

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

HHS Report Finds Source of Many Foods Untraceable

The U.S. Department of Health and Human Services (HHS) has reportedly commissioned a study showing that one-quarter of food facilities contacted by federal health investigators were unaware of laws requiring them to trace their suppliers. Authored by HHS Inspector General Daniel Levinson, the report also found that despite federal regulations, most food manufacturers and distributors were unable to identify the suppliers or recipients of their products. Levinson has apparently recommended that the Food and Drug Administration (FDA) seek greater authority from Congress to require and ensure that food facilities maintain adequate records.

According to *The New York Times*, which obtained a copy of the report expected to be released at a congressional hearing next Thursday, the department's findings may help explain why many small food makers continue to issue peanut-related recalls more than two months after the Peanut Corp. of America was implicated in a *Salmonella* outbreak linked to nine deaths and 691 cases of illness. See *The New York Times*, March 26, 2009.

In a related development, a [report](#) published by the Trust for America's Health (TFAH) and the Robert Wood Johnson Foundation (RWJF) has urged the Obama administration to appoint a senior food safety official within FDA as a first step toward safeguarding the U.S. food supply. "It costs us about \$44 billion annually in medical care and lost productivity, so the stakes are really high," stated an RWJF spokesperson who noted that approximately 76 million people get sick from foodborne illnesses each year. See *Yahoo News*, March 25, 2009.

Meanwhile, the Grocery Manufacturers Association (GMA) is reportedly leading the fight against proposals to charge annual inspection fees regarding food safety. While GMA apparently supports President Barack Obama's new Food Safety Working Group, the association "would support sensible user fees that help to improve food safety while also providing our industry with some benefits. FDA's food safety mission should be funded primarily by Congress through appropriate funds," according to a GMA representative. See *Foodnavigator-usa.com*, March 25, 2009.

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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CDC Calls for Reductions in Sodium Intake

A new Centers for Disease Control and Prevention (CDC) [report](#) has determined that nearly 70 percent of the U.S. adult population should limit sodium intake to 1,500 mg/day.

According to the CDC's March 27, 2009, *MMWR Weekly*, the federal government recommended in 2005 that "all persons with hypertension, all middle-aged and older adults, and all blacks" should limit their sodium intake to 1,500 mg/day, and 69.2 percent of adults met these criteria in 2005-2006. The limit for adults without these characteristics remains at 2,300 mg/day, or about one teaspoon.

Because CDC based its estimate of those in the group that should consume less salt on NHANES data, which do not include institutionalized individuals, the CDC cautions that their inclusion "likely would increase the percentage of the population for whom the recommended 1,500 mg/day sodium limit is applicable." CDC notes, "Most of the sodium we eat comes from packaged, processed, store-bought, and restaurant foods. Only about 5% comes from salt added during cooking and about 6% comes from being added at the table. You can find out how much sodium you are eating by checking the labels on food products and adding up the milligrams of sodium. If at a restaurant, ask for the nutritional information facts that include sodium."

Meanwhile, U.S. doctors are reportedly puzzled about an apparent increase in the number of children with kidney stones; some blame the problem on consumption of salty foods like cheeseburgers and fries. The director of a bone and mineral disorders clinic at Children's Mercy Hospital in Kansas City, Missouri, is apparently conducting research to determine if the increasing incidence is real or just an artifact of better detection methods. According to a news source, Uri Alon is also studying whether improvements to nutrition can prevent the problem. Evidently, diets high in salt can result in excess calcium in the urine, and without adequate hydration, children can be at risk of developing the painful condition. *See Associated Press*, March 26, 2009.

GAO Claims Seafood Fraud Fostered by Federal Inefficiency

A new U.S. Government Accountability Office (GAO) [report](#) claims that a lack of cooperation among federal agencies has contributed to an increase in seafood supply chain fraud. GAO faults Customs and Border Protection, the National Marine Fisheries Service and the Food and Drug Administration for failing to agree on key roles and responsibilities, identify a common goal, and establish joint strategies. "As a result, the agencies have not taken advantage of opportunities to share information that could benefit each agency's efforts to detect and prevent seafood fraud, nor have they identified similar and sometimes overlapping activities that could be better coordinated to use limited resources more efficiently," the report states. *See foodproductiondaily.com*, March 25, 2009.

