

**FOOD & BEVERAGE
LITIGATION UPDATE**



LEGISLATION, REGULATIONS AND STANDARDS

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FDA Issues Industry Guidance on Front-of-Package Labeling

The Food and Drug Administration (FDA) has issued a [letter](#) to the food industry to provide guidance on front-of-package (FOP) labeling and warn that the agency "will consider using our regulatory tools" if the industry fails to provide "a common, credible approach to FOP and shelf labeling." According to FDA, consumers are less likely to read the nutrition facts label on the back or side of a food package and thus rely on information appearing on the front of the package. Acknowledging that food companies have begun relying on "symbol programs" to convey nutritional information, FDA states that it is assessing the criteria established by food manufacturers and comparing them with its regulatory criteria.

FDA Commissioner Margaret Hamburg stated during a conference call with journalists that the agency plans to "take enforcement for egregious examples," observing that "[s]ome nutritionists have questioned whether this information is more marketing oriented than nutrition oriented. From some of the labels that we have seen, we think this is a valid concern." According to a news source, Hamburg specifically cited "products that have got the Smart Choices check mark that are almost 50 percent sugar." An industry spokesperson was quoted as saying, "We believe in the science behind the Smart Choices program" and "look forward to the opportunity to participate in FDA's initiatives on front-of-package labeling." See *FoodNavigator-USA.com* and *The New York Times*, October 21, 2009.

Cornucopia Institute Claims Target Corp. Failing to Comply with NOP Standards

An organization that seeks to advance the interests of organic and family farmers has filed a [complaint](#) with the U.S. Department of Agriculture's National Organic Program (NOP) and state officials in Wisconsin and Minnesota, asking for an investigation of Target Corp. for alleged violations of federal organic regulations. The Cornucopia Institute contends that Target advertised Silk® soymilk "with the term 'organic' pictured on the carton's label, when in fact the product's manufacturer, Dean Foods' WhiteWave division, has been sourcing this product line with conventional soybeans."

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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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According to an institute press release, "Dean Foods, had quietly shifted their products away from organics," before the Target ads appeared in newspapers throughout the Midwest. Cornucopia's senior farm policy analyst was quoted as saying, "Major food processors have recognized the meteoric rise of the organic industry, and profit potential, and want to create what is in essence 'organic light,' taking advantage of the market cachet but not being willing to do the heavy lifting required to earn the valuable USDA organic seal." See *Cornucopia Institute Press Release*, October 20, 2009.

New COOL Legislation Extends Origin Labeling Laws to Dairy Products

Three U.S. Senators have introduced a [bill](#) (S. 1783) that would extend mandatory country-of-origin (COOL) labeling to dairy products. The U.S. Department of Agriculture's current COOL law took effect in 2008 and requires origin labeling on meats, nuts and raw produce, but not dairy products or processed foods. The Dairy COOL Act of 2009 extends the current law to include milk, cheese, yogurt, ice cream, and butter, but retains the exemption for processed foods.

"With the discovery last year of widespread use of melamine in Chinese dairy products, consumers deserve to know whether the milk used to produce the dairy products they buy meets the high safety standards used in the U.S.," said Senator Russ Feingold (D-Wisc.), who co-sponsored the legislation with colleagues Sherrod Brown (D-Ohio) and Al Franken (D-Minn.). Franken said the bill helps address the issue of low milk prices by helping "American dairy farmers stand out in a crowded marketplace."

The International Dairy Foods Association (IDFA) reportedly opposes the bill, fearing that it would cause U.S. manufacturers to use more non-dairy ingredients in their products. "This legislation is misguided, because it would do nothing to help America's dairy farmers," an IDFA spokesman said. See *U.S. Senator Sherrod Brown Press Release*, October 14, 2009; *FoodNavigator-USA.com*, October 20, 2009.

OSHA Plans New Rules Designed to Protect Workers from Combustible Dust

The Department of Labor's Occupational Safety and Health Administration (OSHA) has issued an [advance notice of proposed rulemaking](#) (ANPR) to solicit public feedback on issues related to the hazards of "combustible dust" in workplaces, including agricultural and grain-handling industries, and factories that manufacture food, animal food, pesticides, and pharmaceuticals.

