

Food & Beverage

LITIGATION UPDATE

Issue 291 • February 6, 2009

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LITIGATION UPDATE

Legislation, Regulations and Standards White House

[1] President Revokes Bush-Era Executive Orders on Regulatory Planning and Review

President Barack Obama (D) has issued an executive [order](#) (E.O. 13497) revoking executive orders issued by his predecessor that, among other matters, gave the White House control over federal agency guidance documents and expanded the regulatory oversight authority of policy officers appointed by the president. Additional information about one of the revoked Bush-era executive orders appears in issues 199 and 213 of this Update.

The agency watchdog group OMB Watch issued a statement applauding the president's action, saying that his "decision to revoke E.O. 13422 so early in his administration sends a clear signal that he hopes to limit the role of politics in the regulatory process." E.O. 13422 required agencies to identify the specific market failure that justified agency rulemaking action and gave regulatory policy officers the right to initiate or stop rulemakings at any time without public input. OMB Watch characterized the Bush-era order as an attempt "to paralyze the regulatory process." See *OMB Watch Press Release* and *Federal Register*, February 4, 2009.

111th Congress

[2] Recalls Prompt Renewed Efforts to Reform Food Safety Laws

A number of bills have already been introduced in the new Congress to overhaul the food safety system in the United States. Driven by concerns that current laws are not providing adequate protection for consumers, House members and Senators have proposed the following measures:

- H.R. 185 – Introduced January 6, 2009, by Representative José Serrano (D-N.Y.), this bill would require that consumers be notified if food products are made with crops, livestock or poultry raised on land to which sewage sludge was applied. Referred to the House Committee on Energy and Commerce and the Committee on Agriculture.
- H.R. 759 – Introduced January 18, 2009, by Representative John Dingell (D-Mich.), this bill would require fees for facility registration, verification that food plants are operating under an HACCP plan, HHS guidance or regulations to establish science-based standards for conducting hazard analysis and implementing preventive controls, HHS biannual review of data to identify the most significant foodborne contaminants, and HHS establishment of minimum standards for safe production and harvest of produce. Referred to the House Committee on Energy and Commerce.



- H.R. 814, 815 – Re-introduced February 3, 2009, by Diana DeGette (D-Colo.), these bills would require that FDA and the USDA establish a product tracing system from farm to fork and give the federal government the authority to issue a mandatory recall of contaminated food, respectively. Both bills were referred to the Committee on Energy and Commerce and the Committee on Agriculture.

- H.R. 841 – Introduced February 3, 2009, by Representative Betty Sutton (D-Ohio), this bill would authorize the Secretary of Health and Human Services to order the mandatory recall of any product that the Food and Drug Administration regulates. Referred to the House Committee on Energy and Commerce.

- H.R. 975 – Introduced February 4, 2009, by Representative Rosa DeLauro (D-Conn.), this bill would create a new agency, the Food Safety Administration, “to protect the public health by preventing foodborne illness, ensuring the safety of food, improving research on contaminants leading to foodborne illness, and improving security of food from intentional contamination, and for other purposes.” Referred to the Committee on Energy and Commerce and the Committee on Agriculture.

- S. 92 – Introduced January 6, 2009, by Senator David Vitter (R-La.), this bill would require HHS to refuse admission of any imported seafood failing to meet Food, Drug, and Cosmetic Act requirements or any other federal food safety law. Referred to the Committee on Health, Education, Labor, and Pensions. See *U.S. Food Law Report*, February 2, 2009.

Meanwhile, Food and Drug Administration officials have defended their handling of the latest national *Salmonella* outbreak, noting that the agency’s investigation began in November 2008,

before there was a strong epidemiological link to a specific food. Peanut butter was apparently added to the short list of suspected food sources, following discussions with Minnesota health officials in early January 2009, and by January 9, federal inspectors focused on the Peanut Corp. of America’s Blakely, Georgia, peanut processing plant. Yet, lawmakers do not believe that the food safety system is functioning as it should. According to Agriculture Committee Chair Senator Tom Harkin (D-Iowa), “To say that food safety in this country is a patchwork system is giving it too much credit. It is a hit or miss gamble, and that is truly frightening. It’s time to find the gaps in the system and remedy them.” See *Associated Press*, February 9, 2009.

