

Food & Beverage

LITIGATION UPDATE

Issue 252 • March 14, 2008

Table of Contents

Legislation, Regulations and Standards

- [1] Agricultural Interests Support “Red Tape Reduction” Legislation1
- [2] Meatpacking Executive Testifies Before Congress1
- [3] House Committee Faults FDA for Failing to Enforce Food Safety Standards2
- [4] FSIS Announces Meeting on *E. Coli* Issues3
- [5] OEHHA Extends Public Comment Period for Bisphenol A3
- [6] San Francisco Approves Menu Labeling for Chain Restaurants3

Litigation

- [7] Banana Company Sued for Deaths of U.S. Missionaries in Colombia3
- [8] USDA Ordered to Compensate Farmer for Contaminated Land4
- [9] Trial Court Decides Post-Trial Motions in Dole Pesticide Litigation4

Other Developments

- [10] Debate over Synthetic Bovine Growth Hormones in Milk Continues4
- [11] Private International Food Safety Standards Gain Traction in World Markets5
- [12] Farmers Planting Illegal GM Crops in Legal Limbo5
- [13] Health Group Makes Available Model Menu-Labeling Ordinance6

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] Agricultural Interests Support “Red Tape Reduction” Legislation

Agriculture industry officials are reportedly supporting a bill (S. 2691) introduced by Senator Kit Bond (R-Mo.) that would require federal agencies to conduct an agricultural regulatory flexibility analysis when they propose rules affecting agricultural entities. The analysis would have to explore regulatory alternatives and the possibility of providing exemptions for agricultural operations. A panel of agriculture industry representatives would have to be convened to review any proposed rulemaking with more than a de minimis affect on their business, and agricultural interests would be able to seek judicial review if they are adversely affected by federal agency action. The bill, titled the “Farmer Red Tape Reduction Act of 2008,” has been referred to the Senate Agriculture, Nutrition & Forestry Committee.

In a related development, industry representatives who are convening in Washington, D.C., March 13-14, 2008, as part of a new high-level Environmental Protection Agency (EPA) advisory [panel](#) were apparently expected to urge that EPA begin analyzing the effect of its rules on agriculture. An EPA official reportedly indicated that the panel would be asked to develop a new approach to the regulation of

concentrated animal feeding operations. According to a news source, environmental activists, who are also represented on the panel, have responded by calling the industry effort a “breathtaking attempt to get agriculture to avoid environmental laws.”

During its March meeting, the Farm, Ranch, and Rural Communities Federal Advisory Committee will be briefed on EPA programs and will discuss climate change, renewable energy, livestock management, and panel objectives. *See Inside EPA*, March 11, 2008.

[2] Meatpacking Executive Testifies Before Congress

The House Energy and Commerce Subcommittee on Oversight and Investigations this week heard testimony from the president of Westland/Hallmark Meat Packing Co., which in February responded to allegations of inhumane slaughtering practices with a 143-million-pound beef recall. Steven Mendell at first denied that the California-based facility illegally processed non-ambulatory, or “downer,” cows, but later admitted to the possibility after viewing videotape shot by the Humane Society of the United States that allegedly showed employees using forklifts and water hoses to coerce animals into slaughter boxes. Mendell said the behavior in the video “was a regulatory violation for sure,” although he emphasized that the company received “the highest scores” in audits of its humane handling and food safety standards.

“I had not seen what I saw here today,” Mendell told the subcommittee, which has conducted several recent hearings about lapses in regulatory enforce-



ment. In addition, members of the Senate Appropriations Subcommittee have urged the U.S. Department of Agriculture (USDA) to require surveillance cameras at all slaughterhouses to deter and detect future food safety violations. Mendell noted that as soon as he learned of the potential violations, the company installed 17 cameras to monitor worker compliance. Moreover, Mendell provided documentation signed by the Humane Society's videographer stating that the undercover employee had received the proper training in humane animal handling. The Humane Society investigator reportedly told Chino, California, police that in the six weeks he worked at the plant, he did not participate in any formal training programs. See *Meatingplace.com*, March 10 and 12, 2008; *The Wall Street Journal*, March 11, 12 and 13, 2008; *Associated Press* and *CQ Today Online News*.

