

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] Advocacy Organizations Seek Revocation of Approval for Bovine Growth Hormone

Organizations representing consumer, family farmer and cancer prevention interests have filed a citizen's [petition](#) with FDA, asking the agency to withdraw its approval for Posilac® – a recombinant bovine growth hormone (rBGH) manufactured by Monsanto. According to the February 15, 2007, petition, scientific evidence shows “increased risks of cancer, particularly breast, colon and prostate, from the consumption of milk from cows injected with Posilac®, the genetically modified recombinant bovine growth hormone.” The Cancer Prevention Coalition, the Organic Consumers Association and Family Farm Defenders are asking both that the FDA suspend approval of the drug “based on imminent hazard” and “label milk and other dairy products produced with the use of Posilac® with a cancer risk warning.”

To support their petition, the organizations cite alleged evidence of veterinary toxicity, i.e., injection site lesions, increased incidence of mastitis and use of medication and antibiotics that contaminate milk products; documented abnormalities in rBGH milk,

including excess levels of IGF-1, which purportedly increases cancer risk; and an international ban on the use and import of rBGH dairy products. Samuel Epstein, chair of the Cancer Prevention Coalition, submitted the petition; he recently authored *What's in Your Milk? An Expose of Industry and Government Cover-Up on the Dangers of the Genetically Engineered (rBGH) Milk You're Drinking*.

U.S. Department of Agriculture (USDA)

[2] Cornucopia Institute Threatens Litigation over Organic Milk

An organization dedicated to sustainable and organic agriculture has notified the USDA that it intends to file a complaint in federal court challenging the agency's alleged failure to follow organic regulations and enforce the law regarding milk marketed as “organic” by agribusiness corporations operating “feedlot,” or industrial-scale, dairies. In its February 19, 2007, [letter](#), the Cornucopia Institute contends that USDA delays and inaction in addressing a series of complaints filed over the last two years alleging “violations of organic livestock management practices at industrial-scale organic dairies” have “the potential to irreparably damage the country's existing organic family dairy farm infrastructure.”

According to the letter, three of its complaints “were closed for political reasons (indicated by



documents secured through a Freedom of Information Act request). The other three, some of which have been actively investigated by [the Agricultural Marketing Service] have languished for as long as 15 months without resolution.”

The organization claims that Dean Foods and Aurora Dairy market their milk as organic and have gained a dominant market share. An Ohio attorney who represents the organization on other matters involving the USDA was quoted as saying, “When consumers find out that their milk has come from factory farms in desert states whose scale of operations endanger the livelihood of hard-working families, and the milk is then shipped all around the country, they feel betrayed.” According to the Cornucopia Institute, federal regulations require that organic milk come from pastured cows. The organization has taken numerous steps to educate consumers, including publication of a “dairy score-card” that “outs” corporate brands and highlights “the heroes.” See *Cornucopia Institute Press Release*, February 19, 2007.

110th Congress

[3] Safe Food Act Reintroduced in Congress

Senator Dick Durbin (D-Ill.) and Representative Rosa DeLauro (D-Conn.) this month revived legislation known as the Safe Food Act (H.R. 1148), which aims to create a single federal agency responsible for food safety, inspection and labeling. First proposed in the 109th Congress, the bill comes on the heels of a Government Accountability Office (GAO) report naming food safety a federal high-risk area. “Our current food safety system has turned into a food fight among dozens of federal agencies,” Durbin said in a joint press release, which also

pointed to recent outbreaks of food-borne illness as indicators of an allegedly flawed system. See *Durbin, DeLauro Press Release*, February 14, 2007.

The Center for Science in the Public Interest (CSPI), which supports the bill, has also criticized the Bush administration for distributing funds unevenly between the Department of Agriculture and the Food and Drug Administration. “The Bush food safety budget defies logic,” charged a CSPI spokesperson. “While the budget clearly recognizes the need for more funding for food safety, money is being directed at animal health problems and meat and poultry at the expense of preventing outbreaks from fresh product.” See *CSPI Press Release*, February 14, 2007.

State/Local Initiatives

[4] New York City Councilman Urges FDA to Require Caffeine Disclosure on Labels

New York City Councilman Simcha Felder (D-Brooklyn) has reportedly introduced a resolution designed to persuade federal regulators to require caffeine levels on food and beverage labels. Although the City Council has no clout with the federal government, Felder says he wants the Food and Drug Administration (FDA) to consider more stringent labeling rules for caffeine. “I drink three or four cups of coffee a day,” he told the media. “When I don’t have it, I do get a headache. It’s certainly important for people to know there is caffeine in products.” See *Newsday*, February 20, 2007.

Meanwhile, both PepsiCo and the Coca-Cola Co. will soon begin disclosing caffeine content on all product packaging. While the Center for Science in the Public Interest (CSPI) praised PepsiCo for this decision, others criticized the cola manufacturer for



recently “buying up” health experts to sit on its advisory board. California-based public health attorney Michele Simon writes in her [blog](#) that Derek Yach, formerly of the World Health Organization and Yale’s Rudd Center for Food Policy and Obesity, joined PepsiCo as its director of global health policy. Simon also solicits the opinion of New York University’s Marion Nestle, who said that while she believes Yach is “sincere,” “[w]hen goals come into conflict, corporate profit imperatives must take precedence and will inevitably compromise public health goals.” See *CSPI Press Release* and *Appetite for Profit Blog*, February 20, 2007; *CocaCola Co. Press Release* and *Food Navigator USA.com*, February 21, 2007.

