

## FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### Commercial Fishing Regulation Based on Climate Change; Chamber Seeks Trial on Scientific Evidence for Human-Caused Climate Change

According to a news source, the U.S. government has, for the first time, decided to prohibit commercial fishing in American waters in the Arctic because of climate change and not due to overfishing. The waters have apparently never been actively fished, nor is anyone particularly interested in fishing there, but the secretary of commerce took the action assuming that climate change will cause a rapid ice melt that will one day make the area more accessible and commercially attractive.

Believed to be rich in cod, snow crab and other species, the waters subject to the ban cover nearly 200,000 square miles north of the Bering Strait. Environmentalists and Alaskan harvesters and processors reportedly sought the prohibition to maintain the status quo while study of this "poorly understood ecosystem" and the effects of climate change lead to a sustainable fishing plan. *See The New York Times*, August 24, 2009.

Meanwhile, the Chamber of Commerce of the United States of America has [petitioned](#) the Environmental Protection Agency (EPA) to conduct a public hearing on whether greenhouse gas emissions are actually responsible for climate change. According to press reports, Chamber officials have characterized their request as "the Scopes monkey trial of the 21<sup>st</sup> century," referring to the 1925 trial in which lawyers Clarence Darrow and William Jennings Bryan went head to head over the legality of teaching evolution in a Tennessee classroom.

A Chamber spokesperson was quoted as saying, "It would be evolution versus creationism. It would be the science of climate change on trial." If EPA denies the request, the Chamber reportedly indicated that it will take the dispute to federal court. The petition was filed in June 2009 and supplemented August 25.

According to the petition, EPA has proposed a rule to regulate greenhouse gas emissions under the Clean Air Act with "historically and economically massive consequence" on the basis of "untested scientific sources." The petition outlines the events, including a U.S. Supreme Court ruling, that led to the agency's proposal, and cites dissenting views and negative comments to assert that scientific evidence on the human contribution to climate change is uncertain.

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The Chamber also reportedly claims that higher temperatures will reduce mortality rates in the United States. A climate scientist with the Union of Concerned Scientists said of the chamber proposal that it "brings to mind for me the Salem witch trials, based on myth. In this case, it would be ignoring decades of publicly accessible evidence." EPA has apparently called an on-the-record hearing of this nature a "waste of time." See *The Los Angeles Times*, August 25, 2009.

### USDA and DOJ Announce Public Meeting on Agriculture and Antitrust Enforcement

The U.S. Department of Agriculture (USDA) and U.S. Department of Justice (DOJ) have [announced](#) a series of public workshops "to explore the competition issues affecting the agricultural sector in the 21<sup>st</sup> century and the appropriate role for anti-trust and regulatory enforcement in that sector." Organized in response to "concerns about changes in the agricultural marketplace, including increasing processor concentration in some commodities," these meetings will focus on "the dynamics of competition in agricultural markets, including, among other issues, buyer power (also known as monopsony) and vertical integration."

The workshops will also address (i) "the impact of agricultural concentration on food costs"; (ii) "the effect of agricultural regulatory status and other applicable laws and programs on competition"; (iii) "issues relating to patent and intellectual property affecting agricultural marketing and production"; and (iv) "market practices such as price spreads, forward contracts, packer ownership of livestock before slaughter, market transparency, and increasing retailer concentration." USDA and DOJ are also soliciting comments from lawyers, economists, agribusinesses, consumer groups, academics, agricultural cooperatives, and other interested parties "on the application of antitrust laws to monopsony and vertical integration in the agricultural sector, including the scope, functionality and limits of current or potential rules." Respondents should provide comments as soon as possible, but no later than December 31, 2009. See *Federal Register*, August 27, 2009.

### USDA Establishes Dairy Advisory Committee, Requests Nominations

U.S. Department of Agriculture (USDA) Secretary Tom Vilsack has announced the creation of a Dairy Advisory Committee that will "play an important role in building a more stable market for dairy production for years to come," according to an agency [news release](#). The two-year committee will specifically review farm milk price volatility and dairy farmer profitability, and offer suggestions on how USDA can best address these issues to meet the dairy industry's needs. The 15 members will include producers and producer organizations, processors and processor organizations, handlers, consumers, academia, retailers, and state agencies involved in organic and non-organic dairy at the local, regional, national, and international levels. Nominations will be accepted through September 28, 2009. See *USDA News Release*, August 25, 2009.

