

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] Massive Food Recall Follows Botulism Outbreak .....1
- [2] USDA Announces Biotech Committee Meeting and Forums on Genetically Engineered Organisms .....1
- [3] Washington County Adopts *Trans* Fat Ban and Nutritional Labeling at Restaurants .....2
- [4] EU Bans Red Food Coloring .....2

#### Litigation

- [5] Marler Clark Files Second *Salmonella* Lawsuit Against Veggie Booty Marketer .....2
- [7] Federal Appeals Court Affirms Dismissal of Advertising Claims Against Brewers and Distillers .....2
- [8] Trial Begins in Pesticide Exposure Case Brought by Central American Banana Workers .....3
- [9] Mad Cow Case Gets Hearing in Ninth Circuit .....3

#### Media Coverage

- [10] Stephanie Chen, "Should You Sip Your Vitamins Through a Straw?," *The Wall Street Journal*, July 24, 2007 .....4

#### Scientific/Technical Items

- [11] Researchers Link Diet Soft Drink Consumption to Risk of Heart Disease .4

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] Massive Food Recall Follows Botulism Outbreak

Calling the most recent food recall an “urgent public health matter,” FDA has recommended that people immediately discard more than 90 different canned meat products and dog food made at a Georgia processing plant after a number of consumers were hospitalized in at least two states with botulism poisoning. Castleberry Food Co. apparently initiated the recall, which involved only 10 products, on July 18, 2007, but has expanded the recall to more than 80 types of canned stew, chili, hash, other products, and pet food. According to an FDA spokesperson, tens of millions of cans may have been compromised. Botulism poisoning symptoms appear within 18 to 36 hours of consumption and can cause death. Symptoms reportedly include dizziness, double vision, breathing difficulty, paralysis, and abdominal problems. *See Associated Press and Reuters*, July 23, 2007.

#### Department of Agriculture (USDA)

##### [2] USDA Announces Biotech Committee Meeting and Forums on Genetically Engineered Organisms

A public meeting of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21) has been scheduled for August 1-2, 2007, in Washington, D.C. According to the USDA's [notice](#), new committee members will be introduced during this session, and AC21 will complete substantive work on a paper that addresses the question, “What issues should USDA consider regarding coexistence among diverse agricultural systems in a dynamic, evolving and complex marketplace?” The committee includes representatives of the biotechnology industry, farmers, food manufacturers, commodity processors and shippers, animal handlers, environmental and consumer groups, and academic researchers. Federal agency representatives also serve on the committee. *See Federal Register*, July 13, 2007.

USDA's Animal and Plant Health Inspection Service (APHIS), which recently released a draft environmental impact statement related to the importation, interstate movement and environmental release of genetically engineered organisms, has [announced](#) the dates for the four public forums that will be held to allow the public to comment on the draft. They will be held August 1 and 3, 2007, in



Riverdale, Maryland; August 16 in Davis, California; and August 30 in Kansas City, Missouri. While a previous notice about the draft indicated that written comments could be submitted until September 17, this notice calls for comments to be submitted on or before September 11. *See Federal Register*, July 23, 2007.

## State and Local Governments

### [3] Washington County Adopts *Trans* Fat Ban and Nutritional Labeling at Restaurants

According to a news source, the King County Board of Health, which has jurisdiction over Seattle and most of its suburbs, has approved legislation that will prohibit *trans* fats in oil and shortening used in regular frying or in spreads by May 1, 2008, and in deep frying by February 1, 2009. The county's public health officer has apparently been told to let the board know in 14 months whether products without the fats are available and the rules are workable. The legislation also reportedly requires, as of August 1, 2008, that any local restaurant in a chain with 10 or more outlets nationally provide information about calories, carbohydrates, fats, and sodium for all items on the menu for 60 days, including beer, wine and liquor. Fast-food outlets must post calorie information on their menu boards and make other nutrition information otherwise available to customers. The board reportedly took the action after a six-hour debate during which one restaurant owner, who opposed the measure, suggested posting a warning at the door saying "Eating here is fattening and could kill you." *See The Seattle Post-Intelligencer*, July 20, 2007.