OSHA defines combustible dust as "all combustible particulate solids of any size, shape, or chemical composition that could present a fire or deflagration hazard when suspended in air or other oxidizing medium." Materials that can form combustible dust include wood, coal, plastics, biosolids, candy, sugar, spice, starch, flour, feed, grain, fertilizer, tobacco, paper, soap, rubber, drugs, dried blood, dyes, and certain textiles and metals. OSHA will accept comments on the proposed rule until January 19, 2010. See *Federal Register*, October 21, 2009.

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EU Approves \$417 Million Aid Package for Dairy Sector

EU Agriculture Commissioner Mariann Fischer Boel has reportedly announced €280 million (\$417 million) in additional subsidies to dairy farmers affected by plummeting agricultural prices. Intended to appease vocal protestors and agricultural lobbies, the aid responded to requests from 21 member states, including France and Germany, despite objections from the United Kingdom and the Netherlands. In addition, the European Union has agreed to cap milk production, although it stopped short of creating a pan-European institution to regulate the market. "We hope that we can stabilize the market with the proposals that we have today," Swedish Farm Minister Eskil Erlandsson was quoted as saying.

Meanwhile, the European Milk Board has welcomed the subsidies and production limits but noted that farmers have already lost €15 billion (\$22 billion) in the current economic crisis. "That shows that 280 million euros won't get us far," the board president told reporters. See *The Canadian Press*, *Daily Mail Reporter*, *The Parliament.com*, October 20, 2009.

LITIGATION**Federal Court Refuses to Recognize \$97 Million Nicaraguan Judgment in Pesticide Exposure Litigation**

A federal court in Florida has refused to enforce a \$97 million judgment obtained in a Nicaraguan court by 150 banana plantation workers who alleged that exposure to the pesticide DBCP caused their sterility. *Osorio v. Dole Food Co.*, No. 07-22693 (U.S. Dist. Ct., S.D. Fla., decided October 20, 2009). The plaintiffs sought to enforce the award under a Florida law allowing for the recognition of out-of-country foreign money judgments. Defendants Dole Food Co. and Dow Chemical Co. contended that the Nicaraguan law under which the case was litigated, Special Law 364, violated their due process rights in a number of respects, and the court agreed, finding multiple grounds for non-recognition under the Florida statute.

Among other matters, the Nicaraguan law targeted a limited number of defendants, established irrefutable presumptions about causation, restricted defendants' ability to introduce evidence, required significant financial deposits by defendants even before liability was determined, and granted no right of appeal. The U.S. court discussed at length the history of the Nicaraguan law and how it had been found unconstitutional by that nation's attorney general. The court also conducted a limited review of the scientific and medical evidence to determine that "it is scientifically and medically impossible for DBCP to cause most of the impaired sperm conditions represented in the Judgment."

The court took issue with the damages awarded to date in Nicaraguan courts under its special law, which imposes a minimum damages award, noting that "the gross national product of Nicaragua is somewhere between \$6 and 7 billion, meaning that the \$2 billion in DBCP judgments rendered to date would, if enforced, increase the size of Nicaragua's total economy by as much as 30%."

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The court also reluctantly examined the integrity of the Nicaraguan judicial system and concluded, “the substantive law under which this case was tried, Special Law 364, and the Judgment itself, purport to establish facts that do not, and cannot, exist in reality. The law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs’ claims. Finally, the judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a ‘system of jurisprudence likely to secure an impartial administration of justice.’”

Fast Food Companies Sued in Connecticut for PhIP in Chicken Meals

Connecticut residents have filed a putative class action in state court against several fast food companies alleging that they violated consumer protection laws by selling grilled chicken products containing a carcinogenic chemical without providing warnings. *Delio v. McDonald’s Corp.*, No. n/a (Hartford Superior Court, Connecticut, filed October 21, 2009). They seek to represent a class of all individuals who purchased and ingested these products in Connecticut and allege that the defendants knew or should have known that PhIP is formed when chicken is grilled and that it “has no safe level for ingestion.”

