

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] GMA Calls on Lawmakers to Reject Sugar Producers Efforts to Limit Open Markets

The Grocery Manufacturers Association (GMA) and other business groups have asked the Bush administration and Congress to oppose the efforts of U.S. and Mexican sugar producers to contravene the provisions of the North American Free Trade Agreement (NAFTA) by agreeing to limit open markets. According to GMA president and CEO Cal Dooley, such efforts “to rewrite the rules of NAFTA undermine free and fair trade and would have a negative impact on our nation’s economy that go far beyond just sweetener and agricultural trade.” Dooley further contends, “Allowing this agreement between two narrow special interest groups to become law would hurt the United States’ credibility in future trade negotiations.” Under NAFTA, trade restrictions are to be removed and allow for the unrestricted trade of sugar between the United States and Mexico beginning January 1, 2008. GMA and its allies are apparently concerned that altering NAFTA’s sugar provisions “would strengthen the hand of the hand of the numerous Mexican agricultural groups seeking to renegotiate other provisions.” See *FoodUSANavigator.com*, February 5, 2008.

### U.S. Department of Agriculture (USDA)

#### [2] USDA Suspends Slaughterhouse Production Following Allegations of Animal Abuse

USDA has reportedly suspended operations at a California-based meat packing facility after an animal rights group accused workers of using various inhumane methods to slaughter ill, or “downer,” cattle deemed unfit for human consumption. USDA forbids the sale of beef from these cows because they exhibit a higher prevalence of bovine spongiform encephalopathy (BSE), or mad cow disease. Activists with the Humane Society of the United States apparently released undercover video showing that the meat producer forced downer cows to stand before entering slaughter boxes, from which they presumably crossed into the human food supply. The society has faulted the eight on-site USDA inspectors for not ensuring that cattle could walk from one pen to the next and back prior to slaughter, a required screening test to distinguish non-ambulatory cattle from their healthy brethren. In addition, the activists blamed the meat packer for failing to report cattle that collapsed after the pre-slaughter inspection, as required by USDA regulation. Although food safety experts have since declared that the violations present a low risk of BSE contamination, some industry members have red-flagged the incident as further evidence of the agency’s lackluster performance. “We would hope that this example will impress upon the USDA the need to bolster its inspection processes to enforce



the current law that prohibits downer animals in the human food supply,” a representative of the Ranchers-Cattlemen Action Legal Fund (R-CALF) was quoted as saying. *See Los Angeles Times*, February 7, 2008.

Meanwhile, USDA has responded to these criticisms in a press release announcing a February 4 suspension of inspection at Westland Meat Co., Hallmark’s distributor and a supplier of ground beef for the National School Lunch Program. USDA has claimed that it issued an administrative hold on all Westland meat products and indefinitely suspended the company’s participation in federal programs on January 30, 2008, the same day that the Humane Society released the findings of its undercover operation. “On January 30, Agriculture Secretary Ed Schafer called upon the Office of the Inspector General to work with FSIS [the Food Safety and Inspection Service] and the USDA’s Agricultural Marketing Service to conduct an investigation into the allegations of inhumane handling of non-ambulatory disabled cattle at Westland Meat Company,” the agency stated. Westland Meat Co., which voluntarily stopped operations on February 1, cannot resume business until written corrective actions are submitted for FSIS approval. *See USDA Press Release*, February 5, 2008.

## State and Local Initiatives

### [3] Mississippi Bill Designed to Draw Attention to Rising Obesity Levels

A recent Mississippi bill ([H.B. 282](#)) elicited a nationwide response when it proposed requiring restaurants to refuse service “to any person who is obese, based on criteria prescribed by the state department of health.” State Representative John

Read (R-Gaultier), who co-sponsored the initiative, has reportedly said that he never expected the bill to pass, but wanted to stimulate debate on Mississippi’s rising obesity rates. Although the legislation died in committee, several public health advocates wasted little time in lambasting the bill as counterproductive to identifying and changing the systemic causes of obesity. “This brings bias against obese individuals to a new and appalling level, and at a time when significant progress is being made in the effort to stop blaming obesity on the people who have it and to address the social and political conditions that drive it,” opined Kelly Brownell, the director of Yale University’s Rudd Center for Food Policy and Obesity. “Are these legislators fighting to get rid of soft drinks in schools? Are they working to stop the relentless marketing of unhealthy foods to children? Are they doing anything about the fact that poor people do not have access to healthy foods?”

Read, however, has apparently acknowledged that at 5 feet, 11 inches and 230 pounds, he might have fallen victim to his own bill. “I was trying to shed a little light on the No. 1 health problem in Mississippi,” Read was quoted as saying. “Anybody with any sense knows it’s not going to happen, not going to pass. Mississippi has been ranked the most obese state in the nation. With all the attention paid to tobacco problems, this was to shed some light on another major problem. This has been at least getting the dialogue going.” *See The Smoking Gun.com*, February 1, 2008; *USA Today*, February 5, 2008; *Food Law Prof Blog* and *Scientific American*, February 7, 2008.



