

# Food & Beverage

## LITIGATION UPDATE

Issue 268 • July 25, 2008

### Table of Contents

#### Legislation, Regulations and Standards

- [1] Kerry and Snowe Introduce Legislation to Bolster Nanotechnology Initiative . . . 1
- [2] EPA Prohibits Carbofuran Pesticide Residue on Domestic or Imported Foods. . . 1
- [3] Details of Feed Ban Regulations Available on FDA Web Site . . . . . 2
- [4] FDA Announces Food Safety and Security Monitoring Project . . . . . 2
- [5] EFSA Raises Questions About Welfare of Animal Clones . . . . . 2
- [6] FSA Finds UK Daily Salt Consumption Decreasing . . . . . 3
- [7] Health Canada Proposes Stricter Labeling for Common Food Allergens . . . . . 3
- [8] California Adopts Humane Handling Laws Banning Sale of Non-Ambulatory Cattle . . . . . 4
- [9] Georgia Threatens to Defy FDA over Salmonella Warnings . . . . . 4
- [10] Los Angeles City Council Considers Restricting Fast Food Restaurants . . . . . 4

#### Other Developments

- [11] Sara Lee to Disclose Whole Grain Content on Labels . . . . . 5
- [12] Agricultural Groups Oppose California Proposition to Ban Gestation Crates. . . 5
- [13] Animal Rights Activists Launch Anti-Meat Campaign in Chicago . . . . . 6
- [14] TFAH Report Claims Disease Prevention Could Save America \$16 Billion in Five Years . . . . . 6

Shook,  
Hardy &  
Bacon<sup>LLP</sup>

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

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] Kerry and Snowe Introduce Legislation to Bolster Nanotechnology Initiative

Senators John Kerry (D-Mass.) and Olympia Snowe (R-Maine) have introduced legislation ([S. 3274](#)) to bolster the National Nanotechnology Initiative (NNI) by increasing its “commitment to environmental health and safety research.”

The National Nanotechnology Initiative Amendments Act of 2008 would establish an Environmental, Health and Safety (EHS) research plan that “identifies a timeline for both short- and long-term goals and specifies needed funding by objective and agency,” according to a July 16, 2008, press release issued by Kerry. In addition, the bill would establish a White House post to implement the EHS plan and a public database for EHS research projects, as well as require White House compliance with the recommendations of the NNI external advisory committee. “Nanotechnology is a huge part of America’s future, but it’ll never take off if people don’t trust that it’s safe,” stated Kerry. “As we begin to further understand the immense capacity of this technology to improve our quality of life, public health and environmental safety must be top priorities.”

### Environmental Protection Agency

#### [2] EPA Prohibits Carbofuran Pesticide Residue on Domestic or Imported Foods

EPA this week [announced](#) that it will no longer allow carbofuran pesticide residue on domestic or imported foods after determining that the chemical poses a health risk to young children. EPA reportedly found that the neurotoxin exceeded the agency’s safety standard for children ages 1 to 2 by 200 percent. Although the pesticide affects less than 1 percent of domestic crops, it is used more frequently in developing countries on rice, bananas, coffee, and sugar cane exported to the United States. “This is a product that we don’t believe meets our high standards for the general population, particularly for small children who are more sensitive,” stated James Gulliford, associate administrator for the EPA Office of Prevention, Pesticides and Toxic Substances, which will accept comments on the proposed tolerance revocation for 60 days.

The decision reportedly surprised environmental groups that have long lobbied the EPA to cancel carbofuran’s registration due to its impact on wildlife. The agency’s new zero-tolerance policy for residue, however, effectively ends the pesticide’s use in the United States while bypassing the lengthier registration cancellation process. In addition, EPA undercut the U.S. Department of Agriculture, which argued that officials should weigh the products’ benefits against its costs. “It’s not a benefit-risk



decision, it's a risk-based decision," countered Steven Bradbury, director of the EPA's special review and re-registration division, in an interview. "This is part of our process to ensure we have the safest food supply of any country in the world." See *The Washington Post*, July 25, 2008.

