

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Congressional Research Service (CRS)

[1] CRS Releases Report on 2007 Farm Bill

The Congressional Research Service has issued a [report](#) that outlines the actions to date that have been taken on the 2007 Farm Bill. The report, *Farm Bill Proposals and Legislative Action* in the 110th Congress, details the proposals advanced by the administration, farm groups, commodity associations, conservation and rural development groups, and other interested organizations, including those dedicated to renewable fuels. According to the CRS, “The 2007 farm bill debate differs from the 2002 debate in some important ways,” including “potentially significant budgetary and spending constraints” and the Bush administration’s submission of its own proposal, seeking changes to existing programs and provisions. The report also notes that groups not ordinarily involved in farm policy have gotten involved and seek to influence its scope. The report will be updated as major legislation relating to existing farm bill statutes is introduced.

U.S. Department of Agriculture (USDA)

[2] USDA Identifies Source of GM Rice Contamination

USDA’s Animal Plant and Health Inspection Service (APHIS) this week announced that genetically modified LLRICE604, a herbicide-resistant rice developed by Bayer CropScience, has been identified as the source of genetic material found in BASF’s long-grain rice, Clearfield 131 (CL131). Earlier this month, APHIS issued emergency action notifications to halt plantings of CL131 seed, which tested positive for non-approved genetic material. The agency reports that although similar strains of GM rice are considered safe for consumption, LLRICE604 has not yet been deregulated and therefore CL131 must be discarded in a manner preventing germination. *See USDA Press Release, March 22, 2007; Food Navigator USA.com, March 23, 2007.*

In response to this development, the California Rice Commission has reportedly called for a statewide moratorium on all GMO field testing. “Based on the events of the last few months, it is clear that the federal regulatory process is not working for rice. It is imperative that those systems are evaluated and approved,” a commission spokesperson told the press. *See Food Quality News.com, March 21, 2007.*



Department of Health and Human Services (HHS)

[3] HHS Schedules Public Meeting on Risk-Assessment Model for Feed Contaminants

HHS has scheduled a May 22, 2007, public meeting to present “ ‘work-in-progress’ on a method for ranking animal feed contaminants by their relative risks to animal and human health.” The ranking model under development includes two components: (i) health consequence scoring, which HHS addressed in a previous meeting; and (ii) human and animal exposure scoring, slated for discussion during this meeting. HHS proposes to apply exposure scoring to chemical, physical and microbiological feed contaminants. A future meeting will cover plans to combine the two scoring methods under one risk-ranking model, which is intended to update FDA’s Animal Feed Safety System. *See Federal Register*, March 29, 2007.

Food and Drug Administration (FDA)

[4] FDA Releases Results of *E. Coli*-Tainted Spinach Investigation

FDA and California’s Department of Health Services (CDHS) have released a final [report](#) on a 2006 *E. coli* outbreak that implicated spinach-processor Natural Selection Foods and several growers based in California’s Salinas Valley. The report identifies the contamination source as Mission Organics, which leased land from a cattle ranch where investigators found the *E. coli* O157:H7 that sickened 205 people and killed three. Researchers speculate that cow manure, tainted water or wild pigs brought the bacteria from the

Paicines Ranch into the spinach fields, but failed to confirm a transmission vector. Mission Organics then shipped its greens to the processing plant, where they were mixed with other growers’ spinach to conceal bruising, according to FDA and CDHS. Four additional farms also tested positive for *E. coli*, though none harbored the genetic strain linked to this particular outbreak. *See FDA Press Release*, March 23, 2007.

“No one in the industry should take solace from the fact that Mission Organics is named as the most likely source of contaminated product,” trial lawyer Bill Marler, who is leading litigation against Natural Selection Foods, was quoted as saying. Meanwhile, California’s leafy vegetable farmers have adopted a marketing agreement that rewards best agricultural practices with a state-certified “seal of approval.” *See San Jose Mercury News*, March 24, 2007.

