

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] House Committee Hears Testimony on Chinese Imports

The House Subcommittee on Oversight and Investigations of the Energy and Commerce Committee held a [hearing](#) on October 11, 2007, the third in its series addressing food safety and security issues in light of concerns over contaminated imports from China and other countries. Committee members heard from staff who recently traveled to China to investigate that country's food supply chain and meet with government officials. According to hearing testimony, the Chinese food supply chain "does not meet international safety standards." A certification program is in place, but few comply with it, and the Food and Drug Administration (FDA) refuses to acknowledge the Chinese certificates.

Investigators also examined the food safety systems of Hong Kong and Japan and learned how their governments ensure the safety of food imported from mainland China. Hong Kong apparently requires "massive sampling" that could not be done in the United States, while Japan restricts imports to a small number of Chinese producers and tests about 15 percent of Chinese imports.

Efforts of this scale in the United States, according to hearing witnesses, would require extensive resources and would result in higher food prices. FDA Associate Commissioner for Food Protection David Acheson testified that the FDA needs a new approach, but provided few specifics, saying that the Bush administration's plan has not yet been finalized. Agricultural and seafood products imported from China between 1996 and 2006 have increased by 346 percent, but hearing witnesses emphasized that unsafe foods are also coming from Mexico, India and domestic sources. *See CQ HealthBeat News*, October 11, 2007.

U.S. Department of Agriculture (USDA)

[2] USDA Announces Meeting to Address Shiga Toxin-Producing *E. Coli*

USDA's Food Safety and Inspection Service, FDA's Center for Food Safety and Applied Nutrition, and the Centers for Disease Control and Prevention have [announced](#) a meeting slated for October 17, 2007, to address the public health significance of Shiga toxin-producing *E. coli* (STEC), a bacteria linked to severe and often fatal illness in humans. USDA currently tests for and recognizes only one STEC strain, O157:H7, as a food adulterant that necessitates a product recall. Scientific evidence, however, has suggested there are several pathogenic *E. coli* strains that "not only contain Shiga toxin but also additional virulence determinants that, together with the toxin, cause illnesses similar to those



caused by *E. Coli* O157:H7.” Approximately “20 percent of the people who get sick from *E. coli* in the [United States] are probably suffering because they ate food contaminated with strains of the bacteria that most inspectors weren’t looking for,” USDA Undersecretary for Food Safety Richard Raymond was quoted as saying.

The public meeting will solicit input from industry, consumers, academia, and other public health and regulatory agencies on whether to treat non-O157:H7 STECs as adulterants. The government agencies will also seek comments on (i) how to identify, track and report additional STECs, (ii) whether “interventions designed to remove or destroy *E. coli* O157:H7 in food or raw products” would be effective against other STECs; and (iii) how to “define, monitor and control pathogenic non-O157:H7 STECs in raw food or food products.” See *The Wall Street Journal*, October 11, 2007.

State/Local Initiatives

[3] Public Interest Group Condemns Proposal to Allow *Trans* Fat in Philadelphia Bakeries

The Center for Science in the Public Interest (CSPI) has issued a press release condemning a proposal that would exempt bakeries from a regulation adopted by the Philadelphia City Council to phase out *trans* fat in all city restaurants. Several bakeries reportedly claimed that partially hydrogenated oil is a necessary ingredient in many cakes, pastries and other baked goods, although *trans* fat has already been removed from deep-fryers in all Philadelphia eateries. Restaurants were given an additional year to eliminate *trans* fat from baked goods and non-prepackaged items. “The idea that partially hydrogenated oil is some kind of artisanal

ingredient, passed down through the ages in secret recipes, is ludicrous,” said CSPI Executive Director Michael Jacobson, who testified before a committee hearing this week. “If we’re going to be nostalgic about the recipes of yesteryear, we should be nostalgic for foods that come from farms, not factories.” See *CSPI Press Release*, October 5, 2007.

