

## FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### USDA Retains Bush Administration Position on GM Sugar Beets

According to a news source, the U.S. Department of Agriculture (USDA) has elected not to change its position on the deregulation of genetically modified (GM) sugar beets. The Center for Food Safety and Earthjustice apparently requested that USDA reconsider its deregulation decision pertaining to Monsanto's Roundup Ready® sugar beets, and the agency's lawyers apparently chose to "stand by" its decision.

Center for Food Safety lawyer Zelig Golden was quoted as saying, "This certainly is not the 'change' the Obama administration promised. We're very disappointed that the USDA and Secretary [Tom] Vilsack did not take this important opportunity to reverse the Bush administration's flawed position on [genetically modified organisms], and take steps to safeguard public health, environment and farmers' livelihoods." Critics of GM crops are particularly concerned about the contamination of non-GM and organic crops. See *Foodnavigator-USA.com*, April 1, 2009.

### USDA Solicits Nominations for Advisory Committee on Biotechnology, Agriculture

The Agricultural Research Service has requested nominations for individuals to serve two-year terms on the U.S. Department of Agriculture (USDA) Advisory Committee on Biotechnology and 21<sup>st</sup> Century Agriculture. The committee is charged with examining the long-term impacts of biotechnology on the U.S. food and agriculture system. A minimum of 12 committee slots need to be filled, including the chairperson's. Written nominations must be received by fax or post-marked on or before April 29, 2009. See *Federal Register*, March 30, 2009.

### USDA Establishes RSS Feeds, Twitter Accounts in Effort to Broaden Audience

The U.S. Department of Agriculture (USDA) recently updated its news information services by establishing [RSS feeds](#) and Twitter accounts for some of its major divisions, including the [Food Safety and Inspection Service](#) (FSIS), [National Agriculture Statistics Service](#) (NASS) and [Cooperative State Research, Education and Extension Service](#) (CSREES). The department has joined several other government agencies in revamping its media outreach efforts, responding in part to the availability of new social networking sites in which a wide spectrum of consumers, interested citizens

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and industry stakeholders are participating. In what the White House Web blog has described as "a smart match," FSIS has thus far used its Twitter account to "tweet" about recalled products, the importance of food safety precautions during natural disasters and newly available resources. See *Meatingplace.com*, March 30, 2009.

### Pistachio Recall Linked to *Salmonella* Risk

The Food and Drug Administration (FDA) has warned consumers to avoid eating all pistachio and pistachio-containing products after a California-based processor issued a voluntary recall for its entire 2008 crop due to suspected *Salmonella* contamination. Meanwhile, the agency has praised Kraft Foods Inc. for demonstrating how the country should handle food safety issues. Kraft voluntarily notified FDA after one of its suppliers, Georgia Nut Co., discovered *Salmonella* on its pistachios during routine testing and traced the tainted products to Setton Pistachio of Terra Bella, Inc, the nation's second-largest pistachio processor.

"You can call it a fluke, you can call it good luck, or you can call it good judgment on the part of Kraft," David Acheson, FDA's associate commissioner on food safety, was quoted as saying. "They're not required to tell us. They did and we're moving on it." See *Foodproductiondaily.com*, March 31 and April 3, 2009; *The Associated Press*, April 2, 2009; and *Perishablepundit.com*, April 3, 2009.

In related news, U.S. farmers may reportedly cut peanut plantings by 27 percent this year after buyers slashed contracts following the recent peanut *Salmonella* scare. According to the U.S. Department of Agriculture (USDA), growers intend to plant 1.12 million acres this year, compared to 1.534 million in 2008. See *Reuters.com*, March 31, 2009.

### EU Bans Import of Some California Wines Due to Protected Names

A European Union (EU) ban on U.S. wines violating rules about the use of terms such as "clos" and "chateau" apparently took effect in March 2009. With strict regulations about the use of words like "Champagne," "Chablis" and "Burgundy," the EU has been feuding with the United States at least since 2002, and has ended a three-year waiver extended to U.S. vintners in 2006. The United States considers these terms to be "semi-generic," descriptive of wine styles and not French geography. A number of Sonoma County, California, wineries have reportedly been affected; they include Clos du Bois, Chateau St. Jean, Clos Du Val, and Clos Pegase. According to a news source, the term "clos," which means "enclosure," can appear on a French wine label only if the vineyard using the term produces and bottles its own wine. See *Miami Herald*, March 27, 2009.

