

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Trade Commission (FTC)

##### [1] Administrative Law Judge Appointed in Whole Foods Antitrust Case

The FTC has appointed Acting Chief Administrative Law Judge D. Michael Chappell to oversee the antitrust hearing in the commission's case against the 2007 merger of Whole Foods Market, Inc. and Wild Oats Markets, Inc. The administrative hearing is scheduled to begin February 17, 2009. FTC Commissioner J. Thomas Rosch presided over the scheduling conference in September 2008, and a news source indicated that Whole Foods objected to the possibility that he would be appointed to hear the matter. In its October 20 order, FTC notes that the FTC chair and commissioners, including Rosch, "are committed, subject to the bounds of reasonableness and fairness, to a just and expeditious resolution of any potential appeal from an Initial Decision filed by the Administrative Law Judge in this matter that may be taken to the full Commission." The administrative proceedings are separate from collateral proceedings pursued in federal court. Further details about the most recent federal court decision appear in issue 269 of this Update. See *Supermarket News*, October 22, 2008.

### National Institute of Environmental Health Sciences (NIEHS)

##### [2] Federal Agencies Seek Input to Focus Future Research on Bisphenol A

NIEHS and the National Toxicology Program (NTP) have [published](#) a request for information, seeking "input on a number of key research areas that have been identified in recent evaluations of bisphenol A (BPA)." Submissions should be made online by December 1, 2008. Among the research needs identified are (i) "Studies of the concentrations of BPA and metabolites in human blood, urine, breast milk, amniotic fluid, placenta and other tissues, particularly in infants and young children"; (ii) "More complete assessment of sources of human exposure to BPA"; (iii) "The potential for effects on the immune system"; (iv) "The potential for metabolic disruptions leading to obesity, diabetes, or other metabolic disease"; and (v) "The potential for disruptions to the male reproductive tract including effects on sperm quantity and quality." The information collected will apparently be used to develop future research and testing programs and may appear in future reports. See *Federal Register*, October 21, 2008.



## Canada

### [3] Health Canada to Ban Baby Bottles Manufactured with Bisphenol A

The Canadian government has reportedly declared that bisphenol A (or BPA) is a hazardous substance, and Health Canada will begin drafting regulations to prohibit the importation, sale and promotion of baby bottles made with the chemical. The agency's scientists apparently contend that the primary exposure for newborns and infants is through the use of such baby bottles, particularly when they are heated, and from the chemical's migration into infant formula from cans lined with the substance.

While the levels of exposure are evidently below those posing a health risk, the government decided to take the action as a precaution, citing research showing that "low-level exposure to BPA, particularly at sensitive life cycle stages, may lead to permanent alterations in hormonal, developmental or reproductive capacity." Health Canada will also apparently work with industry to reduce bisphenol A in the linings of infant formula cans.

Responding to the regulatory initiative, the Grocery Manufacturers Association released a statement to reassure the public about the chemical's safety, claiming that Canada's "precautionary action is disproportional to the risk determined by public health agencies. An assessment of the entire body of scientific evidence and the findings of the FDA—which reaffirmed the safety of BPA as recently as August—and numerous health authorities and researchers have concluded that consumers can continue to safely enjoy foods and beverages in the many forms of packaging provided, including those that contain BPA, without changing their purchasing or eating patterns."

Meanwhile, the *Milwaukee Journal Sentinel* has reported that the Food and Drug Administration (FDA) draft report, which concluded the chemical was safe, was written, for the most part, by "the plastics industry and others with a financial stake" in the industry. The newspaper's earlier story that the FDA subcommittee reviewing the report is chaired by a man who founded and co-directs an institute that received \$5 million from a man who claims bisphenol A is safe apparently touched off a congressional inquiry. Further details about the congressional probe appear in issue 278 of this Update.

