

Food & Beverage

LITIGATION UPDATE

Issue 254 • March 28, 2008

Table of Contents

Legislation, Regulations and Standards

- [1] FDA Responds to House Inquiry About Bisphenol A Research1
- [2] Federal Agencies Announce Meeting to Discuss Codex Food Labeling Agenda1

Litigation

- [3] Idaho County's Suit to Recover Illegal Immigrant Costs from Agribusiness Companies Fails2
- [4] Tips Lawsuit Filed Against Starbucks in Massachusetts2
- [5] Produce Company Settles Claims of Congenital Injury from Pesticides2
- [6] *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (S.D.N.Y., filed Sept. 30, 2002): Pretrial Conference Scheduled3
- [7] Canadian Farmer Settles GM-Contamination Lawsuit3

Other Developments

- [8] Major Food Retailers Plan "Hormone-Free" Labeling on Dairy Products3
- [9] Cargill to Undertake Food Safety Management Training Overseas4
- [10] Illegal Dumping in Italy Endangers Naples' Buffalo Mozzarella Industry4
- [11] European NGO Finds Pesticide Residues in EU Wines5

Media Coverage

- [12] Barbara Minton, "The Whole Story About Whole Foods Market," *NaturalNews.com*, March 25, 20085
- [13] Steve Boggan, "Once Bitten..." *Guardian*, March 26, 20085

Scientific/Technical Items

- [14] Research on Breast Cancer Published; Endocrine Disrupting Compounds Included as Risk Factors6

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] FDA Responds to House Inquiry About Bisphenol A Research

According to a Food and Drug Administration (FDA) [response](#) to questions about bisphenol A from Representative John Dingell (D-Mich.), chair of the House Committee on Energy and Commerce, the agency relied on two industry-funded studies to conclude that current exposure levels posed no “safety concern.” Dingell sent letters in January 2008 to the FDA and infant formula manufacturers seeking information about the chemical, which is used to line metal cans used for infant formula and in baby bottles. Further details about the investigation appear in issue 245 of this Update. A bisphenol A researcher at the University of Missouri-Columbia was quoted as saying, “The FDA is really going to have problems over this.”

The *Milwaukee Journal Sentinel* has been following the story and reported that FDA’s response was only recently made available online. The newspaper states that the studies, sponsored by the Society of the Plastics Industry, a subsidiary of the American Chemistry Council, have been criticized because one was never subjected to peer review and the other used flawed experimental methods. With

some 6 billion pounds of bisphenol A produced annually in the United States and used to line food and beverage containers, the chemical has reportedly been found in the urine of 93 percent of Americans tested. Bisphenol A is a synthetic estrogen that has purportedly been shown to cause disease in laboratory animals. *See Milwaukee Journal Sentinel*, March 21, 2008.

U.S. Department of Agriculture (USDA)

[2] Federal Agencies Announce Meeting to Discuss Codex Food Labeling Agenda

USDA has [announced](#) a public meeting slated for March 31, 2008, to discuss agenda items and draft positions pertaining to the 36th Session of the Codex Committee on Food Labeling (CCFL) of the Codex Alimentarius Commission, which will meet in April 28-May 2 in Ottawa, Canada. The public meeting will address (i) the implementation of the World Health Organization’s (WHO’s) Global Strategy on Diet, Physical Activity and Health; (ii) guidelines for the “production, processing, labeling, and marketing” of organic foods; (iii) the labeling of foods and ingredients derived from genetic engineering techniques; (iv) draft amendments related to the labeling of prepackaged foods; and (v) a draft definition for advertising based on nutrition and health claims. In addition, a working group will meet on April 26 to further discuss WHO’s Global Strategy on Diet, Physical Activity and Health.



Litigation

[3] Idaho County's Suit to Recover Illegal Immigrant Costs from Agribusiness Companies Fails

The Ninth Circuit Court of Appeals has dismissed claims filed by an Idaho county against agricultural entities alleging that their "sustained custom of hiring and/or harboring undocumented workers amounts to a pattern of racketeering activity."