The named plaintiffs, who are represented by The Cancer Project, a Washington, D.C.-based nonprofit organization, seek warning signs, actual damages, punitive damages, and attorney’s fees. The complaint refers to scientific research on PhIP and notes that California placed it on its list of chemicals known to the state to cause cancer in 1994 and that the group Physicians Committee for Responsible Medicine notified defendants McDonald’s Corp. and Burger King Corp. about the chemical’s cancer risk in April 2006. Thus, the proposed class includes those who purchased the products between October 2006 and October 2009.

The complaint also refers to tests conducted on chicken samples purchased from California fast food outlets revealing the presence of “substantial levels of the known carcinogen, PhIP,” and claims that “the grilled chicken products tested in California are identical to the grilled chicken products sold by Defendant’s Connecticut restaurants.” While the plaintiffs allude to increased cancer risk and increased health care costs, they do not allege personal injury from their ingestion of grilled chicken products. Also named as a defendant is Friendly Ice Cream Corp.

Mississippi GM Rice Plaintiffs Seek Relief Granted to Missouri Plaintiffs

After a federal court in Missouri agreed to dismiss some of the claims and defenses in litigation filed by Missouri rice farmers over the alleged contamination of commercial rice crops with genetically modified (GM) rice, the defendants and Mississippi rice farmers filed motions to have the same rulings applied to their case, which is pending before the same multidistrict litigation court. *In re: Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., motions filed October 15, 2009). Information about the court’s October 9 ruling, striking claims for negligence per se, public nuisance and violations of the North Carolina Unfair Trade Practices Act, appear in issue 323 of this Update.

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The Mississippi plaintiffs have requested that the court grant summary judgment on the defenses of (i) intervening/superseding acts or omissions and (ii) actions in conformity with generally recognized, state-of-the-art standards in the industry. They argue that these defenses are not available on the record facts under Mississippi law. Plaintiffs in these GM rice cases allege that they lost millions when the worldwide market for U.S. rice collapsed after GM rice purportedly contaminated commercial rice and foreign countries refused to import U.S. rice.

E. Coli Plaintiffs Seek to Certify Two Classes

Plaintiffs who brought personal and economic injury claims against Topps Meat Co. for an *E. coli* outbreak that led to the recall of more than 20 million pounds of ground beef in 2007 have filed a motion for class certification. *Patton v. Topps Meat Co.*, No. 07cv654 (U.S. Dist. Ct., W.D.N.Y., Buffalo Div., motion filed October 15, 2009). While the proposed classes, a “consumer class” of persons who purchased ground beef subject to the recall and allege economic losses and an “injury class” of persons who consumed the ground beef and allege personal injury, are national in scope, the plaintiffs contend that New York law will apply to the case.

According to the named plaintiffs, each of whom was allegedly sickened by consuming contaminated meat, federal investigators confirmed 40 *E. coli* cases linked to the outbreak strain and estimate that for every reported case, 20 cases go unreported. Thus, they suggest that the number of injury class members could be as high as 800 and, with hundreds of thousands potentially members of the consumer class, argue that the class mechanism would be the most economical and efficient way to adjudicate the claims. They also argue that recovery against Topps, which declared bankruptcy, is limited to about \$11 million, representing the available insurance proceeds, and claim that certification under Rule 23(b)(1)(B), for limited fund class actions, would be appropriate. The litigation includes a number of nationwide retailers, but the plaintiffs acknowledge that “a jury could assess all liability to Topps.”

Plaintiffs attempt to bolster their argument as to the suitability of the class-action device by noting that the case involves a single product, a single manufacturer and confirmation that at least some of the product was contaminated and caused injury. They also claim that the proposed classes are readily identifiable and “depend solely on existing, objective facts; whether a person purchased recalled frozen ground beef products and whether a person is claiming injury from consuming these products.”

OTHER DEVELOPMENTS

Britain’s Royal Society Issues Report Advocating GM Crops

The Royal Society has issued an October 2009 report, [*Reaping the Benefits: Science and the sustainable intensification of global agriculture*](#), that calls for “a £2 billion ‘Grand Challenge’ research program on global food security.”

