

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA to Convene Nanotechnology Meeting in Fall 2006

The FDA plans to hold a meeting in mid-October 2006 on FDA-regulated products that contain nanotechnology materials. According to the *Federal Register* notice, the agency “is interested in learning about the kinds of new nanotechnology material products under development in the areas of foods (including dietary supplements), food and color additives, animal feeds, cosmetics, drugs and biologics, and medical devices; whether there are scientific issues that should be addressed”; and other related issues. FDA will issue further details about the meeting in a subsequent notice and in the interim, invites public comments on the topic. See *Federal Register*, April 14, 2006.

U.S. Department of Agriculture (USDA)

[2] USDA Seeks Comments About the Role of Pasture in the National Organic Program

The agriculture department is [inviting comments](#) from stakeholders on how USDA should address the relationship between ruminant animals, especially dairy animals, and pasture or land used

for grazing under National Organic Program (NOP) regulations. More specifically, the agency seeks input on topics that include (i) research supporting an expectation by consumers that organic milk comes from dairy cows raised on pasture; (ii) the appropriate contribution of pasture to ruminant animal nutrition; (iii) the potential implications of adopting minimum pasture requirements; and (iv) ways to evaluate compliance with measures adopted to change the role of pasture. Comments must be submitted by June 12, 2006. See *Federal Register*, April 13, 2006.

State/Local Initiatives

[3] Colorado Governor Vetoes School Nutrition Bill

Colorado Governor Bill Owens (R) last week vetoed legislation ([H.B. 1056](#)) that would have required school districts to adopt policies requiring at least 50 percent of vending machine offerings to meet particular nutritional standards. “There is no question that obesity and associated health complications resulting from a sedentary lifestyle are escalating problems for our youth,” Owens said in his veto message. “Though I am in favor of efforts to improve the physical and nutritional lifestyles of Colorado’s children, I cannot support legislation that micromanages school districts and their policies.” See *Veto Message of Governor Bill Owens*, April 11, 2006; *The Denver Post*, April 13, 2006.



Legal Developments

[4] Proposed Changes to Federal Rules to Affect E-Discovery Process

The U.S. Supreme Court last week approved proposed amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information. The [amendments](#) have been transmitted to Congress and will take effect on December 1, 2006, unless Congress enacts legislation to reject, modify or defer them. When it introduced the proposed rules, the Civil Rules Advisory Committee recognized that electronically stored information has important differences from information recorded on paper. The Committee observed that “[t]he most salient of these differences are that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic rather than static; and electronically stored information may be incomprehensible when separated from the system that created it.” Committee members went on to reason that these differences are causing problems in discovery that the amendments are designed to address.

The proposed rules will require counsel to discuss e-discovery issues during the early stages of litigation. The intent of the early discussions and court involvement if needed – regarding such issues as the scope of preservation, the types of search technologies to locate and review electronic documents, and the form of the ultimate production – is to create more consistent expectations and

predictability in the discovery process. Highlights relating to the proposed rule changes include the following:

Rule 16: The proposed amendment to this rule provides that the scheduling order contemplated by the rule can include provisions for disclosure or discovery of electronically stored information and any agreements the parties reach for asserting claims of privilege.

Rule 26: Under the proposed amendments to this rule, the parties must discuss any issues relating to preserving discoverable information. In addition, the initial disclosure requirement under the amended rule requires the production of a copy of, or a description by category and location of, all documents and electronically stored information that are in the possession, custody or control of the party and that the disclosing party can use to support its claims or defenses. But a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. In addition, the proposed amendment to Rule 26(b)(5) would create a process for asserting privilege after production. The producing party would be able to notify the receiving party, within a reasonable time, of a claim that privileged material or work product was inadvertently produced. After notification, the receiving party must return, sequester or destroy the information and not use it or disclose it to others until the claim of privilege is resolved.

Rule 33: Under the amendment to Rule 33, a



party can respond to an interrogatory by providing access to electronically stored information if the burden of finding the answer is essentially the same for either party.

Rule 34: The amendment to this rule establishes electronically stored information as a discoverable category distinct from “documents” and “things.” Rule 34’s amendment would also allow a requesting party to specify the form of production and allows the responding party to object to the requested form of production. In the absence of an order, agreement or request that electronically stored information be produced in a particular form, the amended rule permits a party to produce it in the form in which it is ordinarily maintained or a reasonably usable form.

Rule 37: The proposed amendment to this rule provides that, absent special circumstances, a court cannot impose sanctions under these rules upon a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

E-discovery has been at issue in U.S. courts for many years, but it has become a more prominent issue in recent years since the *Zubulake* series of decisions in New York and the *Coleman v. Morgan Stanley* case in Florida. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); 220 F.R.D. 212 (S.D.N.Y. 2003); 216 F.R.D. 280 (S.D.N.Y. 2003); 217 F.R.D. 309 (S.D.N.Y. 2003) (ultimately ordering an adverse inference jury instruction); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071, No. CA 03-5045 (Fla. Cir. Ct. – Palm Beach Cty. 3/23/05) (ordering sanctions, including a partial default judgment).

Scientific/Technical Items

Alcoholic Beverages

[5] Canadian Study Allegedly Links Beer Drinking to Increased Risk of Lung Cancer in Men

A new Canadian study suggests that beer consumption might be linked to an increased risk of lung cancer in men, while wine consumption appears to have a protective effect for both men and women. (A. Benedetti, et al., “Consumption of Alcoholic Beverages and Risk of Lung Cancer: Results from Two Case-Control Studies in Montreal, Canada,” *Cancer Causes and Control* 17(4): 469-480, May 2006.) Researchers examined data on beer, wine and spirits consumption from two population-based studies conducted in Montreal. For Study I, the researchers found that lung cancer risk increased 50 percent in men who consumed seven or more beers a week. In Study II, beer consumption was related to lung cancer risk only in men with low fruit and vegetable consumption. Moderate wine consumption (1-6 glasses/week) for women and men was significantly related to a decreased risk of lung cancer.



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Leo Dreyer and Mary Boyd in the Kansas City office of SHB.
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