

**FOOD & BEVERAGE
LITIGATION UPDATE**



LEGISLATION, REGULATIONS AND STANDARDS

CONTENTS

Legislation, Regulations and Standards

Smart Choices Program™ Halted Pending Review by FDA, Connecticut AG1

NIH Program to Spend \$30 Million on Bisphenol A Research2

Draft Acrylamide Toxicological Profile Now Available for Public Comment3

World Trade Organization COOL Initiative Blocked3

EU Rebuffs United States in WTO Poultry Dispute3

San Francisco Questions Cereal Maker's Immunity Claims3

Litigation

U.S. Supreme Court Review Sought in GM Alfalfa Case4

Convenience Store Chain Settles with Produce Supplier in *Salmonella* Outbreak4

Other Developments

Fish Farm Salmon Escape into British Columbia Waters; Hawaii Approves Tuna Farm5

Pine Nuts Reportedly Leave Some People with "Pine Mouth" Aftertaste5

Media Coverage

New York Daily News Guest Columnist Peter Singer Advocates Meat Tax6

Experts Debate Promise of GM Crops in *New York Times*6

Scientific/Technical Items

Danish EPA Publishes Report on Endocrine Disruptors in Consumer Products7

Researchers Allege Link Between HFCS and Hypertension7

Smart Choices Program™ Halted Pending Review by FDA, Connecticut AG

The food industry has reportedly halted a new front-of-packaging (FOP) labeling campaign pending Food and Drug Administration (FDA) guidance. According to an October 23, 2009, press release, the Smart Choices Program™ voluntarily postponed active operations after FDA Commissioner Margaret Hamburg indicated "that the agency intends to develop standardized criteria on which future front-of-package nutrition or shelf labeling will be based." While awaiting FDA guidance, the program will no longer enroll new companies or encourage use of the logo. "We welcome the FDA's interest in developing uniform front-of-package and shelf-labeling criteria," said program chair Mike Hughes. "The Smart Choices Program shares that exact goal, and was designed to provide a voluntary front-of-package labeling program that could promote informed food choices and help consumers construct healthier diets. We continue to believe the Smart Choices Program is an important step in the right direction." *See Reuters*, October 23, 2009; *FoodNavigator-USA.com* and *UPI.com*, October 26, 2009.

Hamburg had reportedly criticized the program for including products that contain almost 50 percent sugar. She also announced plans to investigate alleged misuses of FOP labeling and "take enforcement for egregious examples," a proposal seconded by Connecticut Attorney General Richard Blumenthal in a letter to industry. "The program's cessation of active operations makes continued use of the logo potentially even more misleading and compounds consumer confusion," said Blumenthal, who reported yesterday that all food manufacturers have agreed to phase out the Smart Choices logo. "Our investigation into Smart Choices continues – seeking any scientific research and reasoning to support a program that promotes fat-filled mayonnaise, sugary cereal and ice cream as Smart Choices." *See The New York Times*, October 24, 2009; *FoodNavigator-USA.com*, October 28, 2009; *Connecticut AG Office Press Release*, October 29, 2009.

In a related development, the Rudd Center for Food Policy and Obesity has published a report titled "[Cereal F.A.C.T.S.: Evaluating the Nutrition Quality and Marketing of Children's Cereals](#)," which claims that "child cereals contain 85 percent more sugar, 65 percent less fiber and 60 percent more sodium when compared to adult cereals." The report apparently examined the nutrient composition and marketing efforts of 115 cereals brands and 277 individual

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 325 | OCTOBER 30, 2009

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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com



or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com



If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

cereal varieties, distinguishing “between brands marketed directly to children (i.e., child brands); those marketed to parents and adults as appropriate to feed their children and/or families (i.e., family brands); and those marketed to adults for adult consumption only (i.e., adult brands).” The results purportedly revealed that “the average preschooler sees 642 cereal ads per year on television alone, almost all for cereals with the worst nutrition rankings,” and that “42 percent of child-targeted cereals contain artificial food dyes, compared with 26 percent of family cereals and 5 percent of adult cereals.”