### FDA Solicits Scientific Data on Acrylamide in Food

The Food and Drug Administration (FDA) has issued a [request](#) for "comments and scientific data and information on acrylamide in food," noting that the agency is considering industry guidance on this issue. Describing acrylamide as "a chemical

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that can form in some foods during certain types of high-temperature cooking," the agency is seeking information from manufacturers on how to measure and reduce acrylamide levels in food. The agency has also asked responders to provide detailed feedback about: (i) techniques for acrylamide mitigation; (ii) best monitoring practices; (iii) standard practices for the delivery, storage, temperature control, reconditioning, and screening of potatoes; (iv) changes to food packaging instructions and other measures that can reduce acrylamide levels during a product's final preparation by consumers; (v) food types for which the agency could recommend target acrylamide levels; and (vi) achievable acrylamide levels for french fries, potato chips, breakfast cereals, coffee, cookies, and other baked goods and corn-based snacks. FDA will accept written comments and scientific data until November 24, 2009. *See Federal Register*, August 26, 2009.

Meanwhile, Health Canada has recommended adding acrylamide to schedule 1 of the Canadian Environmental Protection Act (CEPA 1999), the Health Canada Cosmetic Ingredient Hotlist and the Environmental Emergencies Regulations of CEPA 1999. The government aims to reduce Canadians' exposure to acrylamide by following a three-pronged risk management approach that includes (i) "pressing the food industry to develop and implement acrylamide reduction strategies for use by food processors and the food service industry"; (ii) "regularly updating consumption advice"; and (iii) "coordinating risk management efforts for acrylamide in food with key international food regulatory partners." Health Canada apparently reached its final assessment on acrylamide despite several recent studies finding no link between acrylamide and various cancers. *See Health Canada Press Release*, August 21, 2009; *FoodNavigator-USA.com*, August 26, 2009.

### EU Ramps Up Regulation of Functional Food Health Claims

The European Commission (EC) has reportedly entered the second phase of a crack-down on functional food health claims advertising a product's purported health benefits. EC regulations currently require the European Food Safety Authority (EFSA) to draw up a "positive list" of permitted health claims by 2010, but the commission is now discussing further restrictions on functional foods that also contain high levels of sugar, saturated fat or salt. According to EFSA, the agency has received "4,185 main health claim entries" that each comprise "a food component, a health relationship and an example of wording." This review process "takes into account the conditions of use and references available for around 10,000 similar health claims."

Meanwhile, the UK Food Standards Agency (FSA) has asked the commission to restrict advertising for products with more than 15 percent sugar content, although the final threshold appears likely to fall between 20-25 percent sugar content. Several media reports have focused on the impact that these thresholds would have on cereal advertising, noting that many manufacturers would need to withdraw their health claims even under the EC's more generous definition of "high sugar." "Cereal manufacturers make a variety of claims," stated FSA Deputy Head of Nutrition Corinne Vaughan. "Some are genuine, but other foods are heavily promoted on the basis of health claims for one ingredient, while the unhealthy levels of sugar, fat and salt hardly get a mention." *See The London Times* and *The Telegraph*, August 23, 2009; *Daily Mail*, August 24, 2009.

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### Boulder County Commissioners Delay Decision on GM Sugar Beets

The Boulder County Board of Commissioners has reportedly delayed a decision about whether genetically modified (GM) sugar beets can be grown on open-space land. At a August 25, 2009, public hearing, six farmers who in December requested permission to grow the beets on county land apparently asked the commissioners to delay the decision. "I don't think any of us thought for a second that this issue would have become as emotionally charged as it has today," one of the farmers was quoted as saying.

In 2003, the commissioners voted to allow GM corn but stipulated that any new GM crop would need new permission. This spring, county staffers researched the pros and cons of GM sugar beets but during the recent meeting the commissioners asked the Parks and Open Space Department to create a broader policy that would address GM crops in general. "We do not want to be in a position of doing hand-to-hand combat" about every GM seed, one commissioner told reporters. The commissioners also want a comprehensive plan for the county's 17,000 acres of cropland that could include goals for more organic acreage, rules for herbicide use and plans for keeping conventional family farming viable in an increasingly urban county. See *Boulder Daily Camera*, August 25, 2009.

## LITIGATION

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### California Court Rules Against Insurer over Losses from Spinach Contamination Outbreak

A California trial court has determined that the insurer of the nation's largest seller of bagged fresh spinach must pay for its losses from the 2006 nationwide *E. coli* outbreak that led to a Food and Drug Administration (FDA) advisory against eating any fresh spinach. *Fresh Express, Inc. v. Beazley Syndicate 2623/623 at Lloyd's*, No. M88545 (Cal. Super. Ct., Monterey County, decided August 18, 2009). The outbreak was ultimately traced to a different producer, and the insurer denied coverage.

