Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

110th Congress

[1] Congress Schedules Hearing to Discuss Compensation for Tomato Industry

The House Committee on Energy and Commerce's Oversight and Investigations Subcommittee this week heard testimony from food industry leaders about a continuing *Salmonella saintpaul* outbreak linked to raw jalapeno and Serrano peppers grown in Mexico. Congress reportedly called several hearings to discuss a delayed federal response that first implicated U.S. tomato farmers and cost them an estimated $100 million in sales, according to the Florida Growers Exchange, which has asked lawmakers to approve compensation funds. "More important than the financial loss is the loss of consumer confidence," Kathy Means, vice president of the Produce Marketing Association, was quoted as saying. "This has long-term effects for the industry."

In addition, the House Subcommittee on Horticulture and Organic Agriculture scheduled a July 30 meeting on "the legal and technological capacity for full traceability of fresh produce," while the U.S. International Trade Commission **solicited** public input on its monitoring program for tomato and pepper imports. Several state officials have since expressed anger over the way the Food and Drug Administration (FDA) handled the outbreak, faulting the agency for its lack of communication and for issuing "blanket" warnings that affected entire agricultural sectors.

FDA lifted its consumer warning on all tomatoes and domestic peppers only after tracing the outbreak to a small produce distributor in McAllen, Texas, which received shipments from a Nuevo Leon farm where investigators identified the rare *Salmonella* strain in irrigation water and product samples. Industry leaders have apparently asked FDA to elaborate on its initial findings and why the agency waited to exonerate U.S. tomatoes once it had shifted focus elsewhere. "The lack of coordination likely made a bad situation worse, slowing the investigation and resulting in unnecessary harm to industry as well as the public health," stated Representative Bart Stupak (D-Mich.), chair of the Energy and Commerce Committee, in response to these concerns. *See The Washington Post*, July 26 and 31, 2008; *Palm Beach Post*, July 28, 2008; *The Wall Street Journal* and *Western Growers Spotlight*, July 30, 2008; *The New York Times*, July 31, 2008.

The Oversight and Investigations Subcommittee also interviewed Florida Agriculture Commissioner Charles Bronson, who specifically noted a disconnect between FDA and state regulators, as well as a gap between the limited information supplied by FDA and the more detailed reports coming from the Centers for Disease Control and Prevention (CDC). The commissioner worried that although Florida public health and agriculture officials shared this

vital data, some states house these functions in different agencies and "information does not always flow quickly between the two." He suggested that regulators (i) "clearly establish the roles and responsibilities of each governmental agency, both state and federal, in response to foodborne illness outbreaks" and (ii) "improve traceability on all levels" by requiring a country-of-origin identifier until the final point of sale. Bronson also urged legislators to adopt the "Safe Food Enforcement, Assessments, Standards and Targeting Act," (HR 5904), which would require "all domestic and foreign food companies selling food in the United States to conduct a food safety risk analysis that identifies potential sources of contamination, outlines appropriate food safety controls, and requires verification that the food safety controls implemented are adequate to address the risks of foodborne contamination." *See Florida Department of Agriculture Press Release*, July 31, 2008.

Meanwhile, consumer advocates have apparently blamed both government and industry for the spate of unnecessary recalls. *MSNBC.com* claimed in a July 25, 2008, article that food companies which asked Congress to dilute tracking requirements are now reaping the "apparent but intended consequences of the lobbying success: a paper record-keeping system that has slowed investigators, which estimated business losses of $250 million." In particular, the Center for Science in the Public Interest told *MSNBC* that the original laws crafted by government experts were "significantly watered down" by White House and FDA officials at the request of industry interests. The Food Marketing Institute (FMI), however, has said food manufacturers are open to a better tracing system as long as they have a voice in its design and implementation. "It's the government's job here to say that industry needs to develop an effective trace-back system, and then hold the industry accountable without trying to define exactly how it's done," FMI President Tim Hammonds was quoted as saying. *See The New York Times*, July 31, 2008.

