

Food & Beverage

LITIGATION UPDATE

Issue 227 • August 17, 2007

Table of Contents

Legislation, Regulations and Standards

- [1] Border Agency Takes Action to Keep Foot-and-Mouth Disease Out of Country . 1
- [2] Unidentified Virus Decimates China's Pig Population 1

Litigation

- [3] Federal Judge Approves Whole Foods/Wild Oats Merger 2
- [4] Tainted Pet-Food Lawsuit Filed Against Chinese Company 2
- [5] Puerto Rico Dairy Enjoined from Selling Milk or Meat Due to Drug Residues . . 3

Legal Literature

- [6] Jim Chen, "Beyond Food and Evil," *Duke Law Journal*, 2007. 3

Other Developments

- [7] Nickelodeon to End Licensing Characters to Promote Foods of Little Nutritional Value 4
- [8] Castleberry's Recall Estimated to Cost \$35 Million 4

Media Coverage

- [9] Tom Mueller, "Slippery Business: The Trade in Adulterated Olive Oil," *The New Yorker*, August 13, 2007. 5

Scientific/Technical Items

- [10] Studies Claim Choline, Western Diet Linked to Colon Cancer Risk 5
- [11] Study Alleges Association Between Pregnant Women's Eating Habits and Childhood Obesity. 6

**Shook,
Hardy &
Bacon** L.L.P.

GLOBAL PRODUCT LIABILITY
LAW FIRM OF THE YEAR

2005|2006|2007



WHOS WHO LEGAL
The International Who's Who of Business Lawyers

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Customs & Border Protection (CBP)

[1] Border Agency Takes Action to Keep Foot-and-Mouth Disease Out of Country

Acting on notice of foot-and-mouth disease in U.K. cattle, the CBP has banned the importation of live pigs, swine meat and by-products from that country. Cattle, sheep and goat importation was already proscribed due to the U.K.'s bovine spongiform encephalopathy status. In addition, the CBP will confiscate all pork and pork products found in the possession of travelers to the United States from Britain, and any footwear or equipment used on a farm, ranch or pasture in Britain will be disinfected. The action went into effect August 3, 2007. *See CBP News Release*, August 8, 2007.

China

[2] Unidentified Virus Decimates China's Pig Population

An unidentified virus that decimated the pig population in China's coastal and southern regions has reportedly spread inland and westward, raising

concerns that the epidemic will affect the global livestock market. The virus, which resembles a potent strain of blue-ear pig disease, has reached 25 of the country's 33 provinces, including Sichuan Province where most of its pork is produced. "They haven't really explained what this virus is," said Federico Zuckermann, an immunology professor at the University of Illinois College of Veterinary Medicine. "This is like SARS. They haven't sent samples to any international body. This is really irresponsible of China. This thing could get out and affect everyone."

Meanwhile, the Chinese government has claimed that only 165,000 pigs have contracted the disease, despite a pork shortage that has increased China's pork prices by 85 percent in the last year and prompted fears of widespread inflation and unrest. Some farmers engaged in "panic selling" have continued to bring infected animals to illegal slaughterhouses regardless of food safety regulations and government aid. Health authorities are also trying to determine whether a similar pathogen identified in Vietnam and Myanmar originated in China, the world's fourth-largest exporter of live and slaughtered hogs. "This is already considered to be a threat to the global industry," a virology expert was quoted as saying. "It would be naïve to think we could contain this virus." *See The New York Times*, August 16, 2007.



Litigation

[3] Federal Judge Approves Whole Foods/Wild Oats Merger

A federal district court has reportedly denied the Federal Trade Commission's (FTC) request to temporarily block Whole Foods Market, Inc.'s plan to purchase rival Wild Oats Markets, Inc. The court's reasoning is unknown; its 93-page decision was sealed because it contains secret, proprietary information, according to a news source. The FTC had argued that the deal would stifle competition and that, while other supermarket chains sell natural and organic foods, Wild Oats is best positioned to keep prices in this industry market in check. The case attracted significant attention from analysts and industry insiders given FTC's reluctance to block retail mergers in recent years.