The New York Times recently published an article re-examining proposals to irradiate foods. While the federal government says that such technology can safely destroy bacteria in processed foods, food manufacturers apparently complain about its expense, and consumer groups question its long-term safety. While the technology can improve the safety of products such as fresh produce and ground beef, it does not work well on products with high fat or oil content, like peanut butter, because these products can turn rancid under radiation. See *The New York Times*, February 2, 2009.

Canada

[3] Quebec Signals Harsher Penalties for Youth Marketing Law Violations

Quebec courts have reportedly fined a snack cake manufacturer CAN\$44,000 for violating the province’s Consumer Protection Act, which forbids marketing to children younger than age 13. Saputo Inc. pleaded guilty to 22 charges resulting from a



complaint filed by anti-obesity advocate Coalition Poids and the Union des Consommateurs. The groups claimed that Saputo used a cartoon gorilla to promote its product in day care centers, hailing the decision as “a victory for children.” “The World Health Organization has identified junk-food advertising as one of the top five causes of the current obesity epidemic,” Coalition Poids Director Suzie Pellerin was quoted as saying.

Meanwhile, Quebec’s consumer protection agency has apparently verified similar complaints pending against Burger King and General Mills. Media sources have noted that the successful prosecution of Saputo could signal a shift in how Quebec enforces its unique marketing code. The last court case testing the Consumer Protection Act occurred in 1989, when a toy manufacturer lost a legal challenge before the Canadian Supreme Court. *See The National Post*, January 27, 2009.

United Kingdom (UK)

[4] House of Lords Creates Subcommittee on Nanotechnology and Food

The House of Lords Science & Technology Committee has created a subcommittee to investigate the use of nanotechnology in the food sector. Led by Lord John Richard Krebs, the inquiry will focus on food products, additives and supplements; food contact packaging; food processing; animal feed; pesticides and fertilizers; and food containers and utensils. “We intend to highlight those areas where our understanding of the use of nanotechnologies in food needs the most urgent attention, allowing us to take action to ensure appropriate steps are taken,” Krebs was quoted as saying. *See Foodbev.com*, February 4, 2009.

The subcommittee has also issued a [call for evidence](#) seeking input on a range of issues involving (i) the state of the science and its current use in the food sector; (ii) health and safety; (iii) regulatory framework; and (iv) public engagement and consumer information. The deadline for written submissions is March 13, 2009. *See House of Lords Press Release*, February 3, 2009;

Litigation

[5] Punitive Damages Added to Tainted Peanut Butter Claims; Criminal Investigation Launched

Food litigator William Marler has reportedly filed an amended complaint on behalf of a Vermont couple whose son was allegedly sickened and hospitalized following ingestion of a product containing *Salmonella*-tainted peanut butter. *Meunier v. Peanut Corp. of Am.*, No. 1:09-CV-12 (U.S. Dist. Ct., MD. Ga., Albany Div., first amended complaint filed January 28, 2009). The plaintiffs are now seeking punitive damages for “willful concealment of known defects.” The amendment follows the release of a Food and Drug Administration (FDA) inspection report showing that the Peanut Corp. of America (PCA) shipped products that tested positive for *Salmonella* after the company had the products retested and received negative test results.

Marler was quoted as saying, “In 15 years of litigating food cases, this is one of the worst examples of corporate irresponsibility I have ever seen. Not only does the plant appear to have atrocious practices, but the product that seems to have repeatedly tested positive for *Salmonella* was shipped to hospitals, nursing homes and schools regardless.” *See Product Liability Law 360*, January 30, 2009.

Meanwhile, FDA officials have reportedly



confirmed that a criminal investigation of PCA has been launched in coordination with the Department of Justice. No other details have apparently been released, but PCA posted a statement on its Web site claiming that it “uses only two highly reputable labs for product testing,” and “categorically denies any allegations that the Company sought favorable results from any lab in order to ship its products.” See *CQ Healthbeat News*, January 30, 2009.

In a related development, PCA’s insurer has reportedly filed a lawsuit in a Virginia federal court seeking a ruling on whether the policy requires it to defend or indemnify the company. *Hartford Cas. Ins. Co. v. Peanut Corp. of Am.*, No. n/a (U.S. Dist. Ct., W.D. Va., filed February 3, 2009). According to Hartford spokesperson David Snowden, “We are seeking a declaratory judgment from the court to determine the extent of our obligation to Peanut Corp. of America. We believe this will help clarify the claims process.” The insurance company has asked the court to examine “exclusions and limitations” in its policy with PCA and decide whether they “exclude or nullify coverage . . . for one or more of the *Salmonella* claims.” See *The Atlanta Journal-Constitution*, February 5, 2009.