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National Organic Standards Board Announces Public Meeting to Discuss Policy Revisions

The U.S. Department of Agriculture's National Organic Standards Board (NOSB) has announced a public meeting slated for May 4-6, 2009, at The Washington Plaza Hotel in Washington, D.C. NOSB committees will present recommendations to the full board for a vote concerning (i) the use or prohibition of 13 petitioned substances for the National List of Allowed and Prohibited Substances; (ii) revisions to the NOSB policy and procedures manual and the Guide for New NOSB Members; (iii) guidance for accredited certifying agents regarding the use of the 100 percent label claim on processed products and the strengthening of the on-farm implementation of the principals of biodiversity and conservatism; (iv) guidance to the National Organic Program (NOP) regarding compliance with the Peer Review requirements of the Organic Foods Production Act and the organic regulations; (v) guidance on standards for the management of bivalves; and (vi) a change to the definition of nonagricultural substances. The NOSB will also receive an update from the NOP and will address reports about committee work plans and discussion items. *See Federal Register*, March 20, 2009.

LITIGATION

Forfeited Baby Formula Ruled Unfit for Sale

The Seventh Circuit Court of Appeals has upheld a district court decision refusing to allow the sale of baby formula seized by the government in a civil forfeiture proceeding. [*U.S. v. Approx. 81,454 Cans of Baby Formula, No. 08-2637 \(7th Cir., decided March 25, 2009\)*](#). Federal agents seized more than 80,000 cans of powdered baby formula in February 2007 on suspicion that they had been stolen from retail stores. According to the court, many of the cans still had retail-store markings or evidence of altered labels, including the products' "use by" dates. The court distinguished this case from one involving salad dressing, decided earlier in March, that had altered "best when purchased by" dates. Details about that case appear in issue 296 of this Update. Judge Richard Posner authored the opinions in both cases.

A "use by" date on baby formula is mandatory under federal law; selling products after that date involves retesting the formula to demonstrate that it continues to meet nutritional requirements. The defendant in the government's forfeiture proceedings sought the court's permission to sell the baby formula because the "use by" dates were approaching or were already past. In asset forfeiture actions, the court may order the sale of all or part of the property sought to be forfeited if it is perishable or at risk of "deterioration, decay, or injury by being detained in custody pending action." The district court denied the defendant's motion on the ground that the baby formula might endanger the babies who consumed it.

The appeals court agreed, citing evidence "that one can of baby formula inspected by the government had been found to be mislabeled as to contents, which could endanger babies who have food allergies, and also that that solvents used by the

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appellant in changing the labels, along with the generally unhygienic condition of the warehouse in which the cans were delabeled and relabeled, created a threat of contamination of the contents.”

Court Refuses Remand in GM Rice Litigation

A federal court in Missouri has determined that Texas plaintiffs alleging injury from the contamination of conventional rice crops with genetically modified (GM) rice had no reasonable basis to join non-diverse defendants and thus denied their motion to remand to state court. *In re Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., E. Div., decided March 24, 2009). The 34 cases at issue were transferred from Texas to the Missouri court along with some 200 others from four other states as part of a multidistrict litigation proceeding. Rice farmers allege that the GM rice contamination adversely affected the global market for their products.

The Texas plaintiffs sued the GM seed rice company and its affiliates, citizens of states other than Texas, and also sued a Texas rice grower and his affiliated companies alleging that he negligently grew the GM rice and contaminated neighboring fields or sold them GM seed rice. Plaintiffs can prevent removal to federal court by joining non-diverse defendants.

Defendants removed the cases to federal court and opposed the motion to remand, arguing that the Texas defendants had been fraudulently joined to defeat diversity jurisdiction. The court agreed, finding no factual basis for the allegation that the Texas defendants ever tested or grew the GM seed that allegedly caused plaintiffs’ losses. According to the court, if the Texas defendants did plant GM seed, they did so inadvertently or used a GM seed that had been approved for human consumption and was not part of the plaintiffs’ case.

Court Orders Banana-Plantation Litigants to Address Potential Termination of Litigation

A California judge has reportedly ordered the parties to litigation over the exposure of banana-plantation workers to a pesticide that allegedly caused their sterility to explain why two lawsuits should not be dismissed as a sanction for the alleged misconduct of the plaintiffs and their lawyers. *Mejia v. Dole*, No. BC340049 (Cal. Super. Ct., Los Angeles County). In 2008, a jury awarded six Nicaraguan workers \$5.8 million in damages in the first of several such cases to be tried in the United States; the court reduced the verdict by half, and the case is on appeal.