## European Union (EU)

### [4] EU Bans Red Food Coloring

The EU has reportedly decided to prohibit the use of a red food coloring that scientists have linked to cancer. According to a news source, Red 2G dye, which is used to color breakfast sausages and hamburgers primarily marketed and sold in Ireland and Britain, breaks down in the body into aniline, a carcinogenic substance. The ban will affect all 27-member nations. *See The Wall Street Journal*, July 23, 2007.

## Litigation

### [5] Marler Clark Files Second *Salmonella* Lawsuit Against Veggie Booty Marketer

Seattle-based attorney William Marler has filed a second lawsuit against Robert's American Gourmet Food, Inc. in a New York state court. This suit apparently contends that Patrick and Elex Scheels and two of their 20-month-old triplets were sickened in April 2007 with *Salmonella wandsworth* after they ate Veggie Booty snacks, which Robert's American Gourmet markets. According to Marler's Web site, the Centers for Disease Control and Prevention notified the family that their children were part of a nationwide outbreak traced to the product. Marler has indicated that the case raises a number of questions, including who actually manufactures the product, whether other *Salmonella* strains linked to the product have been found, and why Robert's American Gourmet has not offered to assist those who have fallen ill. *See [www.marlerclark.com](http://www.marlerclark.com)*, July 17, 2007.



**[7] Federal Appeals Court Affirms Dismissal of Advertising Claims Against Brewers and Distillers**

The Sixth Circuit Court of Appeals has dismissed lawsuits filed by the parents of minor children who claim that alcohol advertising is responsible for their children's purchase of alcoholic beverages. [\*Alston v. Advanced Brands & Imp. Co., Nos. 06-1836/3367, \(6th Cir., decided July 17, 2007\).\*](#) The decision affirms rulings in two cases that were consolidated for appeal and does so on the basis of the parents' lack of standing "because they cannot show causation or redressability." The complaints sought to recover money allegedly spent on purchases of alcoholic beverages by minor children and to enjoin further advertising, but the plaintiffs failed to allege any facts "tending to demonstrate that their own minor children, or any particular minor children, have actually purchased any such alcohol."

According to the court, the parents would be unable to overcome the standing deficiency even if they amended their complaints, because the illegal sale of alcohol to minors by third party vendors and the illegal purchase of alcohol by minors breaks any purported connection between the defendants' advertising and the plaintiffs' alleged injuries. "A crime is an independent action. . . . Consequently, the plaintiffs cannot allege any facts that would demonstrate causation sufficient to establish standing to litigate the present claims." The court added, "The plaintiffs' most obvious remedy would be to recover from their children the money those children converted from the plaintiffs (i.e., parents) in order to violate the law prohibiting underage purchase of alcohol. A second obvious remedy would be to recover money from the retailers who sold alcohol to minors in violation of the law."

To date, all of the courts considering similar claims have dismissed them. Further details about these cases appear in issues 112, 144, 165, and 181 of this Update.

**[8] Trial Begins in Pesticide Exposure Case Brought by Central American Banana Workers**

Attorneys for Central American banana workers, Dow Chemical Co. and Dole Food Co. squared off in a Los Angeles County, California, courtroom July 19, 2007, in a case with claims that the companies knowingly exposed the workers three decades ago to a pesticide that caused their permanent sterility. Dow made the chemical dibromochloropropane, known as DBCP, and Dole sprayed it on their banana plantations in Costa Rica, Honduras, Guatemala, Nicaragua, and Panama. Numerous suits have apparently been filed on behalf of the workers, and settlements are pending in some; this is apparently the first to go before a jury. The cases of 12 workers are reportedly at stake in the Los Angeles litigation, and thousands of others are apparently poised to sue. One plaintiff's lawyer was quoted as saying, "This is the tip of the iceberg. This is the beginning." According to legal commentators, suits alleging injury against U.S. companies for conduct occurring in other countries are rare, so the matter is being closely monitored. *See The Los Angeles Times*, July 20, 2007.