Researchers also claimed that in 2006, “cereal companies spent \$229 million to target children and adolescents,” despite the efforts of the industry-backed Children’s Food and Beverage Advertising Initiative (CFBAI) to promote healthier products. “We found that cereal companies are in full compliance with their self-defined CFBAI pledges to reduce unhealthy marketing to children. And yet, we also found that the amount of cereal marketing to children and the nutrition quality of children’s cereals remain at unacceptable levels and have not objectively or meaningfully improved,” concluded the study authors, who recommended government intervention to require that “foods marketed to children must be more, not less, nutritious than foods marketed to adults.” See *USA Today*, October 25, 2009; *FoodNavigator-USA.com*, October 26, 2009; *Rudd Center Press Release*, October 27, 2009.

Meanwhile, the Kellogg Co. has noted that all of their products comply with labeling requirements and list guideline daily amounts of nutrients. “The reality is a single serving of Frosties® or Coco Pops® has the same amount of sugar in it as a glass of orange juice or a banana,” a company spokesperson was quoted as saying. “While a bowl of Rice Krispies® gives you less than a tenth of your daily allowance for salt, less salt than you’d find in one slice of dry wholemeal bread.” See *FoodNavigator-USA.com*, October 27, 2009.

NIH Program to Spend \$30 Million on Bisphenol A Research

The National Institute of Environmental Health Sciences (NIEHS) has announced that it will spend \$30 million on two-year research grants targeting the potential health risks of bisphenol A (BPA) exposure. The ubiquitous chemical is used to make polycarbonate plastics and epoxy resins that may leach into foods and beverages from product packaging.

“We know that many people are concerned about bisphenol A, and we want to support the best science we can to provide the answers,” NIEHS Director Linda Birnbaum was quoted as saying. NIEHS and the National Toxicology Program identified BPA as a priority after concluding in 2008 that evidence from animal studies showed that BPA “may be causing adverse effects.”

Researchers will reportedly focus on low-dose BPA exposure and compile data on “a number of health effects including behavior, obesity, diabetes, reproductive disorders, development of prostate, breast and uterine cancer, asthma, cardiovascular diseases and transgenerational or epigenetic effects.” See *USA Today* and *NIH News Release*, October 28, 2009.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 325 | OCTOBER 30, 2009

Draft Acrylamide Toxicological Profile Now Available for Public Comment

The Department of Health and Human Service's Agency for Toxic Substances and Disease Registry has posted on its Web site a [draft toxicological profile](#) for acrylamide, a chemical by-product of some high-temperature cooking processes that has been linked to cancer in laboratory rats. The agency is accepting public comments on the profile until February 26, 2010.

World Trade Organization COOL Initiative Blocked

The United States has reportedly blocked Canadian and Mexican efforts to convene a World Trade Organization (WTO) panel that would determine whether the new U.S. country-of-origin (COOL) labeling requirements for meat products are fair. Under WTO procedures, a country can block the creation of a dispute settlement panel once. If, as expected, Canada and Mexico renew their calls for a panel at the WTO dispute settlement body's November 19, 2009, meeting, the United States will be unable to block it again unless the body consents. U.S. officials reportedly told the WTO, "The U.S. urges Canada and Mexico to reconsider their decisions to request a panel in these disputes, and we are not in a position to agree to the establishment of a panel at this time." See *Meatingplace.com* and *Law 360*, October 26, 2009.

EU Rebuffs United States in WTO Poultry Dispute

The European Union has reportedly blocked a U.S. request that the World Trade Organization (WTO) settle a dispute over a ban on American poultry imports. The Office of the U.S. Trade Representative apparently asked for the ruling after industry groups criticized the scientific evidence behind an EU regulation prohibiting the pathogen-reduction treatments used in U.S. poultry processing. According to the National Chicken Council, U.S. poultry exports could exceed \$300 million if EU regulators permitted the in-plant use of chlorine dioxide, trisodium phosphate, acidified sodium chlorite and peracetic acid in products destined for the European market. The European Union cannot block a second request, which is apparently expected in November. See *Bloomberg.com*, October 23, 2009; *Meatingplace.com*, October 26, 2009.

