDA Chief Economist Keith Collins and Animal and Plant Health Inspection Service Administrator Ron DeHaven reportedly faced tough questions from Democratic and Republican lawmakers last Thursday in a Senate Agriculture Committee hearing convened to discuss USDA's plan to resume imports of Canadian cattle on March 7, 2005. Of primary interest to the senators was a provision in the USDA proposal that will allow resumed shipments of Canadian beef products derived from cattle older than age 30 months while prohibiting imports of live cattle of the same age. Senators Mike Crapo (R-Idaho) and Mark Dayton (D-Minn.) reportedly claimed the proposal's inconsistency will result in the loss of American meatpacking jobs. "U.S. cattle producers and our economy are impacted as domestic processing capabilities are squeezed and shifted above the border," Crapo was quoted as saying, while Dayton called USDA's conclusion that the

rule would have only a "moderate economic impact" on U.S. industry "ignorant and offensive."

Johanns reportedly responded to the lawmakers by saying he was "aware of concerns" about the impact of beef shipments from older cattle and would review that part of the proposal before March 7. He promised a final report on feed ban issues by mid-February and an epidemiological report on Canada's recent BSE cases by the end of March. See *Testimony of the Honorable Michael Johanns* and *Reuters*, February 3, 2005; *Congress Daily*, February 4, 2005.

### Codex Alimentarius Commission

#### [2] **U.S. Delegates Schedule Public Meetings to Discuss Food Additives and Analytical Methods Proposals**

The U.S. Department of Agriculture has scheduled a March 9, 2005, [public meeting](#) in College Park, Maryland, to discuss U.S. draft positions to be presented at the April 25-29 meeting of the Codex Committee on Food Additives and Contaminants in The Hague, Netherlands. Issues to be considered at the March 9 meeting include (i) the Codex General Standard for Food Additives, (ii) draft maximum levels for cadmium in rice and various vegetables, (iii) draft codes of practice to prevent tin contamination and reduce dioxin and PCB contamination of foods, and (iii) discussion papers on risk management options for acrylamide and polycyclic aromatic hydrocarbons in food.



USDA has scheduled a similar [public meeting](#) for March 15 in College Park, Maryland, to discuss U.S. positions to be presented at the April 4-8 meeting of the Codex Committee on Methods of Analysis and Sampling in Budapest, Hungary. Agenda items at the March 15 meeting include criteria for analytical methods for biotechnology-derived foods and analytical methods for detecting dioxins and PCBs. See *Federal Register*, January 28 and February 2, 2005.

## Litigation Warnings

### [3] Restaurant Companies Settle Prop. 65 Lawsuit Involving Mercury Warnings

A San Francisco County Superior Court judge last Friday approved a [settlement](#) in a lawsuit against 15 restaurant companies that allegedly failed to warn customers of possible exposure to mercury in fish. California Attorney General Bill Lockyer filed the lawsuit in April 2003, alleging the companies violated the state's antitoxics law (Proposition 65) by failing to post "clear and reasonable" warnings about exposure to mercury and mercury compounds in shark, swordfish and tuna. Prop. 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses to warn the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity"; the law does not apply to chemicals that occur naturally in food. Methylmercury has been listed as a known reproductive toxin under Prop. 65 since 1987; mercury and mercury compounds as known reproductive toxins since 1990; and methylmercury compounds as carcinogenic since 1996.

The companies will pay a total of \$132,287 in civil penalties and the same amount for compliance costs and funding for consumer education programs. Restaurants covered by the settlement include Outback Steakhouse, Red Lobster, Ruth's Chris Steakhouse, and P.F. Chang's. See *Office of the California Attorney General Press Release*, February 4, 2005; *The Los Angeles Times*, February 5, 2005.

## Organic Foods Production Act

### [4] First Circuit Issues Ruling on Inconsistencies in USDA's Organic Standards

The First Circuit Court of Appeals has ruled that certain regulations governing the agriculture department's National Organic Program (NOP) are inconsistent with the Organic Foods Production Act of 1990 (OFPA). [Harvey v. Veneman, No. 04-1379 \(1st Cir. 1/26/05\)](#). OFPA prohibits synthetic substances in multi-ingredient products labeled as "organic" (those containing at least 95 percent organic ingredients), but NOP regulations have allowed limited use of 38 synthetics in organic processed foods. Under the court's ruling, most of the synthetic ingredients will no longer be allowed. Another court-directed change to the NOP regulations relates to dairy herds. OFPA requires all organic dairy animals to receive organic feed for 12 months before sale of milk or other milk products, but NOP rules have permitted dairy herds transitioning to organic production to receive 80 percent organic feed for nine months before the sale of any products. The court's ruling invalidates that NOP provision. According to a news source, USDA has not yet decided whether to take further action on the case but has issued a



[Federal Register notice](#) seeking comments on NOP procedures. See *Federal Register*, February 1, 2005; *Inside EPA*, February 4, 2005.