Echoing PCA statements that its Georgia plant was regularly inspected and found to “meet or exceed” audit expectations, Kellogg is reportedly reviewing how it qualifies its independent auditors after the food-safety auditor it hired gave “superior” ratings to PCA’s Georgia facility during inspections in 2007 and 2008. Kellogg apparently requires that its ingredient suppliers undergo audits, which check for compliance with good manufacturing, sanitation and other practices. Kellogg has been named as a defendant in the *Meunier* litigation. A company spokesperson reportedly said in an e-mail, “had we known of the issues cited (by the FDA), we would

have discontinued the relationship with PCA.” See *USA Today*, February 5, 2009.

News accounts have quoted PCA employees who spoke of sanitation, maintenance and infestation issues. According to one cook at the Georgia plant, “I never ate the peanut butter, and I wouldn’t allow my kids to eat it.” The employees reported wet conditions inside after it rained, as well as regular sightings of rodents and cockroaches. Texas officials have reportedly discovered that PCA owned and operated a plant in that state, and while it conducted business uninspected and unlicensed for four years, no *Salmonella* contamination has been found on the premises. See *Chicago Tribune* and *Houston Chronicle*, February 3, 2009.

During a hearing on the outbreak before the Senate Agriculture Committee, Senator Patrick Leahy (D-Vt.) reportedly called for “some people to go to jail,” observing that fines do not appear to be working. The U.S. Department of Agriculture (USDA) has, in the meantime, suspended PCA from participating in government contract programs for at least one year, and new Secretary of Agriculture Tom Vilsack has apparently removed PCA President Stewart Parnell from the USDA’s Peanut Standards Board. See *Seattle Post-Intelligencer*, February 5, 2009.

[6] Class Action to Proceed for “Natural” Pasta Sauce Containing HFCS

A federal court has refused to dismiss putative class claims filed under California’s consumer protection law against a company that advertises its pasta sauce, which contains high-fructose corn syrup (HFCS), as “all natural.” *Lockwood v. ConAgra Foods, Inc.*, No. 08-04151 (U.S. Dist. Ct., N.D. California, decided February 3, 2009). The



defendant sought to dismiss the claims on preemption grounds and called for the class allegations to be stricken “because plaintiffs cannot prove reliance on a class-wide basis.”

According to the court, the federal Nutrition Labeling and Education Act (NLEA) does not apply to the “complaint as currently pled. Plaintiffs do not allege that defendant’s pasta sauce contains artificial flavoring, coloring or a chemical preservative; rather, they allege that the ‘high fructose corn syrup’ is not produced by a natural process and therefore the pasta sauce is not ‘all natural.’” The court also found that the claims were not impliedly preempted because “Congress has explicitly stated that it *does not* intend to occupy the field of food and beverage nutritional labeling; instead, it permits states to regulate subject matters covered by the NLEA and its regulations provided that such state laws do not fall within the FDCA’s [Food, Drug, and Cosmetic Act’s] express preemption provisions.” The court noted that the Food and Drug Administration’s refusal to adopt any regulations about the use of the term “natural” also suggested an intent not to occupy the field.

The court denied defendant’s motion to strike the class allegations, because it could not determine on the pleadings whether a classwide inference of reliance is appropriate in this case.

[7] **Meat Processors Enter Dispute over Responsibility for *E. Coli* Outbreak**

Nebraska Beef, Ltd. has filed a lawsuit in federal court seeking a declaration that it was not responsible for the *E. coli* contamination that led to the recall of nearly 7 million pounds of beef in 2008. *Nebraska Beef, Ltd. v. Meyer Foods Holdings, L.L.C.*,

No. 09-00043 (U.S. Dist. Ct., Nebraska, filed January 30, 2009). According to the complaint, the defendant provided the meat subject to the recall to Nebraska Beef for processing and shipping. When contaminants were found, the defendant informed Nebraska Beef that legal claims were being made against it and demanded indemnification from Nebraska Beef. Stating that it “expressly denies the Contamination originated at its processing plant; that it was negligent in its processing or handling of any cattle or product; or that it breached any of the terms of its agreement(s) with Meyer Natural Foods,” Nebraska Beef, which has also been sued over the incident, requests a judicial declaration as to “its rights and liabilities, if any, with respect to Meyer Foods Holdings, L.L.C.,” and damages exceeding \$75,000.

