

CONTENTS

FIRM NEWS

Shook Attorneys Author WLF
Monograph on Federal Preemption 1

LEGISLATION, REGULATIONS AND STANDARDS

USDA Investigating American
Egg Board over Campaign Against
Just Mayo 2

WHO Report Classifying Red and
Processed Meat as "Carcinogenic"
Draws Media Scrutiny 2

LITIGATION

Ninth Circuit Refuses to Reconsider
Hawaii's Overturned Anti-GMO
Statute 4

European, U.S. Courts Split
on Compensation for False
Outbreak Identifications 4

NYC Appeals Trial Court Ruling on
Polystyrene 5

Whole Foods Settles Trademark
Dispute with Criterion Collection . . 5

Jim Beam Files Opposition to
"Double Oaked" Trademark
Application 5

OTHER DEVELOPMENTS

The Lancet Launches Multidisciplinary
Obesity Commission 6

Advocacy Group Alleges Much
"Wild" Salmon Is Mislabeled 6

FIRM NEWS

Shook Attorneys Author WLF Monograph on Federal Preemption

Shook, Hardy & Bacon attorneys **Frank Cruz-Alvarez**, **Jennifer Voss**, **Jared Sherr** and **Talia Zucker** have authored an October 2015 Washington Legal Foundation (WLF) monograph surveying eight years of U.S. Supreme Court rulings to forecast trends in federal preemption analysis for practitioners and policymakers.

With a forward by GlaxoSmithKline Senior Vice President and General Counsel Daniel Troy, **Federal Preemption: Origins, Types and Trends in the U.S. Supreme Court** considers how the doctrine of federal preemption "will continue to challenge the judicial system in light of Congress's increasing desire to enact federal regulatory schemes that implicate many traditional state government powers and functions."

To this end, the monograph aims to provide "a guide to the competing views on preemption expressed by the United States Supreme Court and to anticipate what participants in the judicial system can expect in the coming years as new preemption problems find their way to the Court." Examining express and implied preemption, the authors address cases touching on air, motor and rail transportation; food safety and advertising; immigration; natural gas; pharmaceuticals and medical devices; tobacco; and securities and banking. They also discuss the future of textualism and the increasing conflict over the "presumption against preemption."

"As our economy becomes more complex and Congress continues to struggle with crafting broad federal regulatory schemes that impact states' regulatory authority, preemption jurisprudence will continue to evolve to address the needs of our modern federal republic," note the authors. "Although over the course of the last decade the Court's preemption jurisprudence has been inconsistent, the stage is set for a renaissance in the Court's interpretation and application of the preemption doctrine within our federal system."

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

LEGISLATION, REGULATIONS AND STANDARDS

USDA Investigating American Egg Board over Campaign Against Just Mayo

The U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service (AMS) has reportedly launched an investigation into the American Egg Board (AEB) following the release of emails that allegedly revealed a concerted campaign against Hampton Creek, the manufacturer of an egg-free mayonnaise-like spread called Just Mayo. According to *The Guardian*, the announcement comes after calls for a congressional investigation by Hampton Creek CEO Josh Tetrick and others.

"Recent news reports have brought to light a series of emails, obtained under the Freedom of Information Act, that contain compelling evidence that [American Egg Board] leadership, including the Egg Board's President and CEO, may have violated the federal laws and administrative regulations governing checkoff programs," stated U.S. Sen. Mike Lee (R-Utah) in an October 20 letter to USDA Secretary Tom Vilsack about the emails. Additional details about the AEB emails and litigation against Hampton Creek appear in Issues [578](#) and [549](#) of this *Update*.

"AMS is conducting a thorough administrative review of issues involving the American Egg Board. This involves a substantial amount of material, and while AMS expects to complete the review in an expeditious manner, a complete review will take some time. AMS will not comment on personnel matters involving the board," a USDA spokesperson was quoted as saying. *See The Guardian*, October 23, 2015.

Shook 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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WHO Report Classifying Red and Processed Meat as "Carcinogenic" Draws Media Scrutiny

The World Health Organization's (WHO's) International Agency for Research on Cancer (IARC) has announced a monograph evaluating the alleged link between red and processed meat consumption and cancer. According to an October 26, 2015, [press release](#), 22 experts from 10 countries reviewed more than 800 epidemiological studies about this association, with the greatest weight given to "prospective cohort studies done in the general population."

