

Food & Beverage

LITIGATION UPDATE

Issue 288 • January 16, 2009

Table of Contents

Legislation, Regulations and Standards

- [1] Nationwide *Salmonella* Outbreak Linked to Peanut Butter1
- [2] USDA Publishes Final Details of COOL Program1
- [3] Public Forum to Target Safety of Exposure to Nanoscale Materials;
EPA Gathers Data; Shareholders Urge Disclosure of Nanomaterials
in Personal Care and Food Products2

Litigation

- [4] U.S. Supreme Court Denies Further Review of Salmon Class Action3
- [5] FTC Asks Court to Order Whole Foods to Rename Former Wild Oats Stores3
- [6] Objectors Appeal Pet Food Settlement; Compensation Delays Anticipated4
- [7] Purina Claims Losses from Excessive Aflatoxin in Feed Ingredient4
- [8] California Court Upholds OEHHA Listing of Phthalates
as Reproductive Toxicant4
- [9] Chinese Parents Seek Long-Term Care and Research for Children Injured by
Contaminated Milk Products5

Upcoming Conferences and Seminars

- [10] GMA Announces 2009 Consumer Complaints Conference6

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Centers for Disease Control and Prevention (CDC)

[1] Nationwide *Salmonella* Outbreak Linked to Peanut Butter

The U.S. Centers for Disease Control and Prevention (CDC) and Food and Drug Administration (FDA) are reportedly investigating a *Salmonella typhimurium* outbreak implicating King Nut and Parnell's Pride brand peanut butters manufactured by the Peanut Corporation of America (Peanut Corp.) and sold to non-retail food establishments. Health departments have purportedly linked the outbreak to more than 400 illnesses and possibly five fatalities, prompting Peanut Corp. to issue a voluntary recall for 21 lots of peanut butter produced since July 1, 2008, at its Blakely, Georgia, facility. In addition, Kellogg Co. has since issued recalls for its Austin and Keebler brand peanut butter crackers as a precautionary measure. See *King Nut Press Release*, January 12, 2009; *Law 360* and *Health Day Reporter*, January 13, 2009; *Kellogg Co. Press Release*, January 14, 2009; *The Associated Press* and *The Wall Street Journal*, January 15, 2009.

Meanwhile, plaintiffs' lawyers have apparently cited the incident in urging stricter food safety regu-

lations and heightened corporate responsibility. Attorney Bill Marler praised Kellogg Co. on his law blog for its quick actions, but questioned the delay of the CDC, FDA and Peanut Corp. in detecting the contamination. Personal injury lawyer Fred Pritzker also told reporters that government agencies and companies must devote more resources to preventative measures and earlier detection, pointing to an earlier nationwide foodborne illness outbreak that FDA wrongly attributed to U.S.-grown tomatoes. Media sources noted that litigation filed as the result of a 2008 peanut butter contamination case is still ongoing. See *FoodNavigator-USA.com*, January 12, 2009; *Marler Blog*, January 13 and 14, 2009.

U.S. Department of Agriculture (USDA)

[2] USDA Publishes Final Details of COOL Program

USDA this week [issued](#) a final rule for its mandatory country-of-origin labeling (COOL) program, which applies to beef, pork, lamb, chicken, goat meat, wild and farm-raised fish and shellfish, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. USDA had previously published an interim final rule in advance of a September 30, 2008, implementation deadline to incorporate changes required by the 2008 Farm Bill, including the addition of several agricultural commodities.



Effective March 16, 2009, the final rule takes into account public comments on the interim version. In particular, the rule clarifies USDA's position on multiple countries of origin labeling and eliminates allowances for commodities of U.S. origin to retain this designation if processed or handled in foreign countries. The final rule also upholds a provision criticized by the Ranchers-Cattlemen Legal Fund (R-CALF) that excludes processed food ingredients from COOL regulations.

"Publication of the final rule may alleviate some of the market uncertainty that currently disrupts our U.S.-Canada trade relationship," a Canadian Pork Council spokesperson was quoted as saying. Canada had filed a complaint with the World Trade Organization over the interim final rule, which Canadian ranchers said discriminated against their livestock. See *Meatingplace.com*, January 13, 2009.

National Nanotechnology Coordination Office (NNCO)

[3] **Public Forum to Target Safety of Exposure to Nanoscale Materials; EPA Gathers Data; Shareholders Urge Disclosure of Nanomaterials in Personal Care and Food Products**

The NNCO has [announced](#) that a public forum will be held in Bethesda, Maryland, February 24-25, 2009, "to discuss the state-of-the-art of the science related to environmental, health, and safety aspects of engineered nanoscale materials in the area of human and environmental exposure assessment." Workshop participants will also "discuss the path forward for addressing research needs in this area." According to the notice, priority research needs that have been identified include (i) "characterizing

exposure among workers," (ii) "characterizing exposure to the general population from industrial processes and industrial and consumer products containing nanomaterials," and (iii) "characterizing the health of exposed populations and environments."