Federal Trade Commission

[2] Integrated Food and Beverage Marketing to Kids Exceeds $1 Billion, Says FTC

Calling on industry to improve the nutrition of the products it promotes to youths, the FTC has issued its **report** on food and beverage marketing to children and adolescents. With six **appendices** providing detailed analyses of the confidential data submitted by 44 companies relating to their 2006 expenditures, the report, titled "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation," calculated total expenditures of $1.6 billion for product promotions specifically targeted to children under 12 and adolescents ages 12 to 17.

During the press conference at which the report's release was announced, FTC spokespersons prefaced their remarks by noting that the data represented expenditures made while the industry was only beginning to pledge better practices through the Children's Food and Beverage Advertising Initiative launched by the Council of Better Business Bureaus. Thus, the findings will be used as a "benchmark" to assess the progress of "future voluntary efforts." Among the report's major findings were (i) carbonated beverages, fast-food restaurants and breakfast cereals accounted for 63 percent (or $1.02 billion) of the total spent on youth marketing; (ii) some 24 percent of the amount spent to market carbonated beverages was spent in schools; and (iii) TV advertising predominates at 46 percent of all youth marketing expenditures.

The report also explored the integrated nature of youth marketing in this industry sector. Branding is reinforced through product placements in entertainment media, packaging, licensed characters and tie-ins with TV programs and toys, in-store displays, and extensive use of electronic media, including the Internet and text messaging. Other promotions include premiums, i.e., free items provided with a food product, viral marketing, "in which consumers are encouraged to share electronic promotional messages with other consumers," and celebrity endorsements. The report also discussed youth content on company Web sites, advergames and promotions offering free downloads for adolescents, "such as screensavers, wallpapers, ringtones, music, and layouts for MySpace pages." Downloads for younger children can include "activity sheets, pages to color, stickers, iron-on decals, and games."

FTC was careful to note that the report does not make associations between food and beverage advertising and rising rates of childhood obesity. While the agency contends that promoting healthier foods to children is important, it considers obesity to be a complex problem caused by any number of factors, like less physical education in schools and more sedentary pastimes pursued by children.

The agency does not recommend specific government action now, preferring to take a wait-and-see approach to determine if self-regulation will produce desired results. In response to a press conference question, an FTC representative noted that the agency was most surprised about the total dollars spent on youth marketing because a $10 billion figure has been touted for some time as the food and beverage youth marketing budget. According to the report, the discrepancy can be explained by the data to which it had access and by the types of expenditures the agency excluded from its calculations, such as marketing for food and beverage products directed toward adults on behalf of their children.

The report's recommendations focus on numerous stakeholders, including the entertainment industry and call for "standardizing the nutrition criteria for 'healthy dietary choices' that may be marketed to children." FTC also calls for food and beverage companies participating in former President Bill Clinton's "Alliance for a Healthier Generation," which focuses on products offered to children in their schools, to "consider incorporating their Alliance commitments into distributor contracts."

U.S. Department of Agriculture

[3] USDA Publishes Interim Final Rule for Country-of-Origin Labeling

USDA has **issued** an interim final rule requiring meat, fruit, vegetable, and nut retailers to use country-of-origin labeling (COOL) for several commodities, including muscle cuts of beef, veal, lamb, chicken, goat, and pork or ground meat derived from these sources; shellfish; fresh and frozen fruits and vegetables; peanuts; pecans; ginseng; and macadamia nuts. In accordance with the 2008 Farm Bill, retailers must implement COOL by September 30, 2008, when USDA can begin investigating alleged violations. The agency will consider livestock to be of U.S. origin if continuously present in the United States since July 15 and will accept an official ear tag or animal marking device from the National Animal Identification System as a basis for origin claims. These regulations do not apply to food service establishments; processed goods that are cooked, cured, smoked, or

restructured; or commodities produced and packaged before September 30. USDA will accept public comments for 60 days after the rule is published in the *Federal Register*.

