

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Interagency Working Group on Import Safety

[1] Interagency Working Group Hears Recommendations for Improving Food Safety

“We simply can’t inspect our way to safety,” said Secretary of Health and Human Services Mike Leavitt in [opening remarks](#) at a meeting this week convened by the Interagency Working Group on Import Safety. After hearing food safety recommendations from more than 40 speakers, the working group reportedly expects to publish an action plan next month that advocates using new technologies to develop a risk-based approach to managing imports.

Some public health advocates, however, have also called for more inspectors at foreign processing plants and tighter controls at ports of entry. In addition, lawmakers have continued to emphasize short-term measures such as stringent industry self-regulation and long-term solutions that would consolidate federal oversight under a single agency. Proposed legislation would also broaden FDA authority to mandate recalls and levy fees on importers to bolster inspections, although industry stakeholders have argued against relying too much on warning systems. “There is an emerging consensus that we

should continue to improve our ability to detect threats but not rely on detection as the front line,” a Grocery Manufacturers Association spokesperson was quoted as saying. “Our inspectors should be the remedy of last resort.” See *The Washington Post*, October 2, 2007.

U.S. Department of Agriculture (USDA)

[2] USDA Bans Poultry from Saskatchewan After Bird Flu Outbreak

USDA has reportedly prohibited imports of live birds and unprocessed avian products from Saskatchewan, where Canadian officials have detected the H7N3 strain of bird flu in a farm’s flock of 45,000 chickens. Although the strain is not the H5N1 virus linked to human illnesses in Asia, the outbreak presents a considerable threat to the U.S. poultry industry, according to USDA officials. The H7N3 strain is normally a low-pathogenic form found in wild ducks, but it can quickly become highly pathogenic in commercial poultry flocks. In addition, U.S. Customs officials in Minnesota and North Dakota have apparently seized more than 4,100 game birds from hunters re-entering the United States. “It’s better to act with an abundance of caution,” said a spokesperson from the Animal and Plant Health Inspection Service. See *Reuters*, September 27, 2007; *Meatingplace*, September 28, 2007; *The Canadian Press*, October 2, 2007.



[3] **USDA Economic Research Service Announces Foodborne Illness Regulations Conference**

USDA's Economic Research Service (ERS) has [announced](#) a "Risk Assessment, Economic Analysis and Foodborne Illness Regulations Conference" slated for November 16, 2007, in Washington, D.C. Geared toward the research community, public and private policymakers, and the general public, the conference will cover (i) "the concept of integrating risk assessment and benefit/cost analysis"; (ii) "recent advances in the valuation for food risks"; and (iii) "the economic incentives in the public and private sector and how they contribute to safer food"; and will solicit remarks from policymakers and risk analysts on the new economic valuation methodologies. The agenda includes speakers from the Department of Agriculture, the Food and Drug Administration, George Mason University, and Harvard University.

Litigation

[4] **Federal Appeals Court Hears Arguments in Lactose Intolerance Lawsuit**

According to a news source, the Physicians Committee for Responsible Medicine (PCRM), a Washington, D.C.-based nonprofit that promotes preventive medicine and opposes the use of animals in scientific research, has argued its appeal of a case seeking warnings on milk cartons that milk can cause serious digestive illness. *Milton Mills, M.D. v. Giant of Md., LLC*, No. n/a (D.C. Cir., argued Sept. 14, 2007). PCRM reportedly asked the D.C. Circuit Court of Appeals whether it made sense to warn about a product that can make people sick from a common condition that is not commonly known.

The putative class-action lawsuit, filed on behalf of all D.C. residents, claims that many are not aware they are lactose intolerant and experience side effects after drinking milk. Defendants include Giant of Maryland, Safeway, Horizon Organic, Dean Foods, Nestle Holdings, Farmland Dairies, and Stonyfield Farm. Further details about the case, including the trial court's dismissal of the claims, appear in issues 146, 180 and 181 of this Update. See *PCRM Online Newsletter*, October 2007.

