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FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 540 | OCTOBER 10, 2014

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LEGISLATION, REGULATIONS AND STANDARDS

Senate Coalition Urges Appropriations Committee to Thwart Attempts to Revise COOL

A bipartisan group of 32 federal lawmakers led by U.S. Senators Jon Tester (D-Mont.) and Mike Enzi (R-Wyo.) penned an October 6, 2014, **letter** to the Senate Appropriations Committee asking its leaders to "reject efforts to weaken or suspend Country of Origin Labeling (COOL) through any continuing resolution or omnibus appropriations bill" pending a World Trade Organization (WTO) decision on the United States' meat labeling dispute with Canada and Mexico.

According to their letter, "anonymous foreign sources continue their efforts to undermine COOL," making it essential that the Committee "not allow these rumors from abroad to preemptively weaken U.S. law before the dispute resolution process has run its course." U.S. consumers, they contend, "have the right to know where their food comes from and farmers should be able to market their livestock as born and raised in America."

FDA Schedules Meeting of the National Center for Toxicological Research's Science Advisory Board

The U.S. Food and Drug Administration (FDA) has scheduled a **meeting** of the Science Advisory Board (SAB) to the National Center for Toxicological Research (NCTR) for November 6-7, 2014, at NCTR's research campus in Jefferson, Arkansas. Public sessions of the two-day meeting will include the NCTR director's update on scientific initiatives; a report from the National Toxicology Program on opportunities for collaboration; and discussions of specific research needs from representatives of the Center for Veterinary Medicine, Office of Regulatory Affairs and the Center for Food Safety and Applied Nutrition. Individuals interested in making presentations during the meeting should express interest in doing so by October 22 while those wishing to submit data or views in writing should do so by October 30. *See Federal Register*, October 9, 2014.

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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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LITIGATION

Consumer Interest Groups Denied Intervention in Lawsuit Challenging Vermont GMO-Labeling Law

A federal court has denied Vermont Public Interest Research Group (VPIRG) and the Center for Food Safety's (CFS's) motion to intervene in a lawsuit challenging Vermont's statute requiring food manufacturers to label their products if they contain genetically modified organisms (GMOs). *Grocery Mfrs. Ass'n v. Sorrell*, No. 14-0117 (U.S. Dist. Ct., D. Vt., order entered October 7, 2014). In their motion to intervene, the consumer groups argued that they had a right to be involved in the litigation because if Act 120 were held to be unconstitutional, it would "injure their organizational missions, their advocacy efforts, and the personal interests of their members." In addition, they asserted that the state's financial and human resources were insufficient to defend the law.

In response, the court cited a Sixth Circuit decision holding that, according to the district court's summary, "a public interest group does not have a separate interest sufficient to intervene in a challenge to the constitutionality of an enacted statute because, in such circumstances, the public's interest is entrusted to the government." Finding that while VPIRG and CFS had shown that they had significant interests in the lawsuit, the court said that they had not proved they were necessary parties to the litigation. It also found that the state's advocacy of the law was adequate because the state's representatives had assured the court that Vermont would "vigorously defend Act 120" and had sufficient financial resources to do so.

Despite the denial of their intervention, VPIRG and CFS were granted the rights to file memoranda as *amicus curiae* without seeking further permission from the court. "We're very pleased to be granted the opportunity to help defend the GMO labeling law from attack by corporate interests," said Paul Burns, executive director of VPIRG, in an October 8, 2014, press release. Additional information on the lawsuit appears in Issue **526** of this *Update*, and details about the law's passage appear in Issue **521** of this *Update*.

PCA Executives Seek New Trial

Stewart Parnell, former CEO of Peanut Corp. of America (PCA), and his brother Michael Parnell, former vice president of sales, have filed a joint motion for a new trial following their recent convictions on charges stemming from a *Salmonella* outbreak traced to their peanut-processing facilities. *United States v. Parnell*, 13-cr-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., motion filed October 7). In a separate motion, former quality control manager Mary Wilkerson asked the court to acquit her of obstruction-of-justice charges because, she argued,

the government failed to provide "a recording, time log, video, affidavit, state or any time of record of the alleged interview" in which Wilkerson was apparently asked "if she was aware of any positives [for *Salmonella*] in any of the FDA Inspector's notes."

In their motion, the Parnells claimed that jury members conducted their own research and discovered that the *Salmonella* outbreak had been linked to nine deaths, a fact that had been excluded at trial. They argued that a survey of the jury following the convictions revealed that "some of the other jurors indicated to them that the defendants were guilty because they had caused nine (9) deaths," and one of the jurors apparently said that the information about the deaths had influenced her decision. Further details about the convictions appear in Issue 538 of this *Update*.

Settlement Approved in Ghirardelli White Chocolate Case

A California federal court has preliminarily approved a settlement in a case alleging that Ghirardelli failed to include white chocolate, cocoa or cocoa butter in its white chocolate chips. *Miller v. Ghirardelli Chocolate Co.*, No. 12-4936 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., order entered October 2, 2014). Additional details about the settlement appear in Issue 535 of this *Update*, and further information about the litigation appears in Issues 465 and 479 of this *Update*. Under the agreement, Ghirardelli will pay $5.25 million to a common fund to distribute to class members. Notices to potential class members will appear in *People* magazine and the *Oakland Tribune* and on several popular websites, and any leftover balance in the settlement fund will be divided among several consumer and food organizations, including Consumers Union and Florida State University's Food & Nutrition Science Department. A fairness hearing is scheduled for February 2015.

OTHER DEVELOPMENTS

Consumer Reports Tests "Natural" Foods for GE Corn and Soy

The Consumer Reports (CR) Food Safety and Sustainability Center has reportedly tested more than 80 processed foods for genetically engineered (GE) corn or soy, concluding that products labeled "natural" contained GE ingredients in levels comparable to those of their conventional counterparts. After analyzing breakfast cereals, bars, corn chips and tortillas, baking mixes and flour, meat and dairy substitutes, and tofu/tempeh, CR reported that (i) the majority of corn and soy identified in conventional products was genetically modified; (ii) products deemed "no GMO" by the manufacturer were less than 0.9 percent GE corn or soy; and (iii) products bearing third-party "Organic" or "Non GMO Product Verified" claims also contained negligible amounts of

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GE corn or soy. Based on these findings, CR has dubbed "Natural" labels "not meaningful," as the U.S. Food and Drug Administration (FDA) does not enforce any formal definition for this label.

In addition, CR Food Safety and Sustainability Center Executive Director Urvashi Rangan wrote an October 6, 2014, letter urging the Federal Trade Commission to investigate one corn-chip product made with "significant amounts of genetically engineered (GE) corn" despite its "no-GMO" label. According to the letter, six different packages of Xochitl Totopos de Maiz original corn chips had "an average of more than 75% GE corn content," although the company's Organic White Corn Chips apparently met their certified organic and GMO claims.

"Vermont recently passed legislation requiring GMO labeling, and similar actions are being considered in more than two dozen other states, including Colorado and Oregon, where residents will begin voting on a GMO-labeling ballot initiative in late October," notes CR in an October 2014 article about the testing process. "There is fierce opposition to GMO labeling from many seed manufacturers and big food companies, which have spent nearly $70 million in California and Washington state alone to defeat GMO-labeling ballot initiatives."

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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.