USDA's Food Safety and Inspection Service (FSIS) last month announced plans to publish a list of retailers that receive tainted meat and poultry during a recall representing the highest public health threat. COOL aims, in part, to assist this effort by compelling retailers to keep records that can identify an immediate source, as well as subsequent destinations. The agency currently estimates "total first-year implementation costs for all directly affected firms at $2.5 billion," according to *Meatingplace.com*, which lists individual firm costs at $376 for producers, $53,948 for intermediaries and $235,551 for retailers. *See Meatingplace.com* and *Product Liability Law 360*, July 29, 2008.

State and Local Governments

[4] California Governor Approves Statewide *Trans* Fats Ban

California Governor Arnold Schwarzenegger (R) has signed legislation (A.B. 97) prohibiting the use of *trans* fat in the state's 88,000 restaurants, cafeterias, bakeries, delicatessens, and food facilities. The new law requires food purveyors to eliminate partially hydrogenated fats from restaurant dishes by 2010 and all baked goods by 2011 or face fines ranging from $25 to $1,000. "Consuming *trans* fat is linked to coronary heart disease, and today we are taking a strong step toward creating a healthier future for California," Schwarzenegger said about the measure, which health experts reportedly anticipate will prevent 6 to 19 percent of heart attacks and related deaths per year.

Meanwhile, the California Restaurant Association has opposed the regulation on "philosophical" grounds, arguing that only the federal government should have the power to issue health-based mandates. In addition, the association noted that consumer demand has already driven many restaurants to switch to healthier oils despite an increase in preparation costs. "The only effect it is going to have on the consumer is that we are going to have to raise our prices," one restaurateur was quoted as saying. "I think this is good for the health of the consumer. On the other hand, people who eat French fries are not concerned with their health that much." *See The New York Times* and *The Los Angeles Times*, July 26, 2008.

[5] South Los Angeles Issues Yearlong Moratorium on New Fast Food Restaurants

The Los Angeles City Council this week voted unanimously to block new fast food restaurants from opening within a 32-square-mile area of the city that includes West Adams, Baldwin Hills and Leimert Park. The yearlong moratorium defines fast food outlets as "any establishment which dispenses food for consumption on or off the premises, and which has the following characteristics: a limited menu, items prepared in advance or prepared or heated quickly, no table orders and food served in disposable wrapping or containers."

With the possibility of two six-month extensions, the law aims to attract sit-down food facilities offering healthier options and provide city planners with time to craft new zoning laws. "This will buy us time to aggressively market the district and show potential developers that we are not only open for business, but have some substantive incentives to make it worth their while to develop in South L.A.," stated council member Jan Perry, who introduced the initiative.

Some restaurant owners, however, have countered that the moratorium will reduce job opportunities and restrict food choices in these neighborhoods, where 30 percent of children are reportedly obese. "The intent of this bill, and this proposal, is a very good one. There is an obesity problem," one restaurateur told the press. "[But] I don't think the restaurant industry is to blame." *See The Los Angeles Times* and *The Associated Press*, July 30, 2008.

[6] California Considers PFOA Restrictions in Food Packaging

The California Legislature is considering a **bill** (S.B. 1313) that would "prohibit the manufacture, sale, or distribution of any food contact substance, as defined, that contains perfluorinated compounds, as defined, in any concentration exceeding 10 parts per billion." According to the measure's findings, such chemicals have been used to make stain- and grease-proof coatings for more than 50 years and accumulate in human blood and wildlife.

"Recent studies have demonstrated the presence of two particular perfluorochemicals, perfluorooctane sulfate (PFOS) and perfluorooctanoic acid (PFOA), in more than 98 percent of Americans' blood, and 100 percent of 293 newborns surveyed. PFOA is considered by the federal Environmental Protection Agency (EPA) Science Advisory Board to be a likely carcinogen and is considered a chemical that induces breast tumors in animals. In addition, PFOA and PFOS have been linked to problems in pregnancy, including developmental complications."

State Senator Ellen Corbett (D-San Leandro) introduced the measure in February 2008, and it has been approved in the Senate. According to a news source, the proposal will be considered by the full Assembly in the next few weeks. The chemical industry opposes the bill, contending that PFOA, which is used to make non-stick cookware, Gore-Tex® clothing and to prevent foods from sticking to packaging, has not been shown to cause harm in humans. *See The Los Angeles Times*, July 30, 2008.