Thereafter, the defendant began filing the depositions of Nicaraguan witnesses who claimed that (i) some of the plaintiffs had never worked on banana farms, (ii) work certificates and lab reports had been falsified, and (iii) some of the plaintiffs have children, despite their sterility claims. The court reportedly stayed the personal-injury lawsuits and ordered a separate trial on the fraud charges, but, in March 2009, decided not to conduct that trial because of concerns over witness safety and orders to “beat” and “club” defendant’s investigators in Nicaragua.

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The court has also apparently allowed depositions to be taken of the plaintiffs' law firm employees, citing the crime-fraud exception to attorney-client privilege. Law Professor Lester Brickman remarked on the rarity of sanctions such as termination of litigation for attorney misconduct and law firm depositions, saying this could indicate "the court thought the lawyers had a significant role in creating this scheme." See *Law.com*, March 24, 2009.

Chinese Court Accepts Civil Lawsuit in Melamine-Tainted Milk Scandal; Criminal Convictions Upheld

A Chinese court in Shijiazhuang has reportedly agreed to accept a lawsuit filed by the parents of a child allegedly affected by the 2007 melamine contamination of milk and infant formula. Until this week, no court had accepted the litigation, a first step in securing compensation outside the administrative procedures established by the government. According to a news source, as many as 600 families refused to accept the compensation offers from the 22 dairy companies that agreed to provide payments ranging from US\$290 to US\$29,000. The families apparently believed the amounts were not enough to cover emotional suffering and other losses.

The Beijing lawyer who filed the case that has been accepted reportedly indicated that it involves an 11-month-old girl who became sick from infant formula manufactured by the now-bankrupt Sanlu Group. The family is seeking about US\$4,500, the smallest of the six lawsuits the lawyer has filed against milk producers. He was quoted as saying, "As long as we can prove that the children drank Sanlu's products, then there is no question we will win. The only question really is how much compensation will be awarded."

In a related development, an intermediate appellate court has apparently upheld the sentences imposed on individuals found responsible for producing and selling the tainted milk. The former chair of the Sanlu Group, sentenced to life in prison, lost her appeal. Death sentences against two men have been upheld as has another life sentence, against a middle man who supplied the melamine to the dairies. See *Jurist Legal News & Research*, March 25, 2009; *The New York Times*, *BBC News*, March 26, 2009.

LEGAL LITERATURE

Rudd Center Director Co-Authors Trio of Food Policy Papers

Recently published articles co-authored by Yale University's Rudd Center for Food Policy and Obesity Director Kelly Brownell explore various aspects of addressing obesity. They include:

- Kelly Brownell & Kenneth Warner, "The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?," *The Milbank Quarterly*, 2009. This article discusses the "Frank Statement" that cigarette manufacturers published in the 1950s assuring smokers that the industry "always will cooperate closely with those whose task it is to safeguard the public's health." The authors call

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this “a charade, the first step in a concerted, half-century-long campaign to mislead Americans about the catastrophic effects of smoking and to avoid public policy that might damage sales.” They examine the food industry to find purported parallels.

They claim that food companies appear to have a similar strategy, focusing on “personal responsibility as the cause of the nation’s unhealthy diet”; raising “fears that government action usurps personal freedom”; vilifying “critics with totalitarian language, characterizing them as food police”; criticizing “studies that hurt industry as ‘junk science’”; emphasizing “physical activity over diet”; stating “there are no good or bad foods; hence no food or food type (soft drinks, fast foods, etc.) should be targeted for change”; and planting “doubt when concerns are raised about the industry.” The authors call for the food industry to make changes and “behave in honorable, health-promoting ways.”

The article concludes by warning food companies that if they do not change, public opinion could turn against them. “Litigation could be one source of shifting opinion, with addiction potentially a looming target. Whether food companies are ever found responsible for health damages may be less important than the disclosure of internal documents generated by the discovery phase of the legal process. Tobacco was seriously wounded when its tactics became public knowledge.”

A spokesperson for the American Dietetic Association (ADA) rejected the comparison made in the article, observing, “There is no way to incorporate cigarettes into a healthy lifestyle, while it is not only possible but necessary to incorporate food into your lifestyle in a healthy way.” ADA president Martin Yadrick agreed that checks need to be put in place to ensure that industry-funded scientific research is sound and called for fixing public health issues by focusing on “synergy,” noting that recent changes in food labeling and *trans* fats came about “because everyone worked together.” See *Foodproductiondaily.com*, March 20, 2009.