[5] **Recalled Beef Spawns *E. Coli* Litigation, USDA Investigation and Debate over State Inspections**

Topps Meat Co. has recalled some 21.7 million pounds of ground beef for potential contamination with *E. coli*, which was apparently discovered by New York State Department of Health sampling. Plaintiff's lawyer Bill Marler has already reportedly filed suit in New York state court on behalf of a girl who allegedly fell ill from eating contaminated Topps beef. Press reports indicate that 25 people in eight states may have been sickened by the meat. As of October 1, 2007, three cases were confirmed. The U.S. Department of Agriculture (USDA) has launched an investigation into food-safety practices at the Topps meat plant, which the agency suspended from grinding beef on September 26. A USDA official stated on national TV that "the American meat supply is the safest in the world," an assertion Marler challenged, noting that 21 million pounds of hamburger meat represents 84 million quarter-pound hamburgers. A spokesperson for the National Association of Meat Processors was quoted as saying "no one believes there is *E. coli* in all that meat."



Meanwhile, the U.S. House of Representatives version of the 2007 Farm Bill would provide state inspectors with the authority to inspect meat sold across state borders. Opponents reportedly believe this would lower meat inspection standards and complicate future recalls. The Consumer Federation of America (CFA), a nonprofit consumer advocacy group, pointed to the Topps matter to call such legislation into question. “While the USDA is overseeing a massive nationwide recall, the Senate agricultural committee is set to approve a bill, already passed by the House of Representatives, which would vastly complicate future recalls by permitting up to 80% of all meat and poultry plants in the U.S. to choose to be inspected by state governments rather than USDA,” CFA reportedly said. Those defending the proposal claim that state inspectors would be required to follow USDA regulations, although of the current 27 states with meat inspection programs, about half were found not “equal to” federal laws and regulations. *See ABC News, The Wall Street Journal and meetingplace.com, October 1, 2007; Portfolio Media Inc., October 1 and 2, 2007.*

Other Developments

[6] *Lancet* Calls for Framework Convention on Alcohol Control

A recent editorial in *The Lancet* suggests that an international treaty modeled on the WHO’s Framework Convention on Tobacco Control is needed “[f]or alcohol-control measures to be taken more seriously by government.” According to the medical journal’s editors, such regulation is needed because alcohol “causes 4% of global deaths and disability.” They suggest that alcohol is viewed as

more socially acceptable than other drugs due to “the putative health benefits associated with moderate drinking,” or because it is popular “among higher socioeconomic groups.” The editorial notes that ineffective control strategies, such as warning labels and education in schools, have been adopted at the country level; more effective alcohol controls would require increasing taxes or restrictions on hours or days of sale. Contending that momentum is gathering for a Framework Convention on Alcohol Control, the editorial concludes by calling for the 2008 WHO World Health Assembly to take the first steps toward “a global treaty to reduce alcohol-related harm.” *See The Lancet, September 29, 2007.*

[7] Ad Authority Criticizes Trade Group Poster on Benefits of Tea

The U.K.’s Advertising Standards Authority (ASA), an independent advertising watchdog organization, has reportedly criticized a poster that claims “Five portions of fruit and veg plus four cups of tea. It all adds up to a healthy diet.” According to ASA, there is no evidence to “firmly substantiate” claims that tea has any particular health benefits. ASA further contends that, by linking tea consumption to the benefits of eating fruits and vegetables, the U.K. Tea Council, the trade group behind the poster, could mislead readers into thinking the poster was linked to the government’s campaign to increase their consumption of fruits and vegetables. A council spokesperson argues that it has presented numerous papers to ASA about tea’s antioxidant properties, but the ASA “effectively told us we’d have had to run clinical trials, normally reserved for medical drugs” to prove such claims. *See BBC News, September 26, 2007.*