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According to an October 21 press release, the world must increase food crop production by at least 50 percent by 2050 to meet global demands without damaging the environment. The “Grand Challenge” program should thus aim to support public research and policies designed to explore “new methods of crop management to increase yields and minimize environmental impact. It should also support the development of improved crop varieties by both conventional breeding and genetic modification.”

The report assesses “science-based technologies and developments in biological science that are seen to have potential benefits for increasing crop yields.” It specifically examines the consequences and complications of food crop innovation stemming from short-term (less than eight years), medium-term (nine to 16 years) and long-term (more than 16 years) projects. The Royal Society specifically analyzes plans involving the “breeding and [genetic modification] of new varieties of crops that are resistant to disease, drought, salinity, heat and toxic heavy metals,” noting that some “new varieties of wheat with high water use efficiency have shown yield increases of [10 to 15 percent].”

“It’s unmistakable that scientific development holds the key to ensuring future food security. The Green Revolution was built on decades of substantial global investment in agricultural research and if we are to overcome the challenge that now lies before us, we will need an even greater agricultural revolution,” a report author was quoted as saying.

Meanwhile, the UK Soil Association has since issued a statement refuting the Royal Society recommendations. “GM is past its sell-by date,” the group’s policy coordinator stated. “For over two decades, huge claims have been made about the potential for GM, which have not come to fruition. Why is an organization like the Royal Society banging the drum for a failing technology when exciting new developments such as Marker Assisted Selection, included in the report recommendations, are producing almost all of the successful innovations in crop breeding?” See *Soil Association Statement*, October 21, 2009.

CSI: Miami Features Foodborne Illness Investigation

A recent episode of *CSI: Miami* has reportedly drawn criticism from the National Cattlemen’s Beef Association and other trade groups for the show’s portrayal of a foodborne illness investigation. Titled “Bad Seed,” the October 20, 2009, installment of the popular CBS drama focused on a fictional outbreak that eventually led the crime scene investigators to discover, not only the origin of a deadly new *E. coli* strain, but a feedlot using genetically modified (GM) corn. According to the [Agricultural Law blog](#), the plot also covered a wide range of legal issues such as Veggie Libel laws, organic standards, pollen drift and genetic contamination, farmer liability for unauthorized GM crops, undocumented farm workers, farm consolidation, and crop contamination via irrigation water. Plaintiffs’ attorney [Bill Marler](#) reportedly provided CBS producers background information for the episode. See *Agricultural Law*, October 20, 2009

Both the National Cattlemen’s Beef Association (NCBA) and the National Corn Growers Association (NCGA) have since issued statements refuting *CSI: Miami’s* take

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on biotechnology and food safety. While the beef trade group advised the industry to “remember that many fans of the show are less caught up in the details of the cases as they are the interplay and relationships among the characters,” one NCGA spokesperson described the “convoluted” episode as “trying to link together *E. coli*, water pollution from a cattle feedlot, botulism and genetic engineering in corn into a single plot line that came off looking like a spoof of a bad ‘70s cop show.” See *USA Today*, October 20, 2009; *Corn Commentary*, October 21, 2009; *The Truth About Trade & Technology*, October 23, 2009.

“The only crime on last night’s episode . . . was a poor script and even worse research,” stated NCGA senior communications manager Mark Lambert in an October 21 article on the *Corn Commentary* blog. “Apparently the creative well of ideas on novel ways to send people to the great beyond must have dried up in season eight. With more versions of CSI than there are television networks, I guess this was bound to happen.”

Demonstrators Protest “Fat-ism” Outside London Mayor’s Office

Members of the “Size Acceptance Movement” reportedly protested outside the mayor of London’s office recently, urging him to ensure that employers are not prejudiced against overweight people. The group claims that surveys show 93 percent of employers would rather employ a thin person rather than an overweight one even if such individuals are equally qualified.