Published in *The Lancet Oncology* with a detailed assessment to follow in volume 114 of the *IARC Monographs*, the initial summary concludes that red meat—which includes beef, veal, pork, lamb, mutton, horse, and



FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

goat—is “probably carcinogenic to humans” “based on *limited* evidence that the consumption of red meat causes cancer in humans and *strong* mechanistic evidence supporting a carcinogenic effect.” In addition, the meta-analysis purportedly found that meats “transformed through salting, curing, fermentation, smoking, or other processes” are “carcinogenic to humans” “based on *sufficient* evidence that the consumption of processed meat causes colorectal cancer.” The working group also estimated that “each 50 gram portion of processed meat eaten daily increases the risk of colorectal cancer by 18%.”

Meanwhile, the North American Meat Institute (NAMI) issued an October 26 news release describing the IARC report as “alarmist.” As NAMI President and CEO Barry Carpenter explained, “Red and processed meat are among 940 agents reviewed by IARC and found to pose some level of theoretical ‘hazard.’ Only one substance, a chemical in yoga pants, has been declared by IARC not to cause cancer...IARC says you can enjoy your yoga class, but don’t breathe air (Class I carcinogen), sit near a sun-filled window (Class I), apply aloe vera (Class 2B) if you get a sunburn, drink wine or coffee (Class I and Class 2B), or eat grilled food (Class 2A).”

In the wake of extensive media coverage that prompted a #Bacongeddon social media campaign, WHO also released a **statement** clarifying that people do not need to stop eating red and processed meats but should reduce their intakes. “The health risks of processed meat are vastly different of those of cigarettes & asbestos. Cigarettes & asbestos has [sic] no safe level of exposure,” the agency tweeted. “Meat provides a number of essential nutrients and, when consumed in moderation, has a place in a healthy diet.”

In addition, the BBC published a **special report** dissecting several food studies that have caused undue alarm due to sensationalist reporting. The article focuses on scientific claims that allegedly associate bacon and “diet” soft drinks with cancer; wheat with Alzheimer’s disease; butter, cheese, coffee, eggs and full-fat milk with heart disease; and pasteurized milk with immune disorders. “[W]hen the media (and ill-informed health gurus) exaggerate the results of a study without providing the context, it can lead to unnecessary fears that may, ironically, push you towards less healthy foods choices,” opines the article about the recent IARC kerfuffle. “In a nutshell? The odd English breakfast may not do you as much good as a bowl of granola—but nor is it gastronomic asbestos.” See *BBC*, October 30, 2015.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

LITIGATION

Ninth Circuit Refuses to Reconsider Hawaii's Overturned Anti-GMO Statute

The Ninth Circuit Court of Appeals has rejected as moot an appeal for reconsideration brought by the Shaka Movement in an effort to reestablish a ban on genetically modified organisms (GMOs) approved by voters in Maui County, Hawaii. *Robert Ito Farm v. Cnty. Of Maui*, No. 15-15641 (9th Cir., order entered October 23, 2015). A federal court invalidated the statute in June 2015, finding that the ban exceeded county authority to impose fines. The unsigned appeals court opinion offered no further discussion beyond that the “motion to dismiss this appeal as moot is granted.” Additional information about the lower court’s ruling appears in Issue [571](#) of this *Update*.

European, U.S. Courts Split on Compensation for False Outbreak Identifications

A German court has reportedly ordered the city of Hamburg to compensate a Spanish vegetable grower falsely linked to a 2011 *E. coli* outbreak that sickened more than 4,000 people in 16 countries. Vegetable cooperative Frunet asserted that it suffered €2.3 million in damages as a result of its incorrect identification as the source of the outbreak, which was later traced to fenugreek sprouts. The amount of the award has not been confirmed. *See Think Spain*, October 25, 2015.

Meanwhile, the U.S. Court of Appeals for the Federal Circuit has affirmed a lower court’s decision that the government does not owe tomato growers compensation after the U.S. Food and Drug Administration (FDA) publicly attributed a 2008 *Salmonella* outbreak to red tomatoes, then later traced it to jalapeno and serrano peppers. *DiMare Fresh, Inc. v. U.S.*, No. 15-5006 (Fed. Cir., order entered October 28, 2015).

“The problem with the Tomato Producers’ contention is that it seeks to weave a regulatory takings claim, without more, simply out of the fact that the FDA’s press releases and media briefing impacted market demand for their produce,” the court held. “However, any government action such as a warning or report which provides information about a good or service is bound to impact consumer demand in the relevant market. Dissemination of information is critical to the adequate functioning of efficient markets. The fact that the market *chooses* to incorporate all available information, without more, cannot form the basis of a regulatory takings claim.”

