

# Food & Beverage

## LITIGATION UPDATE

Issue 251 • March 7, 2008

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## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] Fallout over Meat Recall Continues

Among the latest developments following public release of the Humane Society's video on illegal slaughtering practices at the Westland/Hallmark Meat Co. are calls for a perjury investigation into statements made by a society representative about delays in the videotape's release and the authorization of a subpoena for the meat company's president who failed to appear at a House subcommittee hearing on food safety.

The Center for Consumer Freedom, a nonprofit coalition of food industry interests, has [asked](#) the chair and ranking member of the House Subcommittee on Oversight and Investigations to look into whether Michael Geiger, who testified during a February 26, 2008, hearing on behalf of the Humane Society, had perjured himself by claiming that the society delayed releasing its videotape at the request of a California district attorney's office. A deputy district attorney reportedly indicated that she made no such request. While the Humane Society has apparently conceded that local prosecutors may not have specifically asked to keep the tape under wraps, its president also acknowledged a reluctance to bring the tape to the attention of the U.S. Department of Agriculture, saying little action has

ever resulted from animal cruelty tapes brought to that agency. As the finger-pointing continues, it remains clear that the delay between the tape's finalization and its public release allowed weeks' worth of potentially hazardous meat into the marketplace and school lunch programs.

Meanwhile, the House Energy and Commerce Oversight and Investigations Subcommittee reportedly authorized a subpoena for Steven Mendell. The Hallmark/Westland Meat Co. president failed to appear for the subcommittee's February 26 hearing. Mendell has apparently been ordered to appear at a March 12 food safety hearing to avoid contempt charges. He will be joined by representatives of the Center for Food Safety and Applied Nutrition, the USDA's Food Safety and Inspection Service (FSIS), retail stores Wegmans and Target Co., and Iowa State University.

In a related development, Representative Tom Udall (D-N.M.) has introduced legislation (H.R. 5518) that would give the USDA secretary the authority to order the recall of tainted meat and poultry products. Udall, who has introduced similar bills in prior congressional sessions, was quoted as saying, "Due to the huge political clout of the meat-packing industry, USDA does not have, nor does it want, the power to issue mandatory recalls of tainted meat and poultry products. Complying with agency recalls, therefore, is at the industry's discretion." The bill would require the recall of products where "there is a reasonable probability that human consumption of the meat product may present a threat to public health."



The Congressional Research Service has issued a report, *USDA Meat Inspection and the Humane Methods of Slaughter Act*, that explains what authorities the federal government has to protect the public from contaminated meat. The law requires FSIS inspectors “to be present at all times meat and poultry slaughter plants are operating,” and “must observe every live animal just before slaughter, both at rest and in motion, to detect signs of any disease or health problems that might render the animal unfit for human food.” The report notes that USDA’s Office of Inspector General has criticized the agency’s inspection procedures which FSIS recently modified, noting that inspectors are examining only 5 to 10 percent of live cattle both at rest and in motion; “the remainder were observed only at rest.”

The massive meat recall has generated a number of press reports examining how food tracing procedures have proven inadequate; apparently, school officials experienced delays in the information USDA distributed once it had learned of the problems at the meatpacking plant, and food producers lack the means to learn promptly whether affected beef is in their products, particularly when the beef has been blended from a number of suppliers. According to a news source, USDA still has not tracked down 10 percent of the recalled beef. *See The Press Enterprise*, February 27, 2008; *Consumer Freedom Press Release*, February 29, 2008; *Product Liability Law 360*, March 3, 2008; *The Wall Street Journal*, March 3, 4 and 5, 2008; *USA Today*, March 4, 2008.

## Food and Drug Administration (FDA)

### [2] FDA Commissioner Calls for Legislation Giving Agency Mandatory Recall Authority

FDA Commissioner Andrew von Eschenbach, during an address before the National Press Club, reportedly called for Congress to adopt a bill that

would expand the agency’s authority over food producers. Specifically, the legislation would give the FDA mandatory recall authority, require food producers to renew their FDA registration periodically, allow the FDA to increase its preventive inspection and control of high-risk foods, authorize third-party food inspectors, and impose new user fees to bolster food safety. According to von Eschenbach, “We need authority to better regulate the food supply.” He apparently urged Congress to pass the legislation by Memorial Day. *See CQ Healthbeat News*, February 29, 2008.

## Litigation

### [3] Animal Rights Group Calls for Native Villagers to Sue Meat Companies over Global Warming

The People for the Ethical Treatment of Animals (PETA) has reportedly called on an Alaskan village that has sued major oil companies for damages allegedly caused by global warming to add U.S. meat producers to their lawsuit as defendants.

Kivilina, located in northwestern Alaska, sued 24 major oil and energy companies alleging that their greenhouse gas emissions are responsible for global warming which is causing rising Arctic waters that threaten the village’s existence. [\*Native Vill. of Kivalina v. ExxonMobil Corp.\*, No. 08-1138 \(N.D. Cal. filed 2/26/08\)](#). The complaint also alleges that some defendants conspired to muddle scientific debate on climate change and to mislead the public about the science of global warming. According to news sources, defendants were selected according to the amounts of carbon emissions they produce. PETA reportedly contends that the livestock industry generates 40 percent more greenhouse gases than all of the cars, trucks, planes,



and ships in the world combined.