The group evidently wants to ban “fat-ism” in the UK by emulating a San Francisco ordinance that prohibits height and weight discrimination in housing and employment. Demonstrators said the overweight should be protected on the same grounds as race, age and religious discrimination, and that attacking someone for being fat should be a hate crime. “I have been punched, I have had beer thrown in my face, I have had people attack me on the train,” one protestor said. See *BBC News*, October 19, 2009.

MEDIA COVERAGE

Paul Voosen, “Ghost of ‘Frankenfood’ Haunts Europe,” *Greenwire*, October 21, 2009

The second of a five-part series, this article examines in some depth how a number of European countries came to turn their backs on genetically modified (GM) crops. Belgian scientists apparently experimented with GM plants in the 1980s and instituted 50 different field trials, positioning Europe to be a world leader in plant biotechnology. A public backlash, fueled by fears over mad cow disease and food safety, followed the European Union’s approval of a pesticide-resistant corn, and no GM crop has since been approved.

European scientists, concerned about the politicization of science, are apparently considering ways to restore public confidence in scientific integrity and the safety of GM crops. The Dutch have apparently proposed that the EU allow each member nation to make its own decision about whether to allow GM crops after giving consideration to a broad range of issues, including human safety, biodiversity,

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"cultural heritage," and economics. The Dutch are reportedly hoping that this approach, which also emphasizes the benefits of biotechnology, such as reduced pesticide and herbicide use, will put the technology in its "proper place," and give farmers the opportunity to move forward with the cultivation of GM crops. The matter will be fully debated in 2010, when the EU's 27 member nations present their proposals to a new European Commission that will consider whether to revise the union's GM policies.

SCIENTIFIC/TECHNICAL ITEMS

Study Questions Efficacy of Public Policy on Salt Consumption

A recent [study](#) in the *Clinical Journal of the American Society of Nephrology* has apparently raised questions about "the scientific logic and feasibility of the decades-long effort to limit salt intake in humans," according to a concurrent University of California, Davis, press release. Researchers analyzed 24-hour urinary sodium excretion data from 19,151 individuals involved in 62 sodium intake studies from 33 countries, concluding that "humans naturally regulate their salt intake within a narrowly defined physiologic range." Their findings revealed that despite varying food environments, human salt consumption "tracks within a narrow range" between 2,700 and 4,900 mg. In addition, neuroscience research has apparently suggested that "sodium intake is tightly controlled by critical pathways in the brain to main optimal function of many physiologic functions."

"If sodium intake is physiologically determined, then our national nutrition guidelines and policies must reflect that reality," the lead author was quoted as saying. "It is unrealistic to attempt to regulate Americans' sodium consumption through public policy when it appears that our bodies naturally dictate how much sodium we consume to maintain a physiologically set normal range. To do otherwise will expend valuable national and personal resources against unachievable goals."

Meanwhile, critics have pointed to studies claiming that even modest declines in individual salt consumption have health benefits. Professor Graham MacGregor of St. George's University of London reportedly noted that his own work appearing in the journal *Hypertension* showed that "reducing salt intake from 9.7 to 6.5 grams per day reduced average blood pressure from 146/91 to 141/88 mmHg within six weeks." In addition, a UK Food Standards Agency (FSA) spokesperson stated that public health efforts resulting in a modest 0.9 g reduction in daily salt consumption have prevented 6,000 premature deaths and saved £1.5 billion annually. "Frankly, [McCarron's] article contains no evidence that salt intake is not beneficial," said MacGregor. "If such measures were introduced in the US, it would reduce the number of death from heart disease and stroke by 150,000 a year." See *FoodNavigator.com*, October 16, 2009.

In a related development, ConAgra Foods Inc. has apparently pledged to remove one-fifth of the salt in its products by 2015. The company decided to remove 8 million pounds of salt from its foods in anticipation of revised U.S. dietary guidelines

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slated for 2010. "We want to let public stakeholders know we're taking this very seriously and we're acting upon it," ConAgra's vice president of nutrition told reporters. "When you're a lead dog, this is what you do, you get out ahead of issues." See *Bloomberg.com*, October 15, 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.

