

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Government Accountability Office (GAO)

[1] GAO Report Faults FDA for Ineffective Oversight of Food Labeling

GAO recently presented a new report, titled [*Food Labeling: FDA Needs to Better Leverage Resources, Improve Oversight, and Effectively Use Available Data to Help Consumers Select Healthy Foods*](#) before the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies.

The report claims that FDA oversight, which has failed to keep pace with the growing number of food firms, offers “little assurance that companies comply with food labeling laws and regulations for, among other things, preventing false or misleading labeling.” In particular, GAO found that FDA (i) “does not have reliable data on the number of labels reviewed”; (ii) conducted only “limited” testing for the accuracy of nutrition information for labels from 2000 through 2006; and (iii) “does not track the complete and timely correction of labeling violations or analyze these and other labeling oversight data in routine reports to inform managers’ decisions, or ensure the complete and timely posting of information on its Web site to inform the public.” GAO also noted that despite the increase in the number of food companies under FDA jurisdiction, “the number of warning

letters FDA issued to firms that cited food labeling violations has held fairly steady.” Calling on food regulators to “better leverage resources,” the report encourages FDA to adopt several measures to “ensure that labeling office managers have the information they need to oversee compliance with food labeling statutes and regulations.”

U.S. Representative Rosa DeLauro (D-Conn.), who chairs the subcommittee, has reportedly called the GAO conclusions “very troubling,” urging Congress to consider “a major overhaul” of the FDA’s food safety responsibilities. In addition, the Center for Science in the Public Interest issued a press release backing the report and citing several formal complaints the group has filed with FDA “to stop misleading consumer claims.” See *CSPI Press Release*, October 10, 2008.

FDA, however, has contested these findings, stating that GAO did not place “food labeling in the appropriate context given the agency’s overall public health mission, and the multitude of competing priorities it faces.” See *Bloomberg.com*, October 9, 2008.

U.S. Department of Agriculture (USDA)

[2] Farm Policy Group Seeks Documents About Almond Pasteurization Rule

The Cornucopia Institute has reportedly filed a Freedom of Information Act request with the USDA and the California Almond Board seeking documents on which the government agencies relied in



adopting a rule requiring the pasteurization of raw almonds grown in California. The Wisconsin-based organization has apparently been unable to obtain information and scientific studies supporting the agencies' position on the effectiveness of pasteurization and "the comparative nutrition, quality, and safety of pasteurized almonds and raw untreated almonds."

According to the Institute's research director, "We have taken this step because we have been frustrated by the Almond Board and the USDA's unwillingness to share the science behind the rule, the science that purports to show that treatment with either a toxic fumigant or steam heat is safe and does not affect the almond's taste and nutritional qualities." The Institute claims that the rule may have been adopted before scientific studies were complete and suggests that "the rule was passed prematurely and without sufficient review" because the data have not been produced to date. See *Cornucopia Institute Press Release*, October 2008.

[3] PCRM Seeks to Ban Processed Meats from School Cafeteria Menus

The Physicians Committee for Responsible Medicine's (PCRM) Cancer Project has filed a [petition](#) with the USDA asking the agency to prohibit processed meats from school cafeteria menus. The initiative follows an advertising campaign warning about the purported cancer risks of processed meat consumption. Further details about the campaign appear in issue 277 of this Update. PCRM advocates a vegetarian diet and opposes animal research. See *PCRM Press Release*, October 9, 2008; *meetingplace.com*, October 13, 2008.

[4] USDA Seeks Comments on Animal Raising Claims in the Labeling of Meat, Poultry

USDA's Food Safety and Inspection Service (FSIS) is [seeking](#) comments on policies that regulate whether processors can use animal raising claims in labeling for meat and poultry products. "[R]ecent experience with labeling claims related to the raising of poultry have led FSIS to initiate a review of its evaluation and approval process for labels of meat and poultry products that contain animal raising claims," stated the agency in a recent *Federal Register* notice.