Litigation

[4] Food Lawyer Files Suit Against ConAgra for *Salmonella* Poisoning

Plaintiff’s lawyer Bill Marler has filed suit in a federal court on behalf of a Minnesota family whose youngest child was allegedly sickened by *Salmonella* after eating a ConAgra Banquet® pot pie. Filed on October 11, 2007, the lawsuit is reportedly the first to be filed since it was announced that the product had purportedly been linked to a *Salmonella* outbreak. According to the Reinert family, their daughter’s *Salmonella* matches the strain found in dozens of other cases across the country. While ConAgra has reportedly said its pot pies are safe if thoroughly cooked according to the package instructions, the Reinerts contend that they cooked the pot pies longer than directed. The child reportedly had diarrhea for six weeks and was taken to the emergency room for seizures and a loss of consciousness. See *Associated Press* and *marlerclark.com*, October 11, 2007.

Meanwhile, the Department of Agriculture’s Food Safety and Inspection Service (FSIS) has reportedly warned consumers to discard frozen chicken and turkey pot pies manufactured by ConAgra. The pot pies have been linked to 139 *Salmonella* cases in 30 states, according to epidemiologic evidence gathered by the Centers for Disease Control and



Prevention. In addition to issuing a voluntary recall, ConAgra this week suspended production at its Marshall, Missouri, processing plant while USDA investigates the source of the contamination. Although a ConAgra spokesperson has also stressed that “any potential issue was likely due to consumer undercooking of the product,” at least one critic has expressed dissatisfaction with the explanation. “If you cook anything long and hot enough you can kill *Salmonella*. But the story is that hundreds of people have apparently not been able to do that; either they didn’t follow the instructions or the instructions were inadequate,” an epidemiologist with the Oregon Public Health Division was quoted as saying. See *USA Today*, October 9, 2007; *Star Tribune* and *Meatingplace.com*, October 10, 2007.

[5] *Mothershead v. Aurora Dairy Corp.*, No. 4:07-1701 (U.S. Dist. Ct., Eastern Dist. Mo., Eastern Div., filed October 4, 2007)

St. Louis residents have filed a putative class action complaint against Aurora Dairy Corp. alleging that the company “committed unfair and deceptive practices and was unjustly enriched by marketing and selling milk alleged to be organic, at prices much higher than non-organic milk, when [it] knew or should have known that its milk did not meet the standards or organic certification.” Named plaintiff Kristine Motherhead alleges that she purchased Aurora-produced milk for some two years because she wanted to consume an organic product. She further alleges that Aurora violated the standards for organic milk production and thus, did not produce organic milk. She brings the action on behalf of a nationwide class of purchasers for unjust enrichment and on behalf of a statewide class of consumers for violations of Missouri’s unfair and

deceptive business practices laws and negligence. Motherhead seeks compensatory and punitive damages as well as a preliminary and permanent injunction “enjoining Defendant from continuing to engage in the unlawful activities described herein, specifically including any labeling of milk as organic when it is not.”

[6] USDA Fails to Find Cause for Genetically Engineered Rice Contamination

The U.S. Department of Agriculture (USDA) has reportedly decided not to take enforcement action against Bayer CropScience for allowing unapproved, genetically engineered rice to contaminate the U.S. supply of long-grain rice. According to the administrator of the USDA’s Animal and Plant Health Inspection Service (APHIS), “The exact mechanism for the introductions could not be determined.” Apparently, documents that might have assisted the investigation were either lost or routinely destroyed.

The agency’s [report](#) summarizes the extent of the investigation which consumed 8,500 staff hours and included site visits to more than 45 locations in six states.

The investigators do not believe that cross-pollination was responsible for the contamination which resulted in significant losses for farmers who faced import bans by countries around the world and lower rice prices. APHIS also released a “Lessons Learned” document that suggests the government adopt certain record-keeping protocols that would require companies to retain maps and other records that would indicate when and where they plant experimental crops.

Bayer reportedly issued a brief statement saying it was pleased the government had found no violation



of legal requirements. An advocacy organization countered that the report demonstrates the U.S. regulatory system for genetically modified crops does not work. A spokesperson for the Union of Concerned Scientists reportedly said, "After all this investigation, there is no reason to think there are not more of these genes out there just waiting to be discovered." The APHIS report notes that during the investigation the agency "discovered seven instances in which field trials were planted or not terminated during the period specified by APHIS requirements." Because these violations occurred outside the statute of limitations and did not contribute the rice contamination, however, the agency discusses them as a point of information only. *See The New York Times, UPI and Washington Post, October 6, 2007.*

