

# Food & Beverage

## LITIGATION UPDATE

Issue 201 • February 8, 2007

### Table of Contents

#### Legislation, Regulations and Standards

- [1] GAO Lists Food Safety Network Among Federal High-Risk Areas .....1
- [2] FDA Proposes Heart Healthy Claim for More Whole Oat Products .....1
- [3] California Legislator Introduces Food Safety Bills .....1

#### Litigation

- [4] USDA Ordered to Conduct More Detailed Reviews of GE Crop Applications .....2
- [5] California AG to Appeal Mercury Warnings Decision .....3
- [6] Taco John's Voluntarily Dismissed from *E. Coli* Suits in Iowa .....3

#### Other Developments

- [7] U.N. Releases Annual Environmental Report, Calls for Nanotech Regulation .....3

#### Media Coverage

- [8] *Chronicle* Features Lawyer Who Launched Attacks on *Trans Fats* .....3
- [9] Lorne Manly, "Brewtube," *The New York Times*, February 4, 2007 .....4

#### Scientific/Technical Items

- [10] Study Suggests Possible BSE Risk from Milk .....4

**Shook,  
Hardy &  
Bacon** L.L.P.®

2005 & 2006  
Global Product Liability Law Firm of the Year  
WHO'S WHO LEGAL  
The International Who's Who of Business Lawyers

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Government Accountability Office (GAO)

##### [1] GAO Lists Food Safety Network Among Federal High-Risk Areas

A GAO [report](#) recently released to Congress has added food safety to its list of high-risk areas overseen by federal agencies. The report describes a “fragmented federal food safety system in which 15 agencies collectively administer at least 30 laws related to food safety,” with the Department of Agriculture (USDA) and the Food and Drug Administration (FDA) accounting for 90 percent of federal expenditures. Among the challenges identified in the report, federal agencies face (i) differences in regulatory authority; (ii) overlapping expenditures; (iii) little or no power to compel food recalls; (iv) management problems that may interfere with antiterrorism measures; (v) limited resources to inspect imports, especially seafood; and (vi) an uneven distribution of funds.

To address these issues, GAO recommends that “Congress enact comprehensive, uniform, and risk-based food safety legislation and commission the National Academy of Sciences or a blue ribbon panel to conduct a detailed analysis of alternative organizational food safety structures.” The Bush Administration has reportedly requested an \$11 million increase for food safety in the fiscal 2008 budget. *See Los Angeles Times*, February 1, 2007.

### Food and Drug Administration (FDA)

##### [2] FDA Proposes Heart Healthy Claim for More Whole Oat Products

In response to a petition filed by the Quaker Oats Co., FDA has [proposed](#) amending a regulation that allows some foods high in soluble fiber to make claims about lowering the risk of coronary heart disease (CHD). Under the current regulation, whole oat products that do not meet FDA “low fat” requirements cannot claim to affect CHD risk factors. The amendment would allow these foods to make soluble fiber and CHD claims if the “fat content is derived from whole oat sources.” FDA states that because whole oats contain higher amounts of total fat than barley, whole wheat, rice, or corn, “it is possible that a product could exceed the maximum total fat permitted under the ‘low fat’ requirement solely due to fat from whole oat sources.” Comments on the proposal should be submitted by April 23, 2007. *See Federal Register*, February 6, 2007.

### State/Local Initiatives

##### [3] California Legislator Introduces Food Safety Bills

State Senator Dean Florez (D-Shafter) has introduced a trio of bills to address the safety of leafy green vegetables in California. Senate Bills 200, 201 and 202, named “The California Produce Safety



Action Plan,” are intended to stop the *E. coli* outbreaks that plagued the spinach and lettuce industries in 2006.

While the bills are not yet available on the state’s legislative Web site, Florez announced during a February 2, 2007, press conference that (i) S.B. 200 would give the Department of Health and Human Services the authority it needs to “effectively manage future outbreaks” by allowing recalls, quarantines or produce destruction; requiring growers to undergo a licensure process that would identify potential risk factors such as proximity of fields to wildlife; and establishing an inspection program; (ii) S.B. 201 would require DHS to establish “good agricultural practices” that involve everything from water and fertilizer use to sanitation and flooding issues; water testing and recordkeeping would also be part of these practices; and (iii) S.B. 202 would establish a “traceback system” that would allow rapid tracking of leafy greens from the retailer and through distributors and processors to a specific grower.