Following a bench trial, the court determined that (i) the produce company introduced sufficient evidence to establish that it committed "errors" within the policy's meaning by failing, before purchasing spinach, to conduct a food safety audit of the field where it was grown to verify that the growers had complied with good agricultural practices; (ii) this verification of good practices compliance "was an integral and inseparable part of its safe manufacturing practices"; and (iii) sufficient evidence established that the produce company had reasonable cause to believe that these errors had led or would lead to bodily injury given the field's proximity to a cattle feedlot. The court also found that the produce company provided sufficient and timely notice of the claim to its insurer and satisfied all conditions precedent for coverage.

While the court found that the insurer did not breach the implied covenant of good faith and fair dealing in denying the claim, it also found that the losses could not be excluded under the policy because they were caused by a "governmental ban" or "loss of confidence." According to the court, the FDA advisory was not a ban because

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the agency “lacked the authority to ban any spinach under the circumstances,” nor were the produce company’s losses caused by a loss of public confidence. In this regard the court stated, “to read the Policy to Exclude coverage for losses related to ‘loss of public confidence’ when an Insured Event has occurred, such as coverage for lost gross profits and for rehabilitating the brand name after a recall or withdrawal, would render the coverage provisions under the policy meaningless.”

The court awarded the produce company the policy’s \$12 million cap and left an award of prejudgment interest to a post-trial hearing.

### OTHER DEVELOPMENTS

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#### AHA Sets Guidelines on Limiting Consumption of Added Sugars

The American Heart Association (AHA) has issued [guidelines](#) on limiting the consumption of added sugars, claiming that most American women should consume no more than 100 calories (six teaspoons) of added sugars per day and men no more than 150 calories (nine teaspoons). Citing a report from the 2001-04 National Health and Nutrition Examination survey, AHA notes that the average intake of added sugars for all Americans was 22.2 teaspoons per day. The AHA guidelines provide information about “the relationship between excess sugar intake and metabolic abnormalities, adverse health conditions and shortfalls in essential nutrients.”

“Sugar has no nutritional value other than to provide calories,” said lead author and nutrition professor Rachel Johnson in an AHA press release. “Consuming foods and beverages with excessive amounts of added sugars displaces more nutritious foods and beverages for many people.” Johnson purports that sugars added to foods during processing or preparation are linked to the rise in obesity and are associated with increased risks for high blood pressure, high triglyceride levels, other risk factors for heart disease and stroke, and inflammation, a marker for heart disease.

Johnson claims soft drinks and other sugar-sweetened beverages are the No. 1 source of added sugars in Americans’ diet. “One 12-ounce can of regular soda contains about 130 calories and eight teaspoons of sugar,” she was quoted as saying. But a spokesperson for the American Beverage Association told a news source that obesity and heart disease are complex problems that can not be reduced to the number of calories found in particular drinks. “You can be a healthy person and enjoy soft drinks and other sugar-sweetened beverages in moderation,” the spokesperson said. “What matters most is balancing the calories from the food and beverages we eat and drink with regular physical activity.” *See American Heart Association Press Release, August 24, 2009; FoodNavigator-USA.com, August 25, 2009.*

#### Stephen Lendman, “Codex Alimentarius (CA) Threatens Human Health,” *Health*, August 24, 2009

According to a researcher with a non-profit think tank that focuses on curbing “globalization,” the Codex Alimentarius Commission is controlled by corporate interests and thus poses a threat to consumer health and fair trade practices in the food

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market. According to Stephen Lendman of the Montreal-based Centre for Research on Globalization, genetically modified (GMO) foods and drugs will proliferate under the commission's standards and guidelines, labeling will be banned and industry will determine "what will and won't be sold." The article explains how the commission is organized and operates and argues that World Trade Organization member nations are legally bound to adopt the commission's standards to the detriment of consumer choice and health.

Lendman contends that Codex standards will become "globally mandated" at the end of 2009 in the absence of any legal challenges. According to Lendman, this means that "[c]ommon foods, herbs, nutrients, amino acids, homeopathic and other natural remedies would be called drugs. Potencies would be limited, and prescriptions would be required for their use. Some would be banned altogether. In contrast, about 300 dangerous food additives will be allowed, including aspartame, BHA, BHT, potassium bromate, and tartrazine. New guidelines will authorize the worldwide proliferation of unlabeled GMO foods, drugs, and ingredients, known to harm human health."

### National Food Policy Conference to Focus on Food Safety and Child Nutrition

Jointly sponsored by the Consumer Federation of America and the Grocery Manufacturers Association, the 32<sup>nd</sup> annual [National Food Policy Conference](#) will feature keynote addresses by Agriculture Secretary Tom Vilsack and Food and Drug Administration Commissioner Margaret Hamburg. Scheduled for September 8-9, 2009, in Washington, D.C., the conference will convene speakers representing industry, government, academia, and consumer interest organizations to address food safety and child nutrition, "two issues that have become critical concerns in recent months both domestically and internationally."

