

## FOOD & BEVERAGE LITIGATION UPDATE

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## LEGISLATION, REGULATIONS AND STANDARDS

### Cornucopia Institute Renews Charges About Aurora Dairy Organic Practices

The Cornucopia Institute, which represents the interests of small organic agricultural operations, has called on the U.S. Department of Agriculture (USDA) to investigate charges that Aurora Dairy's High Plains facility is operating in violation of National Organic Program (NOP) standards. In its August 31, 2009, [letter](#), the institute refers to a similar complaint it filed about Aurora Dairy in 2007. According to the letter, the agency assured the institute that the 2007 complaint "would be incorporated into the probation that Aurora Dairy was operating under, pursuant to a consent agreement signed with the Department. Based on freedom of information documents, obtained by The Cornucopia Institute, no scrutiny of this facility ever took place and the allegations we communicated in 2007 were never investigated."

The letter outlines how Aurora Dairy has allegedly fallen short of NOP requirements and specifically points to the planting of an annual forage crop in the animals' pasture, which meant that for a number of weeks in prime grazing season no pasture was available for Aurora's milk cows. According to the institute, "[t]he regulations clearly call for cows to have access to pasture." The letter notes that much of the forage crop was brown when inspected in 2007, and would have burned out "in the coming 100° heat. Certainly before July 2007 that would have left most of the fields that were designated as 'pasture' devoid of vegetation that would meet the legal definition in the NOP standards. The situation in 2009 is reported to be very similar."

The Cornucopia Institute also requests that the USDA evaluate and assess both entities certifying Aurora Dairy's operation—Colorado's Department of Agriculture and Quality Assurance International. Aurora Dairy has reportedly responded that the charges are "without merit." According to a company spokesperson, "They are false claims that have never proven out. This is basically the same complaint as in 2007 and USDA has declined to investigate." The company never lost its organic certification after previous complaints found 14 alleged violations of NOP rules and culminated in an agreement that the company would reduce its herd and provide its animals with daily access to pasture during the growing season. See *FoodNavigator-USA.com*, September 1, 2009.

### FDA Offers No Objection to GRAS Status for SweetLeaf® Stevia

The Food and Drug Administration (FDA) has reportedly declined to send an objection letter to Arizona-based Wisdom Natural Brands™ concerning its request for generally recognized as safe (GRAS) status for its stevia sweetener, SweetLeaf®. Considered the gold

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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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standard in GRAS rulings, the lack of an FDA objection has confirmed earlier determinations by two independent scientific panels that reviewed SweetLeaf's® GRAS status in March 2008. The company first lodged a notification of GRAS status with FDA for a "general purpose sweetener in various food categories" in March 2009. See *FoodNavigator-USA.com*, September 2, 2009.

In a related matter, a *Los Angeles Times* article titled "Sweet stuffed: We eat lots (and lots of kinds) of sweeteners. What's in them?" offers a primer of common and not-so-common sweeteners such as sucrose, glucose, fructose, corn syrup, high fructose corn syrup, lactose, honey, and agave syrup. "America's sweet tooth is growing," writes Wendy Hansen. "Like many other mammals, we are hooked on sugar because it is packed with energy and our bodies have evolved ways of encouraging us to consume more of it. The trouble is, foods and beverages with added sugars are plentiful today and usually cheaper on a per-calorie basis than vegetables or naturally sweet fruits."

She claims that "passions burn fiercely" about sweeteners: "Some people are convinced that high fructose corn syrup has properties that link it to the fattening of America—partly for that reason, today regular sugar is almost achieving health-food status in some circles." See *The Los Angeles Times*, August 31, 2009.

### FDA Announces Two Public Meetings to Discuss *Salmonella* Prevention in Shell Eggs

The Food and Drug Administration (FDA) has [announced](#) two public meetings to discuss the prevention of *Salmonella enteritidis* (SE) during the production, storage and transportation of shell eggs. Slated for September 30, 2009, in Chicago, Illinois, and November 5, 2009, in Atlanta, Georgia, the meetings will explain an FDA final rule that requires shell egg producers "to implement measures to prevent SE from contaminating eggs on the farm and from further growth during storage and transportation, and requires these producers to maintain records concerning their compliance." The agency has anticipated that the rule will prevent 79,000 illnesses and 30 deaths attributed to SE, a leading bacterial cause of foodborne illness in the United States. See *Federal Register*, August 31, 2009.