The case made additional headlines when the FTC reportedly released ineffectively redacted documents in court filings as part of its challenge. Before federal regulators were able to correct the error, the press was able to download the material and found that (i) a new Whole Foods store can cut the revenue to nearby Wild Oats stores by 30 percent or more; (ii) Whole Foods bars its suppliers from selling directly to Wal-Mart stores to increase its costs; (iii) Whole Foods predicts that shutting down certain Wild Oats stores after the merger will increase revenues at nearby Whole Foods stores by 85 to 90 percent; (iv) Whole Foods targets college graduate density when deciding where to locate its outlets; and (v) the proposed takeover will send 80 to 90 percent of Wild Oats shoppers to Whole Foods stores and "as a result," according to an FTC analysis, shoppers "will unambiguously be worse off," because of increased prices.

Whole Foods has reportedly indicated that it is investigating this "apparently improper release by the Federal Trade Commission of confidential proprietary business information." A company spokesperson said there is "no plan at all," and that the company had "no idea how many stores" would be closed if the deal went through. A spokesperson for Wild Oats was quoted as saying the release of this information is "obviously unfortunate and unfair" to both companies. Meanwhile, several consumer groups reportedly sided with the FTC in opposing the merger. The brief filed by the Consumer Federation of America, the American Antitrust Institute and the Organization for Competitive Markets argued that the purchase will lead to higher food prices; absent the merger, the companies would be expected to expand independently and compete aggressively. *See The Wall Street Journal Online*, August 13, 2007; *Associated Press*, August 14, 2007; and *Chicago Tribune*, August 17, 2007.

[4] Tainted Pet-Food Lawsuit Filed Against Chinese Company

A putative class action complaint has been filed in a California state court seeking to recover damages from the Chinese company that supplied the melamine-tainted rice protein used in U.S. pet foods that purportedly caused the deaths of numerous dogs and cats. *Quintana v. Binzhou Futian Biological Technology, Co., Ltd.*, No. 07-465924 (San Francisco Superior Court, California, filed August 8, 2007). The complaint alleges violations of Chinese law and the Consumer Legal Remedies Act, unfair competition and false advertising, failure to warn, negligence, breach of express and implied warranty, fraudulent concealment, and unjust enrichment.



The named plaintiff, whose cat died in April 2007, is seeking to certify a class of California residents who purchased Natural Balance Pet Food, Inc. products. Legal experts have reportedly indicated that collecting a judgment from Binzhou Futian could be problematic in that it was closed by Chinese authorities in May, does not appear to have assets in the United States and has uncertain ownership. Moreover, Chinese courts are apparently inhospitable to foreign claims. According to a press report, the owner of Natural Balance Pet Foods, who was also sued, was surprised by the lawsuit, claiming that most of the 400 claims made by individuals who contacted the firm have been paid. See *San Jose Mercury News*, August 9, 2007.

[5] Puerto Rico Dairy Enjoined from Selling Milk or Meat Due to Drug Residues

A U.S. district court in Puerto Rico has issued an order permanently enjoining two dairies from selling milk or their cows for slaughter for human consumption because illegal drug residues were found in their animals. The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) apparently found excessive levels of antibiotics such as sulfamethazine, sulfathiazole, sulfadimethoxine, and penicillin in the edible tissue of three dairy cows sampled between August 2003 and September 2005. Recent Food and Drug Administration (FDA) inspections revealed that the dairies used animal drugs contrary to label directions without a veterinarian's oversight, and failed to maintain appropriate recordkeeping systems. According to the FDA, the defendants will not be allowed to resume selling or delivering milk or meat in interstate commerce until they are notified that they are complying with the court order. See *FDA News*, August 14, 2007.

In a related development, the FDA has filed a complaint and consent decree of permanent injunction in an Iowa district court against a dairy in that state after illegal drug residues were found in its cows. Like the Puerto Rican dairies, Ysselstein Dairy, Inc. produces milk and sells dairy cows for slaughter for human consumption. FSIS found nine illegal antibiotic drug residues at levels not permitted by the FDA in the edible tissue of seven dairy cows between July 21, 1992, and March 10, 2006. The dairy must implement identification, recordkeeping, drug control and other systems and further comply with the terms of the consent decree. If it fails to do so, the FDA may shut the dairy down and impose fines for each day it is out of compliance and for each animal it sells or delivers for sale in violation of the decree. See *FDA News*, August 9, 2007.

