

**FOOD & BEVERAGE
LITIGATION UPDATE**



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LEGISLATION, REGULATIONS AND STANDARDS

WHO Raises Pandemic Alert Level as “Swine Flu” Spreads

The World Health Organization (WHO) this week raised its influenza alert to the second-highest level as an outbreak of H1N1 virus – also known as swine flu – continues to surface across the globe. First identified in Mexico, H1N1 has spread to the United States and several other countries, including Canada, Germany, Israel, New Zealand, Spain, and the United Kingdom. The U.S. Centers for Disease Control and Prevention (CDC) have thus far confirmed 109 cases in 11 states, while Mexican officials have reported at least 2,500 suspected illnesses and 170 deaths. “All countries should immediately activate their pandemic preparedness plans,” stated WHO Director-General Margaret Chan. “At this stage, effective and essential measures include heightened surveillance, early detection and treatment of cases, and infection control in all health facilities.” See *GMA Press Release* and *FoodNavigator-USA.com*, April 27, 2009; *WHO Press Release, MSNBC.com* and *The London Times*, April 29, 2009; *The New York Times*, May 1, 2009.

Meanwhile, the U.S. Department of Agriculture (USDA) has reportedly assured consumers that “you cannot get swine flu from eating pork or pork products,” according to USDA Secretary Tom Vilsack. The pork industry has objected to the characterization of H1N1 as “swine flu,” fearing that the misnomer will further dampen sales and exports during the economic recession. China, Ecuador, Japan, Kazakhstan, the Philippines, Russia, South Korea, and Ukraine have already restricted pork imports, while Egypt’s decision to cull its pig population has prompted riots among farmers who insist that the government compensate them for their losses. Vilsack, however, has stressed that “There is no evidence at this time showing that swine have been infected with the virus,” which USDA has described as “a mixture of genetic material from swine, avian and human influenza viruses.” See *Meatingplace.com* and *The Wall Street Journal*, April 27, 2009; *The Associated Press*, April 28, 2009; *Advertising Age*, *The New York Times* and *The London Times*, April 29, 2009.

In a related development, a Mexican media outlet has purportedly linked the outbreak to a large pig operation near the suspected epicenter in La Gloria, Veracruz. *La Marcha* apparently cited the claims of La Gloria residents who initially opposed the farm and have blamed H1N1 on its waste lagoons. Several consumer advocacy blogs, including *U.S. Food Policy* and *Food & Water Watch*, have also alluded to these allegations in calling for an end to concentrated animal feeding operations (CAFOs). Mexico’s chief epidemiologist, Miguel Ángel Lezana, has since portrayed

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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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these theories as "highly improbable," noting that the hogs in question are from North America but the viral swine genes hail from Europe and Asia. See *The Grist*, April 25, 2009; *The Wall Street Journal*, April 27 and 30, 2009; *U.S. Food Policy Blog*, April 26 and 28, 2009; *Reuters*, April 30, 2009.

Pew Environment Group Asks FDA to Apply Drug Rules to All Imported Farmed Salmon

According to the Environment Group of the Pew Charitable Trusts, salmon farming companies producing fish for export to the United States from Canada, Norway and Scotland are using pesticides and antibiotics that do not appear on the *FDA/CVM Approved Drugs in Aquaculture* list. In an April 23, 2009, [letter](#) to the acting Food and Drug Administration (FDA) commissioner, the Pew Environment Group notes how FDA inspections have successfully addressed the use of banned drugs in Chile's salmon farming facilities and calls for the agency to expand its focus to imports from other countries.

Contending that these drugs pose threats to human health and the environment, the group cites detailed evidence suggesting that other countries are using unapproved drugs in salmon aquaculture and asks the FDA (i) whether it intends to require all companies exporting salmon to the United States to adhere to U.S. regulations; (ii) how it reconciles its requirement that Chilean salmon companies use only "approved" drugs in aquaculture while allowing the U.S. salmon farming industry to use one of these unapproved drugs through an investigational new animal drug permit; and (iii) whether the agency has visited or plans to visit salmon production or processing facilities in Canada, Scotland, Ireland, Norway, China, or other salmon exporting regions.

FDA Continues to Study Use of Symbols for Nutrition Information

The Food and Drug Administration (FDA) has prepared a [summary](#) of the comments and information provided during a 2007 hearing on the use of symbols to communicate nutrition information. Posted to the hearing docket on April 28, 2009, the document notes that significant gaps remain in research about consumer perception, understanding and use of symbols that convey information about nutrition claims on food products. According to the FDA, numerous nutrition symbol systems already exist, but because they "differ greatly," "the ability of consumers to use these symbols to make nutritional comparisons between products or to determine how a food fits into a diet is uncertain."

FDA commissioned a focus group study and "is currently analyzing qualitative information collected from the study to explore varieties and ranges of consumers' understanding of and reactions to a selected sample of existing and alternative nutrition symbols." The agency also apparently needs more information about the economic impact of requiring the use of symbols on food products; manufacturers differ over whether these costs and the costs of reformulating their products increase product development costs and also over whether nutrition symbols increase product sales.