## Food and Drug Administration (FDA)

### [3] Details of Feed Ban Regulations Available on FDA Web Site

FDA recently [posted](#) the answers to frequently asked questions about its animal feed regulations, which in 2008 underwent revisions to provide additional protection against bovine spongiform encephalopathy (BSE). The agency added a new section (589.2001) to an earlier BSE regulation prohibiting the use of high-risk cattle material in feed destined for cattle and other ruminants. The updated rule makes this ban applicable to all animal feeds and defines the following as prohibited cattle material (CMPAF): (i) the entire carcasses of BSE-positive cattle; (ii) the brains and spinal cords of cattle 30 months of age or older; (iii) the entire carcasses of cattle not inspected and passed for human consumption, unless the cattle are less than 30 months old or the brains and spinal cords have been effectively removed; (iv) tallow derived from BSE-positive cattle; (v) tallow derived from CMPAF that contains more than 0.15 percent insoluble impurities; and (vi) mechanically separated beef derived from CMPAF. "The primary impact of the 2008 rule will be on the rendering industry due to a number of specific requirements for renderers," according to FDA. "However, feed manufacturers may be impacted by the requirement in the new rule that animal feed and feed ingredients shall not be manufactured from, processed with, or otherwise contain CMPAF."

### [4] FDA Announces Food Safety and Security Monitoring Project

FDA has [announced](#) the availability of cooperative agreements "for equipment, supplies, personnel, training, and facility upgrades to Food Emergency Response Network (FERN) chemistry laboratories" funded by state, local and tribal governments. The grants will secure the additional "surge capacity" needed by FERN laboratories to analyze food and food products in the event of chemical terrorism. FDA has issued the grants to encourage participation in the networks and enhance federal, state and tribal food safety and security efforts. The agency also added that state laboratories currently "lack the specialized equipment to perform the analyses and/or the specific methodological expertise in the types of analyses performed for screening food and food products involving chemical terrorism events."

## European Food Safety Authority (EFSA)

### [5] EFSA Raises Questions About Welfare of Animal Clones

EFSA this week [issued](#) a final scientific opinion on animal cloning and its impact on food safety, animal health and welfare, and the environment. Although the agency's scientific committee called food safety concerns "unlikely," EFSA noted that "uncertainties in the risk assessment arise due to the limited number of studies available, the small sample sizes investigated and, in general, the absence of a uniform approach that would allow all the issues relevant to this opinion to be more satisfactorily addressed." Moreover, EFSA concluded that "a significant proportion of clones, mainly within the juvenile period for cattle and the perinatal



period for pigs, have been found to be adversely affected, often severely and with a fatal outcome.” The agency did not link cloning to any negative environmental consequences, but again pointed to a lack of sufficient data in this area.

EFSA ultimately recommended further research “on animal welfare, including behavioral studies, in healthy clones under normal husbandry conditions,” as well as called for investigations into “the causes of pathologies and mortalities observed in clones” and “the susceptibility of clones and their offspring to diseases and transmissible agents.” The opinion will inform future measures adopted by the European Commission, member states and the European Parliament to regulate animal clones and derivative products. “[We] must acknowledge that the evidence base, while growing and showing consistent findings, is still small,” stated Scientific Committee Chair Vittorio Silano, adding that EFSA will face “many challenges” in the future as the science of cloning evolves. *See EFSA Press Release and The Daily Mail*, July 24, 2008.

## United Kingdom (UK)

### [6] FSA Finds UK Daily Salt Consumption Decreasing

The UK’s Food Standards Agency (FSA) recently announced that daily salt consumption in the United Kingdom has declined to 8.6 grams from 9.5 grams since 2000. FSA is aiming to reduce average salt intake to 6 grams per day in an effort to prevent an estimated 20,200 premature deaths annually. To meet this goal, the agency has singled out the catering sector as instrumental in improving “the nutritional content of food eaten out of the home.”

Meanwhile, FSA is accepting comments until October 31, 2008, on its proposal to tighten voluntary salt content targets for 85 food categories and to set more challenging 2012 targets for 80 food categories. “The reduction in salt consumption, since 2000, reflects the positive progress made by the food industry in reformulating products, as well as behavioral changes of consumers,” stated FSA. “Although substantial advances have been made by some manufacturers and retailers to meet the 2010 targets, the Agency’s review of industry progress has found that there is still scope for some sectors of industry to do more.” *See FSA Press Release*, July 22, 2008.

