

# Food & Beverage

## LITIGATION UPDATE

Issue 249 • February 22, 2008

### Table of Contents

#### Legislation, Regulations and Standards

- [1] Agriculture Groups Dispute USDA User Fee Proposal .....1
- [2] OEHHA Schedules Workshop to Discuss Prop. 65 Warnings for  
Chemicals in Foods .....1
- [3] EU Farmers Request Approval for More Biotech Crops .....2
- [4] European Parliament Urges Investigation of Alleged Supermarket Scheme .....2

#### Litigation

- [5] Criminal Charges Filed in Downer Cow/Recalled Beef Episode .....3
- [6] Organic Vegetable Grower Sues Organic Fertilizer Suppliers over  
*Salmonella* Contamination .....4
- [7] State Attorneys General Seek Marketing Documents from Makers of  
Caffeinated Alcohol Beverages .....4
- [8] Botulism Lawsuit Filed in Ohio Against Chili Sauce Maker .....5

#### Other Developments

- [9] Obesity Expert's Affidavit Draws Fire for Questioning Menu Labeling Laws .....5
- [10] Jennifer Steinhauer, "A Spoonful of Immunity?," *The New York Times*,  
February 17, 2008 .....6

#### Scientific/Technical Items

- [11] Researchers Address Obesity at AAAS Annual Meeting .....6
- [12] Two Studies Offer Contradictory Findings on GE Crops .....7

Shook,  
Hardy &  
Bacon LLP

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

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

##### [1] Agriculture Groups Dispute USDA User Fee Proposal

Several prominent food and agriculture groups have reportedly penned a [letter](#) asking Congress to reject a USDA proposal to charge meat, poultry and egg producers a “user fee” for inspections. Signed by the American Meat Institute, National Pork Producers Council, National Turkey Federation, and National Chicken Council, the letter argues that a user fee system would further erode government accountability and its ability “to manage program costs, results or efficiencies.” In addition, the groups maintain that the extra taxes would put U.S. meat, poultry and egg products at a competitive disadvantage on the international market. “These new food safety taxes will be charged directly to the meat, poultry and egg products sector, which will be forced to pass this additional cost onto tax-paying consumers,” the coalition concludes, adding that the letter authors “know of no farm or industry organization that supports imposing a tax to pay for meat, poultry and egg products inspections.” See *Meatingplace.com*, February 21, 2008.

### State and Local Governments

##### [2] OEHHA Schedules Workshop to Discuss Prop. 65 Warnings for Chemicals in Foods

California’s Office of Environmental Health Hazard Assessment (OEHHA) has scheduled a March 14, 2008, [workshop](#) to address ways to provide public warnings about exposures to those chemicals in foods known to the state to cause cancer or act as reproductive toxicants.

According to the agency, which implements the state’s Safe Drinking Water and Toxic Enforcement Act of 1986 (also referred to as Prop. 65), a number of stakeholders have asked it to “provide more guidance concerning acceptable methods for providing warnings to consumers for exposures to listed chemicals in foods purchased at retail stores.” Options under consideration include “on-product labels, off-product signage, centralized warnings for all affected food products in the store, in-store warning information kiosks, print media warnings or web-based information.” OEHHA also seeks input about the content of warnings to avoid “undue confusion for consumers.” Written comments may be submitted by March 28. OEHHA plans to draft a regulatory proposal based on the input it receives and will schedule an additional workshop before initiating “any formal regulatory process on warnings for exposures to listed chemicals in foods.”



## European Union (EU)

### [3] EU Farmers Request Approval for More Biotech Crops

Farmers in the European Union have warned lawmakers that a failure to approve more genetically engineered (GE) crops could decimate a livestock industry already vulnerable to skyrocketing feed prices. Copa-Cogeca, which represents EU farmers, told reporters that unless agriculture ministers can shorten the two-to-four year approval process, livestock producers will not be able to compete in a global market increasingly flooded with GE crops. The European Union imports 80 percent of its feed protein needs, but ministers have accepted only about a dozen GE crops due to consumer fears and objections raised by the environmental directorate. A recent EU report has apparently estimated that if American, Argentine and Brazilian soy growers switched to non-approved crops, the cost of feed in Europe would rise 600 percent in a worst-case scenario. With 18 GE crops awaiting authorization for cultivation and 49 for export, the European Commission has since pledged to expedite this process after losing its World Trade Organization case against the United States. In the interim, some farmers have predicted, up to one fifth of EU pork producers will fold by 2009 as the result of soaring production costs and falling prices. *See The London Times*, February 14, 2008; *Financial Times*, February 19, 2008.