Animal raising claims include language that describes a product as "raised without antibiotics"; "not fed animal by-products"; "free range"; "vegetarian fed diet"; and "raised with added hormones." FSIS currently evaluates such claims "by reviewing testimonials, affidavits, animal product protocols, and other relevant documentation provided by animal producers." The agency is soliciting public input on this approval process, which also allows meat and poultry establishments to submit certification from outside organizations or entities in support of animal raising claims. Comments must be received by November 14, 2008.

[5] USDA Announces Meeting of 2010 Dietary Guidelines Advisory Committee

USDA has [announced](#) the first meeting of the 2010 Dietary Guidelines Advisory Committee to formulate an agenda for its review of the 2005 *Dietary Guidelines for Americans*. Slated for October 30, 2008, the meeting also includes presentations on the history of the *Dietary Guidelines* published every five years by USDA and the Department of Health and Human Services. USDA has encouraged the public to submit written



comments before October 24, 2008, to ensure prior transmission to the committee, but will accept comments throughout the committee's deliberations.

World Trade Organization (WTO)

[6] Appellate Body Supports U.S. Sanctions over EU Beef Ban; EU Ban Amendments Upheld

The WTO has reportedly issued a ruling supporting the United States in its decision to impose duties on European imports in response to a ban on beef from animals treated with growth hormones. According to the U.S. trade representative, "The Appellate Body's report confirms that WTO members that are subject to additional duties for failing to bring themselves into compliance with the WTO's rulings and recommendations must do more than simply claim compliance in order to obtain relief from such duties." The ruling ends an EU appeal from a March 2008 ruling by the trade organization finding that the EU failed to justify its ban on these imports and allowing the United States and Canada to impose duties on Roquefort cheese, truffles and chocolates because the EU's practice violated international trade rules.

The WTO Appellate Body apparently reversed that part of the March ruling which criticized the United States for continuing to impose the tariffs without first filing a complaint with the WTO. The tariffs were originally imposed in 1998 and were kept in place even after the EU changed its hormone law in 2003, because the amendments continued to prohibit some hormones. The appellate body also reportedly reversed a decision that found the EU's amendments were incompatible with an earlier WTO ruling. According to an EU

trade spokesperson, "The panel had no sound basis for questioning the WTO-legality of the new EU hormones directive. These clarifications will strengthen WTO members' ability to protect citizens." See *Product Liability Law 360*, October 16, 2008.

UK Food Standards Agency (FSA)

[7] UK Food Regulators Consider Reduction of BSE Testing for Cattle

The UK Food Standards Agency (FSA) recently convened a board meeting to discuss reducing the bovine spongiform encephalopathy (BSE) testing requirement for cattle. The Spongiform Encephalopathy Advisory Committee (SEAC) "recognized an increase in the age at which cattle intended for human consumption are BSE tested would represent a 'minimal to negligible increase in the risk to human health,'" according to an October 15, 2008, press release. FSA has consequently agreed to "support a move to increase the age at which UK cattle are BSE tested from 30 months to 48 months, subject to a review of current and continued BSE surveillance."

FSA Chief Scientist Andrew Wadge also emphasized that other BSE controls offer sufficient consumer protection. "Prevention of exposure to BSE rests primarily with SRM [specified risk material] controls and not BSE testing," he was quoted as saying. See *FSA Press Release*, October 15, 2008.

Japan

[8] Japanese Health Officials Investigate Pesticide-Tainted Beans from China

Japanese health officials have reportedly warned consumers that particular lots of frozen green



beans imported from China are tainted with the organophosphate insecticide dichlorvos, resulting in the illness of at least three people. Residents of Kashiwa in the Chiba Prefecture experienced mouth numbness, vomiting and other symptoms after eating adulterated beans manufactured by Shandong-based Yantai Beihai Foodstuff Co. and sold in Japan under the Ingen brand. Japanese regulators stated that the beans contained 6,900 parts per million of the pesticide, or approximately 34,000 times the legal limit. At this level, a 132-pound person would feel acute symptoms if she consumed just 0.07 gram of the product, according to officials.

Quarantine authorities have since halted all food imports originating with the company, urging retailers to pull 265 tons of the frozen beans from shelves pending an investigation. The ministry also noted that it was willing to work with Beijing to resolve the problem. "For more than a year, products made in China have caused damage in various places," Prime Minister Taro Aso was quoted as saying. *See Reuters*, October 15, 2008; *The Japan Times*, October 16, 2008.