Litigation

[7] Whole Foods and Wild Oats Merger Again Subject to FTC Challenge

A divided D.C. Circuit Court of Appeals panel has reversed a district court ruling that denied the Federal Trade Commission's (FTC's) request to stop the merger of Whole Foods Market, Inc. and Wild Oats Markets, Inc. ***FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C. Cir., decided July 29, 2008)**. At issue was whether the district court correctly analyzed the product market by focusing on the "marginal" consumer rather than the "core" or "committed" consumer and concluded that Whole Foods and Wild Oats compete within the broader market of grocery stores and supermarkets and thus, that the merger could not constitute an "undue concentration in the relevant market." According to the appeals court, "[i]n appropriate circumstances, core customers can be a proper subject of antitrust concern."

The case has been remanded for the district court to balance the equities involved in this preliminary injunction proceeding. Among the issues the district court will have to consider is whether the equities favor the FTC now that the merger has taken place and Whole Foods has closed or sold a number of Wild Oats stores. According to the court, transactions are rarely irreversible, and, if the FTC prevails on the merits, divestiture could be ordered "to ameliorate the harm to competition from an antitrust violation."

The appeals court found erroneous the district court's belief that "the antitrust laws are addressed only to marginal consumers . . . because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket." According to the court, "The FTC described the core PNOS [premium, natural and organic supermarkets] customers, explained how PNOS cater to these customers, and showed these customers provided the bulk of PNOS's business. The FTC put forward economic evidence—which the district court ignored—showing directly how PNOS discriminate on price between their core and marginal customers, thus treating the former as a distinct market. Therefore, we cannot agree with the district court that the FTC would never be able to prove a PNOS submarket."

The dissenting panel member, stating that "the panel majority seeks to unring the bell" that allowed the merger to go forward in 2007 when it refused to issue an injunction pending the appeal, found the FTC's case weak and concluded "[t]here is no good legal basis to block further implementation of this merger." An FTC spokesperson was quoted as saying, "We are pleased by today's decision of the appeals court in the Whole Foods matter and are looking forward to future proceedings before the district court, leading to a full trial on the merits before the Commission." *See The Wall Street Journal*, July 30, 2008.

[8] Ohio Appeals Court Dismisses Popcorn Lung Claims Against Flavoring Manufacturers

A woman who was allegedly exposed on the job to diacetyl, a butter flavoring linked to breathing problems and *bronchiolitis obliterans*, will not be able to pursue her personal injury claims against the chemical's manufacturers. *Mitchell v. Int'l Flavors & Fragrances, Inc.*, No. C-070530 (Ohio Ct. App., 1st Dist., decided July 25, 2008). According to a news source, the Ohio Court of Appeals has determined that plaintiff Beverly Mitchell was collaterally estopped from claiming that the occupational exposure caused her injury because the state's worker's compensation authority denied her claim and she did not appeal that decision or refile her claim before seeking compensation from the manufacturing defendants.

Mitchell apparently argued that the parties involved in the two proceedings differed and thus, that collateral estoppel should not be applied. The court disagreed, ruling that as long as the specific issues had previously been fully litigated and decided, subsequent claims were barred. In this regard, the court stated, "When the Industrial Commission of Ohio determines that a worker was not injured in the course and scope of her employment . . . the determination is binding in subsequent litigation in which she must establish the same injury."

Some 500 lawsuits raising similar claims are reportedly pending against numerous companies that either produced the chemical or used it in food products such as popcorn and baked goods. One of the defendants in the Ohio litigation has apparently been involved in several verdicts or settlements totaling more than $42 million. Plaintiffs' lawyers contend that workers were allowed to handle the chemical with little or no protection and complain about the government's failure to adopt protective regulations. Manufacturing interests reportedly argue that their customers were warned to mix the flavoring in well-ventilated areas and provide workers with respirators when they heated it. *See The* (New Jersey) *Star-Ledger*, July 27, 2008; *Product Liability Law 360*, July 29, 2008.