Meanwhile, environmental activists have opposed the farmers' initiative by suggesting that Europe scrap its biofuel targets to alleviate feed prices. Friends of the Earth has accused GE proponents of manipulating the food cost issue to their own advantage, contending that "the recent squeeze has

been kick started by biofuels." Although biofuels began as a "green" project, the group reportedly says that the alternative energy source is having a detrimental effect because, for example, major food companies have increased carbon emissions by burning swamps and forests to plant biofuel crops. Friends of the Earth has also recommended that the European Union assuage price hikes by (i) helping its livestock industry source GE-free animal feed; (ii) encouraging countries such as Argentina and Brazil to establish standards similar to its own; and (iii) developing strict traceability and liability systems that place the cost burden on biotech companies, not the livestock importer, farmer or consumer. *See Beverage Daily.com*, February 21, 2008.

### [4] European Parliament Urges Investigation of Alleged Supermarket Scheme

At least 439 Members of Parliament (MEPs) have reportedly issued a written, non-binding declaration calling on the European Commission to investigate and possibly sanction large supermarkets for allegedly using their market dominance to extract low prices from suppliers. The MEPs also asked the commission's Directorate General for Competition to examine the impact of these supermarkets on smaller businesses, suppliers, workers, and consumers. The declaration apparently contends that a small number of supermarket chains are becoming "gatekeepers" of the EU market by controlling suppliers' access to consumers. "There should be binding legislation on supermarkets concerning how to regulate their activities inside the EU," said MEP Gyula Hegyi (PES – Hungary), who forwarded the initiative. The declaration requires the support of more than one-half of the assembly's 785 MEPs to become binding. *See The Parliament.com*, February 19, 2008.



## Litigation

### [5] Criminal Charges Filed in Downer Cow/Recalled Beef Episode

As Hallmark/Westland Meat Packing recalls more than 140 million pounds of raw and frozen beef products that the U.S. Department of Agriculture (USDA) declared unfit for human consumption, county prosecutors in California have reportedly filed felony and misdemeanor animal cruelty charges against the slaughterhouse manager and an assistant, who were seen on a Humane Society video forcing sick cattle to stand so they could be slaughtered in accordance with USDA regulations. If convicted, Daniel Ugarte Navarro could be imprisoned for more than eight years; his assistant, an illegal immigrant, faces up to three years in prison. Neither apparently attended their arraignments, and arrest warrants have been issued. Further details about the events leading to the recall and filing of criminal charges appear in issues 247 and 248 of this Update. See *The Los Angeles Times*, February 16, 2008; *meatingplace.com*, February 18, 2008.

While the USDA has explained that the meat, most of which has likely already been consumed, poses only a “remote probability of sickness,” its Food Safety and Inspection Service (FSIS) has decided that any processed beef products containing any amount of recalled Westland beef must be recalled and destroyed. Activist organizations, such as the Center for Science in the Public Interest and the Consumers Union, are calling for the USDA to release the names of wholesalers and retailers who sold the Westland beef, complaining that its refusal to do so has made it more difficult for consumers to determine whether they have purchased the products. Food & Water Watch has

apparently requested that the agency thoroughly investigate “what went wrong at the Hallmark/Westland meat plant” and “to further investigate the inspector shortages and top down orders that keep meat inspectors from doing their jobs.” The agency’s Office of Inspector General is reportedly investigating whether the company or federal inspectors were to blame. See *The Wall Street Journal*, February 19, 2008; *CQ Today Online News, Food & Water Watch* and *Center for Science in the Public Interest Press Releases*, February 20, 2008; [USDA Audio, February 21, 2008, Press Conference](#).

Meanwhile, cattle industry interests and animal rights groups are reportedly at odds over the significance of what occurred at Westland. According to a National Cattleman’s Beef Association spokesperson, the videotaped incident was atypical of how most slaughterhouses operate. Wayne Pacelle, president and CEO of the Humane Society of the United States, contended that because his organization picked the facility for random investigation, he is skeptical of the industry’s practices. He was quoted as saying, “it’s certainly a bad sign for the industry and the USDA to have been exposed for their failures in this single, random investigation.” See *FindLaw.com*, February 19, 2008.