Litigation

[9] U.S. Supreme Court Asks for Government's View of Preemption in Salmon Labeling Case

The U.S. Supreme Court has reportedly asked the solicitor general to file a brief discussing the federal preemption issues in case filed against retailers for failing to inform California consumers that the farm-raised salmon they sold was artificially colored. *Albertson's, Inc. v. Kanter*, No. 07-1327 (U.S.). FDA regulations allow salmon farmers to augment the normally grayish pigment of farm-raised fish with

chemicals that turn the flesh pink like that of wild salmon. Federal law also requires that the use of coloring be indicated on product labels, but does not allow individuals to enforce the law through litigation. The plaintiffs filed several lawsuits in state court alleging that the grocery stores violated federal and state food and drug labeling laws by failing to provide this information to consumers. A trial court and intermediate appellate court found that federal law preempted the claims, but the California Supreme Court ruled in plaintiffs' favor. Further details about the lower court decisions appear in issues 183, 241 and 248 of this Update. *See Product Liability Law 360*, October 6, 2008.

[10] Organic Farm Wins Pesticide-Contamination Lawsuit

A California jury has reportedly awarded an organic farm in Santa Cruz \$1 million for the contamination of its edible herbs by pesticides applied on neighboring farms. *Jacobs Farm/Del Cabo v. W. Farm Serv., Inc.*, No. n/a (Santa Cruz County, California, filed May 2007; verdict rendered September 29, 2008). Pesticide drift from aerial spraying allegedly made it impossible for the plaintiff to sell large portions of its sage, rosemary and dill harvests in 2006 and 2007. The defendant, a pesticide application company, has reportedly indicated that it intends to appeal the verdict; a spokesperson was quoted as saying that the verdict "raises concerns about future use of organophosphates in California." The company apparently claims that it followed all product labeling standards and county agricultural permits when it applied the pesticides and that decisions about the uses and risks of pesticides should rest in the hands of government regulators and not juries. The company also contends that an organic operation should not have moved into an area where conventional



farming takes place. Still, its pesticide application was found to be negligent and to constitute a trespass and nuisance. See *Environment News Service*, September 29, 2008.

[11] Melamine-Tainted Pet Food MDL Litigation Settles

A federal court in New Jersey has reportedly approved a \$24 million settlement that resolves claims for contaminated pet food filed in 80 putative class actions against more than 60 companies. *In re Pet Food Prods. Liab. Litig.*, MDL No. 1850 (D.N.J., settlement approved October 14, 2008). The claims, which had been consolidated for pre-trial proceedings before a multidistrict litigation (MDL) court, arose out of the deaths and illnesses of cats and dogs that consumed pet food with wheat gluten which had been adulterated with melamine in China to boost its protein content.

The contamination led to a massive recall in March 2007. Apparently, more than 10,000 pet owners have filed claims; they will reportedly have until November 24, 2008, under the settlement's terms to obtain up to \$900 per animal, even without receipts for pet food or the costs of their pets' illness and death. No sums will be paid for alleged human pain and suffering, and any remaining money will be contributed to animal-welfare charities. A judge in Canada will reportedly hold a hearing in November to determine if the settlement will be applied to similar claims filed in that country.

One of the law firms representing plaintiffs in several of the cases reportedly sought a share of attorney's fees and costs before the settlement was finalized. Co-lead counsel countered the motion, contending that the settlement agreement calls for lead counsel to distribute the fees, which will not exceed 25 percent of the settlement proceeds. It is

not known how the fee dispute was resolved, but the settlement's approval likely put an end to any final objections. See *Product Liability Law 360*, October 9 and 14, 2008; *Associated Press*, October 14, 2008; *Mealey's Litigation Report: Food Liability*, October 15, 2008.