NNCO has indicated that the information provided during the forum will be used to manage the National Nanotechnology Initiative's environmental, health and safety research strategy. See *Federal Register*, January 15, 2009.

Meanwhile, the Environmental Protection Agency's Office of Pollution Prevention and Toxics (OPPT) has issued an [interim report](#) titled "Nanoscale Materials Stewardship Program," that represents a summary of information the agency has received from companies and trade associations about nanoscale materials used in commerce. According to the report, while most submissions "included information on physical and chemical properties, commercial use (realized or projected), basic manufacturing and processes as well as risk management practices . . . very few submissions provided either toxicity or fate studies." EPA apparently intends to use the information "in future nanoscale material regulatory and research work."

And in a related development, a corporate responsibility organization has informed the *BNA Daily Environment Report* that shareholder resolutions urging companies to disclose the nanomaterials in their personal care and food products have been filed with a cosmetics manufacturer and three food companies for their 2009 annual meetings. According to the associate director of the As You Sow Foundation's Corporate Social Responsibility Program, "In general, 'product safety' resolutions have been increasing over the last four



years, and a virtually unregulated new technology such as nanotech will be sure to get increased shareholder attention.” The shareholders will also reportedly press companies to describe their policies for handling nanomaterials.

Similar shareholder resolutions were reportedly filed against several companies in 2008; the Securities and Exchange Commission apparently allowed one targeted retailer to dismiss it, concluding that these resolutions are more appropriate for product manufacturers. A 2008 resolution submitted to Avon Products Inc. reportedly found favor with 25.4 percent of shareholders, a result considered to be a success among advocacy groups, given that resolutions of this nature generally receive 5 to 6 percent favorable votes. *See BNA Daily Environment Report*, January 15, 2009.

Litigation

[4] U.S. Supreme Court Denies Further Review of Salmon Class Action

The U.S. Supreme Court has denied a petition seeking review of a California Supreme Court ruling that allowed plaintiffs to pursue putative class claims alleging that grocery stores failed to inform California consumers about the artificial coloring used in the farm-raised salmon they sold.

Albertson's Inc. v. Kanter, No. 07-1327 (U.S., certiorari denied January 12, 2009). The retailers had asked the Court to find the claims preempted by the Food, Drug, and Cosmetic Act. The case should now proceed to trial.

Food and Drug Administration regulations allow salmon farmers to augment the normally grayish pigment of farm-raised fish with chemicals, but also require that the use of coloring be indicated on

product labels. Federal law does not allow individuals to enforce the law through litigation, but it does not, according to attorneys involved in the case, bar civil lawsuits for violations of state law. The litigation was brought on both federal and state law grounds. For additional information about the case, see issues 183, 241, 248, and 278 of this Update. *See Product Liability Law 360*, January 12, 2009.

[5] FTC Asks Court to Order Whole Foods to Rename Former Wild Oats Stores

The Federal Trade Commission (FTC), continuing to challenge the merger of Whole Foods Market, Inc. with Wild Oats Markets, Inc, has reportedly indicated in court filings that it will seek a court order requiring Whole Foods to rename the Wild Oats stores that were changed into Whole Foods stores and rebrand them as Wild Oats. The FTC also apparently said that a trustee should be appointed to separately manage Wild Oats assets to preserve the status quo in the organic foods market until all legal proceedings have concluded. The \$565 million merger has been completed, but the FTC convinced an appeals court in 2008 to allow the administrative antitrust proceedings to resume. Responding to the latest filing, Whole Foods reportedly stated, “Not only have they found us guilty before the final evidence is in, now they want to impose a burdensome remedy even before the first word of final evidence is in.” More information about the case can be found in issue 285 of this Update.

In a related development, Whole Foods has filed motions seeking to force about two dozen of its competitors to comply with subpoenas for documents, such as sales data, marketing plans and internal e-mails and memos, needed to support Whole Foods’ antitrust defense. Whole Foods issued



the subpoenas in October 2008 to more than 93 grocers and vendors nationwide in an effort to obtain information that will prove that competition is robust in 29 markets that the FTC identified as compromised by the merger. According to a news source, Whole Foods is having difficulty securing the proprietary information it needs, despite promising to protect the documents from disclosure to Whole Foods employees. *See The Oregonian*, January 13, 2009.

[6] Objectors Appeal Pet Food Settlement; Compensation Delays Anticipated

While a federal district court approved the settlement of class claims that melamine-tainted dog and cat food sickened and/or killed tens of thousands of pets in the United States, the pet owners who were expecting compensation in 2009 will apparently have to await the outcome of two separate appeals filed in December 2008. According to the claims administrator's Web site, "No payments will be made on eligible claims until all appeals are resolved. It is uncertain how long these appeals will take to resolve, and the timing of resolving the appeals is not within the control of the parties or their counsel. It is not uncommon for appeals to take several months or even years to resolve."