Congress will be taking action; hearings have reportedly been scheduled for: (i) February 26 before the Committee on Energy and Commerce’s Subcommittee on Oversight and Investigations – plaintiff’s lawyer Bill Marler and the president of the Hallmark/Westland meat company have been invited to testify; (ii) February 28 before the Senate Agriculture Appropriations Subcommittee – the chair, Senator Herb Kohl (D-Wis.), has promised to discuss the issue of retail outlet disclosures with FSIS officials during the hearing; and (iii) on



unspecified dates in March before the House subcommittee with oversight of the USDA's budget – top department officials are expected to testify, according to subcommittee chair Rosa DeLauro (D-Conn.). See *Marler Blog*, February 19, 2008; *The Wall Street Journal* and *CQ Today Online News*, February 20, 2008.

**[6] Organic Vegetable Grower Sues Organic Fertilizer Suppliers over *Salmonella* Contamination**

Alleging that *Salmonella*-tainted fertilizer contaminated its spinach and spring-mix crops in 2007, an organic vegetable grower filed suit against the fertilizer's manufacturer and distributor in federal court in California. *Oceano Packing Co., LLC v. True Organic Prods., Inc.*, No. 5:08-cv-00839 (U.S. Dist. Ct., N.D. Cal., filed February 6, 2008). The plaintiff claims that one of the defendants recommended the chicken manure-based fertilizer that was used and allegedly contaminated its fields and crops. According to the complaint, the fertilizer's manufacturer promised on its Web site that its product was "completely pathogen-free." The plaintiff alleges violation of the Organic Foods Production Act, breach of express and implied warranties of fitness, negligence, fraud, negligent misrepresentation, state and federal unfair competition, conversion, and defamation. Among the remedies sought are more than \$1 million in compensatory damages, punitive damages, injunctive relief, attorney's fees, and costs.

The fertilizer's manufacturer was quoted as saying, "True Organic Products will vigorously defend itself in this litigation and upon successful defense pursue remedies against those responsible for bringing this meritless lawsuit." According to a news source, the manufacturer contends that its product was tested and confirmed free of pathogens

before shipment and after delivery. The manufacturer also reportedly claims that other farmers who used fertilizer from the same production lot were able to grow pathogen-free crops. See *Product Liability Law* 360, February 15, 2008.

**[7] State Attorneys General Seek Marketing Documents from Makers of Caffeinated Alcohol Beverages**

According to press reports, the attorneys general from a number of states have issued subpoenas to several beer makers, including Anheuser-Busch Cos., seeking company documents related to their marketing practices. The request is apparently part of an investigation into the sale of caffeinated beer marketed as an alcohol energy drink. An Anheuser-Busch spokesperson was quoted as saying that the company is "cooperating with the subpoenas," but noted that "it is important to realize that the AGs are investigating products whose formulation and labeling have already have been approved by the federal authorities, as well as by those states that require state liquor authority approval." While the attorneys general are not widely publicizing their action or providing media comments, a special assistant to New York Attorney General Andrew Cuomo observed, "This is an early stage in the investigation."

Maine's attorney general, who joined the action, issued a press release indicating that he has "urged the Alcohol and Tobacco Tax and Trade Bureau (TTB) to take immediate action to investigate allegations" that such beverages "contain unsafe levels of caffeine." The request was apparently triggered by a Florida news report that disclosed the results of laboratory tests showing that the beverages contain more than 200 mg. of caffeine and higher levels of alcohol than stated on the label. A cup of coffee



contains an average 100 mg. of caffeine. Maine Attorney General Steve Rowe said, “Caffeine is a stimulant that can mask feelings of intoxication, giving drinkers the false impression that they can drink more and function normally. This is a recipe for disaster.”

Anheuser-Busch reportedly indicated that it was unfair for the attorneys general to target its products, pointing to other beverages that mix alcohol and caffeine and are all becoming more popular. A company communications official was quoted as saying, “Caffeinated alcohol beverages are nothing new; for decades adults have consumed cocktails like Rum and Coke, Jack and Coke, and Irish Coffee.” The Federal Trade Commission will be addressing the marketing of caffeinated, alcoholic beverages in a forthcoming report. *See The Wall Street Journal* and *BusinessWeek*, February 20, 2008; *Forbes.com*, *Baltimore Business Journal* and *Maine Attorney General Press Release*, February 21, 2008.

#### [8] Botulism Lawsuit Filed in Ohio Against Chili Sauce Maker

Plaintiff’s lawyer Bill Marler has apparently filed a lawsuit in a federal court in Ohio on behalf of a state resident who was allegedly diagnosed with botulism poisoning after eating Castleberry’s Chili Sauce in June 2007. *Ours v. Castleberry’s Food Co.*, No. n/a (U.S. Dist. Ct., N.D. Ohio, filed February 19, 2008). According to Marler, the plaintiff, whose symptoms led to hospitalization and recovery in a nursing home, incurred medical expenses and lost wages exceeding \$100,000. The company reportedly recalled millions of pounds of canned meat products in July 2007 after they were identified as the source of a botulism outbreak. Marler called for Castleberry “to offer restitution for Mr. Ours’ phys-

ical, emotional and financial losses.” *See Marler Blog*, February 19, 2008.