[12] Court Dismisses Class Action Claims for Fraud in Sale of "Aged" Beef

A federal court in Ohio has dismissed the putative class action claims filed by a woman who alleged that Kroger Co. deceived the public by selling its beef as aged, when it was actually selling beef packaged and shipped almost immediately after slaughter. *St. Clair v. Kroger Co.*, No. 3:07CV03798 (U.S. Dist. Ct., N.D. Ohio, decided October 14, 2008). The case was originally filed in state court and removed on defendant's motion under the Class Action Fairness Act of 2005 (CAFA). Because the plaintiff failed to allege that Kroger had prior notice that its conduct was "deceptive or unconscionable," the court was compelled under Ohio's Consumer Sales Practices Act (CSPA) to dismiss the class claims. Prior notice, under the law, must be "in the form of a rule adopted by the state Attorney General or a judicial decision made publicly available," neither of which was referred to in the complaint.

So ruling, the court declined to dismiss the claims on the basis of the "primary jurisdiction" doctrine, which applies when a court and administrative agency have concurrent jurisdiction over the same matter. It disagreed with Kroger that USDA's authority to regulate the labeling of meat products made it a more appropriate place for adjudication. According to the court, "[d]etermining whether Kroger marketed and labeled its beef in a false and misleading way does not require specialized knowledge of the meat industry or the body of regulations



of the USDA. My role—and the role of the jury—is to determine whether Kroger complied with already clear regulations.”

While the court was inclined to dismiss plaintiff’s individual claims for lack of jurisdiction once the class claims were dismissed, it noted that CAFA does not indicate “whether a federal court retains jurisdiction over an individual matter after the court has dismissed a class action or denied class certification.” Thus, the court decided to “give plaintiff leave to undertake to show cause as to why I continue to have subject matter jurisdiction over her individual claim. In the alternative, plaintiff can accept dismissal of her individual CPSA claim without prejudice.” The court also dismissed plaintiff’s breach of warranty claim under the Uniform Commercial Code because she did not provide defendant with reasonable notice of its alleged breach before filing her lawsuit.

[13] Consumer Files Popcorn Lung Lawsuit in Missouri

A microwave popcorn consumer who allegedly developed a lung injury from her exposure to diacetyl, the chemical responsible for the butter-flavoring in the product, has sued popcorn manufacturers, retailers and flavoring companies in a Missouri state court, alleging product liability and negligence. *Khoury v. ConAgra Foods Inc.*, No. 0816-CV31620 (Jackson County Circuit Court, Missouri, filed October 10, 2008). Represented by plaintiffs’ lawyer Kenneth McClain, who brought diacetyl-related litigation against employers on behalf of exposed workers with bronchiolitis obliterans and has also sued cigarette manufacturers on behalf of sick smokers, the plaintiff alleges that defendants failed to warn consumers that inhaling the “buttery aroma of Act II” microwave popcorn could cause respiratory damage.

[14] Environmental Advocates Notify Retailers of Intent to Sue for Contaminants in Bottled Water

The Environmental Working Group (EWG), which has been studying the contents of bottled water for the past two years, reportedly notified a national retailer that it intends to bring a lawsuit under California’s Proposition 65 for the company’s failure to inform consumers that some brands of bottled water contain chlorine-based contaminants that are known to the state to cause cancer. Numerous media outlets announced the release of EWG’s study [results](#), which purportedly show that leading brands contain many of the same contaminants as tap water, such as bacteria, caffeine, acetaminophen, fertilizer, solvents, plastic-making chemicals, and the radioactive element strontium. Researchers opined that some of the substances, detected below federal health standards, come from the tap water that some companies use in their bottled products and others apparently leach from the plastic bottles.

Environmental engineer Jane Houlihan, who co-authored the study, was quoted as saying, “In some cases, it appears bottled water is no less polluted than tap water and, at 1,900 times the cots, consumers should expect better.” Researchers tested 10 bottled water brands, purchased from stores in five states, and subjected two brands to further study when they were found to contain chlorine byproducts above California’s standard. A trade industry spokesperson contended that the EWG was “doing a great disservice to the public” by scaring it with information about bacteria and other contaminants. He reportedly said that bottled water does occasionally have small traces of bacteria, but it is not harmful; the trade association also notes that some dissolved solids are “important for the taste and character of spring and mineral water.” EWG



recommends that people just drink tap water, filter it with carbon, and drink it out of a stainless steel bottle, if they are concerned about limiting their consumption of contaminants. *See Associated Press, WaterTech Online.com, USA Today, and WHSV, October 15, 2008.*