Critics reportedly claim that industry can adequately police itself; a spokesperson for the Western Growers Association was quoted as saying, “Frankly, the Legislature doesn’t know beans about food-safety criteria.” A California assemblywoman who opposes Florez’s approach apparently contends that more research is needed. *See Mercury News*, February 1, 2007; *Santa Cruz Sentinel* and *Fresno Bee*, February 2, 2007.

## Litigation

### [4] USDA Ordered to Conduct More Detailed Reviews of GE Crop Applications

A D.C. district court has determined that the U.S. Department of Agriculture’s Animal Plant Health and Inspection Service (APHIS) failed to comply

with the National Environmental Policy Act (NEPA) in granting The Scotts Co. permits to field test genetically engineered (GE) grasses. [\*Int’l Center for Tech. Assessment v. Jobanns, No. 03-00020 \(U.S. Dist. Ct., D.C., decided Feb. 5, 2007\)\*](#). The field tests were conducted in several states, and pollen from GE grass was found mixed with conventional plants more than 12 miles from experimental plots in Oregon.

According to the court, while APHIS properly determined that the GE grass fit within a NEPA exemption, it failed to make the findings necessary to determine whether an exception to the exemption applied. The exception requires the agency to prepare an environmental impact statement or an environmental assessment where an otherwise exempted field test has the potential to significantly affect the quality of the human environment. In this regard, the court states, “The record contains substantial evidence that the field tests may have had the potential to affect significantly the quality of the human environment, and that the tests involved, at the least, novel modification (if not “new organisms”) that raised environmental issues. APHIS failed, however, to consider any of these possibilities.”

The court permanently enjoined APHIS from processing any acknowledgement or permit under federal regulations addressing GE organisms or products introduced into the environment without inquiring whether the exception applies and an environmental assessment should be prepared. The court also ruled that APHIS erred in denying a petition asking the agency to list the GE grass as a noxious weed; that part of the case was remanded for further proceedings. According to a news source, USDA received some 1,000 applications to grow GE plants in 2006, “most of which were approved quickly and with no formal environmental impact reviews.” *See The Washington Post*, February 7, 2007.



### [5] California AG to Appeal Mercury Warnings Decision

According to a news source, California Attorney General Jerry Brown has decided to appeal a 2006 Proposition 65 ruling which held that the state cannot require tuna manufacturers to warn that their products contain mercury and mercury compounds. The San Francisco Superior Court's decision, summarized in issue 170 of this Report, reasoned that such action is preempted by federal law, the low levels of mercury do not merit warnings, and mercury occurs naturally in fish. A spokesperson for Bumble Bee Foods was quoted as saying, "While we are disappointed that the new attorney general has elected to appeal this sound decision, we are confident that the tuna canners will continue to prevail." Proposition 65 is a state law that requires businesses to warn the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity." It does not apply to chemicals that occur naturally in foods. *See Toronto Star*, February 2, 2007.

### [6] Taco John's Voluntarily Dismissed from E. Coli Suits in Iowa

Taco John's has reportedly been dismissed as a defendant in lawsuits filed in Iowa by individuals alleging exposure to *E. coli* from lettuce at the company's fast food restaurants in the state. According to a news source, the plaintiffs' Seattle-based lawyer, William Marler, took the action, which will leave the franchisees to defend the litigation, because "the law . . . is pretty onerous to tag the corporation in these kinds of cases. Ultimately, it's the franchisee that is responsible." *See The Des Moines Register*, February 1, 2007.

## Other Developments

### [7] U.N. Releases Annual Environmental Report, Calls for Nanotech Regulation

The United Nations Environment Program (UNEP) released its fourth annual [report](#) on the global environment at the start of a conference of environmental ministers in Nairobi, Kenya, February 5, 2007.

Titled *The GEO Year Book 2007*, the report contains a chapter on nanotechnology, which is dubbed an "emerging challenge." According to UNEP, nanotechnology is projected to capture 14 percent of the \$2.6 trillion global manufacturing market by 2014, up from its less than 0.1 percent level in 2004. The report provides a clear definition of nanotechnology and details the ways it can be used in food storage containers and pesticides and fertilizers applied to crops. While noting the good that can come from molecular-level manufacturing processes, the report cautions that insufficient resources have been dedicated to (i) "how nanoparticles might change over time once present in the environment," (ii) "what effect they might have on organisms," and (iii) "what effect they might have on ecosystems." UNEP calls for more research and regulatory oversight, contending that existing regulatory frameworks may not be adequate "to deal with the special characteristics of nanotechnology."