FDA's summary also notes that the agency is "evaluating a citizen petition submitted by a consumer organization requesting that the agency explore the development of a uniform front-label symbol program to indicate the nutritional quality of foods." The

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summary concludes, "FDA will continue to actively evaluate the issues regarding the use of nutrition symbols in food labeling. The agency is considering all nutrition labeling schemes in its effort to help consumers construct healthful diets consistent with the current Dietary Guidelines for Americans." See *CFSAN Constituent Update*, April 28, 2009.

OSHA Convenes Rulemaking Panel on Diacetyl

The Occupational Safety and Health Administration (OSHA) will convene a rule-making panel May 5, 2009, to study the effects that a proposed rule on occupational exposure to diacetyl would have on small businesses. The Small Business Regulatory Enforcement Fairness Act (SBREFA) panel allows small businesses that may be affected by the proposal to provide comments before an agency publishes the rule in the *Federal Register*. The panel must submit its final report within 60 days after convening.

Diacetyl is a chemical used in butter flavoring for popcorn and confectionary products that has allegedly been linked to bronchiolitis obliterans, a lung disease diagnosed in a number of workers at U.S. popcorn-manufacturing plants. The topic was covered in issue 296 of this Update. See *OSHA News Release*, April 29, 2009.

USDA to Conduct First Wide-Scale Survey of Organic Production

The U.S. Department of Agriculture (USDA) has announced the first wide-scale survey of organic farming to ascertain how the growth of such practices is changing the face of American agriculture. The Organic Production Survey will examine organic farming that took place during the 2008 calendar year, including production and marketing practices, income and expenses.

"This is an opportunity for organic producers to share their voices and help ensure the continued growth and sustainability of organic farming in the United States," USDA Secretary Tom Vilsack said. Survey results will apparently help shape future farm policy, funding allocations, availability of goods and services, community development, and other key issues.

USDA's National Agricultural Statistics Service (NASS) will mail the survey in early May 2009 to all known U.S. organic producers, who are asked to respond by June 17, 2009. Participants can also complete the [survey](#) online. NASS will publish results in winter 2009. See www.usda.gov, April 23, 2009.

LITIGATION

Special Litigation Committee Seeks Dismissal of Shareholder Lawsuits Against Chiquita

An independent special litigation committee (SLC) recently filed a comprehensive [report](#) detailing the actions of Chiquita Brands International executives, directors and counsel that led to the \$25 million settlement of a Justice Department investigation into the company's illegal payments to Colombian terrorist groups.

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The SLC recommends that shareholder litigation stemming from the payments, settlement and purported “fire sale” of the company’s Colombian banana business be dismissed because the SLC found no evidence that any defendant acted in bad faith. The SLC also found that the litigation will inflict “substantial further damage on the Company,” the costs outweigh any potential recovery, “an event of this nature is unlikely to recur,” and the shareholder litigation “would serve to further divert management from its core mission.”

The report explains that payments were made to both right-wing and left-wing groups in Colombia to protect the company’s workers and property. Until the recipients were declared terrorist organizations in 2003, however, none of the payments was apparently illegal. While the SLC found some mistakes in the company’s oversight and decision-making process, it concluded that any shortcomings did not breach the defendants’ fiduciary duties. According to a news source, the plaintiffs’ lawyers do not plan to voluntarily dismiss their claims. An attorney representing five American missionaries kidnapped and murdered by Colombian guerrillas in the early 1990s was quoted as saying, “I’m not aware of a case where an American company has laid out in such detail [these] kinds of things. It’s a remarkable listing of . . . the conduct that went on for years and years that nobody knew about.” See *Law.com: International News*, April 28, 2009.

MEDIA COVERAGE

Daniel Engber, “Dark Sugar: The Decline and Fall of High-fructose Corn Syrup,” *Slate*, April 28, 2009

“Like other villainous ingredients – *trans* fat and artificial food dye come to mind – high-fructose corn syrup [HFCS] is accused of being at once *unhealthy*, *unnatural* and *unappetizing*,” writes *Slate* contributor Daniel Engber in this article exploring these “three cardinal claims of food politics” against HFCS, which has suffered a consumer backlash “exacerbated by the general view that it’s less ‘natural’ than other forms of sugar.” According to the article, critics of HFCS have implied that the fructose-based sweetener is more harmful than other added sugars refined from cane sugar or beet sugar. This theory apparently spawned several lawsuits contesting the “metaphysical status of corn syrup” in products labeled “all natural.” The legal disputes have reportedly led the Food and Drug Administration to issue guidance declaring that HFCS can be considered a “natural” ingredient if it has not come into physical contact with glutaraldehyde, a synthetic fixing agent used to convert corn starch into fructose and glucose.