[15] Second Melamine Contamination Lawsuit Filed in China Against Dairy Company

According to a news source, a migrant worker from southern Guangdong province has sued Sanlu Group Co., alleging that the melamine in its baby formula caused his 11-month-old son's kidney stones. The lawsuit, which has not yet been accepted by the Guangzhou Intermediate People's Court, apparently seeks US\$132,000 in damages. The plaintiff's lawyer has reportedly indicated that he is planning to sue the Dairy Association in China for failing to properly supervise its member companies. More than 10,000 children have been hospitalized in China after drinking milk contaminated with melamine, which, in some batches of milk powder, has been found at levels of 6,196 parts per million. These levels far exceed the Health Ministry's recently adopted permissible limit of one part per million for infant formula and 2.5 parts per million for liquid milk, milk powder and foods containing more than 15 percent milk. *See Findlaw.com, October 10, 2008.*

Other Developments

[16] State AGs Ask Baby Bottle Manufactures to Remove Bisphenol A

The attorneys general for Connecticut, Delaware and New Jersey have written to 11 companies asking them to discontinue the use of bisphenol A (BPA) in baby bottles and infant formula packaging.

Attorneys General Richard Blumenthal (Conn.), Anne Milgram (N.J.) and Joseph R. Biden III (Del.) apparently asked manufactures to "affirm [their] commitment to safe products for our children," citing recent studies that purportedly link BPA to "potential health problems." The letter also noted that U.S. Representatives John Dingell (D-Mich.) and Bart Stupak (D-Mich.) have called for a Senate bill to ban the substance in all children's products, as well as an investigation spearheaded by the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC). "The preventable release of a toxic chemical directly into the food we eat is unconscionable and intolerable," Blumenthal was quoted as saying. "Credible, escalating laboratory evidence demonstrates that even low-dose exposure to BPA causes serious damage to reproductive, neurological and immune systems during the critical stages of fetal and infant development." *See Connecticut Attorney General's Office Press Release and Associated Press, October 13, 2008; Delaware Attorney General's Office Press Release and Law360, October 14, 2008;*

Meanwhile, Dingell and Stupak have reportedly initiated a probe to discern whether the chair of the FDA Science Board's subcommittee on BPA failed to disclose a potential conflict of interest. Subcommittee Chair Martin Philbert, co-director of the University of Michigan's Risk Science Center, accepted on behalf of his institution a \$5 million donation from Charles Gelman, a retired manufacturer of medical equipment who previously stated that BPA was "perfectly safe." Once alerted to the potential conflict, a high-ranking FDA official apparently looked into the matter and found nothing improper about the donation because it did not pay Philbert's salary. "That is an incredibly narrow definition of what might constitute a conflict," opined



an October 14, 2008, *New York Times* editorial, which urged greater transparency in the FDA review process. “Consumers need to know that any decision on BPA is completely unbiased – and that the FDA is, too.” See *Law360*, October 16, 2008.

Media Coverage

[17] *New York Times Magazine* Targets Food Topics

The New York Times Magazine featured several prominent food writers in its October 12, 2008, food issue, which covered topics ranging from agricultural production to marketing strategies. Author Michael Pollan penned an open letter, titled “Farmer in Chief,” addressing the numerous food security challenges facing the next U.S. president. Pollan tells the president-elect that even as he copes with rising food prices and decreasing production, he must also “make reform of the entire food system one of the highest priorities of your administration: unless you do, you will not be able to make significant progress on the health care crisis, energy independence or climate change.” Going on to explain the complexities of modern agriculture and its dependence on oil, Pollan recommends that the administration adopt one core idea: “we need to wean the American food system off its heavy 20th-century diet of fossil fuel and put it back on a diet of contemporary sunshine.” Although he acknowledges that “this is easier said than done,” Pollan ultimately argues that “[i]f any part of the modern economy can be freed from its dependence on oil and successfully resolarized, surely it is food.”