[8] Public Interest Group Wary of Milk Carton Promotions

The Campaign for a Commercial-Free Childhood (CCFC) has drawn attention to MilkMedia's "Milk Rocks!" campaign, which advertises popular musicians on more than 25 million milk cartons available in 98,000 schools. CCFC recently posted on its Web site a *Hollywood Reporter* story about "Milk Rocks!," in part because the milk promotion will highlight Janel Parrish, an actress and musician who appeared as a character in the Bratz® live-action movie. CCFC has frequently criticized Bratz® merchandise as peddling "commercially-driven, sexualized stereotypes" that have "contributed to the sexualization of young girls." Aimed at teen and tween students, the "Milk Rocks!" campaign will also include a Web site, a tour, in-school posters and banners, and contests, such as one in which the winner will receive a "school wake-up call" from a Bratz® character. "This program is about encouraging kids to drink milk," said Rob Souriall, the vice president of strategic marketing and promotions at Disney's Hollywood Records. "The program rewards kids with the Web site and acts like ours." See *Hollywood Reporter*, September 28, 2007.

[9] British TV Program Claims Smokers and Obese Denied NHS Operations

A British TV program titled "Too Fat for Treatment" has reportedly alleged that one in 10 National Health Service (NHS) trusts have policies restricting non-emergency surgeries in cases involving obese people or smokers. Aired on ITV1's "Tonight With Trevor McDonald," the program claimed that eight of the 152 trusts in England based restrictions on a patient's weight; seven restricted operations for people who are both smokers and obese; and one restricted operations

for smokers. The General Medical Council, however, has stated that care should not be refused on the basis of a person's lifestyle. "Technically speaking, a BMI of 30-plus means that you're obese," one physician was quoted as saying. "But that figure in itself tells us very, very little about fitness and your medical risk and so on." See *The Associated Press*, October 1, 2007.

Media Coverage

[10] *Scientific American* Focuses on Obesity

The September 2007 issue of *Scientific American* contains a bevy of articles on obesity, nutrition and addiction. Nutritionist Marion Nestle acknowledges the "puzzling" nature of nutrition science and the confusion engendered by conflicting dietary advice in her article "Eating Made Simple." Because "researchers typically examine single nutrients detached from food itself, foods separate from diets, and risk factors apart from other behaviors," Nestle contends that they attribute "health effects to the consumption of one nutrient or food when it is the overall dietary pattern that really counts most." Nestle claims that food companies prefer such research because then they can add single ingredients to their otherwise unhealthful products and "market them as health foods." She further opines about supermarkets, organic foods, calcium, fish, and soda and concludes that her approach – "eat less, move more, eat a largely plant-based diet, and avoid eating too much junk food – makes sense and leaves you plenty of opportunity to enjoy your dinner."

Free lance writer Kristin Leutwyler Ozelli interviews Nora Volkow, the director of the National Institute of Drug Abuse, in an article titled "This is Your Brain on Food." According to Volkow, food and



drugs activate the brain circuitry that “evolved to reward behavior essential to our survival.” For this reason, overcoming the impulse to eat foods craved by the overweight and obese “with sheer willpower is extremely hard.” She suggests a number of areas currently being investigated that could lead to “recovery for compulsive eaters,” including pharmacological interventions, group therapy, the control of brain activity, and “interventions aimed at mitigating withdrawal symptoms.” National Public Radio commentator Paul Raeburn, in “Can Fat Be Fit,” explores recent literature suggesting that being overweight is not necessarily unhealthy. Raeburn discusses a number of studies and concludes that the preponderance of the evidence “clearly points in the other direction.” See *Scientific American*, September 2007.

**[11] James Griffiths & Ray Matulka,
“Nanotechnology in Foods: Its Impact Could
be ‘Large,’” *Update*, September/October 2007**

Authored by toxicology consultants, this article contends that nanotechnology has the potential to enhance food safety. They report that nanotech materials used in food packaging “offer a dramatic improvement in material performance, with significant increases in the mechanical and gas barrier properties of plastic polymers used in the production of food containers.” They also point to improved mechanical and thermal properties and moisture resistance which can increase the shelf life of perishable foods. The article addresses food safety issues, noting that nanotech materials “may lead to unexpected or increased adverse effects in living organisms when ingested,” and that federal agencies have made such concerns a high priority. The article calls for standardized screening procedures so that

manufacturers and regulators can assure “a technophobic public” that this promising technology is safe.