Meanwhile, USDA has refused to disclose a list of 10,000 establishments that sold products implicated in the Westland/Hallmark beef recall. The agency claims that it cannot identify the affected food distributors, processors, grocery stores, and restaurants until lawmakers approve a rule change recommended two years ago by USDA officials. Undersecretary for Food Safety Richard Raymond said that legislators have yet to send the rule change to the White House Office of Management and Budget for approval, although Representative Maurice Hinchey (D-N.Y.) countered that business names are not proprietary information. Hinchey has also taken the issue to OMB Director Jim Nussle, who has apparently pledged to review the matter. "This is a very, very critically important issue," Hinchey was quoted as saying. "If we have stores that are selling bad products, we should know about it." See *The Wall Street Journal*, March 7, 2008.

In a related development, the Food Safety and Inspection Service has [issued](#) two new notices pertaining to humane livestock handling practices. Notice 16-08, titled Humane Handling Activities and Documentation in Livestock Slaughter Establishments, revises a previous notice to emphasize that inspectors should "immediately take any necessary regulatory control action to prevent continued egregious inhumane handling." In addition, Notice 17-08 requires inspectors to increase their Humane Activities Tracking System (HATS) activities by a minimum of 50 percent and up to 100 percent until May 6, 2008. See *Meatingplace.com*, March 12, 2008.

[3] House Committee Faults FDA for Failing to Enforce Food Safety Standards

A recent House Oversight and Government Reform Committee report apparently found that since 2001, the Food and Drug Administration has uncovered sanitary problems at nearly one-half of federally inspected facilities that package fresh spinach. The report alleges that FDA inspectors at 67 establishments discovered violations ranging from unsanitary restrooms to litter piles, rodent infestations and inadequate worker hygiene. In addition, the agency failed to refer these operations to enforcement authorities, send warning letters or seek injunctions. "The inspection reports . . . raise serious questions about the ability of FDA to protect the safety of fresh spinach and other fresh produce," the committee concluded. "It appears that FDA is inspecting high-risk facilities infrequently, failing to take vigorous enforcement action when it does inspect and identify violations, and not even inspecting the most probable sources of many outbreaks." See *The Washington Post*, March 13, 2008.



U.S. Department of Agriculture (USDA)

[4] FSIS Announces Meeting on *E. Coli* Issues

USDA's Food Safety and Inspection Service (FSIS) has [announced](#) a public meeting to discuss the challenges of limiting *E. Coli* in the food supply. Slated for April 9, 2008, the meeting will (i) address "the recent spike in recalls/illnesses related to *E. coli* O157:H7," (ii) "provide updates on FSIS initiatives to control this pathogen," and (iii) "build a foundation for establishing solutions" to combat foodborne illness. Additional details will be released on the FSIS Web site.

State and Local Governments

[5] OEHHA Extends Public Comment Period for Bisphenol A

California's Office of Environmental Health Hazard Assessment (OEHHA) has extended the deadline for public comments pertaining to bisphenol A, which is included in hazard identification materials that the agency plans to deliver to the Developmental and Reproductive Toxicant Information Committee for consideration under Proposition 65. OEHHA will now accept evidence and comments on bisphenol A until April 17, 2008.

[6] San Francisco Approves Menu Labeling for Chain Restaurants

The San Francisco Board of Supervisors has approved a measure requiring restaurants with 20 or more locations in California to post nutrition information on menus, menu boards and posters. The regulation, which takes effect in six months, compels chain restaurants to list calories on menu boards and fat, carbohydrate and sodium content

on prominently displayed posters. Introduced by Supervisor Tom Ammiano, the measure passed unanimously after the Golden Gate Restaurant Association reportedly halted its opposition to the legislation. "The more knowledge and education you have, the better choices you can make. But you have to choose to use that information," said JoAnn Hattner, a nutritionist at Stanford University School of Medicine. "People have labels now, but it certainly hasn't decreased the rapid onset of obesity in this country." See *San Francisco Chronicle*, March 12, 2008.