[*Canyon County v. Syngenta Seeds, Inc., No. 06-35112 \(9th Cir., decided March 21, 2008\)*](#). The county sought to hold food growers and processors, a farm labor contractor, a meat packer, a cheese processor, and the director of a local social services agency liable under the Racketeer Influenced and Corrupt Organizations Act (RICO) for expenses it claimed to have incurred for public health care and law enforcement services provided to undocumented immigrants. Defendants challenged the county's standing to sue under RICO for injury to "business or property" and the adequacy of its allegations of RICO violations. The district court dismissed the complaint, and the county appealed.

The county argued that it suffered injury to its property because it was forced to spend money. The court rejected this contention, because a government entity's expenditures alone will not establish standing under RICO; the county had to show that it held a property interest in the law enforcement or health care services it provides to the public. According to the court, "If government expenditures alone sufficed as injury to property, any RICO predicate act that provoked any sort of governmental response would provide that government entity with standing to sue under § 1964(c) -- an interpretation of the statute that we think highly

improbable." The court also found that the defendants' alleged RICO violations did "not bear a direct connection to the County's asserted harms." The court found that increased demand by people in the county for health care and law enforcement services was "entirely distinct" from the defendants' purported "knowing hiring of undocumented workers."

[4] Tips Lawsuit Filed Against Starbucks in Massachusetts

A former coffee server at a Boston Starbucks shop has reportedly filed a putative class action lawsuit alleging that the company violated state law by requiring tips to be shared with shift supervisors. *Matamoros v. Starbucks*, No. n/a (Suffolk Superior Court, Mass., filed March 25, 2008). The suit was filed less than a week after a California court ordered Starbucks to pay coffee servers, known as "baristas," \$100 million in back tips and interest that had wrongfully been shared with shift supervisors. More information about the California litigation can be found in issue 253 of this Update. The lead plaintiff in the Massachusetts case is an 18-year-old who apparently worked for the company for a short time. Plaintiffs' counsel was quoted as saying, "Every customer who walks in the door isn't necessarily thinking about who's getting the tips, but one would assume it's going to the workers and not the managers." See *The Boston Globe*, March 25, 2008.

[5] Produce Company Settles Claims of Congenital Injury from Pesticides

A Florida produce company has reportedly settled claims filed by former tomato pickers alleging that its misuse of pesticides in farm fields caused their son to be born without arms and legs. The child's mother had apparently worked in Ag-



Mart Produce Inc. fields in South Florida and North Carolina during her pregnancy. According to her deposition testimony, pesticides were repeatedly sprayed in adjacent fields and drifted to where she and others were working. She also claimed that she was required to work in freshly sprayed fields. The complaint alleged that some of the chemicals used were mutagenic. While the terms of settlement are confidential, counsel for the plaintiffs has indicated in the past that the damages, including costs for life-time care, would run into millions of dollars. *See Palm Beach Post*, March 24, 2008.

**[6] *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (S.D.N.Y., filed Sept. 30, 2002):
Pretrial Conference Scheduled**

Following months of discovery skirmishes, the parties are scheduled to appear for a pretrial conference on April 9, 2008. The plaintiffs, a putative class of obese and overweight teens, allege that the fast-food company misled them with deceptive ads. They are seeking damages for obesity-related health problems. In April 2007, the court issued a scheduling order setting a trial date of April 16, 2008. Since that time, the parties have briefed and argued motions to compel production and have filed numerous documents related to McDonald's motion to strike the class allegations in the second amended complaint. Information about the lawsuit has periodically appeared in this Update since it was filed in 2002. It has been appealed twice to the Second Circuit Court of Appeals, its issues have been narrowed, and it has been followed closely by consumer advocates and the food industry. While some predicted that obesity lawsuits would proliferate as plaintiffs' lawyers sought new deep pockets following waves of asbestos and tobacco litigation, causation has been identified as a significant

obstacle given the multitude of factors recognized as contributing to obesity.