State/Local Initiatives

[5] Maryland County Council Member to Introduce *Trans* Fat Ban

A member of the Montgomery County Council in Maryland is reportedly poised to introduce a regulation that would restrict county restaurants from using *trans* fats in their foods. She was expected to publicize her proposal with a March 26, 2007, event in a county cafeteria at which employees would be served *trans*-fat free foods, local and national restaurateurs would discuss how they are eliminating *trans* fats from their kitchens, and nutritional experts would explain the importance of replacing the substance with healthier alternatives. If the bill is passed, it would make the county the first in the nation to adopt the ban modeled after the legislation adopted by the New York City Board of Health



in 2006. According to a news source, similar restrictions affecting the use of *trans* fats in restaurants or school cafeterias are pending in 18 state legislatures. Maryland has apparently decided to seek voluntary statewide initiatives; if they are not successful, legislation will be introduced in 2008. See *montgomerycountymd.gov*, March 16, 2007; *The Washington Post*, March 22, 2007.

Litigation

[6] California Farm Sues Taco Bell for Libel in Aftermath of *E. Coli* Outbreak

Boskovich Farms, Inc., which grows green onions in southern California, has reportedly sued the Taco Bell Corp. for continuing to link its product with an *E. coli* outbreak in December 2006 despite learning that the cause of the outbreak was actually lettuce. According to a news source, Taco Bell officials knew by December 9 or 11 that tests for the bacteria in green onions were negative. Yet, the company allegedly published a letter in national newspapers on December 13 claiming “all Taco Bell ingredients have come back negative for *E. coli* . . . with the possible exception of green onions.” The fast-food chain also announced that it would no longer include green onions as a food ingredient. Counsel for the farm was quoted as saying that the false connection between the farm and the outbreak cost the farm “millions of dollars of business.” Due to declining sales, the farm will not be re-planting 55 acres with green onions. See *Associated Press*, March 23, 2007.

[7] Monsanto Claims Injunction Will Cost \$250 Million

Monsanto Co. has reportedly asked a federal district court in California to lift a preliminary injunction that bars farmers from buying its

Roundup Ready® alfalfa seed or planting it after March 30, 2007. The injunction was entered after the court determined that the U.S. Department of Agriculture (USDA) had improperly de-regulated the genetically engineered seed by failing to prepare an environmental impact statement. Additional information about the case appears in issue 207 of this Report. According to Monsanto, the injunction will cost it, its distributors and farmers up to \$250 million over the next two years. Monsanto also reportedly contends that Roundup Ready® alfalfa will not contaminate conventional or organic crops and is not likely to contribute to the development of herbicide-resistant weeds; concerns about these issues led the court to conclude that USDA had violated the National Environmental Protection Act. In its filing, Monsanto apparently outlined steps farmers could take to minimize such risks. See *Greenwire*, March 26, 2007.

In a related development, USDA's Animal Plant and Health Inspection Service has published a *Federal Register* notice, advising the public of the court's action and announcing that Roundup Ready® alfalfa is “once again considered regulated” under 7 CFR part 340. The notice also details the court's preliminary injunction as it relates to farmers and notes that a hearing on a permanent injunction will take place on April 27. See *Federal Register*, March 23, 2007.

[8] Colombia May Seek Extradition of Chiquita Executives

After Chiquita entered a plea bargain with federal prosecutors and was fined \$25 million for paying Colombian groups to protect its employees, Colombian authorities were believed to be calling for the extradition of some company executives to face criminal charges there. According to a news source, Chiquita has not received any official



requests and does not know if they are likely. No individuals were named or charged by the U.S. Department of Justice following its three-year investigation into the illegal payments that were made to groups the U.S. government has classified as foreign terrorist organizations. See *Food Navigator USA.com*, March 27, 2007.

