

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

U.S. Representatives Ask FTC to Investigate Seafood Labeling Claims

U.S. Representatives Edward Markey (D-Mass.) and Barney Frank (D-Mass.) have reportedly [asked](#) the Federal Trade Commission (FTC) to investigate claims that seafood sold in grocery stores, restaurants and markets is often mislabeled. According to the congressmen's October 31, 2011, letter, two separate investigative reports used DNA testing to conclude that purveyors frequently sold seafood as more expensive or different varieties. In particular, *The Boston Globe* [reported](#) that 48 percent of fish sampled in the area were sold under the wrong name, while *Consumer Reports* [estimated](#) that more than one-fifth of the 190 pieces of seafood it tested in Connecticut, New Jersey and New York were "mislabeled as a different species of fish, incompletely labeled, or misidentified by employees." The latter report also noted that all 10 of the "lemon soles" and 12 of the 22 "red snappers" purchased were not the species advertised.

"Only four of the 14 types of fish we bought—Chilean sea bass, coho salmon, and bluefin and ahi tuna—were always identified correctly," said *Consumer Reports*. "Whether deliberate or not, substitution hurts consumers three ways: in their wallet, when expensive seafood is switched for less desirable, cheaper fish; in their health, when they mistakenly eat species that are high in mercury or other contaminants; and in their conscience, if they find out they've mistakenly bought species whose numbers are low."

Markey and Frank have argued that advertising and selling mislabeled seafood "is not only dishonest, and potentially dangerous, but also would likely be deemed as 'unfair or deceptive acts and practices' under Section 5 of the Federal Trade Commission Act." They have asked the Commission to determine by November 21, 2011, whether such practices are, indeed, deceptive and what actions will be taken to penalize violators and protect the public. See *Law360*, November 1, 2011.

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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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Public Health Group Urges FDA to Implement Strategies to Reduce Sodium

The American Public Health Association (APHA) has reportedly passed a [resolution](#) asking the Food and Drug Administration (FDA) to revoke salt's status as a generally recognized as safe (GRAS) substance within one year. According to the resolution, which was unanimously approved during APHA's 139th Annual Meeting in Washington, D.C., the revocation of salt's GRAS status would pave the way for FDA regulation and "substantially improve the cardiovascular health of the American public."

Among other things, the resolution recommends that FDA (i) establish a schedule for food manufacturers and preparers to progressively lower sodium levels by 75 percent within the next 10 years; (ii) require front-of-package labels that clearly identify whether products contain high-, medium- or low-sodium levels; and (iii) require the food industry to use 2,300 milligrams (mg) as the current standard of calculating sodium daily values in processed foods and lower the daily values to 1,500 mg by 2017.

The Center for Science in the Public Interest (CSPI) has applauded the measure. "Salt, in the amounts presently used in processed foods, is the single deadliest ingredient in the food supply, contributing to the premature deaths of tens of thousands of Americans each year," CSPI Executive Director Michael Jacobson said. "This has been widely acknowledged in the medical community for many years, but has been mostly ignored by food manufacturers and regulators. I hope that the American Public Health Association's powerful recommendation spurs the Food and Drug Administration to act—at last." See *CSPI Press Release*, November 1, 2011.

FDA Commits to Pet Food *Salmonella* Testing

The Food and Drug Administration's (FDA's) Center for Veterinary Medicine (CVM) has issued an October 24, 2011, [memorandum](#) calling for nationwide testing of pet food "to determine the prevalence of *Salmonella*" and remove contaminated samples from commerce. According to CVM, regulators are concerned about the transmission of "pathogenic and antibiotic-resistant bacteria to humans and other animals," as well as the risk that *Salmonella*-tainted pet food, pet treats and supplements for pets could infect consumers in their homes, where products "are likely to be directly handled or ingested by humans."

CVM has directed investigators to collect and submit non-canned pet food, treats and supplements for analysis, which aims to identify "the serotype, genetic fingerprint, and antimicrobial susceptibilities of each *Salmonella* found in samples." The agency will also use these samples for "research purposes" and "providing surveillance information on microbes other than *Salmonella*."

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“Salmonella-contaminated pet foods, pet treats and supplements for pets pose a significant health risk to humans;” warns CVM. *“Certain vulnerable populations such as children, the elderly, and individuals with compromised immune systems, are particularly susceptible to Salmonella infection from such animal feeds. For these reasons, CVM considers it prudent to keep Salmonella-contaminated pet foods, pet treats and supplements for pets out of interstate commerce.”*

FSIS Issues Final Rule Defining Classes of Poultry

The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has issued a [final rule](#) amending the definitions and standards of classes of poultry ready for market. Effective January 1, 2014, the measure aims to “ensure that the labeling of poultry products is truthful and not misleading.”