## Litigation

### [4] Makers of Tainted Pet Food Indicted Following FDA Investigation

The U.S. Attorney's office in Kansas City, Missouri, announced this week that criminal charges have been brought against Chinese and American businesses owners whose companies were allegedly responsible for the melamine contamination of pet food that sickened and killed thousands of cats and dogs in 2007. The grand jury [indictment](#) against Xuzhou Anying Biologic Technology Development, Co.; Mao Linzhun, Suzhou Textiles, Silk, Light Industrial Products, Arts and Crafts, I/E Co.; and Zhen Hao Chen alleges 13 felony counts of distribution of adulterated food and 13 felony counts of distribution of misbranded food. If convicted, the individual defendants could face up to three years' imprisonment and a \$250,000 fine on each count. The corporations face a \$500,000 penalty on each count.

The [indictment](#) against Las Vegas-based ChemNutra, Inc. and its owners Sally and Stephen Miller brings the same charges as misdemeanors and adds one felony count of conspiracy to commit wire fraud. The penalties against the individual U.S. defendants include one year of imprisonment and a \$100,000 fine on each of the first 26 charges and five years' imprisonment and a \$250,000 fine on the wire fraud charge. The U.S. corporation faces fines of \$200,000 on each of the first 26 counts and a \$500,000 fine for wire fraud.

The Food and Drug Administration's (FDA) Office of Criminal Investigations [announced](#) that the indictments were for the defendants' "roles in a scheme to import products purported to be wheat gluten into the United States that were contami-

nated with melamine. These products were used to make pet food." According to the indictments, the defendants were responsible for the manufacture or importation of 800 metric tons of "purported wheat gluten, totaling nearly \$850,000" into the United States between November 2006 and February 2007. The wheat gluten was allegedly misbranded because the labels incorrectly stated that it had a minimum protein level of 75 percent. The indictments allege that e-mails show the U.S. wheat gluten importer knew that the product was being mislabeled with incorrect product codes to avoid inspection by Chinese officials.

According to a [statement](#) from the U.S. attorney's office, the melamine-tainted wheat gluten found its way into pet food and led to the recall of "more than 150 brands of dog and cat food across the nation last year, following reports of cats and dogs suffering kidney failure after eating the affected products." The FDA learned of the problem in March 2007, ultimately receiving more than 14,000 consumer complaints within the month. With no national tracking system to account for pet deaths, the FDA has estimated the loss of 1,950 cats and 2,200 dogs due to consumption of contaminated pet food.

According to a news source, it is not clear whether U.S. authorities will be able to extradite the named Chinese executives or enforce fines against their companies. ChemNutra reportedly noted in a statement that the government has not accused its owners of knowing there was melamine in the gluten and further stated, "Mr. and Mrs. Miller strongly deny any intent to defraud or knowledge of wrongdoing." Sally Miller is apparently a Chinese national. See *The New York Times*, February 7, 2008.



### [5] Restaurateurs Challenge NYC Calorie-Labeling Rule

The New York State Restaurant Association has filed a lawsuit in federal district court seeking to stop the latest New York City Board of Health rule on the display of calorie information at fast food chains from going into effect. In late January 2008, the board voted to approve a new version of the rule designed to withstand judicial scrutiny. Further details about the new rule appear in issue 245 of this Update, and information about the September 2007 decision finding the Board's first attempt to require calorie-count displays preempted by federal law appears in issue 230. The association contends that the board has exceeded its authority and that restaurants already provide the required information by other means, such as tray liners and posters and on company Web sites.

According to the law firm representing the association, "No new argument has been added [to the lawsuit]. The same federal preemption and first amendment arguments apply to the revised regulation as well." A spokesperson for the city was quoted as saying, "It is unfortunate that the Restaurant Association and the chain establishments it represents would rather go to court than provide customers with the clear information they want and need." See *Crain's New York Business.com* and *New York State Restaurant Association Press Release*, January 31, 2008.

## Other Developments

### [6] Ice Cream Maker Weighs in on Bovine Growth Hormone and Cloning

Ben & Jerry's Homemade Inc., which opposes the use of recombinant bovine growth hormone (rBGH)

in dairy cows and was among the first to say so on its product labels, has joined a national campaign that seeks consumer support and action. According to the ice cream maker's Web site, biotechnology advocates have been trying to get state governments to restrict or ban such labeling, while the company has been fighting back "to defend our right to label, and your right to know about the food you eat." The company is calling on consumers to add their voices to the debate and let local dairy companies know that they support rBGH labeling. Those who oppose hormone use have reportedly been successful in keeping state legislatures from adopting contrary legislation, which has apparently frustrated farmers and chemical companies that believe in its safety. See *The New York Times*, February 5, 2008.