Among the scheduled speakers are Margo Wootan, Director of Nutrition Policy for the Center for Science in the Public Interest, and representatives of organic associations, Trust for America's Health, the National Wildlife Federation, American Academy of Pediatrics, Consumers Union, the U.S. Trade Representative's office, Food & Water Watch, American Council for Fitness & Nutrition, and The Pew Charitable Trusts. They will discuss pending federal legislation, improving children's health with better nutrition, food safety needs in a global marketplace, and school food and fitness, among other matters.

## MEDIA COVERAGE

### Meg Kissinger & Susanne Rust, "BPA Industry Fights Back: Public Relations Blitz Takes Cue from Tobacco Companies' Past Tactics," *Milwaukee Journal-Sentinel*, August 22, 2009

This article discusses a four-month *Milwaukee Journal-Sentinel* investigation into the initiatives allegedly undertaken by the plastics industry to forestall the proliferation of local, statewide and national restrictions on the use of bisphenol A (BPA) in food and beverage product packaging. According to the authors, "The industry



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has launched an unprecedented public relations blitz that uses many of the same tactics—and people—the tobacco industry used in its decades-long fight against regulation. This time, the industry's arsenal includes state-of-the-art technology. Their modern-day Trojan horses: blogs, Facebook, Twitter, Wikipedia and YouTube."

The reporters apparently relied on IRS reports, disclosure forms and e-mails exchanged by lobbyists and government officials, in addition to the industry's public relations documents and materials. They contend, "The documents offer a rare glimpse of the hardball politics of chemical regulation, where judgments about safety are made not necessarily on the merits of science but because of the clout of lobbyists working the system." Citing previous articles about the Food and Drug Administration's relatively recent purported deference to the industry on BPA safety, the article claims that the documents show, "agency scientists have relied on chemical industry lobbyists to help draft public safety standards on BPA for much longer, more than a decade."

Among other matters, the authors note that documents supposedly found in the archives of The Tobacco Institute, which was disbanded by court settlement in 1998, detail meetings between federal regulators and chemical industry lobbyists. The article states, "Lobbyists for tobacco closely followed the government's assessment of BPA because of concerns that a ban on the chemical would affect cigarette filters and plastic packaging. The two industries share the same lobby firm, the Weinberg Group." The authors cite details they allegedly uncovered about multi-million dollar campaigns to protect the chemical industry's image, exaggerate safety claims and use "outdated studies to support their position." A public health and history professor is quoted as saying, "We're watching a propaganda campaign in the making."

## SCIENTIFIC/TECHNICAL ITEMS

### Researchers Claim Brains of the Elderly Obese Show More Atrophy

According to researchers with the University of Pittsburgh and UCLA Schools of Medicine, brain scans of 94 elderly individuals showed that "obese subjects with a high BMI (BMI>30) showed atrophy of the frontal lobes [planning and memory functions], anterior cingulate gyrus [attention and executive functions], hippocampus [long-term memory], and thalamus [sensory information processing and relay] compared with individuals with a normal BMI (18.5-25)." Cyrus Raji, et al., "Brain Structure and Obesity," *Human Brain Mapping*, August 6, 2009. They also apparently found that higher BMI was associated with lower brain volumes in overweight and obese elderly subjects. The scientists conclude, "Obesity is therefore associated with detectable brain volume deficits in cognitively normal elderly subjects."

Senior author Paul Thompson, UCLA professor of neurology, was quoted as saying, "That's a big loss of tissue and it depletes your cognitive reserves, putting you at much greater risk of Alzheimer's and other diseases that attack the brain. But you can greatly reduce your risk for Alzheimer's, if you can eat healthily and keep your weight under control." Thompson also reportedly said that obese people's brains

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"looked 16 years older than the brains of those who were lean, and in overweight people looked eight years older." See *LiveScience.com*, August 25, 2009.

### Study Credits Family of Viruses in Decline of Honeybee Population

A recent study has reportedly suggested that multiple viruses are responsible for the increase of colony collapse disorder (CCD) among global honeybee populations. Reed M. Johnson, et al., "Changes in transcript abundance relating to colony collapse disorder in honey bees (*Apis mellifera*)," *Proceedings of the National Academy of Sciences*, August 2009. According to researchers, "Microarray analysis revealed unusual ribosomal RNA [rRNA] fragments that were conspicuously more abundant in the guts of CCD bees," which also carried more viruses and other pathogens than their healthy counterparts. The study posits that fragmented rRNA "may be a possible consequence of picorna-like viral infection, including deformed wing virus and Israeli acute paralysis virus." These viruses are known to "hijack the ribosome" of bees to produce viral proteins instead of the ones needed for survival, explained lead study author May Berenbaum, who noted that the viral overload leaves CCD bees vulnerable to pesticides, disease and other environmental factors.

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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.