Litigation

[7] Banana Company Sued for Deaths of U.S. Missionaries in Colombia

According to a complaint filed in a federal district court in Florida, Chiquita Brands International, Inc. is liable for the deaths of five U.S. missionaries who were killed in Colombia by a leftist rebel group known as FARC. The wrongful-death lawsuit, which apparently seeks unspecified damages, claims that the company provided "numerous and substantial hidden payments" to FARC in addition to weapons and other supplies. The missionaries were reportedly kidnapped in the 1990s when Chiquita was, according to a spokesperson, making payments to the guerrillas under duress "to protect the lives of our employees and their families." The litigation follows the company's admission, during a federal investigation, that it made illegal payments to groups on the State Department's terrorist organization list. While the company resolved criminal charges by paying a \$25 million fine, this lawsuit apparently joins at least four other civil actions brought in the United States, alleging that the company was complicit in deaths occurring in



Colombia. See *The Wall Street Journal*, March 12, 2008; *CNNMoney.com*, March 13, 2008.

[8] USDA Ordered to Compensate Farmer for Contaminated Land

A Georgia dairy farmer will reportedly be compensated by the U.S. Department of Agriculture (USDA) for the loss of 1,730 acres of land which was allegedly poisoned by the sewage he spread as fertilizer with the government's blessing. The "biosolids" provided by Augusta's sewage treatment plant apparently contained levels of arsenic, toxic heavy metals and PCBs up to 2,500 times that allowed by federal health standards. The federal judge who entered the award reportedly found that government data about the sewage sludge that farmer Andy McElmurray used on his farm were "unreliable, incomplete, and in some cases, fudged." The government has encouraged farmers to spread free sewage sludge on their acreage for the past 30 years and contends that it does not pose a health risk.

Nevertheless, McElmurray was also awarded \$1.5 million in a settlement with the city of Augusta for the loss of his prize-winning dairy herd which apparently grazed on sludge-treated hay for more than 10 years. A neighbor won a \$550,000 judgment against the city for the death of more than 300 of his cows. According to a news source, the neighbor learned that milk from his cows contained high levels of several chemicals, including thallium, once used as rat poison and considered by USDA as one of the most dangerous potential bioterrorism threats to the nation's food supply. While this farmer informed government agents about the contamination, no one ever apparently told him to stop selling his milk. "They concluded our permit was good," he said, "and we could continue to sell the milk. So we did." See *Associated Press*, March 7, 2008.

[9] Trial Court Decides Post-Trial Motions in Dole Pesticide Litigation

A California trial court judge has issued a number of rulings on post-trial motions filed in litigation involving Nicaraguan workers claiming injuries from exposure to pesticides used on banana plantations. *Telez v. Dole Food Co.*, No. BC 312 852 (California Superior Court, Los Angeles County, decided March 7, 2008). While the court upheld the fraudulent concealment judgment in plaintiffs' favor and dismissed several motions for new trial in individual cases, the punitive damages award of \$2.5 million was overturned, and defendants' motion for judgment notwithstanding the verdict on plaintiffs' strict liability cause of action was granted. Regarding the punitive damages award, the court found no legal support for "endorsing an award of punitive damages 30 years after the defendant's misconduct" or "against a domestic corporation for injuries that occurred only in a foreign country." The court declined to hold Dole liable under a strict product liability theory because the company "was not in the business of purveying [the pesticide] and did not profit from it. Instead, the company 'organized and arranged' its delivery to the plantation in order to facilitate the business [it was] interested in, growing bananas."

Other Developments

[10] Debate over Synthetic Bovine Growth Hormones in Milk Continues

Organizations with conflicting viewpoints on whether milk and milk products derived from cows not treated with recombinant bovine growth hormone (rBGH) should be so labeled are apparently ramping up their efforts. Those supporting



such labels generally contend that the synthetic hormone creates health problems for the animals and are not convinced it is safe for humans to consume. Citizens for Health has launched an action campaign, asking consumers to e-mail the Food and Drug Administration (FDA) to tell the agency that dairy producers should continue to be allowed to label their products as rBGH-free. The FDA allows such labeling if producers also use a disclaimer stating “no significant difference” exists between milk derived from cows treated with the hormone and animals not so treated.