Litigation

[5] FDA Announces Peanut Butter Recall; Litigation Follows

As soon as the Food and Drug Administration (FDA) received information from the Centers for Disease Control and state health departments linking a *Salmonella* outbreak to peanut butter consumers, the agency contacted producer ConAgra, which agreed to institute an immediate recall of Peter Pan peanut butter purchased since May 2006, and Great Value peanut butter with a product code beginning “2111.” The agency then issued a public notification, urging consumers not to eat these products, notified counterparts in other countries and sent scientists and investigators to ConAgra’s manufacturing plant in Georgia, where the products were made. According to news sources, the CDC identified nearly 300 people from 39 states sickened by *Salmonella*. While 46 were hospitalized, no deaths have been reported.

Within two days of FDA’s public notice, the first lawsuit was filed in a federal court in Missouri, by Seattle-based lawyer William Marler who filed *E-coli* lawsuits against spinach growers in late 2006. *Cox v. ConAgra Foods, Inc.*, No. 07-6027 (W.D. Mo., filed Feb. 16, 2007). The complaint alleges that three members of the Cox family ate Great Value peanut butter purchased at a Wal-Mart superstore in St. Joseph, Missouri, and “began developing gastrointestinal illness.” Two family members apparently sought treatment at an urgent care center, and one of the children was allegedly sickened again about the time the products were recalled. Counts of strict liability, breach of warranty, negligence, and negligence *per se* are raised in the complaint, which does not specify monetary damages.

Thereafter, Marler filed a lawsuit in a federal court in New York on behalf of Nicolas Avalone and Tracy Hubright of Ontario, New York, alleging that Mr. Avalone and the couple’s son were sickened with *Salmonella* infections after eating peanut butter produced in ConAgra’s Georgia plant. And faced with a purported volume of calls and e-mails about the issue, Marler subsequently filed a putative class action in a federal district court in Washington. *Daniels v. ConAgra, Inc.* (W.D. Wash., filed Feb. 20, 2007). The named plaintiffs are James Daniels and Linda Oswald, who allegedly missed several days of work after eating Great Value and Peter Pan peanut butter. According to Marler’s Web site and blog, the class could contain more than 3,000 people; the claims have been brought on behalf of all persons who purchased the specified brands since May 2006 and as a result suffered either a lab-confirmed *Salmonella* infection or consistent symptoms, such



as fever, abdominal cramps, headache, and diarrhea. The class excludes anyone who has been hospitalized or died; Marler apparently plans to handle such cases separately. He claims to have heard from the family members of four individuals who died after allegedly eating peanut butter, but their cases have not been verified.

According to a news source, a Texas couple filed a lawsuit against ConAgra in Texas, alleging their children were sickened after eating Peter Pan peanut butter. The lawsuit reportedly seeks damages for medical bills, pain and suffering, and caps damages at \$75,000 for each child. While Marler does not appear to be representing this couple, other law firms are clearly getting involved. Horn Law placed an advertisement for plaintiffs “(especially children)” in *The Kansas City Star* on February 21, 2007. See *Associated Press* and *FDA News Release*, February 16, 2007; *Associated Press*, February 17, 2007.

Other Developments

[6] National Academies to Hold Meeting on Irradiated Foods

The National Academies’ Policy and Global Affairs Division has [announced](#) a March 7, 2007, meeting to discuss irradiation “as a means to counter food-borne illness.” Featuring speakers from the Center for Food Safety and the International Food Information Council, the panel discussion will focus on (i) whether irradiated foods are safe; (ii) how they compare to non-irradiated foods; and (iii) consumer attitudes toward irradiation and its potential to prevent future disease outbreaks.

[7] Do-Si-Don’ts: Anti-Obesity Advocate Calls for Girl Scout Cookie Boycott

“Girls Scout Cookies are high-calorie, high-sugar, high in saturated fat and nearly devoid of nutrition. Using young girls as a front to push millions of cookies onto an already bloated population further exacerbates an alarming crisis, no matter how cute the uniforms are,” charges National Action Against Obesity (NAAO) President MeMe Roth in a statement blasting the \$700 million fundraiser. Roth is calling for a national boycott of the iconic cookies despite new *trans* fat-free recipes and sugarless options. Her campaign also suggests that Girl Scouts learn from the Boy Scouts who are “known for community service,” not baked goods. See *NAAO Press Release*, February 19, 2007.

Meanwhile, a Girl Scouts representative told *New York Times* writer Peter Applebome that the annual sale is designed to teach participants “entrepreneurial and personal skills,” a mission that started 90 years ago with the first cookie fundraiser. While Applebome acknowledges the growth in childhood obesity, he expresses doubt that prohibiting Girl Scout cookies will resolve the issue. “Who’s enough of a Grinch to really want to go to the mat over this one?” he concludes. See *The New York Times*, February 21, 2007.

Media Coverage

[8] Andrew Martin, “Left Holding the Bag in the Land of Fast Food,” *The New York Times*, February 20, 2007

“From a strict liability standpoint, the franchisee is on the hook,” trial lawyer William Marler says in this article about lawsuits resulting from recent *E. coli* outbreaks linked to Taco Bell and Taco John’s



restaurants. Marler represents *E. coli* victims who are now suing individual franchises in addition to the corporate parent. As another personal injury lawyer explains to *Times* writer Andrew Martin, he once “sued the restaurant on behalf of his client; the restaurant sued the distributor, who sued the wholesaler, and so on until they ended up at a farm in Mexico.” He also argues that “the franchisee is in a better position” than an individual to recoup losses from a corporation.

Martin suggests that while past disease outbreaks eroded trust in parent companies, franchise owners have learned new ways of coping with crises. Moreover, Martin concludes that many companies now extend extra money and marketing resources to franchises involved in lawsuits stemming from corporate-level issues.



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