According to FSIS, poultry classes have been defined mostly by the bird’s age and sex, but improvements in poultry feeding and management have reduced the “grow-out” period for some classes, allowing producers to have the birds ready for sale much quicker. The new classifications, which have been in the rulemaking process since 2003, reflect “more accurately and clearly describe the characteristics of poultry in the market today,” FSIS noted.

The new classifications lower the age of poultry ready for market in five classes—roaster or roasting chickens, broiler or fryer chickens, Rock Cornish game hens, capons, and fryer-roaster turkeys. Roaster chickens, for example, will have an age of eight to 12 weeks, rather than the current three to five months, and a carcass weight of at least five pounds. *See Federal Register*, November 3, 2011.

Ohio Will Not Pursue Dairy Labeling Restrictions

According to the Organic Trade Association (OTA), Ohio has decided not to pursue regulations that would prohibit dairy producers from including on their labels statements that organic dairy products are made without antibiotics, pesticides or synthetic hormones. The Sixth Circuit Court of Appeals determined in September 2010 that those parts of the rule involving hormone-free statements violated the First Amendment and remanded the action to the federal district court for further development of the record as to the rule’s ban on composition claims related to antibiotics and pesticides. More details about the court’s ruling appear in [Issue 366](#) of this *Update*.

The trade group stated, “Ohio has now agreed to abandon the rule rather than trying to revive it, recognizing that the First Amendment allows organic dairy products to proudly state that they are produced in accordance with organic standards without the use of synthetic growth hormones, pesticides, or antibiotics.” OTA Executive Director Christine Bushway was quoted as saying,

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"This is significant for all of us who support what the organic foods are about, and for consumers who carefully read food labels to find out what's in their food and how it's produced. The Sixth Circuit opinion made it clear that states cannot unduly restrict organic labels or consumers' right to know how their food is produced, and the State of Ohio's actions today make it clear that the fight to keep labels accurate by OTA, its members, farmers, and consumers was worth it." See *OTA Press Release*, October 31, 2011.

LITIGATION

Environmental Groups Continue Challenge to GE Crops on Wildlife Refuge Lands

The Center for Food Safety (CFS) and other public interest organizations have filed a lawsuit against the U.S. Fish and Wildlife Service (FWS), seeking a declaration that the agency's decision to allow the cultivation of genetically engineered (GE) corn and soybean crops on wildlife refuge lands in the Midwest violated federal environmental laws. [*Ctr. for Food Safety v. U.S. Fish & Wildlife Serv., No. 11-01934 \(U.S. Dist. Ct., D.D.C., filed November 2, 2011\)*](#). The lawsuit involves 66 refuges and wetland management districts encompassing more than 1.2 million acres across eight states. According to the center, the action "marks the latest in a series of successful lawsuits by public interest organizations to stop the planting of GE crops on national wildlife refuges."

The complaint alleges that FWS has entered into cooperative farming agreements with private parties allowing them to farm national wildlife refuge land with GE crops without preparing an environmental impact statement under the National Environmental Policy Act. The agency allegedly prepared a region-wide environmental assessment and issued a finding of no significant impact, "despite evidence that growing GE crops on refuge lands is a major federal action which significantly impacts the quality of the human environment, is highly controversial, and which has potentially harmful effects on human health, the environment, and wildlife." Focusing on the increased use of pesticides, transgenic contamination and the growth of "superweeds" associated with GE-crop cultivation, the plaintiffs seek declaratory and injunctive relief, as well as costs and attorney's fees.

CFS notes that its previous legal actions challenging the cultivation of GE crops in wildlife refuges in other U.S. regions "forced FWS to end GE planting in the entire 12-state Northeastern Region." A CFS spokesperson said, "National Wildlife Refuges are sanctuaries for migratory birds, native grasses, and endangered species. Allowing pesticide promoting, GE crops degrades these vital ecosystems and is antithetical to the basic purpose of our refuge system. Worse still is approval without meaningful review of these crops' impact." See *CFS Press Release*, November 2, 2011.

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Lawsuit Claims Kix Cereal Isn't "All Natural"

Contending that the genetically modified (GM) corn in General Mills' Kix Crispy Corn Puffs® and Honey Kix Crispy Corn Puffs® cereals renders their "All Natural Corn" representations false and misleading, a California resident has filed a putative class action against the company in state court. *Lewis v. General Mills, Inc.*, No. BC472451 (Cal. Super. Ct., Los Angeles County, filed October 28, 2011). Citing the Cornucopia Institute's "Cereal Crimes" report, and testing purportedly showing that Kix contains GM corn, the plaintiff seeks to certify a nationwide class of consumers who allegedly relied on the "All Natural" representations, as well as other company indicia of wholesomeness, to purchase products at a premium price and were denied the benefit of their bargain.