San Francisco Questions Cereal Maker's Immunity Claims

San Francisco's city attorney has [written](#) to the Kellogg Co. to express "serious concerns about Kellogg's advertising of sugary children's breakfast cereals with the claims, 'Now Helps Support Your Child's Immunity' on the front of the package." The company is apparently promoting its Cocoa Krispies® cereal with this claim. The letter contends that "[t]he Immunity Claims may also mislead parents into believing that serving this sugary cereal will actually boost their child's immunity, leaving parents less likely to take more productive steps to protect their children's health."

City Attorney Dennis Herrera also states, "At a time when parents are increasingly worried about the spread of the H1N1 virus ('swine flu'), it is vitally important that parents receive accurate information about what they can do to protect their children's health." He suggests that the company may be violating California's Unfair

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 325 | OCTOBER 30, 2009

Competition Law and that it may be undermining “critical public health efforts to prevent the spread of a disease that the President has declared to be a national emergency.”

The October 27, 2009, letter requests that the company provide consumer studies and surveys it relied on and scientific research supporting the immunity claims, as well as “full reports of experiments, methods, results, and outcomes, in addition to the CVs of the individuals who performed the research.” If the company does not respond within 30 days, the city attorney indicates that he will “seek an immediate termination or modification of the advertising claim.”

LITIGATION

U.S. Supreme Court Review Sought in GM Alfalfa Case

Monsanto Co. and farmers who grow genetically modified (GM) alfalfa have reportedly filed a petition seeking U.S. Supreme Court review of a Ninth Circuit Court of Appeals decision barring them from selling or using Roundup Ready® alfalfa seed until the U.S. Department of Agriculture (USDA) completes an environmental impact statement (EIS). *Monsanto v. Geertson Seed Farms*, No. 09-475 (U.S., petition for writ of *certiorari* filed October 22, 2009). The petitioners apparently argue that the lower court ruling “threatens to make blanket injunctions all but automatic in [National Environmental Policy Act] cases arising in that circuit.” Additional details about the litigation appear in issues 274 and 309 of this Update.

Environmental groups, farmers and consumers filed the litigation against the USDA in 2006 challenging its decision to approve the Monsanto seed. The Ninth Circuit determined that the agency erred by not completing an EIS, given evidence that GM crops could contaminate conventional crops and lead to the creation of weeds resistant to the Roundup® herbicide. According to a news source, the USDA did not join Monsanto in filing its final, unsuccessful petition for rehearing before the Ninth Circuit and has not joined the petition for *certiorari*. A Monsanto spokesperson was quoted as saying, “there is no evidence of any harm resulting from Roundup Ready alfalfa, and the trial court failed to consider relevant scientific evidence in reaching its decision to ban planting.” See *Greenwire*, October 29, 2009.

Convenience Store Chain Settles with Produce Supplier in *Salmonella* Outbreak

According to a news source, Sheetz, Inc., a Pennsylvania-based chain of convenience stores, has settled claims it brought against Coronet Foods, Inc., which allegedly supplied it with *Salmonella*-tainted tomatoes that led to the illness of some 400 consumers in 2004. *Anslinger v. Coronet Foods, Inc.*, No. 2004-gn-5396 (Blair County Court of Common Pleas, Pennsylvania, settled October 23, 2009). Both companies had been sued by the sickened consumers, and Sheetz apparently settled their claims before seeking damages in excess of \$11 million from the produce supplier, which filed for bankruptcy in 2004. The terms of the settlement are reportedly confidential. See *Product Liability Law 360*, October 27, 2009.

**FOOD & BEVERAGE
LITIGATION UPDATE**

ISSUE 325 | OCTOBER 30, 2009

OTHER DEVELOPMENTS**Fish Farm Salmon Escape into British Columbia Waters; Hawaii Approves Tuna Farm**

Some 40,000 Atlantic salmon have reportedly escaped a fish farm into Pacific Ocean waters off the coast of British Columbia. They apparently slipped through a hole in the net while farm crews removed fish that had died from low oxygen levels. Recovery was apparently delayed, and Atlantic salmon were found some miles away by commercial fishermen.

