

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Proposal Would Amend Animal Feed Regulations to Further Guard Against BSE

FDA yesterday announced a proposed rule to bolster bovine spongiform encephalopathy (BSE) defenses that would revise animal feed regulations by prohibiting the use of certain high-risk cattle material in all animal feeds. “These additional measures that we proposed today will make an already small risk even smaller by further strengthening the effective measures already in place to protect American consumers from BSE,” Acting FDA Commissioner Andrew von Eschenbach said.

High-risk cattle material prohibited under the proposal would include (i) brains and spinal cords from cattle ages 30 months and older; (ii) brains and spinal cords from cattle of any age that have not been inspected and passed for human consumption; (iii) the entire carcasses of cattle that have not been inspected and passed for human consumption if the brains and spinal cords have not been removed; (iv) tallow generated from the materials banned by this proposal if the tallow contains more than 0.15 percent insoluble impurities; and (v) mechanically separated beef derived from the materials prohibited by these proposed restrictions.

Press reports indicate that consumer advocates quickly condemned the proposed new rules, claiming FDA should have banned the use of all mammalian protein in the feed of animals used for human consumption. Vocal industry critic John Stauber, author of *Mad Cow U.S.A.*, was quoted as saying FDA and industry are “totally committed to continuing the practice of feeding slaughterhouse waste to cows,” while a Consumers Union representative deemed the revised feed regulations “completely inadequate.” See *FDA News Release*, October 4, 2005; *The New York Times* and *The Wall Street Journal*, October 5, 2005.

[2] FDA and HHS Issue Final Rule on Food Facility Registration

FDA and the Department of Health and Human Services have issued a [final rule](#) implementing the food facilities registration provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Act). The final rule confirms the October 2003 interim rule by requiring domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States to register their facilities by December 12, 2003. See *Federal Register*, October 3, 2005.



United Kingdom (UK)

[3] England to Take Action on “Junk Food” in Schools

Education Secretary Ruth Kelly last week announced the government’s plans to draft legislation by September 2006 that will prohibit “poor quality” hot dogs and hamburgers from school cafeterias as well as vending machines stocked with potato chips, candy and soft drinks. “I am absolutely clear that the scandal of junk food served every day in school canteens must end,” Kelly was quoted as saying.

Since Kelly’s announcement, the Department for Education and Skills has issued for public consultation a report titled *Turning the Tables: Transforming School Food*, which was authored by a panel of dietitians, nutritionists and other key stakeholders. In detailing proposed food- and nutrient-based standards and sample menus for school meals, the report notes that “confectionary, pre-packaged savory snacks [except those low in salt and fat] and high-sugar or sweetened fizzy drinks have no place in school lunch provision and other school food outlets.” It also asserts that the proposed standards “can set the scene for holistic changes in the way young people perceive food and health, and can pave the way for wider changes in our food culture.”

More information about the consultation is available [here](#); public comments are due by December 31, 2005. See *The Independent*, September 28, 2005; *DFES Press Notice*, October 3, 2005.

Litigation

Interstate Commerce

[4] Federal Court Dismisses Challenge to Nebraska’s Corporate Farming Ban

U.S. District Court Judge Laurie Smith-Camp last week dismissed a challenge to the constitutionality of Nebraska’s Initiative 300, finding that plaintiff John DeCamp lacked standing to bring his claims and failed to timely file court papers in the case. *John W. DeCamp, et al., v. State of Nebraska, et al.*, No. 4:04CV3194 (D. Nebraska, 9/28/05). Enacted in 1982, Initiative 300 generally prohibits corporations and certain other businesses from engaging in farming or ranching and provides various exceptions to the ban. DeCamp, a Nebraska state senator, alleged the corporate farming ban violated the Commerce Clause of the U.S. Constitution by unduly interfering with interstate commerce.

Although the *DeCamp* case was dismissed, the constitutionality of the Initiative remains an open question. In a pending case brought by, among others, a paraplegic who co-owns a feedlot, the plaintiffs assert that Initiative 300 violates the Americans with Disabilities Act by requiring at least one family member who owns the farm to engage in the “day to day labor and management” of the facility. A similar corporate farming ban in South Dakota was struck down last year. See *Associated Press*, September 30, 2005.



Hepatitis A

[5] **Chi-Chi's Settles with Man Who Needed Liver Transplant Following Hepatitis A Outbreak**

A federal court in Pittsburgh, Pennsylvania, last week reportedly approved a \$6.25 million settlement between the bankrupt Mexican restaurant chain Chi-Chi's and a man who required a liver transplant after contracting hepatitis A linked to food served at a Chi-Chi's restaurant in western Pennsylvania. State and federal health officials blamed contaminated green onions shipped from Mexico for the fall 2003 incident that killed four people and sickened more than 600. Some \$4.1 million of the settlement will fund a trust to pay for the ongoing care of Richard Miller, 58, while the rest of the money will reportedly compensate his family and cover attorney's fees. *See Associated Press*, September 30, 2005.

Other Developments

[6] **Animal Rights Group Alleges Abusive Farming Practices in New Report**

The organization Farm Sanctuary takes aim at the agribusiness community in a recent [report](#) critical of quality assurance programs, compliance with National Organic Program standards and third-party certification programs. "The lack of federal and state laws that prevent abusive farming practices has allowed cruel industrialized farms to propagate," Gene Bauston, the president of Farm Sanctuary, was quoted as saying. "In an attempt to thwart passage of basic humane legislation, agribusiness has produced voluntary quality assurance programs, which erroneously claim to promote animal welfare.

These industry schemes are intended to maintain the status quo and allow institutionalized animal cruelty to continue," he said. Among other things, the Farm Sanctuary report claims that (i) quality assurance guidelines "codify inhumane farming systems" by failing to prevent suffering and distress; (ii) organic egg and dairy producers use loopholes "to deprive animals of the opportunity to graze and forage" in natural settings; and (iii) labeling claims such as "grass fed" and "cage free" are mostly unverified. *See U.S. Newswire*, September 21, 2005.

Scientific/Technical Items

Obesity

[7] **American Kids Are Eating Too Much Fried Fast Food, Say Harvard Researchers**

A Harvard University study published this week found that the number of children who eat fried foods outside the home on a regular basis more than doubled over the course of a three-year period and generally resulted in weight gain and less healthy eating habits overall. (E. Taveras and D.S. Ludwig, et al., "Association of Consumption of Fried Food Away From Home With Body Mass Index and Diet Quality in Older Children and Adolescents," *Pediatrics* 116: 518-524, 2005). "Adolescence is a very risky time to develop poor eating habits," lead researcher Elsie Taveras was quoted as saying. "If you become overweight [during adolescence], it's very hard to lose the weight, and you are much more likely to become overweight as an adult."



The Harvard team surveyed more than 14,000 children between the ages of 9-14 and recorded their heights, weights, physical activity levels, and the frequency of eating fried foods away from home. At the end of the three-year study, the proportion of children who ate more than four times a week outside the home more than doubled. The change in eating habits was associated with greater intakes of total energy, sugar-sweetened beverages and *trans* fat, and lower consumption of low-fat dairy foods, fruits and vegetables. The researchers speculate that while eating large quantities of fried foods away from home may only result in slight weight gain over the course of one year, continuation of the dietary pattern year after year will ultimately lead to clinically significant weight gain. See *HealthDay Reporter*, October 3, 2005.



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Food & Beverage Litigation Update is distributed by Mark Cowing and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at mcowing@shb.com or mboyd@shb.com. You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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