Other Developments

[7] Anheuser-Busch Denies Greenpeace Allegation Concerning "Liberty Link" Rice

Anheuser-Busch has reportedly refuted an allegation made by Greenpeace that beers produced in its East Coast breweries in 2006 tested positive for a strain of genetically engineered (GE) rice known as Liberty Link. Though permitted in the United States, the Liberty Link series was banned in several countries after two strains, LLRICE601 and LLRICE604, infiltrated approximately 30 percent of the U.S. grain crop and disrupted the world export market. Greenpeace has now claimed that independent test results have confirmed the presence of Liberty Link rice in Budweiser beer and other Anheuser-Busch products. The environmental group has also called on the brewer to ensure that all of its beers are free of GE ingredients and to oppose the use of GE crops in the United States.

"Liberty Link has not been found in any of our tests of our beers brewed in the United States," stated Doug Muhleman, Anheuser-Busch's vice president of brewing, in response to the Greenpeace allegations. The company has a significant market presence in the European Union, where the question of GE crops has been a contentious issue in legislative circles as well as public opinion. Muhleman added that, "Neither [the company], nor our international licensed brewing partners use genetically modified ingredients, including genetically modified rice, in brewing products sold in any country with legal restrictions." *See NutraIngredients.com, October 9, 2007.*

[8] Makers of Bottled Water Face Increased Pressure from Environmental Campaigns

Bottled-water manufacturers have reportedly started engineering plastic containers that use fewer material resources and create less waste, in response to a public demand for environmentally sound products. PepsiCo, Inc., for example, has reduced its water bottles by nearly 40 percent, to 15 grams, and Nestlé Waters recently introduced a 12.5-gram bottle for its single-serving waters. In addition, some manufacturers have built bottle-to-bottle recycling centers where new containers are made directly from old ones. "They're going to be looking into more environmentally friendly packing that's biodegradable," said one restaurant consultant. "They're going to be looking at all of these types of things as we move forward. We think this whole social-consciousness is here to stay."

Meanwhile, the president of the International Bottled Water Association, Joe Doss, has warned consumers that bottled water, though "America's No. 2 beverage" after soda, constitutes only one-third of 1 percent of the nation's waste. "We



strongly think any efforts to reduce the environmental impact of packaging must focus on all consumer goods and not just target one industry, like bottled water,” he was quoted as saying. See *Advertising Age*, October 8, 2007

Media Coverage

[9] *Good Calories, Bad Calories* Challenges Conventional Wisdom on Low-Fat Diets

Two recent reviews in *The New York Times* and *The Wall Street Journal* have covered the issues raised by *Science* correspondent Gary Taubes in his new book, *Good Calories, Bad Calories*, which challenges the conventional wisdom that a high-calorie, high-fat diet has increased heart disease, obesity and related illnesses among Americans. Taubes reportedly argues that the low-fat diet, though based on dubious evidence, gained a foothold in public-health circles because experts succumbed to an “information cascade,” a sociological phenomenon in which “one person after another assumes that the rest can’t all be wrong.” As a result, federal guidelines since the 1980s have recommended a low-fat diet and repeatedly ignored research that shows little or no correlation between fat intake and heart disease. In addition, Taubes posits, the guidelines have encouraged Americans to consume more carbohydrates, perhaps contributing to a rise in obesity and diabetes. “In effect, Americans replaced a good portion of the whole grains they ate in the nineteenth century with refined carbohydrates,” writes Taubes, in theorizing that sugar overloads the liver with carbohydrates and increases the production of fat-storing insulin. His book ultimately recommends further research into a low-carbohydrate diet, which he believes has been rejected

out-of-hand by dieticians eager to prove pet theories at the expense of sound scientific evidence. See *The Wall Street Journal*, October 6, 2007; *The New York Times*, October 9, 2007.

[10] “King Corn” Traces Crop from Farm to Table

Documentary filmmakers have produced a film about corn that has been marketed as a cross between “Sicko” and “Super Size Me.” One of them apparently moved to Iowa with a friend in 2003 and raised an acre of corn which they harvested and followed from the town’s grain elevators to cattle feedlots in Colorado and to Brooklyn where they explored the purported link between high-fructose corn syrup in sodas and obesity. They kept a log of what they ate as they traveled and reportedly found that corn dominated their diets, a finding confirmed by testing their hair chemistry.