## Other Developments

#### [9] Obesity Expert’s Affidavit Draws Fire for Questioning Menu Labeling Laws

The president-elect of the Obesity Society this week filed in federal court an [affidavit](#) on behalf of the New York State Restaurant Association that questions a New York City regulation requiring chain restaurants to list calories and other nutritional information on menus or menu boards. In his court filing, David Allison writes that the effects of menu labeling are “difficult to predict,” theorizing that such measures may deter customers at the point-of-purchase but later cause them to overcompensate by increasing their overall intake of calories. In addition, Allison notes that based on previous studies, it is “reasonable” to consider whether the new rules might “inadvertently” encourage patrons to choose more “decadent” options or “to consume lower calories, but arguably less healthy choices (e.g., a food product that is largely refined sugar versus one that is largely protein).” He ultimately concludes that, while current evidence “supports the *conjecture*” that the program might have beneficial consequences, “there is not competent and reliable evidence that providing restaurant patrons with calorie information on menu items will reduce individual or population levels of obesity.”

Meanwhile, several members of the Obesity Society have publicly criticized Allison’s role in the debate, contending that his industry ties influenced his professional opinion. The society, which represents leading obesity experts, recently issued a statement supporting plans to make nutritional



information available to consumers. In addition, the controversy has elicited criticism from other obesity specialists, including society member Barry Popkin, who authored an affidavit backing the New York City health board, and Rudd Center Director Kelly Brownell, who opined to reporters that “the field is incapable of policing itself.” New York City Health Commissioner Thomas Friedman has also dismissed Allison’s questions about the scientific evidence used to bolster the menu labeling scheme. “We don’t have 100 percent proof that it’s going to work, but we have a reasonable expectation it will be successful,” Friedman was quoted as saying. “When places have to put ‘2,700 calories’ next to an appetizer, they might not have a 2,700-calorie appetizer anymore.” See *The New York Times*, February 16, 2008.

## Media Coverage

**[10] Jennifer Steinhauer, “A Spoonful of Immunity?,” *The New York Times*, February 17, 2008**

“[The] connubial relationship of farm and pharmaceuticals in restaurants is on the march,” writes *New York Times* reporter Jennifer Steinhauer in this article about popular eateries hawking so-called “functional” foods for their purported health benefits. Steinhauer describes, for example, a Vietnamese restaurant in Los Angeles that places an herb insignia next to menu items containing immunity-boosting components, such as the minerals and phytochemicals derived from edible plants and believed to prevent cancers. Unlike man-made functional foods that abound with vitamin supplements and added probiotics, these dishes are made from natural ingredients that the chef chooses for their innate health-enhancing qualities. Microbiology

experts interviewed by Steinhauer, however, were not entirely convinced that scientific evidence warrants such bold claims. “There is no doubt that these menu items have these nutrients,” said Michael Starnbach, an associate professor of microbiology and molecular genetics at Harvard Medical School. “But that is different from the claim being made on the menu.” He drew a distinction between the value of immunity claims and the ubiquitous heart icon, which when used next to an egg-white omelet could steer diners away from foods proven to negatively affect the cardiovascular system. Linda Goodling, a professor of microbiology and immunology at the Emory University School of Medicine, agreed that the evidence was open to debate. “I would have a positive reaction to seeing that menu,” she was quoted as saying. “But as a scientist I would say that’s a personal preference. That’s not a scientific fact. Eating is a lifelong experiment. I think that’s all you can do.”

## Scientific/Technical Items

**[11] Researchers Address Obesity at AAAS Annual Meeting**

The chair of the International Obesity Taskforce reportedly called for a global pact to combat obesity at the American Association for the Advancement of Science (AAAS) annual meeting held February 14-18, 2008, in Boston, Massachusetts. Phillip James, a professor at the London School of Hygiene and Tropical Medicine, asked world leaders to adopt stricter food labeling guidelines and youth marketing protocols. In particular, he endorsed the “traffic light” labeling scheme under consideration by authorities in the United Kingdom, but opposed by some EU commissioners. James also described government-led initiatives as essential to curbing



obesity. “This a community epidemic that is actually a response to all the wonderful apparent industrial and economic development changes that we’ve seen, with a collapse in the need for physical activity, and now a targeting of children to make profits by big industry in food and drink,” James was quoted as saying. *See BBC News*, February 18, 2008.

