

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] Federal Agencies Announce Public Meeting on Codex Agenda Items

USDA, the Food and Drug Administration and the Office of the Undersecretary for Food Safety have [announced](#) a February 10, 2009, public meeting to develop draft positions on agenda items for the 41st Session of the Codex Committee on Food Additives (CCFA) slated for March 16-20, 2009, in Shanghai, China. Part of the Codex Alimentarius Commission established in 1963 by the Food and Agriculture Organization and World Health Organization, CCFA (i) sets maximum levels for individual food additives; (ii) prepares priority lists of food additives for risk assessment by FAO and WHO experts; (iii) assigns functional classes to food additives; (iv) recommends specifications of identity and purity for food additives; (v) considers methods of analysis; and (vi) considers standards for related subjects such as food additive labeling. Specific agenda items for the session also include the Codex General Standard for Food Additives and the scope of its food categories. The U.S. agencies will accept electronic registration for the public meeting through February 6, 2009. *See Federal Register*, January 27, 2009.

### Food and Drug Administration (FDA)

##### [2] FDA Seeks Nominations for Public Advisory Committees

FDA is [seeking](#) nominations for several public advisory committees, including the Transmissible Spongiform Encephalopathies Advisory Committee. This committee evaluates “available scientific data concerning the safety of products which may be at risk for transmission of spongiform encephalopathies having an impact on the public health,” according to FDA. Nominees should have experience in clinical and administrative medicine, hematology, virology, neurovirology, infectious diseases, immunology, transfusion medicine, surgery, internal medicine, biochemistry, biostatistics, epidemiology, biological and physical sciences, sociology/ethics, or other related professions. FDA will accept nominations until it fills all current and upcoming vacancies on the committee. *See Federal Register*, January 29, 2009.

### Litigation

##### [3] Whole Foods Loses Bid to Stop FTC Antitrust Trial

The D.C. Circuit Court of Appeals has reportedly denied a Whole Foods Market, Inc. petition that sought to stop the Federal Trade Commission’s (FTC) antitrust proceedings against the company’s merger with Wild Oats Markets, Inc. The FTC’s



administrative trial is scheduled to begin April 6, 2009, and Whole Foods contends that the commission has pre-judged the outcome. According to a Whole Foods spokesperson, "There is no question our due process and equal protection rights have been violated and we intend to pursue this case until we can get a hearing in a federal court about those violations." According to a news source, Whole Foods is considering reframing and refiling its lawsuit. See *Dow Jones Newswires*, January 23, 2009.

#### [4] **New Peanut Butter *Salmonella* Lawsuit Filed; Product Recall Expanded**

Food litigator William Marler has filed a second lawsuit against the Peanut Corp. of America (PCA) on behalf of a California family whose 3-year-old son allegedly fell ill and was hospitalized after eating *Salmonella*-contaminated peanut butter cracker sandwiches made with a PCA peanut butter product. *Trone v. Peanut Corp. of Am.*, No. n/a (U.S. Dist. Ct., N.D. Cal., filed January 28, 2009). The outbreak, which has reportedly sickened more than 500 people across the United States and contributed to eight deaths, has led to one of the largest food recalls in the nation's history. PCA expanded its recall from peanut butter and peanut paste to all peanuts and peanut products, including whole peanuts (dried, roasted or raw), granulated peanuts and peanut meal, processed in its Blakely, Georgia, facility since January 1, 2007.

According to the PCA recall [notice](#), the company sold its recalled products to institutions, food service industries and private label food companies in this country and in Canada, Haiti, Korea, and Trinidad. PCA President Stewart Parnell stated, "We have been devastated by this, and we have been working around the clock with the FDA [Food and Drug Administration] to ensure any potentially

unsafe products are removed from the market immediately. Additionally, we are working alongside state and federal food safety experts in every way we can to help them protect consumers, both now and in the future."

Documents uncovered by a government investigation have purportedly shown that the company's plant is contaminated with four *Salmonella* strains and that the company knowingly shipped products that tested positive for *Salmonella* bacteria on 12 occasions in 2007 and 2008. The FDA's January 9-27, 2009, [investigation](#) also revealed poor maintenance at the plant with holes in the ceiling, poor storage practices, dirty equipment and utensils, visible mold, and live and dead roaches. *The New York Times* found that state inspections of PCA's Georgia facility in 2006, 2007 and 2008 resulted in citations for sanitation lapses, such as dirty surfaces, grease residue and dirt buildup.