## Other Developments

### [5] DRI Seminar to Target Food Liability Issues

“Food Liability – Law, Science and Risk Management” is the title of a May 19-20, 2005, [seminar](#) in St. Louis, Missouri, sponsored by DRI, an international organization of defense trial lawyers and corporate counsel. Designed for food industry risk managers, claims professionals and lawyers, sessions at the event will include those covering the science of food-borne illness, insurance issues unique to obesity litigation, product tampering, and the use of experts in food litigation. [Madeleine McDonough](#), a Shook, Hardy & Bacon partner and member of the firm’s Agribusiness and Food Safety groups, will address issues that are likely to figure prominently in food litigation over the next decade – e.g., genetically modified food, bioterrorism and mad cow disease.

### [6] CSPI Claims Agricultural Biotechnology Is “Withering on the Vine”

The number of genetically engineered (GE) crops successfully navigating the U.S. government’s regulatory review process has decreased dramatically since the mid-1990s, according to a new [report](#) from the health advocacy group Center for Science in the Public Interest (CSPI). “The biotech industry is quick to bemoan government regulation, claiming it is too onerous,” the director of CSPI’s biotechnology project was quoted as saying. “But the fact is that even without strict government regulations, the industry is not inno-

vating, it’s stagnating. The industry promised a bounty of beneficial crops, but the biotech cupboard remains pretty bare except for the few crops that have benefited grain, oilseed and cotton farmers,” Gregory Jaffe said.

Based on its review of regulatory data from the Food and Drug Administration and USDA’s Animal and Plant Health Inspection Service, CSPI calls on the two government agencies to ensure that all GE products are reviewed more expeditiously and to increase the amount of federal funding for GE research. CSPI’s recommendations for biotech companies include pursuing GE crops that would benefit farmers in developing nations and supporting “sensible biosafety regulation” as a way of bolstering public acceptance among consumers. See *CSPI Press Release*, February 2, 2005.

## Scientific/Technical Items

### Alcohol

#### [7] New Studies Link Heavy Alcohol Consumption to Increased Cancer Risks; Other Studies Link Moderate Consumption to Improved Cognitive Function in Older Women

A new international study suggests that alcohol consumption is as harmful as smoking or high blood pressure in causing death and disability (R. Room, et al., “Alcohol and Public Health,” *The Lancet* 365: 519-530, February 5, 2005). The report focuses on alcohol’s role in multiple cancers, heart disease, stroke, and cirrhosis as well as its association with car accidents, self-inflicted injury and murder. The authors conclude that alcohol is



responsible for as much as 4 percent of the total global burden of disease and claim that a 10 percent increase in the price of alcoholic beverages could produce as much as a 7 percent decline in deaths from cirrhosis of the liver in men.

New research from Japan suggests that while alcohol intake is related to both cancer incidence and mortality in men, the lowest risk of developing cancer occurs among occasional drinkers (M. Inoue and S. Tsugane, "Impact of Alcohol Drinking on Total Cancer Risk: Data from a Large-Scale Population-Based Cohort Study in Japan," *British Journal of Cancer* 92: 182-187, 2005). Nearly 13 percent of cancers among men in the study were attributed to "heavy" drinking.

Meanwhile, two American studies report benefits to older women as a result of moderate drinking. (M. Stampfer, et al., "Effects of Moderate Alcohol Consumption on Cognitive Function in Women," *The New England Journal of Medicine* 352: 245-253, January 20, 2005; M. Espeland, et al., "Association Between Reported Alcohol Intake and Cognition: Results from the Women's Health Initiative Memory Study," *American Journal of Epidemiology* 161(3): 228-238, 2005). Both studies concluded that older women (ages 65 to 81) who consume about one drink a day exhibited better cognitive function than nondrinkers. See *The New York Times*, February 1, 2005.



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## LITIGATION UPDATE

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