The company has also disputed claims about the safety of food made from cloned animals, a point noted in a *New York Times* op-ed titled "Food Politics: Half-Baked." The author, Texas State University History Professor James McWilliams, bemoans the acrimonious nature of the debate over the merits of biotechnology in agriculture. Referring to Ben & Jerry's founder, who characterizes cloning as "just weird," and the anti-biotech forces that coined the term "Frankenfoods," McWilliams states, "One need look no further than the battle over genetically modified crops starting in the 1990s to understand how this language undermines the qualified benefits of biotech innovation." McWilliams also recognizes, however, that "pro-biotech forces" brought an "arrogant attitude" to the table and insisted that biotechnology would end world hunger. "Lost in this rhetorical battle was a quiet middle ground where the benefits and drawbacks of genetically engineered crops were responsibly considered," he states. McWilliams concludes with



the wish that this polarized “situation does not play out on cloning. After all, our collective failure to grapple with genetic modification on its own terms [has] been accompanied by the equally unfortunate failure to bring its benefits to cultures that might gain the most from it. . . . Cloning technology, too, has many possible benefits” and “deserves a fair hearing.” See *The New York Times*, February 5, 2008.

**[7] Consumer Advocate and Corn Refiners Association Oppose San Francisco Soft Drink Tax**

The Center for Science in the Public Interest (CSPI) and the Corn Refiners Association recently signed a joint letter opposing a soft drink tax plan put forward by San Francisco Mayor Gavin Newsome. The plan would only tax drinks containing high-fructose corn syrup (HFCS), but the two groups have pointed to scientific evidence showing that the body metabolizes HFCS and regular table sugar, or sucrose, in the same manner. CSPI has thus disputed the plan’s assumption that HFCS is more harmful than sucrose, calling such claims an “urban myth” that would result in “no health benefit whatsoever if companies switched from high-fructose corn syrup to sugar.” CSPI has instead proposed a tax on all non-diet soft drinks regardless of whether they contain corn syrup or sugar. “We respectfully urge that the proposal be revised as soon as possible to reflect the scientific evidence that demonstrates no material difference in the health effects of high-fructose corn syrup and sugar,” stated the letter. “The real issue is excessive consumption of any sugars may lead to health problems.” See *CSPI Press Release*, February 6, 2008.

**[8] CDC Names Illness Affecting Minnesota and Indiana Pork Plant Workers**

The Centers for Disease Control and Prevention (CDC) has [published](#) recent developments in an on-going investigation into an outbreak of neurological illness among pork plant workers in Minnesota and Indiana. The agency has labeled the illness, which is characterized by fatigue, numbness and tingling in the arms and legs, as progressive inflammatory neuropathy (PIN). At least 13 people at the Minnesota-based Quality Pork Processors plant have contracted the mysterious disease, which authorities suspect is linked to an air compression system used to remove brain tissue from pig heads. CDC and local health department officials are apparently focusing on the possibility that workers operating this equipment inadvertently inhaled pig brains as liquefied droplets. Although both facilities have since discontinued this harvesting method, the latest employee to become sick did not work directly with the air compression system and could have been exposed to brain matter that traveled through chutes and conveyors into a separate rendering area. “There are other possible cases as well,” a Minnesota Health Department spokesperson was quoted as saying. “We are also interviewing people who are not sick, just so we can compare their work and exposure to those who are exhibiting symptoms.” See *Meatingplace.com*, February 1 and 6, 2008.

**[9] Marler Organizes Food Safety CLE at Seattle University School of Law**

Seattle, Washington-based Bill Marler, the plaintiff’s lawyer who blogs as “the food poisoning lawyer,” has organized a continuing legal education (CLE) [conference](#) that will be held at the University of Seattle School of Law on April 11-12, 2008. Titled



“Who’s Minding the Store – The Current State of Food Safety and How It Can Be Improved,” the CLE program will include panel discussions about (i) how food safety concerns are viewed by different stakeholders; (ii) what federal and state agencies are responsible for food safety regulation; (iii) the roles that the civil and criminal justice systems play in food safety; (iv) how food is protected overseas; and (v) the contributions that the media can make to public health and food safety. Among the featured speakers will be Washington Governor Christine Gregoire (D).

## Scientific/Technical Items

### [10] Study Blames Increase in Gout Cases on Soft Drink Consumption

A recent study has suggested that excessive soft drink consumption has led to an increased number of gout cases in the United Kingdom. Hyon K. Choi and Gary Curhan, “Soft Drinks, Fructose Consumption, and the Risk of Gout in Men: Prospective Cohort Study,” *The British Medical Journal*, January 31, 2008. During a 12-year study of 46,000 men aged 40 years or older with no history of gout, researchers identified 755 new gout cases and noted that the risk of developing the condition increased for individuals who consumed five to six servings of sugary soft drinks per week. The study therefore concluded that “men who consume two or more soft drinks per day have an 85 percent higher risk of gout compared with those who drink less than one a month,” according to *BBC News*. Caused by the crystallization of uric acid in the joints, gout symptoms include painful, swollen joints in the lower limbs. Previous studies have reportedly found that fructose intake increases the level of uric acid in the bloodstream, which then

deposits the crystallized substance in joints. The study authors have also advised gout-sufferers to reduce their fructose consumption, in addition to following traditional diets that restrict purine-rich foods such as red meat and beer. See *BBC News*, February 1, 2008.



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