In a related development, the third largest U.S. supermarket chain will reportedly stop selling plastic baby bottles containing bisphenol A. Safeway, with 1,775 stores in the United States and Canada, made the announcement several days after Canada indicated that it would prohibit the chemical in baby bottles. See *Grocery Manufacturers Association Press Release*, October 17, 2008; *FoodUSANavigator.com*, October 20, 2008; *thedaily-green.com* and *Milwaukee Journal Sentinel*, October 22, 2008.

## European Food Safety Authority (EFSA)

### [4] EFSA Seeks Comments on Draft Nanotechnology Risk Assessment

The EFSA Scientific Committee is seeking comments on a draft scientific [opinion](#) that addresses engineered nanomaterials (ENM) used in food and feed applications. Acknowledging the limitations of currently available methods, the draft concludes that "established international approaches" are "a suitable starting point for case-by-case risk assessment of ENMs," but warns against



extrapolating scientific data derived from conventional chemical use. “Possible risks arise because ENM have particular characteristics, due in part to their small size and high surface areas,” the committee stated in an October 17, 2008, press release. “There is limited information on absorption, distribution, metabolism, and excretion, as well as the toxicity of ENM.” Comments will be accepted through the EFSA Web site until December 1, 2008. See *GMA Biotechnology Digest*, October 20, 2008.

## Litigation

### [5] Defendants Claim Federal Preemption in Organic Milk MDL

Aurora Dairy Corp. and other defendants have filed motions to dismiss on preemption grounds in multidistrict litigation (MDL) filed on behalf of consumers who allege that the companies misled consumers by claiming their products are organic, when, in fact, they are not following organic standards and regulations. *In re: Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, No. MDL 1907 (U.S. Dist. Ct., E.D. Mo., motions filed October 17, 2008).

According to the defendants, the plaintiffs’ state-law claims would have the effect of rewriting national regulations for organic food production. Asserting that it holds valid organic certifications from the U.S. Department of Agriculture, Aurora argues that the relief requested would “preclude Aurora from using the very seal that the USDA, through its duly-accredited certifying agents, has expressly authorized Aurora to use.”

Co-lead counsel for plaintiffs was quoted as saying, “Aurora spends a lot of time arguing that

plaintiffs are trying to regulate them, and if you read the complaint, the complaint says that plaintiffs are not. They are seeking damages that result from Aurora’s violation of the Organic Foods Production Act.” See *Product Liability Law 360*, October 20, 2008.

## Other Developments

### [6] U.N. Urges China to Revamp Food Safety System

According to news sources, the United Nations released a report October 22, 2008, calling on China to overhaul its system of food-safety regulation. The World Health Organization’s top food-safety official claimed that the country’s recent tainted-milk scandal was a result of individuals who “exploited weaknesses” in the regulatory system, which is “dispersed” among too many agencies and governmental levels. The U.N. urged the government to streamline its laws, make them tougher and regulate food products from farm to fork. A local spokesperson said that the U.N. stood ready to work closely with Chinese officials on reforming the law.

The report apparently urges the Chinese government to shift more responsibility to food companies by requiring them to institute risk-management programs that can be audited by government inspectors. Released just as the standing committee of the National People’s Congress was preparing to discuss the draft of a new food-safety law that will, in part, improve the government’s ability to trace and recall unsafe foods, the U.N. report evidently warned the country that its food exports will decrease if concerns about its regulatory system are not addressed.



The report also notes that China's regulatory agencies are perennially understaffed and underfunded, leading to an inability to carry out assigned tasks. Those Chinese agencies sharing authority over food safety include the State Food and Drug Administration; the Ministries of Health and Agriculture; State Administration; State Administration for Quality Supervision, Inspection and Quarantine; the State Administration of Industry and Commerce; and the Ministry of Commerce.