According to the plaintiff, companies that produce GM crops note that their genetic makeup has been "altered to exhibit traits that are not naturally theirs," and the World Health Organization defines GM organisms as those "in which the genetic material (DNA) has been altered in a way that does not occur naturally." Thus, claims the plaintiff, cereal containing GM corn is unnatural, and the defendant misleads consumers by promoting Kix cereals as natural. Alleging unlawful, unfair and fraudulent business practices under California law, misleading, deceptive and untrue advertising, violation of the state's Consumers Legal Remedies Act, breaches of express and implied warranties, deceit and misrepresentation, and unjust enrichment, the plaintiff seeks declaratory and injunctive relief, restitution and disgorgement, compensatory and punitive damages, interest, and costs.

SPAM® Trademark Infringement Suit Settles

Without disclosing any settlement details, Hormel Foods Corp. and a Netherlands-based company have secured a court order dismissing trademark infringement claims involving the labels for canned meat products SPAM® and Prem®. *Hormel Foods, LLC v. Zwanenberg Food Group (USA), Inc.*, No. 11-00774 (U.S. Dist. Ct., D. Minn., order entered November 1, 2011). Additional information about the case appears in [Issue 388](#) of this *Update*. Hormel brought the action, contending that the defendant had violated the Lanham Act by selling Prem canned meat with a copycat label using Hormel's distinctive label colors. According to a news source, Prem filed a counterclaim, alleging that the two-color label is not distinctive or protectable and that the U.S. Patent and Trademark Office improperly registered the trademark in May 2011. See *Law360*, November 1, 2011.

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OTHER DEVELOPMENTS

Rudd Center Publishes Report on Food Marketing to Children

Yale University's Rudd Center for Food Policy & Obesity has issued an October 2011 [report](#) claiming that "young people are exposed to a massive amount of marketing for sugar drinks." Titled *Sugary Drink F.A.C.T.S.: Food Advertising to Children and Teens Score*, the report apparently analyzes "600 products from 14 companies that contain added sugar," including full-calorie soda, energy drinks and diet energy drinks, flavored water, sports drinks, iced tea, and diet children's fruit juices. Researchers also reviewed traditional, digital and in-store marketing, as well as collected data on media exposure and spending from syndicated sources such as Nielsen, comScore Inc. and Arbitron Inc.

In particular, the Rudd Center alleges that industry pledges to market fewer sweetened beverages to children have not curbed advertising for these products. Among its key findings, the report concludes that (i) "More than half of sugary drinks and energy drinks market positive ingredients on their packages, and 64 percent feature their 'all-natural' or 'real' ingredients"; (ii) "Energy drinks are inappropriate for children and teens, yet they are heavily marketed to them"; (iii) "Parents think that nutrient claims about Vitamin C or 'real' and 'natural' ingredients mean that products are healthful options"; (iv) "From 2008 to 2010, children's and teens' exposure to full-calorie soda ads on TV doubled"; and (v) "Sixty-three percent of all full-calorie soda and energy drink ads on national TV included sponsorship of an athlete, sports league or team, or an event or cause."

According to the report, beverage companies are not only using "more sophisticated and ubiquitous marketing tactics," but have clearly targeted young people, "especially black and Hispanic youth." The Rudd Center recommends that industry change its marketing practices by (i) developing "child-friendly products with less added sugar and no artificial sweeteners"; (ii) making nutrition information more accessible; (iii) disclosing caffeine content on packaging; (iv) discontinuing marketing efforts directed at teens; and (v) removing "nutrition related claims from high-sugar products."

"Beverage companies have pledged to improve child-directed advertising," said report author Jennifer Harris in an October 30, 2011, press release. "But we are not seeing a true decrease in marketing exposure. Instead companies have shifted from traditional media to newer forms that engage youth through rewards for purchasing sugary drinks, community events, cause-related marketing, promotions, product placements, social media, and smartphones."

Article on Nanofoods Draws Lessons from GMO Debate

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A recent [article](#) published in *Nature Nanotechnology* examines how governments, scientists and food companies can better anticipate the public reaction to nanofoods based on lessons learned from the commercialization of genetically modified organisms (GMOs). Timothy V. Duncan, "The communication challenges presented by nanofoods," *Nature Nanotechnology*, October 2011.

Authored by Food and Drug Administration (FDA) research chemist Timothy Duncan, the article argues that individual receptiveness to nanotechnology applications depend, not just on scientific evidence, but on myriad factors such as "cultural worldview, religiosity, governance philosophy, knowledge and familiarity level, trust (in government, scientists or industry), emotion, age, gender, race/ethnicity, education, general knowledge of/attitude towards science, and awareness of previous technology-based controversies." In particular, Duncan warns that the failure of governments and industry to account for these factors in the past has left consumers even more wary of processes like genetic engineering which are seen, however erroneously, as "tampering with nature."