Industry trade organization GMA has responded to the recall by stating that "the United States continues to enjoy one of the safest food supplies in the world, and food safety is the number one priority for food and beverage manufacturers." GMA noted that "PCA manufactures just 1 percent of peanut products sold in the United States," and that many peanut butters and peanut butter products are not affected by the recall. The group called for increases in FDA funding, the imposition of food safety risk analyses on food and beverage manufacturers, the adoption of federal agricultural and food safety standards for certain produce, and manufacturer implementation of foreign food supplier food safety plans, among other matters.

Meanwhile, federal health officials and scientists have reportedly said that future contamination outbreaks could result in the development of bacterial strains resistant to frontline antibiotics. The strain identified in the peanut butter contamina-



tion is not resistant, but about one quarter of certain *Salmonella typhimurium* bacteria are apparently resistant to at least five of the most commonly used antibiotics. A Centers for Disease Control and Prevention spokesperson reportedly said, “There would be many more deaths than what we’re seeing,” if the bacteria in the current crisis were as resistant as others have become. *See Associated Press* and *The New York Times*, January 27, 2009; *Marler Blog*, *The New York Times*, *Washington Post*, *MSNBC.com*, and *GMA Press Release*, January 28, 2009.

#### **[5] Pomegranate Juice Dispute Goes to Federal Court**

POM Wonderful LLC has reportedly brought false advertising and unfair competition claims in federal court against Welch Foods Inc. for marketing a product with little pomegranate juice as a “white-grape and pomegranate” juice. *POM Wonderful LLC v. Welch Foods Inc.*, No. 09-00567 (U.S. Dist. Ct., C.D. Cal., filed January 23, 2009). According to a news source, POM Wonderful has built a multimillion-dollar business by making and marketing the health benefits of a pomegranate juice-based product line. The company alleges that Welch has taken advantage of its success by developing an intentionally confusing and misleading product and implying “that its product is of the same composition and quality of blended pomegranate juices such as plaintiff’s blended pomegranate juices, when in fact Welch’s has substituted much of the valuable and beneficial substance of pomegranate juice with economically and nutritionally inferior juices such as apple.”

POM Wonderful apparently alleges that Welch has violated the false advertising provisions of the Lanham Act and California Business Code and has engaged in unfair competition. According to its

complaint, POM Wonderful has “invested millions of dollars in researching the nutritional qualities and health benefits of pomegranate juice” and “largely created the burgeoning market for genuine pomegranate juice that exists today.” While Welch’s product, introduced in 2007 and marketed as “100 percent juice white grape pomegranate” with a depiction of pomegranates prominent on its label, POM Wonderful claims that “in fact, the primary ingredients are actually white-grape and apple juice.” *See Product Liability Law 360*, January 27, 2009.

#### **[6] Baby Food Company Faces New Class Action over Product Promotions and Labeling**

A Massachusetts woman has filed a putative class action in federal court against Gerber Products Co., alleging that its packaging misrepresented the quality of its Fruit Juice Snacks®, which “were virtually nothing more than candy with a touch of vitamin C.” *Wiley v. Gerber Prods. Co.*, No. 09-10099 (U.S. Dist. Ct., D. Mass, filed January 22, 2009). She seeks to represent a class of all consumers who purchased the product before Gerber changed its packaging to indicate that the product was a “treat” rather than a “snack.” Alleging violations of a Massachusetts consumer protection law, intentional and negligent misrepresentation, breach of express and implied warranties, and unjust enrichment, the plaintiff requests class certification, a declaration that Gerber’s acts and practices are unlawful, a permanent injunction, corrective advertising, and damages of \$25 per violation amounting to more than \$5 million, refunds, double or treble damages, attorney’s fees, and costs.