Meanwhile, a study published in March 2009 has found that for adults older than 55, drinking an alcoholic beverage a day reduces the risk of death by 28 percent. [Sei J. Lee, et al., "Functional Limitations, Socioeconomic Status, and All-Cause Mortality in Moderate Alcohol Drinkers," \*The Journal of the American Geriatrics Society\*, March 2009.](#) Based on data from 12,500 individuals questioned in 2002 about their alcohol use, functional limitations, education, income, wealth, psychosocial factors, demo-

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graphics, smoking, obesity, and other factors, the researchers found that moderate drinking, as opposed to no drinking, was “strongly associated” with less mortality. Death by the end of 2006 was the outcome measure of the study.

### LITIGATION

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#### **Botulism Cases Lead to \$40 Million Lawsuit Against Factory Equipment Maker**

Bumble Bee Foods, LLC has filed a complaint in federal court against the company that made the food-sterilization system used to process Castleberry hot dog chili sauce that, in 2007, was contaminated with *Clostridium botulinum* and led to a nationwide recall of under-processed products. *Bumble Bee Foods, LLC v. Malo, Inc.*, No. 09-042 (U.S. Dist. Ct., S.D. Ga., Augusta Div., filed March 26, 2009).

Alleging negligent design, failure to warn and negligence, Bumble Bee describes the factory-equipment defect that resulted in incomplete sterilization of its subsidiary's canned foods. The food manufacturer claims that its 2007 product recall, a two-month plant shutdown and a number of claims filed by individuals who purportedly contracted botulism as a result of eating the tainted products cost the company in excess of \$40 million. The complaint alleges that the defendant was aware of the defects “but took no steps either to correct these defects or to advise Bumble Bee or Malo's other customers of the serious safety issues posed by these defects in its products.”

#### **Insurer Not on the Hook for Settlement of Bad Faith Claim Involving Listeria Outbreak**

Pilgrim's Pride Corp. settled claims that its insurance carrier unjustifiably refused to pay a significant portion of coverage owed to the food company arising out of a *Listeria* outbreak. The insurance company that agreed to provide coverage to Pilgrim's insurer for any bad faith claims successfully mounted against it has been granted a declaratory judgment of no liability. *Cont'l Cas. Co. v. Ace Am. Ins. Co.*, No. 07-958 (U.S. Dist. Ct., S.D.N.Y., decided March 31, 2009).

Apparently, Pilgrim's insurer agreed to the essential terms of a settlement proposed by a mediator before seeking Continental's consent to settle. Under Texas law, settlement agreements are legally enforceable when the parties have agreed on the amount of consideration to be paid and the release of claims. While Pilgrim's insurer made minor modifications to the agreement after notifying Continental, the court found that the mediator's proposal was a binding and enforceable settlement agreement. Because Pilgrim's insurer did not receive prior written consent, the court ruled that Continental had no liability for the Pilgrim's Pride settlement.

#### **Salmonella-Tainted Sprouts Spawn Nebraska Lawsuit**

Food litigator William Marler has reportedly filed the first lawsuit against CW Sprouts for a recent *Salmonella Saintpaul* outbreak that purportedly sickened more than

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100 in Colorado, Iowa, Kansas, Nebraska, and South Dakota. Stephen Beumler of Omaha apparently claims that he ate a sandwich with the company's alfalfa sprouts and fell ill with the *Salmonella* strain traced to its products. Filed in a federal court in Nebraska, the lawsuit alleges product liability, negligence and violations of implied warranties of merchantability. Beumler reportedly seeks unspecified damages and attorney's fees. See *U.S. Food Law Report*, April 3, 2009.

### LEGAL LITERATURE

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#### **James O'Reilly, "Nano's Dirty Little Secret: Industrial Users of Nanotechnology Should Start Developing a *Daubert* Strategy and Liability Defenses," *BNA Product Safety & Liability Reporter*, February 2009**

University of Cincinnati College of Law Professor James O'Reilly recommends that defense lawyers begin preparing now for a reasonably predictable wave of litigation involving exposures to nano-sized materials that are being used in increasing number in a variety of foods and other products. According to O'Reilly, defense lawyers should be partnering with the health, safety and environmental professionals in key client organizations and starting to revise material safety data sheets, referring to them as important vehicles for risk disclosure and excellent defense tools.

O'Reilly also suggests that counsel (i) "urge investment in engineering controls on the lines where the nanoparticles are dumped, sprayed or handled"; (ii) "encourage the medical department or industrial hygiene team to track the medical and compensation claims of lung and internal organ problems, and lost-time illnesses, that have both a base line among the worker population before nano-materials use, and a potential for a 'spike' increase after a period of use of the nanoparticles inside the workplace"; (iii) "be a 'best practices' advocate to the manager who makes the decision about worker safety investments"; and (iv) "watch the casualty insurers for signs of a selective aversion to nano-materials."