### Acrylamide Concerns Raised by European Union, New Consumer Research

The European Chemicals Agency (ECHA) is reportedly seeking comments on a proposal to include acrylamide on its hazardous chemicals list along with 14 additional "Substances of Very High Concern" (SVHC). Tendered by the European Environment Agency and several member states, the proposal would classify acrylamide, which forms in some foods during high-temperature cooking, as a category 2 carcinogen and a category 2 mutagen. If unanimously confirmed as an SVHC by ECHA's Member State Committee, acrylamide would become eligible for the list of substances subject to authorization under EU's REACH legislation. ECHA will accept comments focusing on the hazardous properties of acrylamide until October 15, 2009. See *FoodProductionDaily.com* and *IHS News*, September 2, 2009.

In a related development, new consumer research has reportedly shown that a majority of U.S. consumers are unaware of acrylamide as a suspected carcinogen, even as governmental actions in North America have intensified to deal with it. The consultancy firm Financial Dynamics International evidently surveyed 1,002 American consumers aged 25 and older and found "virtually no awareness or familiarity of acrylamide among

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U.S. consumers," according to a firm spokesman. "Upon learning of the acrylamide issue, however, nearly half of consumers are likely to self-educate about acrylamide to learn more as well as alter food consumption and food purchasing decisions. Consumers indicated they would like to see acrylamide levels listed on food packaging." See *Food-ProductionDaily.com*, September 2, 2009; *FoodNavigator-USA.com*, September 3, 2009.

### Cereal Manufacturers Dispute FSA Ads Warning of Excessive Salt Content

The Association of Cereal Food Manufacturers (ACFM) has reportedly asked the UK Food Standards Agency (FSA) to delay a forthcoming public health initiative that warns of excessive salt content in cereals and other products. Slated for release next month, the TV and radio advertisements are part of an ongoing FSA effort to reduce the average adult's salt consumption to 6 grams per day by 2010. According to the agency, the latest £3 million salvo in this campaign does not seek to explicitly "demonize" cereal manufacturers, but instead targets all food products that contain salt.

FSA has since declined to pull the commercials, but has praised ACFM members for reducing the salt content of their products by 44 percent since 1998. The cereal trade group has also reiterated that cereals account for less than 5 percent of the total salt consumed by UK adults. "We don't believe it's appropriate, considering the volume of salt we actually deliver to the UK diet," one company spokesperson was quoted as saying. See *ACFM Annual Statement*, January 31, 2009; *FoodNavigator-USA.com*, September 3, 2009.

## LITIGATION

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### Plaintiffs Claim Bisphenol A Found in "BPA-Free" Aluminum Reusable Bottles

Kentucky and Texas residents have filed a putative class action in federal court against SIGG Switzerland (USA), Inc. claiming that the company misrepresented that its aluminum reusable bottles were free of bisphenol A (BPA). *Johnson v. SIGG Switzerland (USA), Inc.*, 3:09cv669 (U.S. Dist. Ct., W.D. Ky., filed August 28, 2009). The complaint cites actions the company's CEO took in recent years to counter claims that the bottle's resin liner contained BPA, including issuing press releases asserting that the products had no BPA, while actually working to reformulate the liner to rid it of the chemical.

Seeking to represent a nationwide class of consumers "who purchased SIGG bottles that contained BPA," the named plaintiffs allege breach of contract, breach of express and implied warranties, and violation of the Kentucky Consumer Protection Act. They seek a class certification order; compensatory, punitive and statutory damages; restitution and disgorgement of profits; attorney's fees and costs; prejudgment interest; and the costs of suit.

A recent trade publication article discusses the steps that led SIGG's CEO to admit that bottles produced before August 2008 contained trace amounts of BPA and suggests that the company, maker of a product "that became a badge of consumer eco-consciousness and all-around cool, is in danger of becoming a poster child for brand deception and corporate dishonesty." See *Advertising Age*, August 31, 2009.

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### Denny's Faces Second Class Action Over Food Salt Content

Putative class claims have been filed in federal court in Illinois against Denny's Corp., alleging that the company defrauded consumers by misrepresenting or omitting information about the "excessive amount of sodium—the deadliest ingredient in the food supply—present in its meals." *Ciszewski v. Denny's Corp.*, No. 1:09cv05355 (U.S. Dist. Ct., N.D. Ill, E. Div., filed August 29, 2009). Information about similar litigation filed against the company in a New Jersey state court appears in issue 312 of this Update.

