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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

USDA Inspector General Report Criticizes Regulation Deficiencies Regarding GE Animals, Insects

The U.S. Department of Agriculture's (USDA's) Office of Inspector General (IG) has issued an **audit report** criticizing USDA agencies for lacking coordinated oversight of regulations behind research and development of genetically engineered (GE) animals and insects. The agencies conduct and fund research into how GE animals can enhance the productivity of food animals and how GE insects can reduce problems posed by agricultural pests, according to the report.

Among its criticisms, the report faults the Animal and Plant Health Inspection Service (APHIS) for not developing regulations for GE animals and insects that pertain specifically to their introduction for "import, interstate movement, or field release." Noting that "APHIS program units focusing on biotechnology and animal health, respectively, had not coordinated with one another to prioritize the development of a regulatory framework for GE animals and insects," the report states that consequently "the requirements that apply to these organisms were not clear to researchers and the public."

Food & Water Watch has called for a similar IG review of the Food and Drug Administration's research process for GE animals. "They should start with asking why the approval of genetically engineered salmon for human consumption is being approved as a veterinary drug," said the group's executive director Wenonah Hauter. *See Food & Water Watch Press Release,* June 14, 2011.

EFSA Requests Information on Aspartame

The European Food Safety Authority (EFSA) has issued a **public call** for data "on the artificial sweetener aspartame (E 951) for consideration in a full re-evaluation to be completed in 2012 as requested by the European Commission [EC]." EFSA has asked interested parties and stakeholders to submit "scientific or technical data—published, unpublished and newly

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generated—related to the use of aspartame in food and drinks and as a table-top sweetener."

Originally scheduled for 2020, the aspartame review is "part of the systematic re-evaluation of all authorized food additives in the European Union." EFSA apparently agreed to move up the proceedings after European Parliament members voiced concerns about the sweetener. "Due to EFSA's scientific cooperation efforts, particularly with its partners in EU Member States, ongoing liaison with international partners and its stakeholder dialogue, EFSA can draw on a well-established network to ensure that all the relevant data are considered," stated the agency, which will release a summary of the submissions after the September 30, 2011, deadline, and then begin preparing the risk assessment. *See EFSA News Release,* June 1, 2011.

Los Angeles School District Bans Flavored Milk from School Menus

The Los Angeles Unified School District has reportedly removed flavored milk from school menus in an effort to combat rising rates of childhood obesity. The school board approved a five-year, $100-million dairy contract excluding chocolate and strawberry milk in favor of low-fat and nonfat plain milk, and soy and Lactaid products. Beginning in the 2011-12 school year, the menu overhaul will also include more vegetarian and ethnic fare and eliminate corn dogs, chicken nuggets and other breaded items. *See Los Angeles Times,* June 15, 2011.

LITIGATION

Fourth Circuit Allows Compensation for Poultry Workers' Donning and Doffing Time

The Fourth Circuit Court of Appeals has determined that the time poultry workers spend donning and doffing protective gear at the beginning and end of their shifts must be compensated as an "integral and indispensable" part of the principal activity of employment. ***Perez v. Mountaire Farms, Inc.*, No. 09-1917 (4th Cir., decided June 7, 2011)**. Because the time the employees spent doffing and donning some of their gear during an uncompensated meal break was related to their meal break and took a minimal amount of time, the court ruled that time non-compensable.

The court found that the employer did not willfully violate the law, thus a two-year statute of limitations was applied to the litigation. And the lack of willfulness was found to be evidence of its good faith, so the court denied the employees' request for liquidated damages under the Fair Labor Standards Act.

Court Refuses to Dismiss Claims That Safeway Must Warn Loyalty Customers About Recalls

A federal court in California has denied Safeway, Inc.'s motion to dismiss or stay proceedings alleging that it has an obligation to use information in its loyalty card customer database to provide e-mail notice about produce recalls ordered by the Food and Drug Administration (FDA) or U.S. Department of Agriculture. *Hensley-Maclean v. Safeway, Inc.*, No. 11-1230 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., order entered June 13, 2011). Additional details about the case, which was first filed in state court, appear in **Issue 380** of this *Update*.