While the filmmakers did not apparently try to prove “that corn is bad,” they want viewers to better understand “the system that produces most of our food in America, and realize we have a lot of power to confront it. We can vote with our dollars, but we can also vote with our votes.” The film addresses the issue of government subsidies and shows that the acre of corn they grew “would have lost \$19.92, but became profitable with a government subsidy of \$28.” See *The New York Times*, October 10, 2007.

Scientific/Technical Items

[11] Study Shows Governments Slow to Regulate Food Marketing to Children

According to a new study by a researcher who has participated in Public Health Advocacy Institute conferences on addressing obesity with litigation, the food industry has responded to recent pressures



to regulate their youth marketing by adopting self-regulatory approaches, while governments in both developing and developed countries have been slow to act. Corinna Hawkes, "Regulating Food Marketing to Young People Worldwide: Trends and Policy Drivers," *American Journal of Public Health*, November 2007. Funded in part by the World Health Organization (WHO), the study found that since WHO called on nations and industry in 2004 to reduce unhealthy marketing messages, governments have been somewhat more willing to consider restricting food product sales in schools than they have been to impose prohibitive restrictions on food marketing to young people.

Noting that "from a global perspective there was more talk about developing regulations than there was actual implementation," the article suggests that lawsuits have been a key driver in the self-regulation trend and that lobbying by the advertising and food industries has succeeded in "preventing, watering down, or repealing statutory regulations." The author concedes that "no firm conclusions about the effectiveness or ineffectiveness of statutory restrictions or self-regulation can be drawn, because there are no properly controlled studies that examine whether either form of regulation affects obesity." Nevertheless, she considers it likely that ethical concerns are driving whatever regulation is going into effect, i.e., most countries find the manipulation and exploitation of young people through marketing to be unethical. The article concludes by asking whether the marketing of healthier food products to youth will be "an ethically acceptable compromise."

[12] Study Explores Regulation of Sugar-Sweetened Beverages in Schools

A study by Harvard School of Public Health researchers compares the measures that government and industry are taking to curtail the access of school-age children to sugar-sweetened beverages in

schools. Michelle Mello, Jennifer Pomeranz & Patricia Moran, "The Interplay of Public Health Law and Industry Self-Regulation: The Case of Sugar-Sweetened Beverage Sales in Schools," *American Journal of Public Health*, November 2007. The researchers start with the assumption that the consumption of sugar-sweetened beverages contributes to childhood obesity and further note that government regulatory initiatives in this arena generate controversy.

They found that of the 34 states adopting regulations to curtail that consumption of sugar-sweetened beverages in schools only five had what they considered to be "strong" policies, few had any funding provisions and "only 1 state imposed penalties for noncompliance." They also trace the history of industry self-regulation and analyze the agreement that three major beverage manufacturers reached with the Alliance for a Healthier Generation. According to the study, the agreement was a "significant step forward," but it is not binding, has a long phase-in period and is voluntary for schools. Thus, the authors question whether it will be effective.

They contend that the threat of litigation by Public Health Advocacy Institute lawyers, the Center for Science in the Public Interest and other advocacy groups has led to industry changes. The article concludes by identifying what policies are most effective and suggesting that government agencies and public school districts "help companies promote more healthful product offerings, providing them with sales gains in substitute products that will soften the economic effects of complying with the guidelines."

[13] Australian Study Links Esophageal Cancer with Obesity

According to a news source, a study of more than 2,000 Australians suggests that "obesity is an inde-



pendent risk factor” for cancer of the esophagus. People with a body mass index (BMI) of 40 or higher were apparently six times more likely to develop the fatal disease than those with a BMI under 25, even accounting for confounding factors. Those at greatest risk were obese males under 50 who had smoked at some time in their lives and obese people with reflux conditions or severe heartburn. The combination of obesity and acid reflux reportedly increased the risk by a factor of 16. Conducted by the Queensland Institute of Medical Research, the study was apparently published in the British journal *Gut*. Researchers attributed the apparent link to higher levels of fat tissue boosting insulin production which increases the circulation of an insulin-like growth factor that stimulates cell growth and curbs cell death, conditions evidently conducive to cancer development. See *Herald Sun*, October 11, 2007.



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