## Media Coverage

### [8] Chronicle Features Lawyer Who Launched Attacks on Trans Fats

Stephen Joseph, the British-born lawyer who brought the first lawsuit challenging the use of *trans* fat in cookies, is featured in a recent *San*



*San Francisco Chronicle* article. Joseph once served as a Washington lobbyist, but became disillusioned with politics and moved to San Francisco where he began using litigation to advance his newly awakened community interests, which included cleaning up graffiti-covered parking signs in North Beach.

He was apparently inspired to enter the food litigation arena when his healthy stepfather's sudden death appeared to be linked to the consumption of products, like margarine, containing *trans* fats to which he had switched believing they were healthier than butter. Reviled by many for taking on Oreo® cookies, Joseph now serves as a consultant to the many communities, including New York City, that are considering bans on *trans* fats in foods served by restaurants. Not only has Joseph been the catalyst for the reformulation of many food products, such as cookies and french fries, he has launched a Web site to publicize the results of testing various *trans*-fat-free oils.

Joseph has been accused of bringing frivolous lawsuits; he responds by saying "Litigation is the only avenue people have as long as Congress refuses to protect Americans from the excesses of corporate America. I know that when I walk into the courtroom, it's a level playing field. I know the judge hasn't been paid by the food industry." See *The San Francisco Chronicle*, February 4, 2007.

[9] Lorne Manly, "Brewtube," *The New York Times*, February 4, 2007

"Bud. TV is striving to be more than a repository for Budweiser ads and lighthearted, slightly mocking beer-commercial humor," writes media analyst Lorne Manly in this article about the debut of Anheuser-Busch Companies' online network. Bud.TV will apparently feature, not just product

plugs, but short movies and mini-series designed to attract a new generation of consumers increasingly resistant to 30-second TV spots. Described by Manly as "marketing sotto voce," the venture also "evokes the early days of television and radio" when companies sponsored shows rather than slots of commercial airtime.

"We want to be edgy, we want to be fun and interesting, but I really want some class to it," said the vice president of global media and sports marketing at Anheuser-Busch. Manly notes, however, that public advocates condemned Bud.TV in an October 2006 letter to celebrities involved in the project's development. Despite the network's sophisticated age-verification system, many watchdog groups allege that Bud.TV viewers can easily distribute content to underage friends. "It's not as if Colgate-Palmolive is undertaking the initiative," one critic told Manly. "We're not talking dish soap. We're talking about the No. 1 drug problem for kids."

## Scientific/Technical Items

### [10] Study Suggests Possible BSE Risk from Milk

Scientists claim to have detected prion proteins in milk from cows, sheep, goats, and humans using a new analytical tool developed by Alicon AG, a Swiss biotech firm. Their [study](#), which recently appeared in *Plos ONE*, identified prion proteins in pasteurized and homogenized supermarket milk, raising the possibility that milk could harbor the diseased prions responsible for mad cow disease (BSE).

"In the case of the prion proteins detected, it is highly likely that they were of a normal variety posing no danger to health," Alicon's head of



research told the press. “So far there has been no scientific basis for assuming that only ‘healthy’ prion proteins are present in milk and those causing disease were not.” *See Food Production Daily*, February 6, 2007.

Earlier this year, U.S. and Japanese scientists reportedly gene-engineered cattle resistant to BSE. Sponsored by Hematech Inc. in Sioux Falls, S.D., researchers cloned several cows to lack the prion proteins linked to BSE and related diseases. Test results from the animals, which were injected with BSE to test their immunity, are expected later this year. *See Associated Press and Reuters*, January 1, 2007.



---

# Food & Beverage

## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by  
Leo Dreyer 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 [ldreyer@shb.com](mailto:ldreyer@shb.com) or [mboyd@shb.com](mailto: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.

**Shook,  
Hardy &  
Bacon** LLP

**Geneva, Switzerland**

**Houston, Texas**

**Kansas City, Missouri**

**London, United Kingdom**

**Miami, Florida**

**Orange County, California**

**San Francisco, California**

**Tampa, Florida**

**Washington, D.C.**

---