The *Magazine*’s food issue also included articles discussing a “nascent Jewish food movement” focused on sustainability and the decline of North

American catfish farming. In “Kosher Wars,” *Times* contributing writer Samantha Shapiro contrasts the “\$12.5-billion-a-year business” of kosher food production with an emergent market emphasizing “the natural intersections between the sustainable-food movement and kashrut: a shared concern for purity and an awareness of the process goes through before it reaches the table.” In addition, Shapiro notes, “more than 70 percent of kosher-food consumers in the United States are not observant Jews; they choose kosher products because they view them as safer or rely on the strict ingredient labeling for their food allergies or other religious concerns.” Her article highlights recent allegations that the largest independent kosher meat facility, Iowa-based Agriprocessors, engaged in unethical slaughter practices and hired underage workers. According to Shapiro, the revelations have raised questions among many Jewish consumers about “the purpose of religious observance: Does God require adherence to his laws because they are just, or is following God’s laws a good unto itself whether or not the laws serve a moral purpose?”.

W.G. Kellogg Foundation food- and society fellow Paul Greenberg also traces market shifts in his piece, “A Catfish by Any Other Name,” which describes the efforts of North American catfish farms to survive an influx of cheaper white-fish products from Asia. Greenberg points to evidence that high-density fish farms in Vietnam, which is “grabbing up huge swaths of the global white-fish market,” are often “maintained at the expense of environmental and consumer safety.” He also follows the intricate trade negotiations between the United States and Vietnam in their battle over Asia-farmed tra – a relative of channel catfish that can better survive low-oxygen pools and competes with its American cousin in the domestic white-fish market. Although



American fisheries won their trade battle to prevent tra from being labeled “catfish” in the United States, they have nevertheless encountered a new rival in China, as well as rising feed and fuel prices. As a result, Greenberg concludes, the industry recently rolled out a last ditch effort to woo back consumers – “a specially filleted Grade-A piece of the best of the farmed North American channel catfish” called Delacata and endorsed by “Iron Chef America” star Cat Cora.

[18] British Chef Opens “Ministry of Food” to Tackle Obesity

Celebrity chef Jamie Oliver, who gained renown with his cooking show “The Naked Chef,” has apparently launched an initiative designed to teach people how to cook in an effort to reduce the incidence of obesity in Great Britain. Starting in a city of 250,000 in northern England with one of the highest rates of obesity in the nation, Oliver’s “Pass it On” campaign will teach eight cooks 10 recipes; they must promise to teach two people who will teach two people and so on, until, in less than six months, the entire city will, in theory, be able to cook. Although the show is being aired only in the UK, a YouTube® clip of the first ten minutes of his opening television show about his new “Ministry of Food” is [available](#) for viewing.

Oliver is apparently hoping that people who learn to cook easy, nutritious meals will be less likely to buy high-calorie take-out meals. The program apparently reveals the difficulties that working-class people have preparing their own food—it is evidently easier and more cost effective for them to visit a fast food restaurant in the neighborhood than it is to buy bus tickets and travel to a grocery store with several toddlers in tow to purchase fresh produce. *See Weighty Matter Blog*, October 14, 2008.

Scientific/Technical Items

[19] Nestle and Ludwig Claim Food Industry Practices Counter Health Messages

In an article appearing in the *Journal of the American Medical Association*, David Ludwig, M.D., and Marion Nestle, Ph.D, discuss the voluntary efforts that food corporations have undertaken to address the rising rates of obesity in the United States and then detail the counterproductive activities in which they allegedly continue to engage. David Ludwig & Marion Nestle, “Can the Food Industry Play a Constructive Role in the Obesity Epidemic?,” *JAMA*, October 14, 2008. According to the authors, food companies lobby against obesity-related public health campaigns and continue to market food of little nutritional quality to children. The article also cites research purportedly showing that the industry “has an especially insidious influence on the conduct of research and development of public health policy,” where industry-funded studies tend to reach industry favorable conclusions. While they recognize that the companies have an obligation to maximize their profits for the benefit of shareholders, Nestle and Ludwig argue that “appropriate checks and balances are needed to align the financial interests of the food industry with the goals of public health.”



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