[8] **Canadian Meat Producer Agrees to Settle *Listeriosis* Claims**

Maple Leaf Foods Inc. has agreed to pay \$25 million to settle class claims filed after ready-to-eat meats tainted with *Listeria monocytogenes* allegedly sickened dozens of Canadians and caused 20 deaths in 2008. The settlement, which must be approved by courts in several provinces, would provide an additional \$2 million if needed to fully compensate those filing claims by the July 31, 2009, deadline. The company’s [Web site](#) explains the settlement’s terms and notes what those objecting to it can do. Approval hearings will be conducted on March 5, 10 and 20 in Ontario, Saskatchewan and Quebec, respectively.



[9] Dairy Executive Appeals Life Sentence Imposed After Tainted Milk Guilty Plea

According to a news source, former Sanlu Group chairwoman Tian Wenhua has appealed the life sentence she received after she entered a guilty plea to charges arising out of the melamine-tainted milk scandal in China that sickened hundreds of thousands of children and led to a number of deaths. Tian's lawyer reportedly contends that his client did not make the decision to sell the tainted milk and that the Shijiazhuang Intermediate People's Court had insufficient evidence to support a conviction for manufacturing and selling fake or substandard products. The appeal will be heard by the Higher People's Court of Hebei Province. *See Jurist*, February 1, 2009.

Other Developments

[10] CSPI Urges Retailers to Use Loyalty Card Data to Notify Customers About Recalls

The Center for Science in the Public Interest (CSPI) has sent [letters](#) to retailers, calling on them to use their membership and bonus card data, which track customer purchases, to provide targeted warnings when tainted foods are subject to recall. Noting that some companies with bonus card programs already issue food safety alerts and, in fact, notified their affected customers by phone and mail "in response to the peanut recall," CSPI expressed its hope that "your company will do its part to protect your customers' health and help restore their confidence in the food supply."

According to a CSPI staff attorney, "It would be outrageous if some of the deaths in this latest [contaminated peanut butter] outbreak could have been prevented had a supermarket just used the

phone numbers and addresses in its database to notify its customers. It's not enough just to take the tainted product off the supermarket shelf. Wherever possible, supermarkets should reach out to their customers and help get contaminated food products out of their homes." *See CSPI Press Release*, February 3, 2009.

Media Coverage

[11] Sofía Baliño, "Fishing with the Stars," *Food & Water Watch Blog*, February 2, 2009

This blog post examines a fish diet trend currently sweeping Hollywood, raising questions about the safety and sustainability of certain seafood selections. According to *Food & Water Watch*, actor Jeremy Piven became "the rumored victim of mercury poisoning" after eating sushi twice daily, while Madonna has pledged to eat more salmon and Angela Jolie earlier lauded her post-pregnancy diet of organic seafood. "You might remember that, at the time, there were no standards in the U.S. for organic seafood," opines the blog, which describes proposed rules put forth by the National Organic Standards Board as "a fraud" and current EU standards as "poorly designed and incompatible with the concept of organic food."

Food & Water Watch also urges consumers to choose wild salmon over farmed, claiming that "Studies have shown that wild salmon possess lower PCB levels than farmed salmon, as the latter receive feed with greater levels of contamination." "The PCBs found in farmed salmon can pose a health risk to both adults and children, as can the pesticides and antibiotics used in fish farms," the author concludes.



Scientific/Technical Items

[12] Study Claims Consumption of Smoked or Cured Meats Correlates to Increased Leukemia Risk

A recent Harvard School of Public Health study has claimed that eating smoked or cured meats could increase the risk of leukemia in children and young adults. Chen-yu Liu, et al., "Cured meat, vegetables and bean-curd foods in relation to childhood acute leukemia risk: A population case-control study," *BMC Cancer* (2009). Researchers analyzed the dietary habits of 515 participants between age 2 and 20 in Taiwan, finding that those who consumed smoked or cured meats more than once a week were more likely to develop acute leukemia. In addition, the study allegedly confirmed that children who regularly ate vegetables and tofu showed a reduced risk for leukemia.

The authors speculated that nitrites added during the curing and smoking process could play a role in cancer, but stressed a need for further causation studies to discover a mechanism. "These are some very active compounds in your body," stated Harvard Professor of Medicine David Christiani. "Have you ever heard of the hot-dog headache? That's what you get after eating too many hotdogs." See *Physicians Committee for Responsible Medicine*, January 30, 2009; *The Harvard Crimson*, February 6, 2009.



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Food & Beverage Litigation Update is distributed by
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