Fish farm critics have called for closed containment systems for the 35 million salmon raised in fish farms, noting that while Atlantic salmon are not supposed to survive in B.C. waters, escaped farm fish have apparently been found in 80 B.C. rivers, and juvenile Atlantic salmon have been found in three rivers. They called the latest escape "another blow to the health of our marine ecosystems and wild-salmon population."

Meanwhile, the Hawaii Board of Land and Natural Resources has apparently approved the nation's first tuna farm off the coast of the Big Island. The venture, operated by the Honolulu-based Hawaii Oceanic Technology, will artificially hatch bigeye at a University of Hawaii lab in Hilo and then transport the fish to ocean pens three miles offshore where they will be allowed to grow to 100 pounds. The farm is reportedly expected to produce 6,000 tons of bigeye when fully operational. The company expects to avoid the diseases that plague other fish farms, claiming that its fish will not be as densely packed in the cages, which will be in deep water where strong currents will sweep away fish waste and uneaten food.

Still, environmentalists, who call the venture "an industrial feed lot," have reportedly warned that diseased farm fish may escape and contaminate wild stocks. They are also concerned that the project will not be sustainable if it imports its feed and exports the majority of its tuna. See *Victoria Times Colonist* and *Associated Press*, October 24, 2009.

Pine Nuts Reportedly Leave Some People with "Pine Mouth" Aftertaste

Pine nuts imported from China have reportedly left some Americans with a bitter, metallic aftertaste, prompting the Food and Drug Administration (FDA) to investigate the claims. According to a news source, FDA has received about two dozen complaints of "pine mouth" in recent months, but no illnesses have been reported. "Should the FDA find a public health hazard, then we will advise consumers accordingly," an agency press officer said.

The United States reportedly imports some 25 million pounds of pine nuts annually, 90 percent of which comes from China. A Richmond, Virginia, importer of Chinese pine nuts has scoffed at the pine mouth phenomenon, calling it an "Internet sensation" on food Web sites and blogs. He said he first heard reports of pine mouth a few years ago and had his product tested for heavy metals, *Salmonella*, yeast, and mold, but that testing revealed nothing unusual. See *The Baltimore Sun*, October 7, 2009.

**FOOD & BEVERAGE
LITIGATION UPDATE**

ISSUE 325 | OCTOBER 30, 2009

MEDIA COVERAGE

***New York Daily News* Guest Columnist Peter Singer Advocates Meat Tax**

A high tax on meat is needed for meat-eaters to consume less, ultimately resulting in multiple benefits to human health, animal welfare and the environment, writes Peter Singer, a Princeton University bioethics professor and author of *Animal Liberation* and co-author of *The Ethics of What We Eat*, in an October 25, 2009, guest column in the *New York Daily News*. He advocates a 50 percent tax on the retail value of meat, but "if it is not enough to bring about the change we need, then, like cigarette taxes, it will need to go higher." Singer advocates a tax on all meat, fearing "a tax on red meat alone would merely push meat-eaters to chicken."

Americans, Singer writes, have "been ignoring the cow in the room. That's right, cow. We don't eat elephants. But the reasons for a tax on beef and other meats are stronger than those for discouraging consumption of cigarettes, *trans* fats or sugary drinks."

He suggests that a meat tax would (i) save lives because "red meat is likely to kill you"; (ii) discourage people from supporting cruelty to farm animals; (iii) decrease industrial meat production, which "wastes food" and puts "unnecessary pressure on our croplands and causes food prices to rise all over the world"; (iv) "be an important step toward cleaner rivers" because less livestock would result in less agricultural runoff from fertilizers used to grow the grain to feed the livestock; and (v) be a "highly effective way of reducing our greenhouse gas emissions and avoiding catastrophic climate change."

Experts Debate Promise of GM Crops in *New York Times*

The New York Times invited several agriculture experts and activists to participate in its October 26, 2009, "Room For Debate" column, which addressed the potential of genetically modified (GM) crops to alleviate world hunger and protect the environment. Although essays by both Raj Patel of the Institute for Food and Development Policy and North Carolina State University Professor Michael Roberts underscored the political challenges facing the next Green Revolution, Cornell University Professor and 2001 World Food Prize Laureate Per Pinstrup-Andersen remained cautiously optimistic about bioengineering. "While new technology must be tested before it is commercially released, we should be mindful of the risks of not releasing it at all," he wrote.