"Attitudes towards new food technologies, therefore, are often not formed by objective assessments of their sensory characteristics, nutritive value or safety, and they are extremely susceptible to damage by negative emotions and bad publicity," Duncan writes. "Experts and laypeople assess nanotechnology risks differently. Thus, some scientists may become frustrated when the public's worries about naturalness or other social issues divert attention away from scientifically grounded efforts to probe the risks that nanofoods pose to human health and the environment. Nevertheless, public acceptability will ultimately depend on what the public perceives the risks of nanofoods to be, irrespective of what scientists determine, and so stakeholders ignore ethical and social concerns at their peril."

When it comes to introducing new nanofoods, Duncan suggests that companies supplement their usual science-based approach with a greater attention to how consumers perceive risk and how media coverage of controversies or adverse events plays into these perceptions. To this end, he urges industry to implement strategies designed to build public trust by (i) using trade associations to address "fundamental, deep-rooted social concerns about nanofoods while protecting the images of individual corporations"; (ii) avoiding "unnecessary secrecy, opaque behavior and unprofessional risk-communication strategies"; (iii) "collaborating with social scientists to define naturalness in the context of nanofoods and to determine which consumer demographics are more likely to be sensitive to this issue"; (iv) "actively participating in the formulation and delivery of public engagement exercises instead of relying on program reports or summaries after the fact"; and (v) "establishing an enforceable, transparent and inclusive process of self-regulation through a comprehensive, universal voluntary code of conduct that would not only

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encourage open cooperation with governments to address the physical risks of nanofoods, but also take ethical and social concerns, and regional or cultural sensitivities into consideration when developing or marketing new products.”

According to Duncan, adopting some or all of these recommendations could help companies avoid what he describes as “the mishandling of previous food technology debates (such as GMOs),” which has left nanofoods at a disadvantage in public opinion. Commending recent efforts to engage with the public before commercialization of nanoproducts, Duncan nevertheless cautions that the media remain an unpredictable factor in this equation. “[I]t is an open question whether media coverage will continue to provide a balanced portrayal of the potential benefits and risks posed by the incorporation of engineered nanomaterials into food and food-related products,” he concludes, “or whether a gradual change to exaggerated headlines will lead to ripple effects that endanger not only the future of nanofoods, but also the future of nanotechnology as a whole.”

MEDIA COVERAGE

Denver Post Investigates Private Food Safety Auditors

The Denver Post has published an October 30, 2011, investigative report that examines the record of private auditors hired by manufacturers to ensure food safety. According to the article, “Many of the most notorious food-illness outbreaks in the recent years were preceded by glowing private safety audits of the producers, prompting calls for oversight of auditors and forcing grocery store chains to tighten screening of cantaloupes and other foods.”

Highlighting several high-profile food contamination cases that allegedly slipped past third-party audits, the article claims that the latest incident involving *Listeria*-tainted cantaloupe resulted in 28 fatalities even though the supplier received a “superior” safety rating from its private inspector. “I cannot think of one private audit that I’ve ever seen in 20 years that said, ‘These are bad things, fix them,’” confirmed plaintiffs’ attorney Bill Marler. “A private auditor is not going to list a farm’s flaws, tell it to shut down, then say, ‘I finished my audit—can I have my \$2,000?’”

Other food safety experts also took issue with the current auditing system, saying it represents a conflict of interest when inspectors hired by food producers are expected to report and enforce corrective actions. Moreover, the Food and Drug Administration has reportedly noted that it lacks the authority under the 2011 Food Modernization Safety Act to oversee domestic third-party auditors or implement a credentialing system for them. As a result, grocery stores and other retailers are now considering whether to conduct their own audits using more stringent benchmarks such as “test and hold”

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procedures.

WSJ Explores Child Obesity in Parental Custody Context

Wall Street Journal reporters Ashby Jones and Shirley Wang consider in "Obesity Fuels Custody Fights" how family courts have increasingly been asked to determine whether nutrition or obesity should be controlling factors in child-custody lawsuits. According to the article, the issue arises in several guises: sometimes the child is obese; other times a junk food diet is at issue; and in other cases, the parent who seeks custody alleges that the other parent is too overweight to properly care for the child. Noting that in most states the legal standard is the "best interest of the child," the authors report that some states have recently adopted as criteria the child's physical and emotional well-being. Family court practitioners reportedly suggest that the obesity issue is typically part of a larger picture and would have to be extreme to overcome rights to maintain close parent-child relationships and to raise a child as the parent sees fit. See *The Wall Street Journal*, October 29, 2011.

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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.