Legal Literature

- [9] J. Brad Reich, “Getting the Skinny: Fast Food Fat-Based Litigation Is Not a Legal Threat to Business, But It Should Be,” 23 *Hofstra Lab. & Emp. L.J.* 345 (Winter 2006)

This article contends that “if being fat was properly analyzed and recognized as a protected disability under the Americans with Disabilities Act, fat-based discrimination actions by both employees and customers would” be a legal threat to the fast-food industry. Author J. Brad Reich, a business administration professor with a law degree, first explores the efforts of litigators to turn fat-based litigation into the new big tobacco litigation and concludes that such litigation does not pose a significant legal threat. He then focuses on disability-discrimination laws and suggests that being fat should be a protected disability, particularly to the extent that it is perceived as or constitutes an impairment substantially limiting a person’s major life activities. Reich discusses why courts may be reluctant to rule that being fat is a protected disability under the law and questions why being fat should be treated any differently than being an alcoholic. He also claims that “being fat fits multiple definitions of ‘disease.’” Reich does not say in what way the fast-food industry discriminates

against obese customers, although he does conclude, “Children frequently pick on the fat kid, and no one protects the victim. It is not right for businesses and the courts to do the same.”

Other Developments

- [10] Kaiser Foundation Releases Report on TV Food Advertising to Children

The Kaiser Family Foundation has released a [report](#) purportedly indicating that one-half of all advertising time on children’s TV shows is for food. Of the food products advertised to children, 34 percent are for candy and snacks, 28 percent for cereal and 10 percent for fast food. The remaining 5 percent are for dairy products and fruit juices; none are for fruits or vegetables. The study also shows that children see few public service announcements about fitness and nutrition. According to the foundation, “Having an accurate picture of the current landscape with regard to food advertising to children is important as the country moves forward in the effort to combat childhood obesity. If we overestimate the presence of food marketing in children’s lives, or its role in their diets, we may place too much faith in marketing-oriented policy solutions; if we underestimate it, we may neglect important policy options.”

The study was based on a review of 1,600 hours of programming, covering all types of shows that children actually view. Researchers looked at samples that aired during summer and fall 2005. The report acknowledges that the top food companies pledged in late 2006 to devote at least 50 percent of all advertising to healthier foods or messages that encourage fitness or nutrition, noting that this study will nevertheless provide “a useful



benchmark against which to measure progress.” The foundation also suggests that independent research will be important to track any changes instituted by the food industry.

[11] Texas Comptroller Issues Special Report on Costs of Obesity

According to a [report](#) released by the Texas comptroller, nearly two-thirds of the states’ population is overweight or obese, and obesity cost Texas businesses an estimated \$3.3 billion in 2005 for health care, absenteeism, decreased productivity, and disability.

The comptroller notes that if current obesity trends continue unchecked, the state’s businesses could face annual costs of \$15.8 billion by 2025. Overall, the report notes that white, female, more educated Texans are least likely to be overweight or obese, but that even these groups have too high a prevalence of obesity. While the comptroller states, “of course, only the individual can be held accountable for the lifestyle choices he or she makes,” she does suggest that employers, parents, schools, the medical community, and government have a role to play to reduce the number of obese Texans and prevent people from becoming obese.

[12] “Secretive” Pet Food Industry Faces Increased Scrutiny After Recall

The New York State Department of Agriculture this week announced that aminopterin, an illegal rodenticide, might be responsible for animal deaths linked to pet food. State laboratories at Cornell University identified the substance at levels exceeding 40 parts per million in pet-food samples involved in a nationwide recall for “cuts and gravy” style products manufactured by Menu Foods at facilities in Kansas and New Jersey. The company’s

testing apparently confirmed complaints that cats and dogs were experiencing kidney failure after ingesting the food; federal and state officials have not yet identified the source of the contamination, though some observers have reportedly speculated that wheat gluten imported from China may be the source. *See FDA Press Release*, March 17, 2007; *NYS Department of Agriculture Press Release* and *ABC News*, March 23, 2007.

The widely publicized recall, which affected nearly 100 brands, has sparked consumer fears and questions about both premium and private-label pet food. “It’s an extremely secretive industry, more secretive than the food industry, from our experience,” Marion Nestle, Ph.D., said in a recent *New York Times* interview. Nestle, who is co-authoring a book on the subject, also noted that although pet food is FDA-regulated, “products excluded from animal feed can go into pet food – meat and bone meal, nervous system tissue – parts of animals not allowed for anything else. There were cases of mad-cow disease in cats in England.” *See The New York Times*, March 25, 2007.



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