According to the complaint, package claims that the product was “[m]ade with real fruit juices and other all natural ingredients” along with images of



fruits and berries would lead reasonable consumers to “believe that they were buying a fruit snack for their child rather than one in which the two ingredients in greatest quantity were corn syrup and sugar.” The plaintiff alleges that the only fruit juice in the product was “white grape juice from concentrate,” and no white grapes appeared on the package. She also claims, “She was misled by the packaging of Fruit Juice Snacks as she trusted Gerber and did not double-check the ingredients listed in the label on the side, which was not visible to her in the store aisle. She bought the Gerber brand because she was seeking healthy snacks for her children as she is concerned about their health and is aware of the problems of childhood obesity and diabetes facing many young children due to poor eating habits.”

Similar litigation is pending against Gerber in California, where the Ninth Circuit Court of Appeals recently refused to rehear its decision which overturned a lower court’s dismissal of putative class claims that the company’s Fruit Juice Snacks® packaging misled consumers. Further details about that case, which was filed in June 2005, appear in issue 287 of this Update. *See Product Liability Law 360*, January 27, 2009.

## Legal Literature

### [7] William Marler, “Serving Up Trouble,” *Trial*, January 2009

Food litigator William Marler discusses the 2006 spinach *E. coli* outbreak in this article, which provides an overview of the issues that plaintiffs’ lawyers should consider when they represent clients allegedly sickened by contaminated fresh produce. Among the issues flagged are (i) which entities are liable under a strict products liability scheme; (ii) what effect insurance and indemnity agreements

will have on “the all-important questions of who is going to pay”; and (iii) whether the industry’s or individual corporation’s knowledge of the risk gives rise to the availability of punitive damages. The article concludes with a brief consideration of how the industry is regulated and why foodborne pathogens continue to sicken consumers. Marler argues that “the most expedient step in preventing another deadly foodborne illness outbreak like the 2006 Dole spinach outbreak is to push for greater corporate responsibility regarding the oversight of food producers. The lives of American consumers depend on it.”

## Other Developments

### [8] Organic Fertilizer Producer in California under Investigation

Federal agents reportedly raided a major organic fertilizer producer in Bakersfield, California, over concerns that it was using a synthetic nitrogen, which is banned from organic farms. Port Organic Products Ltd. is believed to produce up to half the liquid fertilizer used on the state’s organic farms. The raid follows by about a month press reports that state regulators quietly pulled the product of another fertilizer producer, with about a third of California’s market share, from the organic market in November 2007 for similar problems. Synthetic nitrogen is apparently cheaper than approved nitrogen sources such as ground-up fish and chicken feathers, and it is hard to detect.

No charges have been filed against Port Organic, and federal officials were reportedly not commenting on their investigation, but a county environmental health services department evidently imposed fines on the company for improperly



storing thousands of gallons of aqua ammonia, a common synthetic nitrogen source, in 2005 and 2007. Frustrated organic farmers and fertilizer producers are looking for ways to keep unscrupulous companies out of the market; some are experimenting with tests that can help show whether the nitrogen in a fertilizer came from a natural source. An organic farmers' trade group, California Certified Organic Farmers (CCOF), has adopted a liquid fertilizer approval [policy](#) that seeks "to ensure the highest level of verification and implementation of the National Organic Program."

Under the policy, CCOF will require that by August 15, 2009, all approved liquid fertilizers must undergo third party on-site inspections. "During these inspections, manufacturers must demonstrate compliance with NOP organic regulations pertaining to farm inputs or their products will be prohibited for use by CCOF operations." CCOF will require liquid fertilizer manufacturers to provide documentation to prove they are in compliance, including "Documentation verifying no synthetic nitrogen equipment, tanks, or supplies are within 100 yards of facility producing organic approved inputs at any time of the year."

Meanwhile, the state Senate is reportedly planning to conduct a hearing February 3, 2009, to find out why the state Department of Food and Agriculture was slow to respond and to consider legislative remedies. According to a news source, state inspectors lack the authority to examine organic fertilizer producer records to see whether they are purchasing large amounts of synthetic chemicals. In addition, fertilizer products are generally evaluated by an institute that is supported by the industry. Senate Food and Agriculture Committee Chair Dean Florez (D-Shafter) was

quoted as saying, "We're placing a tremendous amount of trust in the industry to police itself. I think that hasn't worked very well." See *The Sacramento Bee*, January 24, 2009; *Food Law Prof Blog*, January 28, 2009.