Other researchers presented studies at the AAAS meeting that questioned the role of modern diet in contributing to chronic disease. Bruce Ames, a professor with the Children’s Hospital of Oakland Research Institute, contended that a diet high in sugary, fatty or salty foods could increase the risk factors for cancer, dementia, stroke, and other illnesses by depriving the body of essential vitamins, minerals and other micronutrients. Ames apparently found that 56 percent of Americans consumed insufficient amounts of magnesium; 12 percent consumed insufficient zinc; and most African Americans were deficient in vitamin D. Inadequate levels of these nutrients, according to Ames, have been linked to greater DNA damage to cells and a raised cancer risk. He suggested that in attempting to mitigate these shortages, the body rebalances its metabolism in the short term, but ultimately succumbs to “DNA damage (future cancer), adaptive immune dysfunction (future disease), and mitochondrial decay (future cognitive dysfunction and accelerated aging).” *See The London Times*, February 16, 2008.

A prominent obesity expert with the Harvard School of Public Health also presented evidence that obesity would soon outstrip smoking as the leading cause of cancer in the United States. Walter Willett told AAAS attendees that obesity is currently associated with approximately “14 percent of cancer deaths in men and 20 percent in women, compared

with 30 percent each for smoking,” according to *The Associated Press*. He predicted, however, that as “smoking goes down and obesity goes up, it won’t be long before obesity is the No. 1 cancer killer.” Willett highlighted recent research linking obesity with a variety of cancers, including breast, colorectal, liver, pancreas, and gallbladder; as well as studies that associated fruit and vegetable consumption with a reduced risk of mouth, esophagus, lung, and stomach cancers. Willett further estimated that 30 to 35 percent of cancers are due to nutritional factors and, in particular, to obesity. *See The Associated Press*, February 15, 2008.

#### **[12] Two Studies Offer Contradictory Findings on GE Crops**

Two recent studies on the safety, efficacy and environmental impact of genetically engineered (GE) crops have arrived at opposite conclusions, each set of researchers accusing the other of cherry picking its data. The International Service for the Acquisition of Agri-Biotech Applications (ISAAA), an industry-funded research group, issued a report finding that a 12 percent growth in GE acreage worldwide, compared to 2006, is indicative of farmers’ increasing acceptance of GE crops. ISAAA concludes in “Global Status of Commercialized Biotech/GM Crops: 2007” that in addition to reaping \$7 billion in benefits, farmers who planted biotech crops lessened their pesticide use by 289,000 metric tons between 1996 and 2006, contributing to a 15 percent reduction in environmental side effects. The group also argues that the decreased pesticide use in 2006 cut carbon dioxide emissions by 2.6 billion pounds because farmers did not have to burn fuels for the spraying or application of chemicals. “Once farmers have gotten used to this technology, they recognize the benefits,” said Clive James, chair of





ISAAA's board of directors. "Already those farmers who began adopting biotech crops a few years ago are beginning to see socioeconomic advantages compared to their peers."

The Center for Food Safety (CFS) and the Friends of the Earth (FOE) have contradicted these findings in their own report, titled "Who Benefits from GM Crops?: The Rise in Pesticide Use," that criticizes the global increase in GE agriculture. CFS science policy analyst Bill Freese told reporters that new studies show some insecticide-excluding crops, like Bt cotton, are now becoming impotent after years of use. In addition, the CFS/FOE report contends that the rise in Roundup®-resistant crops has corresponded to "a 15 percent increase in the use of that herbicide on soybeans, cotton and corn from 1994 to 2005, with a 28 percent rise in 2006 alone," according to *The Washington Post*. CFA and FOE also point to recent cases in which GE acres allegedly contaminated conventional crops, resulting in ecological and economic damages to several agriculture sectors. The groups further opine that, as a result of these potential complications, only a handful of countries have accepted GE crops, with the majority of those focusing on rich exports instead of resolving hunger and poverty issues at home. See *The Washington Post*, February 14, 2008.



---

# 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](mailto:ldreyer@shb.com) or [mboyd@shb.com](mailto: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** L.L.P.®



**Geneva, Switzerland**

**Houston, Texas**

**Kansas City, Missouri**

**London, United Kingdom**

**Miami, Florida**

**Orange County, California**

**San Francisco, California**

**Tampa, Florida**

**Washington, D.C.**

---