- Jennifer Pomeranz, Stephen Teret, Stephen Sugarman, Lainie Rutkow & Kelly Brownell, “Innovative Legal Approaches to Address Obesity,” *The Milbank Quarterly*, 2009. According to this article, “Legal solutions are immediately available to the government to address obesity and should be considered at the federal, state, and local levels.” Among the legal approaches explored are marketing regulations and compelled advertising; regulations directed toward what foods can be placed prominently in retail establishments; selective ingredient taxes; per-capita limits on the amount of product a minor could purchase; zoning restrictions on the location and number of certain retail establishments; and litigation based on new scientific studies purportedly showing the addictive quality of certain food ingredients.

The authors call for innovative regulation such as imposing fees, fines or penalties on companies that fail to reach outcome goals such as reducing obesity rates among children in a specific region by a specific percent. Acknowledging that working out the regulatory details could be difficult, the authors contend that reframing the issue by placing responsibility for the problem of obesity on “those large companies that profit from these products [like junk food]” would make reaching agreement on the particulars possible. The article suggests that lawsuits

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based on nuisance law could also be a viable public health strategy. The authors conclude, "It is important for legal scholars to devise innovative strategies to address obesity from new perspectives. The great potential for the law to rectify the status quo has yet to be fully explored."

- Jennifer Harris, Jennifer Pomeranz, Tim Lobstein & Kelly Brownell, "A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done," *Annual Review of Health*, 2009. Starting with the premise that food marketing is a contributing factor in rising rates of childhood obesity, this article contends that "food companies invest heavily to increase sales and create brand loyalty among young consumers." The authors are critical of industry self-regulation and, among other matters, call for a range of solutions from company promises and industry performance indicators to local, national and international regulation and private litigation to affect youth marketing practices.

OTHER DEVELOPMENTS

Strategic Alliance Promotes Definition of Healthful Food

The Prevention Institute's Strategic Alliance Healthy Food and Activity Environments has released a sign-on letter titled "[Setting the Record Straight: Nutritionists Define Healthful Food](#)," which asks health and nutrition professionals to adopt the institute's definition of wholesome food. The letter states that healthy food "is not limited to the nutrients that a food contains," but also "comes from a food system where food is produced, processed, transported, and marketed in ways that are environmentally sound, sustainable and just." "Many large food and beverage manufacturers distract the public from the dangers of the food system by deceptively marketing products as 'green' or 'natural' and by using misleading health claims that allow highly processed foods to masquerade as healthful," opines Strategic Alliance, further criticizing the food system for its "heavy reliance on fossil fuels, pesticides and fertilizers, antibiotics, and intensive farming practices."

New York University Professor Marion Nestle recently lauded this endorsement effort on her Web log *Food Politics*, where she favorably compares the healthful food definition to the "unnecessary" scoring systems promoted by food marketers. Nestle agrees with Strategic Alliance's three principles dictating that healthful food should be "(1) wholesome, (2) produced in ways that are good for people, animals, and natural resources, and (3) available, accessible, and affordable." In addition, she notes that Strategic Alliance describes wholesome foods as those that are "minimally processed, full of naturally occurring nutrients, produced without added hormones or antibiotics, and processed without artificial colors, flavors, or unnecessary preservatives." "I wonder how many of those highly processed products in supermarket center aisles can meet this definition?," Nestle concludes. See *Food Politics*, March 26, 2009.

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MEDIA COVERAGE

Andrew Martin, "Is a Food Revolution Now in Season?," *The New York Times*, March 22, 2009

"After being largely ignored for years by Washington, advocates of organic and locally grown food have found a receptive ear in the White House, which has vowed to encourage a more nutritious and sustainable food supply," claims this article exploring the nation's sustainable-food movement. The author writes that at the heart of the movement "is a belief that America has become efficient at producing cheap, abundant food that profits corporations and agribusiness, but is unhealthy and bad for the environment."

Martin cites conventional agriculture producers who argue that organic farming cannot provide enough food because the yields tend to be lower than those of crops grown with chemical fertilizer. "We think there's a place for organic, but don't think we can feed ourselves and the world with organic," Rick Tolman, chief executive of the National Corn Growers Association, was quoted as saying. "It's not as productive, more labor-intensive and tends to be more expensive."