## Scientific / Technical Items

### [9] **Two Separate Reports of Mercury in High Fructose Corn Syrup Spur Calls for Regulation**

A recent study published in *Environmental Health* has allegedly identified mercury in nearly 100 percent of sampled commercial high fructose corn syrup (HFCS). [Renee Dufault, et al., "Mercury From Chlor-Alkali Plants: Measured Concentrations in Food Product Sugar," \*Environmental Health\*, January 2009.](#) The study authors apparently detected mercury in nine of 20 HFCS samples from 2005, concluding that "it may be necessary to account for this source of mercury in the diet of children and sensitive populations." In addition, the Institute for Agriculture and Trade Policy (IATP) has released a [report](#) that claims to have found mercury in one-third of 55 brand-name food and beverage products listing HFCS as the first or second ingredient.

Both publications were co-authored by the director of IATP's Food and Health Program, David Wallinga, who reportedly linked the contamination to mercury-grade caustic soda used to separate corn starch from corn kernels during HFCS production. He speculated that the use of mercury cells to create caustic soda could potentially lead to tainted HFCS. "Mercury is toxic in all its forms," stated Wallinga in a January 26, 2009, IATP press release. "Given how much high fructose corn syrup is consumed by chil-



dren, it could be a significant additional source of mercury never before considered. We are calling for immediate changes by industry and the FDA to help stop this avoidable mercury contamination of the food supply." See *FoodNavigator-USA.com*, January 28, 2009.

Meanwhile, the Corn Refiners Association (CRA) has challenged the *Environmental Health* study, claiming that the tests relied on outdated samples and information. "Our industry has used mercury-free versions of the two re-agents mentioned in the study, hydrochloric acid and caustic soda, for several years," CRA President Audrae Erickson was quoted as saying. "For more than 150 years, wet corn millers have been perfecting the process of refining corn to make safe ingredients for the American food supply." See *CRA Press Release*, January 26, 2009.

#### **[10] Study Claims BPA Remains in Body Longer Than Expected**

A recent study has claimed that the food packaging chemical bisphenol A (BPA) remains in the body longer than expected, raising questions about potential non-food sources. Richard Stahlhut, et al., "Bisphenol A Data in NHANES Suggest Longer Than Expected Half-Life, Substantial Non-Food Exposure, or Both," *Environmental Health Perspectives*, January 28, 2009. University of Rochester Medical Center researchers examined BPA levels in the urine of 1,469 adult participants in the National Health and Nutrition Examination Survey (NHANES) sponsored by the Centers for Disease Control and Prevention. The study authors found that instead of quickly metabolizing BPA, people who fasted for 24 hours still eliminated the chemical in their urine, leading to speculation that BPA might be stored in fat tissue or come from other sources such as tap water or household dust.

Previous research has allegedly linked higher BPA concentrations to ailments ranging from heart disease, type 2 diabetes and liver enzyme abnormalities, to developmental problems in infants and children. "The study reinforces the urgent need for stricter government oversight and regulation of this extremely toxic chemical," a Breast Cancer Fund spokesperson was quoted as saying. "It adds to what we already know about BPA, a chemical so powerful that at extremely low levels – parts per billion or even parts per trillion – it can cross the placenta and alter the mammary gland of the developing fetus, increasing breast cancer risk later in life." See *FoodNavigator-USA.com* and *Milwaukee Journal Sentinel*, January 28, 2009.

#### **[11] Packaging Chemicals May Affect Women's Fertility**

U.S. and Danish researchers have published an [article](#) that discusses a study conducted on a subset of the Danish National Birth Cohort of some 100,000 children and their mothers to explore whether bloodstream levels of perfluorooctane sulfonate (PFOS) and perfluorooctanoate (PFOA), chemicals used in food packaging, may affect fertility. Chunyuan Fei, et al., "Maternal Levels of Perfluorinated Chemicals and Subfecundity," *Human Reproduction*, January 28, 2009. Noting that these chemicals are also used in many other consumer products, "are persistent in the environment and have been detected in wildlife and humans around the world," the researchers found that higher maternal PFOA and PFOS levels were associated with a longer time to pregnancy. They conclude that exposure to these chemicals "may explain some of the fertility differences seen among different populations in developed countries."



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## LITIGATION UPDATE

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