Oxford University economist Paul Collier echoed this response, describing the GM crop debate as "contaminated by political and aesthetic prejudices: hostility to U.S. corporations, fear of big science and romanticism about local, organic production." But Vandana Shiva, founder of the Navdanya movement in India, took issue with this assessment, claiming that "[g]enetic engineering has not increased yields." She pointed to a recent Union of Concerned Scientists study that purportedly failed to find "significantly increased yields from crops engineered for herbicide tolerance or crops engineered to be insect-resistant." According to Shiva, "small farms based on the principles of agri-ecology and sustainability produce more food."

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 325 | OCTOBER 30, 2009

Jonathan Foley of the University of Minnesota's Institute on the Environment proposed a middle ground between "local and organic systems and industrialized agriculture." Noting that "neither paradigm can fully meet our needs," he urged nations to explore "many promising avenues" that would combine organic farming techniques with GM crops designed to reduce water and fertilizer demand. "A new 'third way' for agriculture is not only possible, it is necessary," Foley concluded. "Let's start by ditching the rhetoric, and start bridging the old divides."

SCIENTIFIC/TECHNICAL ITEMS

Danish EPA Publishes Report on Endocrine Disruptors in Consumer Products

The Danish Environmental Protection Agency has published a survey and health [assessment](#) examining the exposure of 2-year-olds to chemical substances in consumer products.

The report apparently focused on endocrine disruptors, including phthalates and bisphenol A (BPA), found not only in general consumer products but specifically in food products and food contact materials. The study apparently concluded that (i) "a few exposures to a high content of an endocrine disruptor, such as that of DBP [bibutyl phthalate] in rubber clogs, may result in a critical risk for the 2 year-old"; (ii) "the amounts that 2 year-olds absorb, in particular from the phthalate DBP (mostly from foods) and dioxins and dioxin-like PCBs (mostly from foods, and partly from indoor air and dust), constitute a risk for anti-androgen disruptions to the endocrine system"; and (iii) "the amounts that 2 year-olds absorb from the parabens propylparaben and butylparaben, in particular, can constitute a risk for oestrogen-like disruptions of the endocrine system." See *Danish Ministry of the Environmental Press Release*, October 23, 2009.

Based on these results, the Danish government reportedly intends to lobby the European Union to restrict the use of these substances in consumer products. According to an October 23, 2009, article in *The Telegraph*, this latest study has contributed to an emerging picture of "ubiquitous chemical contamination driving down sperm counts and feminizing male children all over the developed world." Pointing to earlier research conducted in Canada, Britain, Denmark and the United States, the article also criticizes the United Kingdom's role in exempting these "gender-benders" from EU regulations controlling hazardous chemicals. "Confidential documents show that it did so after pressure from George W. Bush's administration, which protested that U.S. exports 'could be impacted,'" alleges the media report.

Researchers Allege Link Between HFCS and Hypertension

According to a news source, research presented this week during a scientific meeting in San Diego, California, found that more than 4,500 adults who ate or drank more than 74 grams per day of high-fructose corn syrup (HFCS) increased their risks of developing high blood pressure. Apparently, that level of consumption

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 325 | OCTOBER 30, 2009

led to a 28 percent, 36 percent and 87 percent increased risk for blood pressure levels of 135/85, 140/90 and 160/100. The authors reportedly concluded, "These results indicate that high fructose intake in the form of added sugars is significantly and independently associated with higher blood pressure levels in the U.S. adult population with no previous history of hypertension."

Additional research will reportedly be needed to learn if low-HFCS diets can normalize blood pressure and prevent the development of hypertension. The findings were presented at the American Society of Nephrology's 42nd Annual Meeting and Scientific Exposition. See *NutritionHorizon.com*, October 30, 2009.

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

FOOD & BEVERAGE LITIGATION UPDATE

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.

