

**FOOD & BEVERAGE
LITIGATION UPDATE**



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LEGISLATION, REGULATIONS AND STANDARDS

Lawmakers Urge FDA to Halt Approval Process for GE Salmon

A bipartisan group of lawmakers has called on the U.S. Food and Drug Administration (FDA) to stop the approval process for genetically engineered salmon. **Fifteen** members of the House of Representatives and **eight** members of the U.S. Senate signed separate letters to FDA Commissioner Margaret Hamburg expressing economic and environmental concerns over the fast-growing fish.

“We are concerned that the FDA’s review of GE salmon uses the same criteria as it would for approving a veterinary drug,” noted the Senate letter, adding that “the lack of transparency in the approval process is extremely disconcerting given that approval of GE fish is likely the first step toward approval of many more GE animals for human consumption.”

The House recently approved an amendment prohibiting FDA from using money to approve GE salmon applications in fiscal year 2012 and, according to the letters, similar language has been drafted for consideration by the Senate. “Given the strong and ever-growing Congressional opposition to the approval of GE salmon in both chambers, we conclude that spending more time and additional taxpayer money on reviewing GE fish would not be in the public interest,” the House letter said. Currently under FDA application review, AquaBounty Technologies seeks to produce Atlantic salmon containing Chinook and oceanpout genes that accelerate maturation. Details were covered in [Issue 362](#) of this *Update*.

EC Promotes Fruit, Vegetable Consumption Following *E. Coli* Outbreak

The European Commission (EC) has launched a promotional campaign “to help address the difficulties faced by the fresh fruit and vegetables sector following the *E. coli* crisis.” Consisting of an **advertorial** and an audiovisual package for distribution in all European Union (EU) member states, the effort is reportedly an attempt to “win back consumer trust.”

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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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As part of the campaign, EC announced that emergency funding of €210 million has been targeted to aid EU fruit and vegetable producers. "In recent weeks, the *E. coli* crisis forced farmers to dispose of perfectly safe vegetables left to rot by concerned consumers," noted the EC, adding that the "solution can only come from consumers reintroducing fruits and vegetables into their daily diet."

Initially attributed to several sources from France and Germany, an *E. coli* outbreak earlier this year reportedly killed 51 people. The outbreak's source was eventually traced to Egyptian fenugreek seeds and bean sprouts, which have been temporarily banned for importation to the EU. Details of the ban were covered in [Issue 401](#) of this *Update*. See *EC Press Releases*, July 18 and 19, 2011.

LITIGATION

Attorney Chastised in Contaminated GE Rice Litigation

A federal judge in Missouri has reprimanded a plaintiffs' attorney involved in the genetically engineered (GE) rice multidistrict litigation for sending "false and misleading" letters about a recent settlement with Bayer CropScience "to landlords who were either unrepresented or who were represented by other counsel." *In re: Genetically Modified Rice Litig.*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., ordered July 20, 2011).

U.S. District Judge Catherine Perry apparently found that attorney Martin Phipps of Goldman, Pennebaker & Phipps violated the American Bar Association's Rules of Professional Conduct and ordered him to (i) disclose to plaintiffs' counsel information about landlords contacted and the firms representing them; (ii) send a "curative letter to all recipients of the June 2011 letters... [and] publish an advertisement in the Delta Farm Press correcting any misstatements in his earlier letters"; (iii) inquire, before opening communication, whether any rice farmer or rice farm landlord is already represented by counsel; and (iv) abstain from submitting "any consent or general release forms to the claims administrator that he obtained as a result of the June 2011 letters." Additional details about the settlement with Bayer CropScience appear in [Issue 401](#) of this *Update*.

New Jersey Appellate Court Revives Meat Samosa Lawsuit

A New Jersey appellate court has partially reinstated a lawsuit against an Indian restaurant that mistakenly served meat samosas to a group of Hindu vegetarians, who are now seeking compensation for emotional distress and to

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recover the cost of travelling to India for a purification rite. *Gupta v. Asha Enterprises, L.L.C.*, A-3059-09T2 (N.J. Superior Ct., decided July 18, 2011). According to the court opinion, plaintiffs notified Moghul Express & Catering Co. of their “strict vegetarian” status and were twice “assured of the vegetarian nature of the food,” which actually contained meat. The complaint alleges that this oversight caused the diners spiritual injury and involved them “in the sinful cycle of inflicting pain, injury and death on God’s [creations], and it affects the karma and the dharma, or purity of the soul.”

Although the New Jersey Superior Court initially dismissed the claims of negligence, negligent infliction of emotional distress, consumer fraud, products liability, and breach of express and implied warranties, a three-person appeals panel reversed summary judgment on the breach of express warranty claim, concluding that plaintiffs had “presented prima facie evidence of a warranty by employees of Moghul Express that the samosas sold to them were vegetarian.” Citing a previous breach of contract case related to funeral services, the court also ruled that plaintiffs could seek damages for emotional injury and remanded the case for discovery to determine “what consequential damages were foreseen at the time of the sale of the samosas in the event of a breach.” See *Law360*, July 19, 2011; *ABC News*, July 20, 2011.