Meanwhile, Wal-Mart Stores, Inc. reportedly announced during a conference for suppliers in Beijing that it would be imposing stricter standards related to product quality, labor conditions and sustainability on all of its suppliers. The global retailer apparently buys billions of dollars worth of consumer goods from China annually; those suppliers that do not meet the new requirements or have a plan to fix their problems will be banned from supplying products to the company. While the standards will initially apply to clothing, they will ultimately cover all goods and all countries by 2011.

Wal-Mart's chief executive was quoted as saying, "I firmly believe that a company that cheats on the age of its labor, that dumps its scraps and its chemicals in our rivers, that does not pay its taxes or honor its contracts, will ultimately cheat on the quality of its products." The company will reportedly audit its suppliers and require them to meet disclosure requirements. See *Product Liability Law 360*, *Xinhua* and *The Globe and Mail*, October 22, 2008; *The Wall Street Journal*, October 22, 2008.

#### [7] **British Organic Organization Issues Report on GM Food**

The Soil Association, a British environmental group dedicated to sustainable, organic farming, has

released a [report](#), titled "Land of the GM-Free? How the American public are starting to turn against GM food," that contends American consumers, farmers and politicians are losing their enthusiasm for genetically modified (GM) crops. Thus, "it is not surprising that the GM industry has scaled up its efforts to find a new market in the EU."

The report specifically addresses how "genetically engineered bovine growth hormone" and GM crops such as rice, wheat and alfalfa are facing opposition from consumers and others in the United States in the form of lawsuits and regulatory pressures. According to the report, "The Irish Republic, Northern Ireland, Scotland and Wales are all committed to GM-free policies. This has left just the present English government ministers on an increasingly lonely and desperate pro-GM quest, as consumers in their main pro-GM ally, the United States, increasingly reject this uncertain, risky and unproductive technology."

#### [8] **Dairy Report Claims Industrial Producers Are Bad for Consumers**

The non-profit consumer organization Food & Water Watch has released a [report](#), "Dairy 101," that discusses how the dairy industry has moved from thousands of relatively small producers across the nation to fewer, industrial-scale facilities concentrated in a few states. According to the report, this development is not good for the environment or for cows, which "are crowded into high-density feedlots with no access to grass and milked in round-the-clock shifts," and are also not good for consumers, who do not know where their dairy products come from and whether the cows have been treated with antibiotics or growth hormones. The report also contends that pricing formulas and decreasing government support have provided family farmers



with less income, while increasing prices for consumers.

The report concludes by recommending that (i) anti-competitive behavior in the dairy market be ended, (ii) dairy farmers be provided with a fair wage, (iii) industrial dairies be required to comply with environmental laws, (iv) a local dairy production system be re-established, (v) labeling of artificial hormone-free products be allowed to protect consumers' right to know, (vi) the integrity of organic milk standards be protected, and (vii) the Food and Drug Administration be required to stop companies from adding milk protein concentrate to their food products.

## Scientific/Technical Items

### [9] Study Finds Acrylamide Unrelated to GI Cancers

A recent study has reportedly concluded that normal dietary exposure to acrylamide does not increase the risk of developing gastrointestinal cancers. J. G. F. Hogervorst, et al., "Dietary Acrylamide Intake Is Not Associated with Gastrointestinal Cancer Risk," *Journal of Nutrition*, November 2008. Earlier studies have linked high doses of acrylamide, a chemical byproduct of high-temperature cooking processes, to cancer in laboratory animals.

Researchers from Maastricht University analyzed data from 5,000 people enrolled in the Netherlands Cohort Study, concluding that the daily average acrylamide intake for all participants was 21.7 milligrams. During the 13-year follow-up, the authors determined that cases of colorectal, gastric, pancreatic, and esophageal cancers were not associated with acrylamide consumption. In addition, they

noted that obesity and age appeared to be risk factors for these diseases. "Overall, acrylamide intake was not associated with colorectal, gastric, pancreatic, and esophageal cancer, but some subgroups deserve further attention," the authors were quoted as saying. See *FoodNavigator-USA.com*, October 21, 2008.



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