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

NYC Appeals Trial Court Ruling on Polystyrene

New York City has appealed a trial court decision overturning a determination that expanded polystyrene foam (EPS) cannot be recycled, which had resulted in a municipal ban on the material. *In re Restaurant Action Alliance, NYC*, No. 100734 (N.Y. App. Ct., filed October 26, 2015).

The appeal argues that the commissioner of the Department of Sanitation of New York conducted an extensive review over six months before reaching the determination that EPS could not feasibly be recycled and, thus, should be banned from commercial use within the city. “City Council prudently left determination of predictive questions about the future feasibility and sustainability of recycling foam waste to the judgement of the Commissioner,” the appeal argues. “[The trial court] was wrong to second guess the Commissioner’s determination based primarily on a short-term recycling plan proposed by the world’s largest foam manufacturer.” Additional information about the lower court’s ruling appears in Issue [579](#) of this *Update*.

Whole Foods Settles Trademark Dispute with Criterion Collection

Whole Foods Market, Inc. and video publisher The Criterion Collection have filed a notice of voluntary dismissal in a trademark dispute over Whole Foods’ “Criterion Collection” line of wines. *The Criterion Collection v. Whole Foods Mkt., Inc.*, No. 15-7132 (S.D.N.Y., notice filed October 28, 2015). The parties note that matters have been “amicably settled and adjusted between the parties” and voluntarily dismiss the case with prejudice and without costs to either party. Terms of the settlement were not disclosed. The September 2015 lawsuit alleged that Whole Foods infringed Criterion’s trademarked name for a line of republished classic movies. Additional details appear in Issue [578](#) of this *Update*.

Jim Beam Files Opposition to “Double Oaked” Trademark Application

Jim Beam Brands Co. has filed a notice of opposition against an application filed by Brown-Forman Corp., maker of Jack Daniels®, to trademark Woodford Reserve Double Oaked, a bourbon product aged in two charred-oak barrels. *Jim Beam Brands Co. v. Brown-Forman Corp.*, Serial No. 86/450,636 (T.T.A.B., notice of opposition filed October 19, 2015).

Jim Beam argues that the “Double Oaked” portion of the proposed trademark is generic—or at least descriptive—because it “refers to a process of aging alcoholic beverages in a second oak barrel, which is common in

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

the industry.” The notice cites descriptions on Brown-Forman’s website using the terms “double” and “double oaked” to describe the process of making the product. Jim Beam does not object to the registration of Woodford Reserve but requests that Brown-Forman disclaim trademark control of “Double Oaked.”

OTHER DEVELOPMENTS

The Lancet Launches Multidisciplinary Obesity Commission

U.K. medical journal *The Lancet* has announced establishment of a Commission on Obesity “to provide a multidisciplinary platform to contribute to accounting systems for action and to critically analyze the systemic drivers of, and solutions for, obesity.” The **22-member commission** is a partnership among *The Lancet*, University of Auckland, George Washington University, and World Obesity Foundation.

The commission’s activities will reportedly build upon various U.N. initiatives targeting obesity and aim to “stimulate action and strengthen accountability systems for the implementation of agreed recommendations to reduce obesity and its related inequalities at global and national levels” and “develop new understandings of the underlying systems that are driving obesity,” among other things.

The group’s first meeting is scheduled for February 2016 at George Washington University in Washington, D.C. See *The Lancet*, October 31, 2015.

Advocacy Group Alleges Much “Wild” Salmon Is Mislabeled

Conservationist group Oceana has **issued** a report purportedly finding that 43 percent of salmon samples purchased from U.S. restaurants and grocery stores were mislabeled. As a follow-up to a larger study, Oceana researchers DNA tested 82 salmon samples and compared them to the names under which restaurants and grocers sold them. Of the 32 salmon samples sold as “wild salmon,” the tests indicated 69 percent were farmed; “Alaskan” or “Pacific” salmon was also likely to be mislabeled, with five of the nine samples discovered to be farmed Atlantic salmon. Large grocery stores were most likely to advertise their products correctly, while restaurants mislabeled 67 percent of fish offerings. The report further notes that salmon sold out-of-season was much more likely to be mislabeled.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 583 | OCTOBER 30, 2015

ABOUT SHOOK

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.

Shook 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.



“The federal government should provide consumers with assurances that the seafood they purchase is safe, legally caught and honestly labeled,” Beth Lowell, senior campaign director at Oceana, said in an October 28, 2015, press release. “Traceability needs to be required for all seafood to ensure important information about which species it is, whether it was farmed or wild caught, and how and where it was caught follows all seafood from boat (or farm) to plate. Providing consumers with more information about their seafood allows them to make more informed decisions, whether it is for health, economic or environmental reasons.”