## Canada

### [7] Health Canada Proposes Stricter Labeling for Common Food Allergens

The Canadian government has proposed new labeling requirements for prepackaged food products containing common allergens, gluten sources and added sulfites. Existing regulations “require that ingredients of food products be declared on the labels of most prepackaged foods,” according to Health Canada, but “components of certain ingredients are exempted from declaration in the list of ingredients.” Aiming to reduce the number of food recalls and allergic reactions, the new rules would clarify allergen labeling rules and require manufacturers to declare all allergens, gluten sources and added sulfites on food labels.

Health Canada also announced plans to conduct a national study of food allergy prevalence and two studies “on the dietary habits and coping skills of people with celiac disease who are on a gluten-free diet.” In addition, the agency has asked the food industry to help close the loopholes in current



labeling laws. “Ensuring safe foods for Canadians is a collaborative effort between government, industry and consumers,” Health Minister Tony Clement was quoted as saying. “Until the regulatory amendments proposed by my department are enacted, we are asking industry to be proactive in improving labeling of food allergens and gluten sources to protect the health of Canadians.”

## State and Local Governments

### [8] California Adopts Humane Handling Laws Banning Sale of Non-Ambulatory Cattle

California Governor Arnold Schwarzenegger (R) this week signed legislation ([A.B. 2098](#)) banning the purchasing, sale and processing of meat from non-ambulatory cattle, swine and other livestock. Introduced by Assemblyman Paul Krekorian (D-Burbank), the law imposes fines and jail time for processors convicted of handling “downer” livestock for human consumption. The bill reportedly arose from the safety issues cited by authorities in the Westland/Hallmark Meat Co. recall, which affected 143 million pounds of beef. “We are strengthening California’s food safety laws and sending a message that violating these laws will not be tolerated,” Schwarzenegger was quoted as saying. *See The Sacramento Bee*, July 22, 2008; *Meatingplace.com*, July 23, 2008.

### [9] Georgia Threatens to Defy FDA over Salmonella Warnings

Georgia’s Department of Agriculture has asked supermarkets to keep the state’s jalapenos on shelves if the peppers prove free of *Salmonella Saintpaul*, a rare strain responsible for illnesses in 43 states and thus far traced to a single pepper from a distribution center in McAllen, Texas. The state’s

request would defy a warning issued by the U.S. Food and Drug Administration (FDA), which has asked consumers “to avoid eating raw jalapeno peppers or foods made from raw jalapeno peppers until further notice.” Georgia officials reportedly expect the test results of several pepper samples to become available on July 28, at which point a negative outcome would bolster the state’s case that its peppers are safe to consume.

Although the jalapeno season has since ended in Georgia, some farmers have expressed concern that the sweeping recall will needlessly affect sales. In addition, other states have apparently considered following Georgia’s lead. “We fear that kind of thing all the time,” one farmer said about the scope of the FDA warning. “It costs us about \$10,000 to grow an acre of peppers.” *See The Atlanta Journal-Constitution*, July 23, 2008.

Meanwhile, U.S. Representative Tim Mahoney (D-Fla.) has introduced legislation seeking \$100 million in compensation for tomato growers and shippers implicated in the *Salmonella* outbreak. Federal officials have not officially exonerated the tomato industry, but tests seeking *Salmonella* on raw tomatoes have all turned out negative in the wake of widely publicized recalls. Congress has also scheduled three hearings to discuss the delay in identifying a source. *See The Wall Street Journal*, July 25, 2008.

### [10] Los Angeles City Council Considers Restricting Fast Food Restaurants

A Los Angeles City Council member has apparently introduced legislation that would ban new fast-food restaurants within a 32 square-mile area of the city. Jan Perry believes that her proposal would help alleviate obesity rates in districts where consumers already have access to more than 400 fast food





restaurants. The year-long measure defines fast food establishments as those offering “a limited menu” and “food served in disposable wrappings or containers,” a departure from laws in other locales that classify restaurants according to the number of locations. “Ms. Perry’s initiative seems to be a rare instance in which a major city brings health issues into restaurant zoning,” writes *Wall Street Journal* reporter Sarah McBride in a July 22, 2008, article that likens the scheme to regulations eliminating the use of *trans* fats or requiring nutritional information on fast food menus.