Those opposing the labels point to FDA findings about the hormone’s safety and the financial incentives for farmers to use it – cows treated with rBGH apparently produce an additional gallon of milk each day. One such organization, calling itself American Farmers for the Advancement and Conservation of Technology (Afact), reportedly opposes this position and has been meeting with retailers and lobbying state legislators in an effort to ban such labeling. The group was unsuccessful in Pennsylvania, but such measures are reportedly being considered in Indiana, Kansas, Missouri, New Jersey, Ohio, Utah, and Vermont.

Meanwhile, a Drake University law professor has suggested that state bills banning rBGH-free labels may run afoul of constitutional free speech protections. According to Neil Hamilton, who directs Drake’s agricultural law center, “The free speech issue is on the side of marketers and what’s truthful. It’s not clear that state regulators can force you to be silent on this.” He also apparently suggests that dairy producers could argue that local bans are preempted by FDA rules allowing the labels and that variances in state laws would interfere with interstate commerce by subjecting producers to conflicting requirements. See *The New York Times*,

March 9, 2008; *Citizens for Health Alert*, March 11, 2008; *The Organic & Non-GMO Report*, March 2008.

[11] Private International Food Safety Standards Gain Traction in World Markets

While governments around the world generally lack sufficient resources to guarantee the safety of fresh fruits, vegetables and meats, food producers have apparently begun to rely on a private standardization system to gain desirable certifications of quality. According to a press report, one such program involves a private regulator based in Cologne, Germany, that imposes stricter standards than those adopted by government regulators and requires food producers to prove they have met the standards by hiring private certification companies to inspect their facilities and products. The German company, GlobalGap, reportedly expects to bring 100,000 farms and processing plants under its umbrella in 2008, including some in the United States. Small producers and developing countries complain that private-sector standards constitute an unfair trade barrier because they can impose additional costs, but retailers and bigger farms welcome the “privately enforced quality programs.” Wal-Mart Stores, Inc., for example, has apparently indicated that it will start buying produce, meat and seafood only from suppliers that have received accreditation from private inspectors. See *The Wall Street Journal*, March 11, 2008.

[12] Farmers Planting Illegal GM Crops in Legal Limbo

Farmers in Mexico have reportedly started planting illegal genetically modified (GM) corn crops while waiting for the government to implement a 2004 law that allows experimental GM strains in controlled areas. Although Mexico’s



Congress has yet to agree on a GM regulation program, many farmers have apparently risked prosecution to smuggle contraband seed across the U.S. border, citing a need for increased water conservation and decreased pesticide use. Corn producers in Chihuahua, for example, have cultivated an estimated 9,000 hectares of transgenic varieties among the state's 100,000 hectares of corn grown primarily for animal feed. But critics have warned that the law could adversely affect the country's 10,000 unique corn varieties. "For indigenous people corn is sacred, it has another value that means more than just weight and price," said one farmer in Veracruz. Mexico currently imports 8 to 9 million tons of U.S. corn per year, approximately 35 percent of local consumption. Advocates of genetically modified organisms have argued that biotech corn could help Mexico boost domestic output and deflate prices driven up by ethanol demands. "We have to start taking advantage of all the scientific tools available if we want to increase productivity," Emilio Gonzalez, the governor of Jalisco, was quoted as saying. *See Reuters*, March 7, 2008.

In a related development, the U.S. Department of Agriculture (USDA), Environmental Protection Agency (EPA) and Food and Drug Administration (FDA) recently announced that GM corn seed sold by DowAgrosciences LLC since 2006 and planted in Iowa contains trace amounts of unapproved GM material. Dow reported the contamination after discovering that pollen from unapproved corn stalks infiltrated an approved variety grown on the same research plot. Although Dow has voluntarily recalled the seed for the 2008 crop, USDA officials confirmed that the adulterated grain poses no human or animal health risks. *See USDA, FDA and EPA Joint Press Release* and *Des Moines Register*, February 22, 2008.

[13] Health Group Makes Available Model Menu-Labeling Ordinance

Public Health Law & Policy, a group of lawyers and other professionals who focus on tobacco and food-related issues, has developed a model ordinance for local governments to use when they consider requiring restaurants to place nutrition information on their menus. The model is apparently based on legislation (S.B. 120) introduced in California that Governor Arnold Schwarzenegger (R) vetoed in October 2007. Further details about the California measure appear in issue 235 of this Update, October 19, 2007. *See phlaw.org*, March 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 or 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.