The named plaintiff alleges that he has high blood pressure and takes medication for the condition. While he has apparently been advised to limit his salt consumption, he purportedly eats at Denny's "from time to time and with frequency," and eats the company's "Moons Over My Hammy," "SuperBird Sandwich," and "Meat Lover's Scramble," which allegedly contain more than 3,200 mg, 2,600 mg and 5,600 mg of sodium, respectively. The plaintiff seeks to certify a nationwide class of consumers and alleges violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act, unjust enrichment, breaches of contract implied in fact, implied warranty, and accounting. He seeks compensatory and punitive damages in excess of \$5 million.

### Fraud Claims Filed Against Pet Food Sellers

Putative class claims have been filed in a California federal court against Old Mother Hubbard, Inc. and Petco Animal Supplies, Inc. alleging fraud in the sale of Wellness pet food. *Barney v. Old Mother Hubbard, Inc.*, No. 2:2009cv06194 (U.S. Dist. Ct., C.D. Cal., W. Div., filed August 25, 2009). According to a news source, the complaint contends that the pet food, which is more expensive than other brands, is advertised as containing only "human grade" meat, while it actually contains feathers, viscera, skin, and bones. The plaintiffs, who have invoked the court's diversity jurisdiction, seek punitive damages and an injunction to stop ads which allegedly claim that the pet food ingredients are "of the same quality you would feed to your own family." See *Courthouse News Service*, August 31, 2009.

## OTHER DEVELOPMENTS

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### IOM Report Recommends Government Actions to Curb Childhood Obesity

The Institute of Medicine (IOM) has published a report titled *Local Government Actions to Prevent Childhood Obesity*, which advises cities, counties and townships to adopt a variety of health measures likely to directly affect children outside the regular school day. According to IOM, "16.3 percent of children and adolescents between the ages of two and 19 are obese" and "more likely than their lower-weight counterparts to develop hypertension, high cholesterol, and type 2 diabetes when they are young."

The report identifies nine healthy eating strategies focused on improving community and individual access to "healthy, safe and affordable foods"; reducing access to "calorie-dense, nutrient-poor foods"; and raising awareness about childhood obesity prevention. In addition, IOM offers six strategies designed to encourage physical activity, reduce sedentary behavior and stress the importance of sustained exercise. To further

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these goals, the report urges local policymakers to consider a number of action steps, including: (i) menu labeling requirements for chain restaurants, (ii) a tax on sugar-sweetened beverages, (iii) zoning laws that restrict fast food outlets and mobile vendors near schools and public playgrounds, (iv) prohibitions on food and beverage marketing near youth-friendly public spaces, and (v) incentive programs for retailers that reduce point-of-sale marketing for calorie-dense foods.

The IOM Committee on Childhood Obesity Prevention Actions for Local Government has reportedly likened these tactics to government efforts aimed at reducing tobacco use. "A ten percent increase in the price of a sugar-sweetened beverage could reduce consumption by eight to ten percent," one committee member was quoted as saying. See *IOM Briefing, Reuters* and *USAToday*, September 1, 2009; *FoodNavigator-USA.com*, September 2, 2009.

### All Food Packaging Leaches Chemicals

The cover story from the latest *Chemical & Engineering News* details the challenges faced by food and drug makers to keep chemical leaching from product packaging and processing to a minimum. According to the article, even the most inert substances used in food packaging, such as glass, can leach chemicals because they are typically capped with metal, rubber or plastic. For example, carbon black and nitrosamines, both carcinogens, have been used to process rubber and have been found leaching from asthma inhalers and baby-bottle nipples. Bisphenol A and the chemicals in the inks used on labels are also discussed; apparently, even plastic barriers cannot stop ink migration.

The article notes, "Speak with anyone who produces, studies, or regulates packaging, and you will hear this point repeated: It is not a question of whether packaging components will leach into a product, it's a question of how much." Complicating the issue are physical or chemical processes used after packaging that can exacerbate leaching and the chemicals that may be in the shipping environment. The article discusses the possibility that pesticides could have been shipped in a truck that next carries foods or drugs. Food and drug producers reportedly take supply chain and packaging leaching issues into consideration when developing their products.

Various government agencies around the world regulate the components that are allowed in food packaging, although the European Union addresses only plastic packaging. "All other components of packaging are subject to a general rule that food-contact materials should 'not transfer their constituents to foods in quantities which could endanger human health.'" The article also mentions emerging concerns over the use of nanotechnology in packaging. According to the author, "Regulators lack the tools to characterize and detect such nanoscale materials as well as the materials' impact on biological systems." See *Chemical & Engineering News*, August 31, 2009.