Legal Literature

[6] Jim Chen, "Beyond Food and Evil," *Duke Law Journal*, 2007

This [article](#) is based on a presentation Jim Chen, Dean and Professor of Law, University of Louisville, Louis D. Brandeis School of Law, delivered about the mass marketing of genetically modified (GM) foods and regulatory approaches taken by the Food and Drug Administration. Chen, who frequently blogs about science and law issues, is concerned that "the political reality of GM foods" has placed the Food, Drug and Cosmetics Act "and its implementation by the FDA in severe tension with the Organic Foods Production Act and with commercial free speech doctrine." He explains how this tension arises in the realm of voluntary labeling and how "the rise of the OFPA, the revival of First Amendment scrutiny in the commercial sphere,



and the subtle but very palpable shift from the Progressive Era's bureaucratic model of consumer protection to a more consumer- and market-oriented model may bring the misbranding provisions of the [food and drug law] under constitutional attack."

Other Developments

[7] Nickelodeon to End Licensing Characters to Promote Foods of Little Nutritional Value

In an August 15, 2007, [letter](#) to the chair of the House Subcommittee on Telecommunications and the Internet, the president of Nickelodeon Television, a children's cable network, has announced that the company "will be adopting a policy in which the use of our licensed characters on food packaging will be limited to products that meet 'better for you' criteria as established by marketing partners in accordance with governmental dietary guidelines." The company will, however, allow its characters, such as SpongeBob SquarePants, Dora the Explorer and Jimmy Neutron, to be used to promote "a limited number of occasional treats designed for special occasion/celebration purposes, including birthdays and holidays." The changes will be made in new agreements starting in January 2009.

The Center for Science in the Public Interest praised the initiative, noting that CSPI and others had threatened to sue Nickelodeon's parent company in January 2006 "for marketing junk foods to kids." CSPI executive director Michael Jacobson

was quoted as saying, "Nickelodeon is really the 800-pound gorilla of children's programming. It's a very important step for children's health, assuming the criteria are reasonable." It is apparently unclear how the company's marketing partners will define and apply a "better for you" standard. According to a news source, Nickelodeon's announcement follows a similar pledge made by Discovery Kids a few days earlier. See *The New York Times*, *The Wall Street Journal*, and *CSPI Press Release*, August 16, 2007.

[8] Castleberry's Recall Estimated to Cost \$35 Million

Connors Bros. Income Fund, the parent company of Castleberry's Food Co., has estimated that the recent recall of Castleberry's products will cost the company \$35 million after recall insurance. "We believe the \$35 million is comprehensive in covering the known cost elements at this time including product recall, destruction, effectiveness checks, quality inspections, consumer reimbursement, professional services, factory shutdown, and start-up costs," said Connors Bros. President and Chief Executive Officer Chris Lischewski. Castleberry's last month recalled 90 brands of meat and chili products after four people allegedly contracted botulism from items linked to its Augusta, Ga., plant, which stopped production two weeks ago to comply with the ongoing investigation. "To date, FDA and USDA have asserted that the recall has been ineffective as reports indicate recalled products are still on shelves," according to a statement on the Castleberry's Web site. See *FoodProductionDaily-USA.com*, August 14, 2007.



Media Coverage

[9] **Tom Mueller, “Slippery Business: The Trade in Adulterated Olive Oil,”** *The New Yorker*, August 13, 2007

“In 1997 and 1998, olive oil was the most adulterated agricultural product in the European Union, prompting the EU’s anti-fraud office to establish an olive-oil task force,” writes Tom Mueller in this article about Italy’s efforts to end illegal trade practices in the olive-oil industry. In April, Agriculture Minister Paolo De Castro reportedly announced that 205 of the 787 oil producers investigated by the government were guilty of adulteration, false labeling and other infractions, such as customs evasion. But Mueller notes that few of these cases will result in significant penalties, raising questions about the effectiveness of measures taken to ensure the quality of extra-virgin oils. “Instead of supporting small growers who make distinctive, premium oils, the Italian government has encouraged quantity over quality, to the benefit of large companies that sell bulk oil,” he opines. “It has not implemented a national plan for oil production, has employed a byzantine system for distributing agricultural subsidies, and has often failed to enforce EU regulations intended to prevent fraud.”