Located about 625 miles northwest of Anchorage, Kivalina is located on a barrier island that borders the Chukchi Sea. In recent years, the complaint asserts, warming temperatures have caused the sea ice that protects the village from Arctic ocean storms to form later and melt earlier, leaving the village increasingly vulnerable to coastal storm waves and surges that could destroy it. In an April 2006 report, the U.S. Army Corps of Engineers estimated that relocating the village farther inland would cost between \$95 and \$125 million. A separate Government Accountability Office study estimated the costs to be as high as \$400 million. Press reports indicate that several more Alaskan villages may join the lawsuit. *See Greenwire*, February 27, 2008; *BNA Daily Environment Report*, February 29, 2008; and *Anchorage Daily News*, March 6, 2008.

**[4] MDL Panel Transfers Organic Milk Marketing Cases to Missouri for Pretrial Proceedings**

The U.S. Judicial Panel on Multidistrict Litigation (MDL) has transferred a number of putative class-action lawsuits against Aurora Dairy Corp. to a federal district court in eastern Missouri. *In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litig.*, MDL No. 1907 (J.P.M.L., order filed February 20, 2008). Four actions in three districts, as well as 11 tag-along, related actions pending in other districts are part of the transfer order. According to the MDL panel, centralization of the actions “will eliminate duplicative discovery; prevent inconsistent pretrial rulings (particularly with respect to the issue of class certification); and conserve the resources of the parties, their counsel and the judiciary.” Further details about the *Aurora Dairy* litigation appear in issues

234 and 236 of this Report. The essence of the complaints is that the company violated statutory and common law by marketing its milk and dairy products as organic without complying with federal organic regulations.

**[5] McDonald’s Sued for Failing to Reveal Presence of Milk Ingredients in Fries and Hash Browns**

The parents of a child who is purportedly unable to properly digest a milk by-product have sued McDonald’s Corp. in a federal district court in New Jersey claiming that the company’s alleged failure to inform the public that its French fries and hash browns contain milk ingredients led to the child’s permanent neurological injuries, including mental retardation. *Havens v. McDonald’s Corp.*, No. n/a (U.S. Dist. Ct., D. N.J., filed February 12, 2008). According to the complaint, the boy was diagnosed with galactosemia when he was 9 days old and has been on a milk-restricted diet since then. The boy’s parents allege that he consumed the company’s potato products several times a week for many years at a time when the company omitted from nutrition informational material that they are fried in an oil that contains milk casein. The boy has now allegedly been diagnosed “as being mentally retarded requiring life long assistance and care, for education, health and his living day to day.” Plaintiffs allege strict product liability for design defect and failure to warn, negligence, breach of express warranty, fraudulent misrepresentation and concealment, negligent misrepresentation and concealment, and violation of New Jersey’s consumer fraud and deceptive trade practices law. They seek a \$10 million compensatory damages award and \$50 million in punitive damages.



## Other Developments

### [6] **Boston Conference to Consider Food Advertising Issues**

The Campaign for a Commercial-Free Childhood will conduct its 2008 [summit](#) April 3-5, 2008, in Boston; scheduled speakers include Michele Simon and Jason Smith who have both presented during conferences hosted by the Public Health Advocacy Institute (PHAI), which has long advocated litigation to deal with obesity in the United States. Simon, who is affiliated with The Marin Institute and authored *Appetite for Profit*, will be discussing “The Failure of Self-Regulation, from Big Alcohol to Big Food.” Smith, who works for PHAI, will address “Children, Digital Environments, and the Law: Moving Forward to Protect Public Health.”

### [7] **Incoming Advocacy Group Leader Steps Down After Ties to Restaurant Industry Revealed**

David Allison, who was scheduled to assume the presidency of the Obesity Society, has reportedly resigned after public health advocates criticized an affidavit he filed on behalf of the restaurant industry contending that New York City’s new rule requiring calorie information on fast-food menu boards could be counterproductive. According to a news source, Allison apologized “for the distress [the affidavit] has caused to the society,” and acknowledged that his effectiveness as the society’s leader could be compromised because of it. Nevertheless, Allison stated that he stood “behind the scientific statements I made.” In his affidavit, Allison asserted that the city’s requirement was unsupported by scientific evidence and that menu labels might increase obesity by making calorie-dense foods desirable as “forbidden fruit.” Further details about the affidavit

and the controversy it stirred appear in issue 249 of this Update. See *The New York Times*, March 4, 2008.

## Media Coverage

### [8] **Corporations and Health Watch, “Time to Reclassify Malt Liquor and Flavored Malt Beverages as a Distilled Spirit?” 2008**

This [article](#) discusses efforts undertaken in some urban communities to address the marketing of some alcohol beverages that are apparently favored by younger drinkers.

According to the authors, the malt liquor marketing story “demonstrates both the potential and limits of community activism to resist the promotion of unhealthy products.” Community activists claim that malt liquor sales encourage “public drunkenness, loitering, urinating in public, and littering.” While some communities have successfully banned the sale of single bottles and others have rid their city buses and trains of malt liquor ads, more permanent solutions, such as efforts to reclassify “sugary sweet alcopops” and “flavored malt beverages” from beer to distilled spirits, which would increase their cost, have been unsuccessful. The article also discusses the newest trend in this market, i.e., beer with added stimulant ingredients. It concludes, “In the long run, only government agencies that have the backbone and the resources to fulfill their mandates can ensure that special interests don’t threaten the health of the public.”



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## LITIGATION UPDATE

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