### New Anti-Obesity Ad Campaign Draws Criticism from Beverage Association

A new anti-obesity ad unveiled by the New York City Department of Health and Mental Hygiene depicts globs of human fat gushing from a soda bottle and asks the question: "Are you pouring on the pounds? Don't drink yourself fat." The ad urges viewers to choose water, seltzer or low-fat milk instead of high-calorie sodas and juice drinks.

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The \$277,000 ad, which will run in 1,500 subway cars for three months, was apparently denounced by the American Beverage Association as “counterproductive to serious efforts to address a complex issues such as obesity.” ABA spokesperson Kevin Keane said the ad campaign is “over the top and unfortunately is going to undermine meaningful efforts to educate people about how to maintain a healthy weight by balancing calories consumed from all foods and beverages with calories burned through exercise.”

But Cathy Nonas, a dietitian for the city’s health and mental hygiene department, told a news source that focus-group testing concluded that such a graphic approach would work. “We are hoping that the biggest effect is, first of all, shock, and that the understanding is that when you drink extra calories, they will be stored as fat,” she was quoted as saying. See *American Beverage Association News Release*, August 31, 2009; *The New York Times*, September 1, 2009.

### University Officials Claim Bud Light® “Fan Cans” Promote Underage Drinking

A Federal Trade Commission (FTC) lawyer and several universities have reportedly asked Anheuser-Busch InBev to stop using college team colors on Bud Light® beer cans destined for regional markets. Coinciding with the start of the football season, the “Fan Cans” have drawn fire from officials who complained that the advertisements encourage alcohol abuse on campuses and may infringe on school trademarks. According to FTC senior attorney Janet Evans, alcohol marketing restrictions also require at least 70 percent of the target audience to be age 21 or older. “We’ve told them we don’t ever want to see a campaign like this again,” Evans told reporters. “We’re concerned about the promotion because it’s targeted to college campuses where there are a large number of binge drinkers and underage persons in the audience.”

Although the commission has not accused the brewer of any regulatory violations, Anheuser-Busch has already dropped the scheme in some areas at the request of universities. “We place great value in the relationships we’ve built with college administrators and campus communities,” a company spokesperson was quoted as saying. “Certain cans are not being made available in communities where organizations have asked us not to offer them.” See *The Associated Press*, August 25, 2009; *The Los Angeles Times*, August 27, 2009; *Lawrence Journal-World*, August 31, 2009.

## MEDIA COVERAGE

### Kristin Choo, “Hungry for Change: The Feds Consider a Steady Diet of Stronger Regulation to Help Fix the U.S. Food Safety Network,” *ABA Journal*, September 2009

Freelance writer Kristin Choo opens this overview of food safety in the United States by observing, “You could fill a shopping cart with foods recently linked to outbreaks of illness caused by contamination. In June, it was cookie dough. In May, it was alfalfa sprouts. Before that, it was pistachios, peanuts, spinach, tomatoes, jalapeno peppers and, of course, hamburger.”

She discusses the piecemeal development of national food safety regulation, which has resulted in some 15 “different federal entities now regulat[ing] various aspects of

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food safety.” And she discusses the most recent initiatives to address the problem, including the Obama administration’s formation of a Food Safety Working Group which recently found that our food supply system “is hamstrung by outdated laws, insufficient resources, suboptimal management structures, and poor coordination across agencies and with states and localities. This approach was not rationally designed. Rather, it developed in fits and starts as the nation’s attention turned to one crisis after another.”

The article focuses on congressional efforts to address the problem, noting that consumer and industry interests are supporting the latest legislative proposals to improve food safety. Still, without sufficient resources and with Congress adding regulatory responsibilities to the Food and Drug Administration’s (FDA’s) plate, some commentators are concerned that improvements will be slow in coming. A former FDA chief counsel was quoted as saying, “Piling on more and more statutes digs the FDA further into a grave.” The article also cautions that pending legislation which would give FDA the authority to impose food safety requirements on imported foods could be “viewed as a trade barrier by other nations,” which tend to rely on the Codex Alimentarius Commission to establish international standards and could consider retaliation if the measures are ultimately enacted.

Choo concludes by citing Centers for Disease Control and Prevention statistics on food-borne illness outbreaks showing that tainted produce is now the leading cause of illness in the United States. Given the article’s inclusion in a journal for lawyers, the legal and regulatory opportunities for those practitioners familiar with this discipline are also noted.

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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.

