

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

European Union

[1] Commission Takes Steps to Ensure U.S. Rice Is GM-Free

The European Commission has reportedly moved to prohibit U.S. long-grain rice shipments unless they are certified as free of genetically modified (GM) strains following recent disclosures that trace amounts of an herbicide-tolerant GE rice, LLRICE 601, have been found in commercial rice samples. Bayer CropScience apparently notified the U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) that it had detected its bioengineered product in commercial samples, and USDA Secretary Mike Johanns [announced](#) “that the presence of LLRICE 601 in the food and feed supply poses no safety concerns.” The agency indicated that USDA’s Animal and Plant Health Inspection Service (APHIS) would be conducting a public deregulation process for the engineered rice now that it had been detected in the marketplace. LLRICE 601 was field tested between 1998 and 2001 but never commercialized; it is part of Bayer’s regulated line. APHIS will be investigating the circumstances surrounding the GE release and whether violations of USDA regulations occurred. *See FT.com*, August 23, 2006.

Litigation

[2] Restaurateurs Take on Chicago’s Foie Gras Ban

According to news sources, the Illinois Restaurant Association and Allen’s New American Café, a popular local eatery, have filed a lawsuit claiming that Chicago’s ban on the sale of foie gras violates the state constitution. They are seeking preliminary and permanent injunctive relief to stop the rule from taking effect on August 22, 2006. Counsel for the plaintiffs was quoted as saying the nub of the constitutional claim is that:

Local governments are empowered under the Illinois constitution to deal with local problems. All of the foie gras sold in Chicago restaurants is lawfully produced in other states or countries. None is produced in Chicago. So, the City Council ban on restaurant sales is not designed to address any local problems, such as how animals are treated in Chicago. Since local governments are empowered by the Illinois Constitution to deal only with local issues, this ordinance is unconstitutional.

Additional information about the ordinance appears in issue 168 of this Report. Because the ordinance forbids the sale of foie gras, some restaurateurs have reportedly said they would continue to serve it, but it would be given away or incorporated into other dishes. “On the check you



won't see foie gras," said one. "You will see roasted potatoes \$16." See *Chicago Sun-Times*, *The Wall Street Journal Online*, *Chicago Business*, *AP*, and *PRNewswire*, August 22, 2006; *The New York Times*, August 23, 2006.

Legal Literature

[3] Law Review Publishes Trio of Articles on Legal and Legislative Approaches to Obesity

The spring 2006 issue of the *University of Arkansas at Little Rock Law Review* includes three articles, one of which specifically addresses the regulation of food advertisements. In "Regulating Food Advertisements: Some First Amendment Issues," Arkansas Dean and Law Professor John DiPippa suggests that the U.S. Supreme Court's most recent First Amendment decisions regarding commercial speech stand as a significant obstacle to broad bans on food advertising. DiPippa provides an analysis of *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in which Justice Thomas specifically equated anti-smoking regulations (which were stricken in part in *Lorillard*) with anti-obesity regulation. The dean concludes "At most, anti-obesity regulations may limit the access of children in limited circumstances and require disclosures on fast food items. But these tactics will work slowly and unevenly."

The two other articles, provide a point/counterpoint approach to obesity-related litigation. In "A Taxonomy of Obesity Litigation," attorney Theodore Frank, who produces the *Overlawyered.com* blog

and serves as director of the American Enterprise Institute's Liability Project, makes a case for the "fatal flaws" of obesity lawsuits, primarily due to individualized causation issues. Frank also contends that the "real solution to the illegitimate litigation discussed in this essay is not gerrymandering the tort laws to provide protection for individual industries with effective lobbies but rather meaningful class action and civil justice reform that prohibits actions being brought without tangible injury and that enforces the certification standards to protect the due process rights of defendants from such abuses."

From the plaintiffs' perspective, Jason Smith, a protégé of Richard Daynard at the Northeastern University School of Law, claims "Litigation can be a central strategy in improving public health." In his article, titled "Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity," Smith recommends that public health advocates make obesity a public health problem as opposed to an individual matter, arguing that obesity-related litigation is an appropriate step in that direction. He discusses law review articles by Jon Hanson and David Yosifon that "bring the insights of social psychology to legal analysis" and "express the centrality of situation, or environment, to the way people behave as individuals and as groups." If the problem is defined as environmental, then the food industry can be held liable through litigation, according to Smith, who also describes the lengths to which the industry seeks to "reinforce a dispositionist conception of human behavior. This is the 'personal responsibility' argument."



Other Developments

[4] Stakeholders to Gather in Kansas City for International Symposium on Agroterrorism

The potential for terrorist activity targeting crops, livestock and food processing systems will be the topic of a five-day symposium in Kansas City, Missouri, on September 25-29, 2006. Sponsored by the Federal Bureau of Investigation and the Executive Board of the Heart of America Joint Terrorism Task Force, the event will feature sessions that include (i) the role of the military in the event of an agroterrorist attack, (ii) food transportation issues, (iii) water supply safety, and (iv) crisis communications. Shook, Hardy & Bacon Partner [Chris McDonald](#) will co-present a September 28 session on civil litigation and legislative issues. Invited speakers include FBI Director Robert Mueller, U.S. Senator Pat Roberts (R-Kan.) and Homeland Security Secretary Michael Chertoff. More information about the event is available [here](#).

Media Coverage

[5] Dateline NBC Tackles Obesity Issues

An NBC-TV news magazine recently devoted an hour to obesity. Titled "[Food Fight](#)," the August 18, 2006, program provided a forum for food-industry executives and anti-obesity activists such as John Banzhaf to discuss their perspectives on the issue. Dateline NBC host Stone Phillips set the stage by acknowledging that while most people say individuals are responsible for controlling their weight, "a growing number of advocates, nutritionists and lawyers are taking the struggle from the food court to the court of law."

Several of those interviewed during the program talked about the use of toys, cartoon characters and the Internet in youth marketing. Also discussed were addiction research, what Banzhaf refers to as "fat lawsuits" and industry efforts to revamp products with healthier alternatives. Banzhaf claimed that "junk food and perhaps even other foods are the next tobacco." He also claimed that if he could show "that a company misrepresented a product, I can sue on that basis alone and never have to prove that a single person became obese."

Attorneys representing food manufacturers and company spokespersons countered that "big food" is not like "big tobacco" and that the companies are changing their products and marketing.

[6] Jacob Sullum, "The Fried Logic of Food Police. *Trans* fat in fast food? Who knew?," *Reason Online*, August 18, 2006

A senior editor at *Reason* magazine has published an [article](#) questioning the tactics of the Center for Science in the Public Interest (CSPI). The article critically discusses *trans* fat litigation recently filed against KFC by a retired physician with CSPI's support. Additional information about the lawsuit appears in issue 173 of this Report. Sullum contends that CSPI's real goal is to impose its "ideas about a proper diet on consumers who have different values and priorities."



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