The grocery company argued that the "primary jurisdiction doctrine" or "equitable abstention" required the court to dismiss or stay the litigation "until and unless regulatory agencies have had the opportunity to consider and adopt appropriate rules governing the obligations a grocery store has with respect to providing its customers notice of such recalls." According to Safeway, the Food Safety Modernization Act requires FDA to develop notice guidelines by January 2012.

The court rejected this argument because "there is no indication that anything the FDA may choose to do or not do will resolve the claims plaintiffs are making in this action, in whole or in part." The court also noted, "If the FDA were expressly to consider, but ultimately reject, imposing a federal requirement for giving notice in the manner plaintiffs are seeking, it might strengthen Safeway's policy arguments against the necessity for, or value of, email notice, but it would not be dispositive of any of the claims in this action."

As for the alternative equitable abstention issue, the court states that it "turns on the same flawed notion that plaintiffs' claims are best addressed in the first instance by the pending FDA proceedings. While Safeway also suggests in passing that state administrative agencies are equipped to address the issue as well, it has not shown that the possibility of pursuing a state-level administrative remedy warrants abstention in these circumstances."

Court Finds Insurer Has Duty to Defend in GM Rice Lawsuits

A federal court in Arkansas has determined that Liberty Mutual Insurance Co. has a duty to defend an agricultural cooperative in more than 170 civil lawsuits filed by rice farmers over the contamination of their conventional crops with a genetically engineered (GE) variety. *Riceland Foods, Inc. v. Liberty Mut. Ins. Co.*, No. 10-00091 (U.S. Dist. Ct., E.D. Ark., W. Div., decided June 8, 2011). The court found that while the relevant commercial general liability policies precluded coverage for cross-pollination, they were silent as to liability for the physical mixing of a contaminating crop "with conventional rice during harvest, processing, transportation, or storage," which the plaintiffs alleged in addition to cross-pollination as an independent cause of their

injury. The court held that "the duty to defend remains when cross-pollination is presented as one of several potentially independent causes of the damage."

The court also determined Liberty had no obligation to defend a European rice distributor that was sued in a French court, because the matter involved contract damages only, which were not covered under the policy.

Final Approval Sought in Non-Monetary Settlement of *Trans* Fat Claims

The parties to putative nationwide class actions alleging that Unilever U.S., Inc. falsely advertised that its margarine spreads, including Country Crock® and I Can't Believe It's Not Butter®, were good for cardiovascular health are seeking final court approval of a non-monetary settlement that will require the company to remove the *trans* fat from its products. *Rosen/Red v. Unilever U.S., Inc.*, Nos. 09-02563, 10-00387 (U.S. Dist. Ct., N.D. Cal, San Francisco Div., joint motion filed June 6, 2011). Class counsel will receive up to $490,000 in fees if the settlement is approved, and the named plaintiffs will receive up to $4,500. Class members will give up their right to any other equitable or monetary relief.

The joint motion contends that the product reformulation is a substantial benefit to class members because the company is "the world's leading manufacturer of margarine" and that requiring the company to do this "will substantially benefit its customers and will encourage competitors to also move away from the use of PHVOs [partially hydrogenated vegetable oils]," which will purportedly "have a tremendous positive impact on the health of American consumers." In bolstering their case for settlement approval, the parties contend that the lawsuits may have faced dismissal on federal preemption grounds. A court hearing on the motion is scheduled for June 20, 2011.

Pesticide Exposure Claims of Banana Plantation Workers Near Settlement

According to a news source, Dole Food Co. has tentatively agreed to settle the pesticide-exposure claims of more than 5,000 former banana plantation workers in Nicaragua, Costa Rica and Honduras. They are represented by Provost Umphrey, whose lawyers apparently ensured that the workers had actually been employed on the plantations and experienced personal injuries from exposure to dibromochloropropane. Similar claims filed by other trial lawyers and involving hundreds of other plaintiffs have been dismissed due to alleged legal wrongdoing, including falsified medical records, client coaching and the intimidation of Dole investigators. The Eleventh Circuit Court of Appeals determined in March 2011 that a $97 million judgment reached in a Nicaraguan court against Dole and several other companies could not be recognized under Florida law. The terms of the preliminary settlement have not reportedly been disclosed. *See The National Law Journal*, June 14, 2011.