[7] Canadian Farmer Settles GM-Contamination Lawsuit

According to Percy Schmeiser, a Canadian farmer whose canola fields were allegedly contaminated with Monsanto's genetically modified (GM) crops, the company has agreed to pay the costs of cleaning up his fields. The March 19, 2008, settlement is apparently not subject to a gag order, nor does it cover any contamination that could occur in the future. Schmeiser has characterized the agreement as "precedent setting." Further details about the case appear in issue 245 of this Update. Schmeiser and Monsanto have faced each other in court for a number of years; the company sued him for unlawfully growing its GM crops and to recover its technology fee of \$15 per acre when its Round-Up Ready® canola was discovered in his fields. *See www.percyschmeiser.com*, visited March 26, 2008.

Other Developments

[8] Major Food Retailers Plan "Hormone-Free" Labeling on Dairy Products

Ohio-based Kroger and Arkansas-based Wal-Mart are reportedly taking steps to provide consumers with hormone-free milk products. According to news sources, they are doing so in response to customer demand. Kroger's plans have apparently been put on hold because the labels the company intended to use on products derived from cows not treated with recombinant bovine somatotropin (rbST) were deemed inadequate under state law. The legislature will reportedly conduct a hearing on the matter during the first week of April 2008. Monsanto, which produces rbST under the



Prosilac® trade name, opposes such labels because “milk is milk and there is no difference in the safety or quality of the product.” The company also points out that Prosilac® benefits the environment by producing high-quality milk with fewer resources and benefits consumers by making more milk available at lower prices. Kroger apparently intends to fight labeling restrictions in the 30 states in which it has stores.

Meanwhile, Wal-Mart announced that its Great Value® milk will now be produced “exclusively from cows that have not been treated with artificial growth hormones like” rbST. Its Sam’s Club facilities will also offer dairy products from suppliers “that have pledged not to treat cows with rbST.” Wal-Mart acknowledges that the Food and Drug Administration has stated that “milk from cows treated with rbST poses no risk to human health,” but reportedly decided to market hormone-free products in response to consumer expectations. See *Wal-Mart Press Release*, March 21, 2008; *FoodUSANavigator.com*, March 26, 2008.

[9] **Cargill to Undertake Food Safety Management Training Overseas**

According to a news source, food and agriculture company Cargill has agreed with China’s Quality, Inspection and Quarantine Service (AQSIQ) to provide Chinese government officials, academics and business leaders with a two-week food safety training program to improve their food safety management practices. AQSIQ will reportedly select up to 25 participants, and Cargill will underwrite, design and implement the program. Faculty will include U.S. and European counterparts from the private sector, food standards organizations, government, and academia. Contaminated food products from China have reportedly “left manufacturers who

buy ingredients from the country under pressure to demonstrate they are sourcing responsibly.”

Government agencies have also gotten involved overseas, with the Food and Drug Administration stepping up its presence in Beijing, Shanghai and Guangzhou. See *FoodUSANavigator.com*, March 25, 2008.

[10] **Illegal Dumping in Italy Endangers Naples’ Buffalo Mozzarella Industry**

An ongoing trash crisis in Naples, Italy, has reportedly threatened the region’s traditional buffalo mozzarella industry and led to a 30 to 35 percent decline in domestic sales over the last few months, according to the product’s trade association. Health officials recently revealed that some samples of buffalo milk used for mozzarella contained elevated levels of dioxin, presumably as the result of illegal toxic waste dumping near the sites where buffalo are raised to make the famous cheese. The announcement has drawn international attention to the plight of Naples, which for years has suffered under a local government unable or unwilling to end criminal dumping and the “trash wars” that periodically flood the city’s streets with refuse. Both Japan and South Korea have since banned imports of buffalo mozzarella, while the European Commission has threatened to follow suit if Italian authorities do not take immediate action to remedy the situation.

Meanwhile, the Italian government has apparently opened an investigation into reports that substandard mozzarella producers colluded with local officials who allegedly knew about the dioxin-tainted cheese. Some regional leaders, however, have denied a link between waste disposal and the 66 contaminated buffalo herds cited by health officials. Buffalo farmers and mozzarella makers have



also claimed that the crisis is not widespread, pointing to a small number of substandard outfits that do not receive the European Union's Protected Designated Origin quality seal. "It really is problem of criminals making a counterfeit product from God-knows-what," said one restaurateur specializing in buffalo mozzarella dishes. See *International Herald Tribune*, March 25, 2008; *The Guardian*, March 26, 2008; *AFP*, March 27, 2008.