Meanwhile, the Los Angeles restaurant association has agreed to work with the city council to effect “workable” solutions. The industry has persuaded lawmakers to include exceptions to the rule for restaurants willing to forgo a drive-through window or open at least 750 feet from the nearest rival facility. “Health and social issues are the overriding issues, in my mind,” said council member Ed Reyes, whose district would fall under the legislation. “It’s not too different from how we regulate liquor stores.”

## Other Developments

### [11] Sara Lee to Disclose Whole Grain Content on Labels

Sara Lee Corp. has brokered an agreement with the Center for Science in the Public Interest (CSPI) to disclose the percentage of whole grain in its “Soft & Smooth Made With Whole Grain White Bread.” CSPI threatened to sue the company unless it added language to its labels indicating that the product is only 30 percent whole grain. The packaging will also note that two slices contain 10 grams of whole grain and that USDA recommends consumption of

48 grams of whole grains daily. In addition, CSPI has targeted other major food manufacturers for making similar claims regarding whole grain content. “It’s time to take the whole grain halo off of foods made primarily with white flours,” stated CSPI Litigation Director Steve Gardner. “Companies that use the phrase ‘whole grain’ absolutely have the legal responsibility under state consumer protection laws to disclose exactly how much whole is there.” See *CSPI Press Release*, July 21, 2008.

### [12] Agricultural Groups Oppose California Proposition to Ban Gestation Crates

A coalition of agricultural groups, veterinarians, farmers, and businesses have reportedly voiced opposition to California’s “Proposition 2,” a November 2008 ballot initiative that would prohibit the gestation crates and other confinement facilities used to house sows, egg-laying hens and veal cattle. Backed by animal rights activists, the proposal would follow similar actions in Colorado, Oregon, Arizona, and Florida that require farmers to keep livestock in areas that allow free movement. SAFE Food, which includes the National Pork Producers Council, California Cattlemen’s Association and Pacific Egg and Poultry Association, has argued that the proposition would drive up food prices while decreasing overall safety.

“Proposition 2 jeopardizes food safety and public health, wipes out Californians’ access to locally grown, fresh eggs, and harms consumers by driving up prices at grocery stores and restaurants and creates a dependency on eggs shipped from other states and Mexico,” according to the coalition’s [Web site](#). See *Meatingplace.com*, July 21, 2008.



### [13] Animal Rights Activists Launch Anti-Meat Campaign in Chicago

The activist group Mercy for Animals has launched an anti-meat initiative on Chicago's public transit system, where 600 advertisements now depict cows, pigs and hens in cages and gestation crates. Titled "How Much Cruelty Can You Swallow?," the two-month campaign does not aim for "shock value," according to Mercy for Animals Executive Nathan Runkle, but uses "mild images" to influence consumer awareness. One commuter, however, told reporters that the advertisements failed to affect her eating habits, noting that the livestock depicted in the campaign look "like regular farm animals." See *Chicago Sun-Times*, July 18, 2008; *Meatingplace.com*, July 21, 2008.

### [14] TFAH Report Claims Disease Prevention Could Save America \$16 Billion in Five Years

A recent [report](#) published by the Trust for America's Health (TFAH) claims that a "small strategic investment" in disease prevention could save Americans \$16 billion in health care costs within the next five years. Titled *Prevention for a Healthier America: Investments in Disease Prevention Yield Significant Savings, Strong Communities*, the report concludes that private payers alone could save more than \$9 billion if the United States invests \$10 per person in "proven community-based programs to increase physical activity, improve nutrition, and prevent smoking and other tobacco use." In particular, TFAH pointed to health initiatives that emphasize "access to affordable nutritious foods, increasing sidewalks and parks in communities, and raising tobacco tax rates."

TFAH based its finding on an economic model developed by the Urban Institute and several studies conducted by the New York Academy of Medicine. "The report confirms what health professionals have known for years – an ounce of prevention is worth a pound of cure," said Senator Tom Harkin (D-Iowa), chair of the Agriculture, Nutrition and Forestry Committee. "With data showing us that every \$1 spent on prevention strategies yields us a savings of more than \$5 in health care costs, we have no choice but to direct our limited dollars into programs that work." See *TFAH Press Release*, July 17, 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.**

---