This issue of *Update*, published by the Food and Drug Law Institute, also contains an article by an attorney with the Food and Drug Administration about the regulation of biotech foods in the United States and Europe. According to Mark Schwartz, the U.S. approach focuses on the characteristics of the end product to assess safety and nutritional issues, while the EU looks at the process used to create the end product in determining its safety. Thus, the United States has embraced bioengineered foods while the EU has resisted them. Schwartz concludes that the EU approach “seriously impedes the further advancement of our society by eroding science-based risk-management practices, leading to the banning of net-beneficial products as well as products for which there has been absolutely no substantive harm demonstrated.”

**[12] Nestle Addresses Health Claims, Youth
Marketing in Dutch Magazine**

“Health claims are just like Pandora’s Box. It is better to avoid them, as in principle they are misleading, without any exception. For the industry, however, it is a way to sell more products,” opines NYU Professor Marion Nestle in an interview appearing in the August 2007 edition of the Dutch magazine *Elsevier Voedingsmiddelen Industrie* (“Elsevier Food Industry”). Instead of private initiatives that promote products as healthier alternatives to full-calorie versions, Nestle proposes a universal traffic light system as a “more effective solution.” In addition, she contends that price policy and marketing aimed at children are the two key issues facing the U.S. government in its fight against



obesity. The farm bill's proposed corn and soybean subsidies would continue to support low prices for highly processed foods, according to Nestle, while courts have traditionally ruled that the First Amendment protects corporate and individual speech.

She specifically notes that as the Federal Trade Commission has started to move toward curtailing youth marketing, food companies "are scrambling" to institute voluntary guidelines. "From what I observe, obesity rates are rising less rapidly in [countries that regulate marketing] than in those in which the marketing practices of the industry have not been restricted," she concludes, adding that "covert" advertising methods utilizing the Internet, mobile phones and computer games have infiltrated children's media to an extent unrealized by parents.

Scientific/Technical Items

[13] Researchers Claim Alcohol of Any Kind Boosts Breast Cancer Risk

According to U.S. researchers participating in a European cancer conference, women who consume three or more drinks daily increase their risk of breast cancer as much as that posed by smoking a pack of cigarettes. Basing their findings on a study of more than 70,000 women from a variety of ethnic backgrounds, the researchers reportedly found that the risk does not depend on the type of alcohol consumed and is consistent across different age and ethnic groups. They determined that women who drink between one and two alcoholic beverages per day increased their risk of breast cancer by 10 percent, while those drinking more than three drinks daily increased their risk by 30 percent.

Elizabeth Whelan, president of the American Council on Science and Health (ACSH), called reports of these findings overhyped.

Whelan contends that risks of 20 and 30 percent are "modest," comparable to not having a full-term pregnancy or having a first baby after age 35. She notes that taking the B-vitamin folic acid "literally wipes out whatever small risk of breast cancer alcohol consumption might pose." Whelan calls on women not to panic and to recall that moderate drinking has significant cardiovascular benefits. ACSH is a New York-based nonprofit that claims to be a "consumer education consortium" that was organized in 1978 to "add reason and balance to debates about public health issues." *See Reuters*, September 27, 2007; *New York Post*, October 1, 2007.

[14] Dark Chocolate May Ease Chronic Fatigue Symptoms

A pilot study conducted by Hull York Medical School researchers has reportedly linked dark chocolate consumption to a decrease in chronic fatigue syndrome (CFS) symptoms. The trial, which has not been peer-reviewed, included 10 patients who received for two months a daily dose – 45 grams – of either specially-formulated dark chocolate or white chocolate dyed brown. After a one-month break, patients switched chocolate types; those receiving the dark chocolate evidently reported significantly less fatigue. "Dark chocolate is high in polyphenols, which have been associated with health benefits such as a reduction in blood pressure," said Professor Stephen Atkin, the lead researcher. "Also polyphenols appear to improve levels of serotonin in the brain, which has been linked with chronic fatigue syndrome and that may be a mechanism." *See BBC News*, September 30, 2007; *The (York) Press*, October 3, 2007.



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