O'Reilly asks, "Why let your client become a much-publicized defendant in a landmark jury verdict and controversial set of appeals, when your client can invest less money and gain more worker appreciation by ventilation upgrades and issuing better personal protective equipment?" He also notes that the United States is lagging behind other countries in "gathering nanoparticle exposure and toxicity information," and speculates that "a deep pocketed plaintiff with sophisticated resources could utilize global scientists to make the case in a Delaware or Nevada courtroom."

In a related development, a leading Australian consumer group has reportedly raised concerns about the introduction of foods using nanotechnology without notice to the public. According to a spokesperson for Choice, "[U]nder our current food code there's no requirement for any of this to be specifically labeled [as to] the use of nano-particles. They're so small they can actually enter cells and enter parts of the body, which might not routinely happen with normal food stuffs." The

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group is apparently calling for government agencies to provide greater oversight. The Australian Office of Nanotechnology reportedly responded that it is reviewing requirements for foods using nanotechnology and that Food Standards Australia New Zealand (FSANZ) will require such products to undergo a safety assessment and may institute labeling rules. *See Australian Food News*, March 30, 2009.

### **Bruce Silverglade, "FDA Can Help Advance the Administration's 'Prevention' Strategy," *Update*, March-April 2009**

In this publication of the Food and Drug Law Institute, Bruce Silverglade examines his belief that the Food and Drug Administration (FDA) should play a significant role in advancing President Obama's "prevention" agenda. "The Administration should reinvigorate FDA's nutrition mission and the agency should be instructed to develop and implement a series of initiatives that would help Americans improve their diets and protect their health," writes Silverglade, who is director of legal affairs for the Center for Science in the Public Interest in Washington, D.C.

He outlines ways the government could facilitate improvements in diet and health, including product reformulation, food labeling, universal symbols to communicate nutritional content, and food marketing to children. The government, Silverglade writes, "has an important role in mitigating the toxic food environment created by the food manufacturers and restaurant chains promoting huge servings of soft drinks, snacks and 'value' meals that are literally penny-wise and pound foolish."

While he stresses that no public health initiative can solve obesity problems and eliminate diet-related disease, reforms can be the basis of a comprehensive public health program.

## **OTHER DEVELOPMENTS**

### **Consumer Group Calls for Action on Milk Protein Concentrates in Yogurt**

Food & Water Watch has called on supporters to tell the Food and Drug Administration (FDA) that they do not want milk protein concentrates (MPCs) in their dairy products. According to the advocacy group, unregulated imports of inexpensive MPCs "are driving down the price of domestically produced milk and putting American dairy farmers out of business." Food & Water Watch also claims, "No one in the government is checking to make sure that they're safe to eat, and now FDA is thinking about letting them be used to make yogurt." FDA is apparently considering an industry proposal to change yogurt's "standard of identity" to allow the use of MPCs.

The organization explains in its call for action how MPCs are created and then used as an additive in processed cheeses, frozen dairy desserts, crackers, and energy bars. While most MPCs used in the United States are apparently imported, "MPCs have never been tested enough to make the list of food ingredients FDA considers to be safe—and they are not allowed in some dairy products that have regulations on how they are made." *See Food & Water Watch Online Alert*, March 27, 2009.

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### McDonald's to Cut Pesticides in Domestic Potato Supply

In response to a shareholder resolution, McDonald's Corp. this week reportedly agreed to take preliminary steps to reduce pesticide use in its domestic potato supply. According to a news source, the fast-food chain will survey its U.S. potato suppliers, compile a list of best practices in pesticide-use reduction and recommend those practices to global suppliers. The results, to be shared with investors, will be included in the company's annual corporate social responsibility report.

McDonald's is the largest purchaser of potatoes in the United States and said in a statement that the process would support ongoing efforts to make its supply chain sustainable. "Our U.S. potato suppliers are already working with their growers to advance sustainable pesticide practices, such as reductions and alternative methods." See *Reuters.com*, March 31, 2009.

## MEDIA COVERAGE

### Jenna Greene, "Whole Foods' Mixed Bag," *Legal Times*, March 30, 2009

This article comprehensively summarizes the events and proceedings that led Whole Foods Market, Inc. to agree in March 2009 to settle Federal Trade Commission (FTC) charges that its merger with Wild Oats Markets, Inc. violated antitrust laws. According to freelance journalist Jenna Greene, the two-year fight ultimately cost Whole Foods \$28 million and resulted in a D.C. Circuit Court of Appeal's decision "that some fear will make it too easy for the FTC to effectively block future mergers."

She quotes an unnamed antitrust expert who opined, "so long as their lawyers don't get up there and fall asleep at the podium," the FTC will win in merger challenges. Apparently, a week after the Whole Foods settlement, a \$1.4 billion merger between CCC Holdings and Mitchell International collapsed after it was enjoined by a federal district judge who cited the new Whole Foods standard.