**[9] Mad Cow Case Gets Hearing in Ninth Circuit**

The Ranchers-Cattlemen Action Legal Fund (R-CALF), which has sought to keep the U.S. border closed to the importation of Canadian cattle and beef products, argued its challenge before the Ninth Circuit Court of Appeals on July 13, 2007. *Ranchers-*



*Cattlemen Action Legal Fund United Stockgrowers of America v. USDA*, No. 06-35512 (9th Cir.). The litigation began in 2004, when R-CALF challenged a U.S. Department of Agriculture rule on bovine spongiform encephalopathy (BSE). Since then, R-CALF obtained a preliminary injunction against the resumption of Canadian imports, but that was lifted in July 2005. R-CALF is reportedly hoping that the court will either block all Canadian beef imports or remand the case to the district court in Montana for a full hearing on the original action. Additional details about the case appear in issues 118, 119, 134, and 177 of this Report. The group contends that relaxing import restrictions will pose an increased risk of exposure of U.S. citizens and cattle to BSE, “an invariably fatal disease.” See *Agribusiness Freedom Foundation Sentinel*, July 16, 2007.

## Media Coverage

[10] **Stephanie Chen, “Should You Sip Your Vitamins Through a Straw?”** *The Wall Street Journal*, July 24, 2007

Addressing the newest trends in fortified beverages, this article discusses the expanding market for nutrient-laced drinks in the United States. From vitamin-enhanced colas to water infused with fiber, these products more than tripled their sales from 2001 to 2006. Marketers contend that their drinks can boost endurance, manage weight and “provide clarity and focus.” According to this article, nutritionists are concerned that these fortified drinks, which generally contain more calories than drinking water, could increase calorie consumption while offering little real benefit. They do not believe the drinks are worth their retail prices, typically double that of soft drinks or bottled water. At least one consumer believes that Pepsi’s Propel® -- a vitamin-

enhanced water – helped clear up his acne and apparently created a group on Facebook called “I Get All My Vitamins from Propel.”

Meanwhile, the latest issue of *Newsweek* has an article focusing on beverages that contain higher than usual levels of caffeine. According to “America’s Caffeine Addiction Keeps Growing,” sales of “energy” drinks have grown exponentially since 2001 and new products enter the market weekly. “Novelty items, like caffeinated lip balm, caffeinated sunflower seeds, caffeinated beer and even caffeinated soap are also popping up in retail stores and nightclubs.” The article discusses caffeine’s benefits and notes that the stimulant is fairly safe “as long as you don’t overdose.” See *Newsweek*, July 30, 2007.

## Scientific/Technical Items

[11] **Researchers Link Diet Soft Drink Consumption to Risk of Heart Disease**

Based on data generated by the Framingham, Massachusetts, multi-generational heart study, researchers have reportedly found “a significantly higher prevalence of metabolic syndrome [a cluster of symptoms that increase the risk for heart disease] among middle-aged adults who consumed  $\geq 1$  soft drink per day. This association was consistent for intake of both regular and diet soft drinks.” Ravi Dhingra, et al., [“Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community.”](#) *Circulation*, July 23, 2007.

Adjusting their data for a number of confounders, the researchers still found that adults drinking one or more soft drinks daily had a 1.19 to 1.74 relative risk of metabolic syndrome, or a 48 percent increased prevalence of metabolic syndrome



compared to those who drank fewer soft drinks. News reports characterized the study as “inconclusive,” and some nutrition experts dismissed the findings related to diet soda drinkers, contending that the evidence shows such beverages are healthier “in terms of losing weight.” An American Beverage Association spokesperson was quoted as saying, “How can something with zero calories that’s 99 percent water with a little flavoring in it . . . cause weight gain?” See *USA Today*, July 23, 2007.



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## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by  
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