The article takes issue with these claims, which often insist that beet or cane sugar make a healthier or more natural alternative to HFCS. For example, the author notes that because sucrose contains only slightly less fructose than HFCS, the latter “would only be marginally more sinful than ‘real’ cane sugar.” Moreover, “you don’t need high-fructose corn syrup to rack up American-style obesity rates,” states Engber, pointing to Australia where the food industry relies mostly on cane sugar. He also resists the myth that people prefer the taste of cane sugar to corn syrup, raising the specter of “informal taste tests” that “yielded ambiguous results.” The article

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concedes, however, that “it doesn’t matter how weak each claim is on its own terms.” “You can win over hypochondriacs with one argument, environmentalists with another, and gourmands with a third,” Engber concludes. “The foodies haven’t just killed HFCS – they’ve stuck a fork in it.”

Interest Builds Surrounding Taste, Science Behind Stevia

New York University professor and public health nutrition author Marion Nestle wonders “Is Stevia really ‘natural?’” in her April 29, 2009, blog *Food Politics*. The sweetener, she writes, is isolated from the leaves of the stevia plant and therefore the Food and Drug Administration (FDA) lets companies assert that it is natural.

“We can debate whether a chemical sweetener isolated from Stevia leaves is really ‘natural’ but here’s another problem: Stevia doesn’t taste like sugar,” Nestle writes. “Companies have to fuss with it to cover up its off taste. And, they must do so ‘without detracting from the perceived benefits of its natural status.’ Flavor companies are working like mad to find substances that block Stevia’s bitter taste, mask its off flavors, and extend its sweetness, while staying within the scope of what the FDA allows as ‘natural.’” See *foodpolitics.com*, April 29, 2009.

Lyndsey Layton, “David Kessler Knew That Some Foods Are Hard to Resist; Now He Knows Why,” *The Washington Post*, April 27, 2009

Discussing former Food and Drug Administration Commissioner David Kessler’s book about overeating, *Washington Post* staff writer Lyndsey Layton opens with an anecdote about Kessler climbing into dumpsters behind fast-food restaurants to find the ingredient lists for some of the foods they offer. He apparently found high-calorie, fat, sugar, and salt content in many of his favorite foods and contends they are designed in a way to spur the diner to eat faster and eat more. Kessler reports that he was a yo-yo dieter whose weight has ranged from 160 to 230 pounds and back again numerous times. He also claims that he was able to stabilize his weight only by making a shift in the way he thought about food.

Layton quotes Kessler as saying, “We did this with cigarettes. It used to be sexy and glamorous but now people look at it and say, ‘That’s not my friend, that’s not something I want.’ We need to make a cognitive shift as a country and change the way we look at food. Instead of viewing that huge plate of nachos and fries as a guilty pleasure, we have to . . . look at it and say, ‘That’s not going to make me feel good. In fact, that’s disgusting.’”

SCIENTIFIC/TECHNICAL ITEMS

Study Concludes Dietary Acrylamide Not Linked to Lung Cancer

A recent study has reportedly found no positive association between dietary acrylamide intake and lung cancer, concluding that the chemical created by baking, frying and toasting foods at high temperatures may be “involved in human carcinogenesis through pathways other than genotoxicity.” Janneke G. F. Hogervorst, et al.,

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"Lung Cancer Risk in Relation to Dietary Acrylamide Intake," *Journal of the National Cancer Institute*, April 28, 2009. Dutch researchers surveyed the dietary habits of 58,279 men and 62,573 women ages 55 through 69 who were enrolled in the Netherlands Cohort Study on Diet and Cancer. The results after 13 years suggested that men who consumed the most potato chips, French fries, Dutch spiced cake, coffee, bread, and cookies did not have a statistically different risk for lung cancer than those who reported eating the least amount of these foods. Moreover, women with the highest acrylamide intake had a decreased risk of lung cancer compared with their peers.

"We strongly encourage other research groups to examine the association between dietary acrylamide intake and the risk among lung cancer, separately among men and women and stratified by smoking status and alcohol consumption," stated the authors. See *FoodNavigator-USA.com*, April 29, 2009.

Researchers Decode Cow Genome to Improve Livestock Husbandry

A project involving more than 300 scientists from 25 countries has reportedly decoded the complete genome of the cow, thus providing "tantalizing clues to explain 'the essence of bovinity.'" Published in the April 24, 2009, edition of the journal *Science*, the results have apparently shown that the organization of human chromosomes more closely resembles that of the domestic cow than that of mice or rats. Scientists contributing to the effort have said the new information may enable farmers to improve meat and milk production, bolster disease resistance among herds, and practice more environmentally sound husbandry. The genome also suggested that the cow species has retained a sufficient level of genetic diversity despite centuries of domestication. "And beyond that, the tools that this technology gives us allow us to manage diversity at a whole new level. ... I think the outlook is quite bright," one study co-author was quoted as saying. See *The Los Angeles Times* and *National Geographic*, April 23, 2009; *The New York Times*, April 24, 2009.

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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.

