

FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

White House Announces Major Policy Change on Preemption

President Barack Obama (D) has released a [memorandum](#) to the heads of executive departments and agencies instructing them to "include statements of preemption in regulations only when such statements have a sufficient legal basis." Under the Bush administration, a number of health and safety agencies, including the Food and Drug Administration, often placed such statements in a regulation's preamble, attempting to prevent those injured by the consumer products subject to the regulation from bringing state-law based product-liability litigation against manufacturers.

Acknowledging the previous practice, the memorandum indicates that its purpose "is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values."

The memorandum also directs the agencies to "review regulations issued within the past 10 years that contain statements in regulatory preambles or codified provisions intended by the department or agency to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption." If the preemption provisions are unjustified, the agencies are directed to initiate appropriate action, "which may include amendment of the relevant regulation." Government officials have apparently indicated that this review of existing regulations could take weeks or months, particularly where the preemption clause was part of a formal rulemaking process.

The U.S. Chamber of Commerce and industry interests, long concerned about complying with varying standards and rules at the state level, have reportedly criticized the change, claiming that it will interfere with the nation's economic recovery, add to the cost of consumer products and result in a lot of unnecessary litigation. A Chamber spokesperson said, "Allowing for more lawsuits will not create more jobs, except maybe for plaintiffs' lawyers." Consumer advocates praised the action. California Attorney General Jerry Brown was quoted as saying, "This directive is a very positive sign that the federal government will get out of the way and let state

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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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attorneys general defend their citizens from predatory lending, dangerous products and environmental hazards." See *Business Week*, May 20, 2009; *The Wall Street Journal*, May 21, 2009.

Senate Confirms Hamburg as New FDA Commissioner

The U.S. Senate has reportedly voted unanimously to confirm former New York City Health Commissioner Margaret Hamburg, M.D., as commissioner of the Food and Drug Administration (FDA). A physician with expertise in bioterrorism and pandemics, Hamburg told the Senate Committee on Health, Education, Labor & Pensions that she intends to address the agency's food safety record and possibly tighten tobacco regulations. See *Bloomberg.com*, May 18, 2009; *The New York Times* and *FoodNavigator-USA.com*, May 20, 2009.

Harkin, DeLauro Propose Federal Menu Labeling Laws

U.S. Senator Tom Harkin (D-Iowa) and U.S. Representative Rosa DeLauro (D-Conn.) have introduced companion bills (S. 1048 and H.R. 2426) that would amend the Federal Food, Drug and Cosmetic Act "to extend the food labeling requirements of the Nutrition Labeling and Education Act of 1990" to standard menu items offered at large chain restaurants.

Known as the MEAL Act, the bills would require restaurants with "20 or more locations doing business under the same name" to display "in a prominent location on the menu" the amount of calories, saturated fats, *trans* fats, carbohydrates, and sodium contained in each menu item. The legislation asserts that "the provision of nutrition information for away-from-home foods has a positive influence on food purchase decisions," thus enabling consumers to "manage their weight and reduce the risk of, or manage, heart disease, diabetes, and high blood pressure, which are the leading causes of death, disability, and high health care costs." According to DeLauro, her proposed legislation would represent "an incremental step toward combating increasing obesity rates."

Meanwhile, the Center for Science in the Public Interest (CSPI) has lauded the federal effort as an extension of similar measures passed in New York City, California, Massachusetts, and other jurisdictions. "Consumers play an impossible guessing game trying to make healthier choices in restaurant," stated CSPI Nutrition Policy Director Margo Wootan. "Who would guess that a large chocolate shake at McDonald's has more calories than two Big Macs or that a multigrain bagel at Dunkin' Donuts has 140 calories more than a jelly donut?" See *CSPI Press Release*, May 14, 2009; *Law360*, May 15, 2009.

Food Safety Working Group Launches Web Site

The U.S. Department of Agriculture (USDA) has launched a [Web site](#) designed to inform and welcome input about President Barack Obama's Food Safety Working Group. The group, chaired by the secretaries of USDA and the Department of Health and Human Services, is charged with upgrading food-safety laws for the 21st century, fostering coordination throughout government, and designing and enforcing laws to keep the American people safe.