### CBC Radio Highlights Future of *In Vitro* Meat, Sustainable Agriculture

The CBC Radio program *Quirks and Quarks* recently featured the efforts of nonprofit research organization New Harvest to engineer meat cultures on a large scale for human consumption. Co-founded by doctoral student Jason Matheny of the Johns Hopkins Bloomberg School of Public Health, New Harvest harbors "the long-term goal of delivering economically competitive alternatives to conventional meat production" that are "safer, more nutritious, less polluting, and more humane." CBC host Bob McDonald highlighted the research in his roundup of "Nine-and-Half Technologies That Could Change the World," which also lauded developments in sustainable agriculture and clean water accessibility. See *Cbc.ca*, March 28, 2009.

Meanwhile, the People for the Ethical Treatment of Animals (PETA) is currently [holding](#) a \$1 million contest for the first firm to produce *in vitro* chicken meat and sell it to the public by June 30, 2012. The winning contestant must submit an entry



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with “a taste and texture indistinguishable from real chicken flesh”; and “manufacture the approved product in large enough quantities to be sold commercially, and successfully sell it at a competitive price in at least 10 states.”

**SCIENTIFIC/TECHNICAL ITEMS****Study Allegedly Links Sweetened Beverage Consumption to Weight Gain**

Researchers at the Johns Hopkins Bloomberg School of Public Health have reportedly found that “liquid calorie intake had a stronger impact on weight than solid calorie intake.” Liwei Chen, et al, “Reduction in consumption of sugar-sweetened beverages is associated with weight loss: the PREMIER trial,” *American Journal of Clinical Nutrition*, April 2009. According to an April 2, 2009, press release, the study focused on 810 adults ages 25 to 79 enrolled in the PREMIER trial, an 18-month, randomized, controlled, behavioral intervention. Using unannounced phone interviews to track dietary habits, researchers found that sugar-sweetened beverage accounted for 37 percent of all liquid calories consumed by participants. The authors apparently speculated that although the body can regulate its intake of solid food, it is unable to similarly manage liquid calories. “Among beverages, sugar-sweetened beverages was the only beverage type significantly associated with weight change at both the 6- and 18-month follow up,” lead author Liwei Chen, M.D., Ph.D., M.H.S., was quoted as saying. “Our study supports policy recommendations and public health efforts to reduce intakes of liquid calories, particularly from sugar-sweetened beverages, in the general population.” See *Forbes.com*, April 2, 2009.

Meanwhile, a second study appearing in this month’s *American Journal of Clinical Nutrition* has linked sweetened beverage consumption to an increased risk of coronary heart disease (CHD) in women. T.T. Fung, et al., “Sweetened Beverage Consumption and Risk of Coronary Heart Disease in Women,” *American Journal of Clinical Nutrition*, April 2009. Researchers from Harvard Medical School and Simmons College relied on data from the Nurse’s Health Study, which gathered seven food-frequency questionnaires from 88,520 women ages 24 to 29 who were free of CHD, stroke or diabetes at the start of the study in 1980. After adjusting for other risk factors, the study concluded that women who consumed two or more sweetened beverage servings per day increased their CHD risk by 35 percent. “Fructose has been the major sweetener in [sugar sweetened beverages] since the mid-1980s, and it increases triacylglycerol synthesis in the liver, which results in elevated triacylglycerol concentrations, which have been associated with a greater risk of CHD,” said the authors about a possible explanation for their findings, adding that the impact of fructose on blood uric acid concentrations may also be a factor. See *FoodNavigator.com*, March 27, 2009.

In a related development, researchers with the Johns Hopkins Schools of Medicine have published a paper furthering the theory of a purported link between fructose consumption and increased food intake. M. Daniel Lane and Seung Hun Cha,

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"Effects of Glucose and Fructose on Food Intake Via Malonyl-CoA Signaling in the Brain," *Biochemical and Biophysical Research Communications*, March 3, 2009. The review reportedly builds upon previous works "dealing with the role of malonyl-CoA in the signaling system in the brain (specifically the hypothalamus) that has inputs into the higher brain centers that determine feeding behavior, most notably appetite." The authors apparently postulate that while glucose acts in the brain to curb food intake, fructose consumption increases appetite and may contribute to the rising occurrence of insulin resistance and Type 2 diabetes. "We feel that these findings may have particular relevance to the massive increase in the use of high fructose sweeteners (both high fructose corn syrups and table sugar) in virtually all sweetened foods, most notably soft drinks," stated the lead author. See *ScienceDaily*, March 26, 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.