Chicago Hot Dog Makers at Odds

Alleging trademark infringement and unfair competition, Vienna Beef Ltd. has sued a descendant of one of its founders and the competing hot dog company he established in 1986. *Vienna Beef Ltd. v. Red Hot Chicago, Inc.*, No. 11-03825 (U.S. Dist. Ct., N.D. Ill., filed June 6, 2011). When Scott Ladany, whose grandfather started Vienna Beef, left that company in 1983, he purportedly signed a severance agreement promising not to share Vienna's recipes and acknowledging their status as trade secrets.

According to the complaint, Ladany made "few inroads into Vienna's dominance in the marketplace" for the next 25 years and then launched a marketing campaign on behalf of Red Hot, referring to the family history of making "Chicago's finest hot dogs for 118 years." He also allegedly referred to "a tradition that's been handed down through four generations of our family."

The plaintiff contends, "The only way that he can claim that he has been making the finest hot dogs for 118 years is to claim some right to make commercial use of the history and legacy of Vienna." Alleging that this might lead consumers to believe Red Hot is either affiliated with or a continuation of Vienna Beef, the plaintiff seeks the destruction of documents containing its recipes, a notice on Red Hot's Website clarifying that the companies are not affiliated, revenue and profits attributable to Red Hot's use of Vienna Beef's recipes or trademarks, attorney's fees, and exemplary damages. *See Law360*, June 6, 2011.

One Tough Cookie® Takes on Food Show, Claims Compromise of Website Ranking

A New York bakery and its shareholder have filed a trademark infringement action against the Food Network, claiming that its proposed "Tough Cookies" show would confuse consumers. *One Tough Cookie, Inc. v. Scripps Networks Interactive, Inc.*, No. 11-03675 (U.S. Dist. Ct., S.D.N.Y., filed May 31, 2011). According to the complaint, the Food Network has adopted "Tough Cookies" as the name of a "reality" TV series that will air in July 2011. It is apparently based on a "specialty bakery in New Jersey" called Crazy Susan's Cookie Co. The plaintiffs allege that they are nationally known for "concentrating in 'edible art' in the form of cakes, cookies, and other pastries and baked goods" and registered their One Tough Cookie® mark in 2006.

The plaintiffs also allege, "Each time the 'Tough Cookies' television show airs, plaintiffs' website and web server will be compromised due to television fans attempting to find the 'Tough Cookies' television show website. Viewers will click on plaintiffs' page or blog, but will quickly divert from the page upon learning that it does not belong to the television series. These quick visits will cause plaintiffs' website and blog to lose priority in website searches." Alleging federal trademark infringement and dilution, false designation of origin,

violation of state trademark dilution and deceptive acts and practices laws, common-law trademark infringement and unfair competition, and reverse confusion, the plaintiffs seek injunctive relief, damages, disgorgement, treble damages, punitive damages, attorney's fees, and costs.

Fresh Squeezed or Made from Concentrate?

Alabama and Indiana residents have filed a putative class action alleging violation of state consumer protection laws by a company that promotes its orange juice as "not from concentrate juice" and "100% pure Florida squeezed," when it allegedly "contains orange juice concentrate and water." *Leftwich v. TWS Mktg. Group, Inc.*, No. 11-01879 (U.S. Dist. Ct., D. Ala., filed June 2, 2011).

Seeking to certify a nationwide class of consumers, the plaintiffs refer to a Food and Drug Administration letter warning the defendant that its labeling violated the Federal Food, Drug, and Cosmetic Act. The plaintiffs contend that they were misled by the product labeling and that the alleged misrepresentations were a substantial factor in influencing their decisions to purchase the products. They allege a loss of money, because they were "deprived of the benefit of their bargain."