[11] European NGO Finds Pesticide Residues in EU Wines

Pesticide Action Network Europe and other non-governmental organizations have released a [study](#) showing that most of the wines sold in Europe contain pesticides. Analyzing 40 samples of conventionally produced and organic wines from France, Germany, Austria, Italy, Portugal, Australia, Chile, and South Africa, researchers found an average of four different pesticides in 35 samples, including an organic sample. Pesticides were present in wines from all of the countries tested, and some are apparently classified by the European Union as "health-threatening." See *International Herald Tribune*, March 26, 2008.

Media Coverage

[12] Barbara Minton, "The Whole Story About Whole Foods Market," *NaturalNews.com*, March 25, 2008

This article discusses last year's merger of organic food markets and reviews practices at Whole Foods that call into question its appeal to shoppers concerned about the environment and "liberal" causes. According to author Barbara Minton, much of the chain's produce is shipped great distances, and the company "is the second largest union-free

food retailer." Further, while Whole Foods claims that it features products that are "natural," care must be taken to read product labels because many of its products are not organic or free of synthetic hormones, or contain ingredients that Whole Foods itself classifies as "unacceptable." The article concludes, "Whole Foods is a *Fortune* 500 Company, a huge and highly profitable corporation that owes its allegiance to its shareholders. As every good corporation yearns to do, Whole Foods is exploiting a niche market in which it is the only big player. Since it has cleared the field of major competitors, it is free to raise prices and reduce quality."

[13] Steve Boggan, "Once Bitten...", *Guardian*, March 26, 2008

"One thing is certain: after the controversy that surrounded genetically modified foods, nano is set to become the next kitchen battleground," asserts *Guardian* writer Steve Boggan in this article describing a nascent nanotechnology industry and its potential impact on agriculture, food processing and packaging. Boggan follows recent efforts to engineer "smarter" pesticides that target specific insects or more nutritious, longer-lasting products using particles measured in nanometers, or one-billionth of one meter. He also notes, however, that scientists and activists alike have questioned how the tiny molecules will interact with humans and the environment. While some researchers have argued that nanoparticles are as safe as their larger counterparts, others have pointed to generally stable substances, such as aluminum, that become explosive at miniscule levels. One health expert cited by Boggan also raised concerns about the absorption of nanoparticles in the human digestive system and the unintended long-term effects on the



food chain. In addition, several European and U.S. agencies have taken preliminary steps to regulate nanotechnology despite a lack of international standards governing the scientific discourse.

Boggan predicts that because of this controversy, the new technology will face stiff opposition from consumers leery of so-called “Frankenfoods.” As a result, food companies were apparently reluctant to disclose whether they are exploring nanotech applications for their products. One spokesperson reportedly dismissed rumors of widespread nanotechnology use as little more than “hype.” Nevertheless, a German-based technology analyst firm has estimated that the nanotech food-packaging market will reach \$3.7 billion in 2010. “More than 400 companies around the world are active in [nanotech food packaging] research, development and production. The U.S. is the leader, followed by Japan and China,” the Helmut Kaiser Consultancy was quoted as saying.

Scientific/Technical Items

[14] **Research on Breast Cancer Published; Endocrine Disrupting Compounds Included as Risk Factors**

A breast cancer advocacy organization has published its *State of the Evidence 2008* [report](#) providing a review of the environmental factors that have purportedly been linked to the disease.

According to the executive summary, “The increasing incidence of breast cancer over the decades following World War II paralleled the proliferation of synthetic chemicals.” The report summarizes more than 400 epidemiological and experimental studies and discusses ongoing methodological research complexities. Among the

chemicals and compounds apparently linked to breast cancer are hormones and endocrine-disrupting compounds, which are allegedly present in pesticides, plastics, food additives, and personal care products. The report specifically mentions bisphenol A, dioxins, phthalates, and food additives as chemicals of concern.



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.