The article also argues that although the new agriculture secretary, Tom Vilsack, has been "lionized by America's food glitterati," his greatest challenge will be obtaining congressional approval for any major changes in farm policy. According to Martin, "The sustainable-food crowd isn't alone in its love fest with the Obama administration and Mr. Vilsack. Food-safety activists have praised Mr. Vilsack's remarks about creating a single food-safety agency, and nutrition advocates are enthused about his comments on school lunches and health care reform."

Clara Jeffery and Monika Bauerlein, "Editor's Note: Want to Fix the Country? Fix Food," *Smart Growth (Mother Jones)*, March/April 2009

Smart Growth, a special report issued by *Mother Jones* magazine, this month featured an editor's note focusing on the recent Senate confirmation hearing of Agriculture Secretary Tom Vilsack and the need for a sustained dialogue about the U.S. food system. According to the article, the confirmation hearings included remarks by Senator Pat Roberts (R-Kan.) that the editors translated to mean, "Organic farmers = elitists = liberals who are supported by their uppity stockbroker wives. Plus, their produce is worm ridden." "It's that kind of cliché and recrimination that passes for a national conversation about agriculture," opines the article, which similarly lambastes the "foodie movement" for perpetuating a "two-class system: pesticide-laden, processed, packaged, irradiated slop for the many, artisanal sheep's milk cheese for a few."

The editorial recommends drawing on "both ancient practices (like polyculture) and modern farming" to solve resource conflicts and promote healthier, more sustainable eating habits among the American public. The article also questions the investment of some high-ranking Cabinet members in ethanol-based fuel solutions: "Some leaders, including Obama's energy secretary, Steven Chu, still hold out hope for cellulosic ethanol, but that dream might be just one last Hail Mary pass to an industry built around refining, selling, and burning a liquid fuel."

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Christine Haughney, "When Economy Sours, Tootsie Rolls Soothe Souls," *The New York Times*, March 24, 2009

The recession seems to have a sweet tooth, according to this *New York Times* reporter who discovered that many big candy makers are enjoying rising sales and surprising profits despite a sour economy. Haughney reports that Cadbury had a 30 percent rise in profits for 2008, Nestlé's profits grew by 10.9 percent and Hershey, which struggled for much of last year, saw profits jump by 8.5 percent in the fourth quarter. Lindt & Sprüngli, which offers more expensive products, also reportedly expects chocolate sales to remain strong through mainstream retailers like Wal-Mart and Target, even though it plans to close some of its luxury retail stores this year.

Theories vary as to exactly why candy sales are sweet, Haughney writes, but include the notion that candy is relatively inexpensive and "seems to conjure memories of times before bank collapses and government bailouts." She writes that store owners and manufacturers find that the hottest-selling candies these days are the cheaper, old-fashioned ones.

Haughney quotes Peter Liebholt, chairman of the Smithsonian Institution's work and industry division, as saying. "Candy companies are relatively recession-proof. During the Great Depression, candy companies stayed in business."

SCIENTIFIC/TECHNICAL ITEMS

Study Claims Eating Red Meat May Affect Longevity

A recent National Cancer Institute (NCI) study has concluded that consumption of red and processed meat modestly raises the risk of death from all causes, including heart disease and cancer. [Rashmi Sinha, et al., "Meat Intake and Mortality: A Prospective Study of Over Half a Million People," *Archives of Internal Medicine*, March 23, 2009.](#) In one of the largest studies of its kind, NCI researchers examined dietary and lifestyle questionnaires submitted by more than 500,000 people ages 50 to 71. During 10 follow-up years in which 47,976 men and 23,276 women died, the group that reported eating the most red meat had the higher risk of death overall, death from heart disease and death from cancer, than the people who ate the least amount of red meat.

"Red and processed meat intakes were associated with modest increases in total mortality, cancer mortality, and cardiovascular disease mortality," the study concludes. "In contrast, high white meat intake and a low-risk meat diet was associated with a small decrease in total cancer mortality. These results complement the recommendations by the American Institute for Cancer Research and the World Cancer Research Fund to reduce red and processed meat intake to decrease cancer incidence."

Barry Popkin, a nutrition expert and economist at the University of North Carolina, called the study "excellent" in an accompanying editorial. The meat industry,

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however, denounced the study as flawed. "Meat products are part of a healthy, balanced diet and studies show they actually provide a sense of satisfaction and fullness that can help with weight control. Proper body weight contributes to good health overall," said an American Meat Institute executive in published reports. See *Reuters.com* and *Foodnavigator-usa.com*, March 24, 2009.

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