[9] Tainted Peanut Butter Claims Will Proceed Individually

A federal court in Georgia, presiding over multidistrict claims from 10 different states involving salmonella-contaminated peanut butter, has refused to certify two plaintiffs' classes. *In re ConAgra Peanut Butter Prods. Liab. Litig.*, MDL No. 1845 (U.S. Dist. Ct., N.D. Ga., decided July 22, 2008). The classes would have included product purchasers alleging that when the product was recalled it was rendered "unusable and valueless," and a class of those who consumed and were allegedly sickened by the tainted peanut butter.

The court reportedly declined plaintiffs' invitation to apply the choice-of-law rules of Georgia to determine what standards would be used in analyzing the unjust enrichment claims. According to the court, the choice-of-law rules of transferor courts are applied in multidistrict litigation, and it was apparently unwilling to apply the varying substantive laws from the many states involved. The court was quoted as saying, "This morass is useful to establish not only the lack of uniformity of unjust enrichment claims across the country but also the inferiority of classwide resolution due to discerning the many differing legal standards." The court also reportedly noted that proving damages would require individualized determinations and that defendant's refund program, which has provided nearly $3 million to consumers and more than $30 million to retailers, provided another way to address the claim.

As to the putative class seeking compensation for personal injury, the court opined that an "issues class" would not foster judicial economy or materially advance the litigation, stating, "Although the defendant has not formally admitted liability, it is highly unlikely that it will deny that salmonella-contaminated peanut butter is a defective product and makes people sick who eat it." A plaintiffs' lawyer has indicated that the cases will proceed. Calling the court's ruling "a procedural decision," an attorney with Lieff Cabraser reportedly said, "it doesn't change the fact that we and other lawyers represent thousands of people who were made ill by ConAgra's peanut butter, and we want to get those cases to trial as soon as possible." *See Product Liability Law 360*, July 24, 2008.

[10] Canada High Court Allows BSE-Related Claims to Proceed Against Government

The Supreme Court of Canada has reportedly refused to hear an appeal of a 2007 decision from the Ontario Court of Appeal allowing a hearing on class certification for the claims of some 100,000 farmers who alleged the government's negligent regulatory policy on cattle feed caused $7 billion in economic losses when the country's cattle exports were banned over fears of contamination with bovine spongiform encephalopathy (BSE). Also named as a defendant is the feed company Ridley Canada. Further information about the litigation appears in issue 220 of this Update. According to lead plaintiff and cattle farmer Bill Sauer, the government established regulations in 1990 that allowed the feeding of cattle parts to other animals, a practice that had already been prohibited in the United Kingdom and was not changed until 1997. *See The Canadian Press*, July 18, 2008.

Scientific/Technical Items

[11] Study Links Sweetened Fruit Drinks to Type 2 Diabetes

A recent study has allegedly linked sugar-sweetened fruit drinks to weight gain and an increased risk of type 2 diabetes. **Julie Palmer, et al., "Sugar-Sweetened Beverages and Incidence of Type 2 Diabetes Mellitus in African American Women," *Archives of Internal Medicine*, July 28. 2008**. Boston University researchers followed 44,000 African-American women from 1995 through 2005, finding that those who reported drinking two or more non-diet soft drinks per day had a 24 percent increase for type 2 diabetes compared to women who drank fewer than one regular soft drink per month. In addition, women who consumed two or more sugar-sweetened fruit drinks per day had a 31 percent increased risk of developing type 2 diabetes over those drinking only one such beverage in a month.

The study also concluded that orange juice, grapefruit juice and diet soft drinks had no discernible effect on diabetes risk. "The public should be made aware that [sweetened fruit drinks] are not a healthy alternative to soft drinks with regard to risk of type 2 diabetes," the lead author was quoted as saying. *See Reuters*, July 28, 2008; *AP-Foodtechnology.com*, July 29, 2008.

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Leo Dreyer and Mary Boyd in the Kansas City office of SHB.
If you have questions about the Update or would like to receive back-up materials,
please contact us by e-mail at ldreyer@shb.com or mboyd@shb.com.
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