As noted in issues 275 and 283 of this Update, those dissatisfied with the settlement have claimed that (i) it will foreclose their ability to recover for their separate claims that pet food makers improperly labeled their products as "Made in the USA," and (ii) release their claims that marketing pet food as healthy, premium or human grade is false and misleading because such pet food products allegedly contain "nonedible garbage, by-products and waste that is unfit for human consumption." The court determined that these claims would not

be released, but the parties that filed them have apparently disagreed and are challenging the settlement agreement. *See DogChannel.com*, January 9, 2009.

[7] Purina Claims Losses from Excessive Aflatoxin in Feed Ingredient

Land O'Lakes Purina Feed LLC has filed a lawsuit against the company that supplied the peanut hulls it uses in its animal feed, claiming that the hulls contained unacceptably high levels of aflatoxin, a peanut, corn and cottonseed fungus that can cause acute necrosis, cirrhosis and carcinoma of the liver in animals that consume it. *Land O'Lakes Purina Feed LLC v. Severn Peanut Co., Inc.*, No. 2:09-cv-2 (U.S. Dist. Ct., E.D.N.C., Northern Div., filed January 8, 2009).

According to the complaint, the companies' contract specified that the peanut hulls not contain aflatoxin at levels in excess of 22 ppb. Shipments delivered in January and February 2008 allegedly contained aflatoxin "far in excess of the limit under the parties' contract." Purina was also notified at about that time that the North Carolina Department of Agriculture "had detected high levels of aflatoxin in [Purina's] finished feed products containing peanut hulls supplied by Severn." Purina instituted a recall and, to date, has purportedly retrieved more than 150 tons of finished feed products. Purina alleges that the damage to its products, the costs of recalling feed and settling customer claims, product disposal costs, and lost business amount to "incurred damages in excess of \$1 million."

[8] California Court Upholds OEHHA Listing of Phthalates as Reproductive Toxicant

A California Court of Appeals has upheld the Office of Health Hazard Assessment's (OEHHA's)



listing of di-isodecyl phthalate (DIDP), a plasticizer used in polyvinyl chloride plastic products including food packaging, as a reproductive toxicant under Proposition 65 (Prop. 65). *Exxon Mobil Corp. v. OEHHA*, No. B204987 (Cal. Ct. App., 2d App. Dist., Div. 4, decided January 7, 2009). Exxon Mobil Corp. challenged the chemical's listing under Prop. 65's "authoritative body" provision, essentially arguing the OEHHA erred in relying on a National Toxicology Program (NTP) report to list DIDP "and did not make the required determination that an association between adverse reproductive effects in humans and [the chemical] is biologically plausible."

According to Exxon Mobil, the scientific evidence, consisting of animal study data, is insufficient under applicable regulatory standards to demonstrate adverse effects in humans, and the NTP agreed when it concluded that current exposures are "probably not" high enough to cause concern and "there is minimal concern for developmental effects in fetuses and children." The court disagreed, saying, "[s]o long as OEHHA can conclude on the basis of the *entire record* before it, that the authoritative body made the regulation 25306(g) findings, it may list a chemical pursuant to the authoritative body provision of the statute."

Thus, the court upheld OEHHA's interpretation and application of the regulatory standards and found that the underlying administrative record adequately supported OEHHA's listing decision. The court observed that one of the NTP documents in the record "unambiguously identified DIDP as a developmental toxicant." The court also found that other information in the record, including an expert panel report, "contained the analysis necessary for OEHHA to conclude that NTP adequately had considered the regulatory criteria."

According to a news source, Exxon Mobil is considering whether to appeal the court's decision. *See Inside Cal/EPA*, January 16, 2009.

[9] Chinese Parents Seek Long-Term Care and Research for Children Injured by Contaminated Milk Products

Hundreds of parents of children sickened in China by melamine-contaminated milk products have reportedly rejected the government-sanctioned compensation offer, which would have provided about US\$29,000 to families that lost a child and US\$4,380 for each child with serious kidney damage. The parents, who are gathering signatures in support of their demands, will instead seek long-term health care for those affected and research into the health effects that purportedly continue to afflict tens of thousands of children. They also apparently complain that the offer provides nothing for children older than age 3 and will not provide assistance to the dozens of families facing significant hospital bills.

Zhao Lianhai, whose 4-year-old son was sickened, reportedly said in an interview, "Our biggest demand is not the compensation but medical treatment and academic research on the influence that melamine will have on the health of our children. We want to know what kinds of lives [our] children will face." He also apparently said that government censors blocked an attempt to post online a version of the parents' demand for greater compensation. According to a news source, Zhao was one of five people who were detained by the authorities on January 1, 2009, just before they were scheduled to hold a news conference in Beijing. *See The New York Times*, January 14, 2009.



Upcoming Conferences and Seminars

[10] GMA Announces 2009 Consumer Complaints Conference

The Grocery Manufactures Association has announced its 2009 Consumer Complaints Conference, *Modern Management of Consumer Complaints: Unlocking the Secrets of Great Service*, slated for May 6-8, 2009, in New Orleans, Louisiana. SHB Partner [Paul La Scala](#) will present a May 7 session on “Electronic Document Preparation, Management and Retention in the Claims Process.” To view more information and register for the event, please click [here](#).



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.