The plaintiffs allege violations of consumer protection laws, breach of express warranty and unjust enrichment. Claiming damages in excess of $5 million, they seek compensatory, statutory, punitive, or treble damages, as well as disgorgement, injunctive relief, attorney's fees, and costs.

FDA Tomato Recall Generates New Lawsuit

Another tomato grower has filed a claim for damages against the Food and Drug Administration (FDA), alleging that the agency announced a nationwide recall of all tomatoes in the United States in 2008 without having identified tomatoes as the source of a *Salmonella* outbreak. *Williams Farms Produce Sales, Inc. v. United States*, No. 11-01399 (U.S. Dist. Ct., D.S.C., filed June 8, 2011). Details about similar claims also filed in a South Carolina federal court appear in **Issue 395** of this *Update*.

According to the complaint, FDA ultimately conceded that tomatoes were not the source of the *Salmonella* contamination, but not before the price for tomatoes plunged. Alleging negligence, defamation, slander of title, product/commercial disparagement, unconstitutional taking, and violation of unfair trade practices law, the plaintiff seeks actual damages in excess of $11 million, special damages, compensatory damages, treble damages, attorney's fees, and costs.

Appellate Court Rejects Challenge to Prop. 65 Listing Method

A California court of appeal has ruled valid the methods by which the state updates the list of chemicals known to cause cancer or reproductive toxicity under the Safe Drinking Water and Toxic Enforcement Act (Prop. 65). *Cal. Chamber of Commerce v. Brown*, No. A125493 (Cal. Ct. App., decided June 6, 2011). Products containing these chemicals must be labeled with warnings to consumers.

The law requires the state to update the Prop. 65 list annually and authorizes Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) to add chemicals by one of three methods, including one specifically targeted in the lawsuit. The Chamber of Commerce challenged the method that requires adding to the list those chemicals identified under the Labor Code as causing cancer or reproductive toxicity. According to the Chamber, this method could be used to place chemicals on the initial list only. It sought a declaration to this effect and that "any future action . . . to automatically add Labor Code Chemicals to the Proposition 65 List as carcinogens or reproductive toxicants" exceeds OEHHA's authority. Another issue the Chamber raised was whether the chemicals identified by reference to the Labor Code include chemicals on the list compiled by the American Conference of Government Industrial Hygienists (ACGIH).

The court concluded that the parties' proposed statutory interpretations were both "semantically permissible" and thus that the law was ambiguous. Accordingly, the court referred to ballot summaries and arguments to determine voter intent in approving the Prop. 65 ballot measure. The court also looked to the law's implementation history to determine that the Prop. 65 list is not frozen in time and can be expanded to add chemicals included under the Labor Code whether they are derived from lists compiled by the International Agency for Research on Cancer, National Toxicology Program or ACGIH.

OTHER DEVELOPMENTS

WTO Panel Issues Preliminary Ruling Against COOL

The World Trade Organization (WTO) has reportedly issued a preliminary ruling that U.S. country-of-origin labeling (COOL) laws violate the organization's Agreement on Technical Barriers to Trade. According to *Feedstuffs*, a WTO panel found that COOL "constitutes an illegal, non-tariff trade barrier that treats U.S. livestock and perishable commodities more favorably than livestock, fruits and vegetables and other covered commodities from Canada and Mexico." The preliminary ruling will remain confidential for 30 days with a final version slated for release in September 2011, when the United States will have two months to appeal. *See Feedstuffs,* May 25, 2011.

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News of the preliminary ruling has since elicited a favorable reaction from the National Cattlemen's Beef Association (NCBA), which described the decision as "unfortunate for the U.S. government" but a positive development for industry. As NCBA President Bill Donald explained, "Proponents of COOL have always believed that restricting imports of Mexican and/or Canadian feeder cattle will decrease the supply of feeder cattle in the United States and increase the price of U.S. origin feeder cattle. In reality, reducing the number of cattle in the marketplace also reduces the infrastructure of the U.S. beef industry." *See NCBA Press Release,* May 26, 2011.

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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.