Mueller also reports that “baron of extra-virgin” Leonardo Marseglia, owner of Casa Olearia Italiana, will this September stand trial in Puglia, Italy, on charges that he used a shell company known as AgriAmerica to illegally import Turkish and Tunisian olive oil and evade customs duties. Authorities suspect that the product was then mixed with vegetable oil before it was sold to distributors in the United States, where the olive oil market now tops \$1.5 billion. The Food and Drug Administration

(FDA), however, apparently considers fraud a rare problem and instead relies on the olive-oil trade association ASSITOL and the North American Olive Oil Association to police the industry. “You don’t waste your resources on surveys that are likely to make somebody comfortable but don’t do much toward protecting the public health,” said one FDA official, although last year federal marshals seized more than 80,000 liters of adulterated olive oil from a New Jersey warehouse. As another FDA chemist and olive-oil specialist told Mueller: “My experience over a period of some 50 years suggests that we can always expect adulteration and mislabeling of olive-oil products in the absence of surveillance by federal officials.”

Scientific/Technical Items

[10] **Studies Claim Choline, Western Diet Linked to Colon Cancer Risk**

Researchers at the Brigham and Women’s Hospital in Boston have linked choline, a nutrient found in red meat, eggs and dairy products, to colorectal polyps in women, thereby increasing their risk of developing colorectal cancer. Eunyoung Cho, et al., “Dietary Choline and Betaine and the Risk of Distal Colorectal Adenoma in Women,” *Journal of the National Cancer Institute*, August 8, 2007. The study, which surveyed the dietary intake of women enrolled in the Nurses’ Health Study from 1984 to 2002, concluded that those consuming high levels of choline were at an elevated risk for colorectal polyps. Researchers had first speculated that choline would inhibit polyp development because, like folate, it is involved in a process called one-carbon metabolism associated with a decreased risk of colorectal polyps. “Although our results were contrary to expectation



based on choline's role [in one-carbon metabolism], there is a potential biologic basis for the positive association that we observed . . . Once a tumor is initiated, growth into a detectable [polyp] depends in part on choline availability because choline is needed to make membranes in rapidly growing cells," wrote the study's authors. *See JNCI Press Release*, August 15, 2007; *FoodNavigator-USA.com*, August 13, 2007.

In related news, a separate study has concluded that patients undergoing treatment for stage III colon cancer had an increased risk of recurrence or death if they adhered to a "Western-style" diet high in red and processed meats, sweets, refined grains, and desserts. Jeffrey A. Meyerhardt, et al., "Association of Dietary Patterns With Cancer Recurrence and Survival in Patients With Stage III Colon Cancer," *Journal of the American Medical Association*, August 15, 2007. Researchers followed 1,009 patients enrolled in a chemotherapy trial who reported on their dietary intake using a food frequency questionnaire. At the end of five years, patients who reported consuming the most meat, fat, refined grains, and desserts were 3.5 times more likely to suffer a colon cancer recurrence or death when compared to those who did not closely follow a Western diet. Although researchers cautioned against using an observational study to determine causality, they nevertheless raised questions about the association. "Doctors who treat colon cancer need to have the conversation about diet," said Dana-Farber Cancer Center oncologist Jeffrey Meyerhardt. "From my own experience, I know that patients ask about this a lot. They want to know what they should be eating and whether they should be exercising. But it's hard to give them recommendations without firm data." *See WebMD Medical News*, August 14, 2007.

[11] Study Alleges Association Between Pregnant Women's Eating Habits and Childhood Obesity

A Royal Veterinary College study has reportedly alleged that pregnant women who overindulge in "junk food" could saddle their offspring with an addiction to fatty, sugary and salty foods. Researchers apparently observed the effect in pregnant and breast-feeding rats fed a diet of processed foods such as doughnuts, muffins, biscuits, crisps, and sweets. The mother rats in this group were more likely to birth young that exhibited a greater preference for high fat, sugary and salty foods, as compared to the offspring born to mothers consuming a balanced diet. The rats preferring "junk food" were also more likely to overeat and put on more weight. The lead author speculated that exposure *in utero* to excess fat, sugar and salt may "prime the reward centers in the brain so it needs more when it is born." "Although the effect on rats may not necessarily be found in people, the research does back up a U.S. study of 190,000 families published in 2005," according to *The Guardian*. "It found that women who gained more weight during pregnancy than the U.S. Institute of Medicine's recommended amount – 11.5 to 16 kilos (2 to 2.5 stone) – were more likely to have obese two- to four-year-olds." *See The Guardian*, August 15, 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 or 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.