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USDA Solicits Nominations for Fruit and Vegetable Industry Advisory Committee

The U.S. Department of Agriculture (USDA) has [announced](#) plans to reestablish the Fruit and Vegetable Industry Advisory Committee charged with examining the array of issues faced by the industry and providing suggestions on ways that USDA can tailor its programs to better meet the industry's needs. A minimum of 25 committee slots need to be filled for two-year terms. Written nominations must be received on or before July 1, 2009. See *Federal Register*, May 18, 2009.

LITIGATION

Disputes over Insurance Coverage for Organic Milk Litigation Consolidated

A federal magistrate in Colorado has consolidated two lawsuits that address whether Aurora Dairy Corp.'s insurers are required to defend or indemnify the organic dairy in a host of consumer class actions alleging that the company falsely certified its milk as organic. *ACE Am. Ins. Corp. v. Aurora Organic Dairy Corp.*, No. 08-cv-01236 (U.S. Dist. Ct., D. Colo., order entered May 20, 2009).

The putative class actions, consolidated before a multidistrict court in Missouri, claim that Aurora's milk products do not conform to organic standards, citing a U.S. Department of Agriculture report that purportedly found shortcomings in Aurora's organic operations. Among other matters, the claimants seek disgorgement for unjust enrichment.

Aurora sued Nationwide Agribusiness Insurance Co. seeking a declaration that the insurer was required to defend it in at least one of the pending class actions. The dairy also sued for bad faith, breach of contract and related claims. A group of insurers previously brought a declaratory judgment action against Aurora, claiming that the consumer actions against the dairy were not covered by their commercial liability policies because they did not allege bodily, property or other injury as specified in the policies. According to a news source, the plaintiffs in the latter suit sought to consolidate the insurance actions in a unopposed motion filed earlier in May 2009. See *Product Liability Law* 360, May 21, 2009.

Water Bottle Deposit Law Challenged in New York

According to news sources, a bottled water industry trade association and several companies that produce bottled water have sued New York in federal court seeking to overturn an amendment to the state's Returnable Container Act imposing a 5-cent deposit on water bottles. *Int'l Bottled Water Ass'n v. Paterson*, No. 09-4672 (U.S. Dist. Ct., S.D.N.Y., filed May 19, 2009). The original law, reportedly adopted in 1982, was intended to encourage recycling and reduce litter and waste. Currently applying to bottles and cans containing soft drinks, beer and wine coolers, the 5-cent-per-container charge can be recovered by consumers who return their empty cans and bottles to the retailer. The deposit for water bottles containing flavored water, vitamin water and artificial sweeteners becomes effective June 1, 2009. An exception is made for bottled water products with sugar.

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While the plaintiffs are not apparently challenging the law's sustainability goals, their lawsuit takes issue with its new labeling requirements, effective date and the exemption granted to bottled water competitors. They reportedly allege that requiring all bottles covered by the law to contain a New York-specific bar code and forbidding the sale of such bottles outside the state unconstitutionally controls commerce in other states. The complaint also contends that the exception for bottled water with sugar violates the Constitution's Equal Protection Clause. Because the law evidently requires labeling, registration, distribution, and redemption changes and gives the industry fewer than 60 days to comply, the companies are also seeking to delay its implementation. See *PR Web Press Release*, May 19, 2009; *BNA Daily Environment Report*, May 21, 2009.

British Court of Appeal Rules on Snack Food Tax Status

The British Court of Appeal has determined that "Regular Pringles," a snack food made by Procter and Gamble, are subject to the value-added tax under a provision that applies to "potato crisps, potato sticks, potato puffs and similar products made from the potato, or from potato flour, or from potato starch." [*Revenue & Customs v. Procter & Gamble UK*, \[2009\] EWCA Civ 407 \(Eng. & Wales Ct. App. \(Civ. Div.\), decided May 20, 2009\)](#).

Foods are generally not taxed in Britain, but an exception has been carved out for "food not normally bought primarily for nutrition but eaten as snacks." The question before the court was whether the Pringles chips, with just 42 percent potato flour content, are "similar to potato crisps and made from the potato." The company apparently argued that products subject to the tax should be made from 100 percent potato or near 100 percent, to give the product a quality of "potatiness." The court disagreed and found the company responsible for £100m in taxes for past sales and approximately £20m annually in the future.

According to a news source, the company has apparently been paying taxes on the product while the case has been pending, so no back taxes will be due. See *The Guardian* and *The Associated Press*, May 20, 2009.