OTHER DEVELOPMENTS

CFBAI Announces New Ad Guidelines as Food Fight Escalates

The 17 companies comprising the Children’s Food and Beverage Advertising Initiative (CFBAI) have reportedly agreed to abide by new [uniform nutrition criteria](#) as part of a voluntary effort to encourage healthier dietary choices among children. Under the new rules, CFBAI signatories have pledged not to market the following products to children: (i) juices with added sugars and more than 160 calories per serving, (ii) ready-to-drink flavored milks containing more than 24 grams of total sugars per 8 fluid ounces, and yogurt containing more than 170 calories and 23 g of total sugars per 6 ounces; (iii) seeds, nuts, nut butters, and spreads with more than 220 calories, 3.5 g of saturated fat, 240 milligrams of sodium, and 4 g of sugar per 2 tablespoons; and (iv) main dishes and entrees with more than 350 calories, 10 percent calories from saturated fat, 600 mg of sodium, and 15 g of sugar per serving. Seeds, nuts, nut butters, and spreads must also provide at least one ounce of protein equivalent, while main dishes and entrees must provide one or more serving of foods to encourage—that is, fruits, vegetables, non- or low-fat dairy, and whole grains—or at least one-half serving of these foods *and* at least 10 percent of the Daily Value of two essential nutrients. Grains, fruits and

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vegetable products with less than 150 calories must also contain “no more than 1.5 g of saturated fat, 290 mg of sodium and 10 g of sugar,” in addition to providing at least one-half serving of foods to encourage or 10 percent of the Daily Value of an essential nutrient.

As described in a July 14, 2011, [white paper](#), these new requirements will affect approximately one-third of the products currently advertised to children and ideally result in their reformulation by the end of 2013. “These uniform nutrition criteria represent another huge step forward, further strengthening voluntary efforts to improve child-directed advertising,” said CFBAI Vice President and Director Elaine Kolish in a July 14, 2011, press release. “Now foods from different companies, such as cereals or canned pastas, will meet the same nutrition criteria, rather than similar but slightly different company-specific criteria. The new criteria are comprehensive, establishing limits for calories, saturated fat, *trans* fat, sodium and total sugars as well as requirements for nutrition components to encourage.”

Meanwhile, consumer watchdogs like the Center for Science in the Public Interest (CSPI) have greeted the announcement with skepticism, describing the new pledge as “a transparent attempt to undermine the stronger standards proposed by the government’s Interagency Working Group,” which includes the U.S. Department of Agriculture, Food and Drug Administration, Federal Trade Commission, and Centers for Disease Control and Prevention. Calling on the food and media industries to adopt “the sensible nutrition standards” developed by these agencies, CSPI recently submitted comments to the Interagency Working Group in support of both its draft nutrition guidelines and marketing definitions, and urged the agencies to apply its nutrition standards to all marketing aimed at children younger than age 12. “This is a typical industry tactic of a pre-emptive move,” CPSI Director of Nutrition Policy Margo Wootan said of the CFBAI initiative in *The New York Times*. “Rather than have government come up with the standards for food marketing, they want to develop them themselves.” See *CSPI Press Release and The New York Times*, July 14, 2011.

New Book Deems Corporate Agriculture “Perpetrator of Climate Change”

Corporations and Health Watch writer Monica Gagnon recently interviewed Anna Lappé about her new book, *Diet for a Hot Planet*, which describes the agricultural industry as “not just a victim but also a perpetrator of climate change.” According to Lappé, “Our food system indirectly and directly is responsible for about one-third of all greenhouse gas emissions,” a statistic she says is “largely missing from the public conversation.” In particular, Lappé focuses on a “corporate response to the crisis” that reflects the “multifaceted”

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nature of the food sector, where “players don’t always have the same self-interest and use different strategies of denying or acknowledging their impact on climate.”

“What we are seeing is that lot of food companies are pushing to be their own police, not to have government regulate the industry,” Lappé claims, turning a critical eye on strategies like “green advertising” and urging consumers to conduct their own research on social responsibility programs. “[S]ince we live in a regulatory context where it’s easy for companies to greenwash their story and hard for consumers to detect misleading claims, a healthy dose of skepticism is always good.”

SCIENTIFIC/TECHNICAL ITEMS

JAMA Study Examines Accuracy of Restaurant Calorie Counts

A recent study claims that the calorie counts which restaurants provide for their fare is “accurate overall,” although there is “substantial inaccuracy for some individual foods, with understated energy contents for those with lower energy contents.” Lorien E. Urban, et al., “Accuracy of Stated Energy Contents of Restaurant Foods,” *Journal of the American Medical Association*, July 20, 2011. Noting that restaurant foods “provide approximately 35% of the daily energy intake in US individuals,” researchers used a validated bomb calorimetry technique to test 269 food items, including 242 unique items, from 42 quick-serve and sit-down restaurants in Arkansas, Indiana and Massachusetts.

Their findings apparently indicated that 19 percent of the 269 samples “contained measured energy contents of at least 100 kcal/portion more than the state energy contents,” an amount “that has been projected to cause 5 to 15 kg of weight gain per year if consumed daily.” The study also determined that sit-down restaurant entrees with “a lower stated energy content (i.e., the most appropriate choices for individuals trying to lose weight or prevent weight gain) systematically contained more energy than stated, whereas foods with higher stated energy contents had lower energy contents than stated.”

“The results of this study have implications for pending implementation of new legislation requiring more restaurants to document the energy content of their menu items,” concluded the study authors, who recommended greater attention to onsite portioning methods. “Posted information on energy content in restaurants may influence consumer choice toward options with lower stated energy contents. Although our study showed that stated energy contents in restaurants are relatively accurate on average, thus

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supporting greater availability of this information, projected benefits for preventing weight gain and facilitating weight loss are likely to be reduced if restaurant foods with lower stated energy contents provide more energy content than stated.”

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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.