OTHER DEVELOPMENTS

New Report Advocates Better Integration of Food Safety Mechanisms

The Food Safety Research Consortium (FSRC) has released a report titled [*Strong Partnerships for Safer Food: An Agenda for Strengthening State and Local Roles in the Nation's Food Safety System*](#), which recommends the creation of an "integrated food safety system that operates as a full partnership among federal, state and local agencies." A collaboration among diverse research institutions, FSRC aims to develop "analytical and decision tools for devising research, regulatory, and educational interventions and making resource allocation decisions" related to food safety reform. This latest project involved the George Washington University School of Public Health and Health Services in partnership with the Association of Food and Drug Officials, Association of State and Territorial Health Officials, and National Association of County and City Health Officials.

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In addition to detailing the strengths and weakness of the current system, the report makes 19 recommendations designed to support the state and local agencies that bear “primary responsibility for illness surveillance, response to outbreaks, and regulation of food safety in over one million restaurants and grocery stores.” FSRC specifically calls on Congress to (i) “give the secretary of Department of Health and Human Services (HHS) a legislative mandate to lead the development of an integrated, national food safety system”; (ii) “establish and fund an intergovernmental Food Safety Leadership Council (FSLC)”; (iii) “direct the secretary of HHS to create, in collaboration with the states, a National Foodborne Illness Data Program”; and (iv) “establish traceability requirements that permit federal, state, and local officials to rapidly obtain from food companies reliable information on the source of commodities, ingredients and finished products.”

The report also asks state and local government to “maintain adequate and stable funding streams to play their proper role” in a preventative food safety network. “In fact,” concludes the report, “food safety reform at the federal level will remain an incomplete solution to today’s food safety challenges unless state and local roles are strengthened and better integrated into the national food safety system.”

MEDIA COVERAGE

Nina Shen Rastogi, “May Cause Earth Decay: Is Regular Sugar Greener Than High-Fructose Corn Syrup?,” *Slate*, May 19, 2009

This article examines the claim that the production of high-fructose corn syrup (HFCS) has a greater environmental impact than similar processes used to manufacture sucrose from sugar cane or sugar beets. According to *Slate* columnist Nina Shen Rastogi, “sugar cane seems to be the most efficient producer of sugar and potentially the lightest user of fossil fuels, even though its significant water requirements can’t be ignored.” The article reports that one consulting firm ranked HFCS processing “the most energy-intensive food-manufacturing industry in America, meaning it spent the most on electricity and fuel per dollar-value shipments made,” while “sugar beet processing comes in at No. 2” and “sugar cane mills and refineries, collectively, are No. 3.” Other researchers reportedly concluded that, “on average, greenhouse gas emissions, and the release of acidifying substances seemed highest with corn sugar.”

Rastogi notes, however, that each type of processing “returns some useful byproducts that can offset some of the environmental burdens.” In addition, she argues, the United States uses “a whole lot more corn for fuel alcohol (36 percent in 2008) and animal feed (roughly 50 percent),” than it does to produce corn-based sugars, which account for only 7 percent of total U.S. grain corn production. Rastogi ultimately advises readers that reducing HFCS consumption does not make sense from an environmental standpoint unless you are “willing to gobble up the rest of Florida, Louisiana, Hawaii, and Texas just to avoid corn [sugar].”

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SCIENTIFIC/TECHNICAL ITEMS

UK Scientists Discover *Salmonella's* Sweet Tooth Could Lead to Vaccination Against It

UK scientists have shown in new research that the food-poisoning bug *Salmonella* relies on glucose for its survival, a discovery that could apparently provide a new way to vaccinate against it. Steven D. Bowden, et al, "Glucose and glycolysis are required for the successful infection of macrophages and mice by *Salmonella enterica* serovar Typhimurium," *Infection and Immunity* (April 20, 2009). Institute of Food Research (IFR) scientists claim that their discovery of *Salmonella's* weakness for sugar could also lead to vaccine strains to protect against other disease-causing bacteria, including superbugs.

"This is the first time that anyone has identified the nutrients that sustain *Salmonella* while it is infecting a host's body," said study co-author Arthur Thompson in a statement from IFR, which called the discovery "a major breakthrough." The next phase of the research will reportedly test whether mutant strains elicit a protective immune response in mice. See *IFR Press Release*, May 2009.

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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.

