Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

GAO Identifies Collaboration and Enforcement Gaps in Imported Food Safety System

The Government Accountability Office (GAO) has released a report prepared in response to congressional inquiries about the current system for ensuring the safety of imported foods. Titled "Agencies Need to Address Gaps in Enforcement and Collaboration to Enhance Safety of Imported Food," the report focuses on Customs and Border Protection (CBP), the Food and Drug Administration (FDA), the U.S. Department of Agriculture's Food Safety and Inspection Service, and state regulators responsible for the safety of foods imported from more than 150 countries and territories.

GAO discusses the contamination outbreaks recently associated with imported foods and notes that steps federal agencies have already taken are falling short because (i) their "computer systems do not share key information"; (ii) "FDA has limited authority to ensure importer compliance"; (iii) "CBP and FDA do not provide unique identification numbers to firms"; and (iv) "CBP faces challenges in managing in-bond shipments," i.e., "those that move within the United States without formally entering U.S. commerce." The report also found that FDA "does not always share certain information during a recall."

Specific recommendations to improve the safety of imported foods include adapting some of the EU's practices for use in the United States, improving interagency communications, identifying foreign firms with a unique identifier, engaging in joint port initiatives, developing performance measurements for an FDA program that will target high-risk imported food shipments for field and laboratory examinations, and giving FDA the authority to assess civil penalties on those violating food safety laws.

Scientists Claim New FDA Research on BPA Unnecessary and Poorly Designed

Led by a University of Massachusetts biology professor, more than 30 scientists have reportedly written to the Food and Drug Administration (FDA) to express concern about the agency's plans to further study the health effects of bisphenol A (BPA), a plasticizer ubiquitous to food packaging that has apparently been

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subject to more than 900 studies. According to the researchers, many of whom have participated on government BPA health-effects panels, "FDA's plans to spend significant time and money on a very well researched chemical are disturbing."

The agency has indicated that it will issue a new opinion on the chemical's safety by November 30, 2009, and the scientists note that FDA plans to spend $7 million on new BPA research in the interim. Not only are they concerned about the quality of the planned research, which calls for BPA to be tested on a rat strain insensitive to BPA at low levels, the scientists are also "deeply troubled that the agency would announce these research plans in light of its decision to release a reassessment of BPA by Nov. 30. This disconnect between research and reassessment raises concerns about whether the FDA is striving to resolve the critical public health issues raised by widespread exposure to BPA, or is avoiding making a decision because of the pending research, the results of which will not be available for review for many years." *See* (Milwaukee) *Journal Sentinel*, October 12, 2009.

Meanwhile, the German Federal Institute for Risk Assessment has apparently concluded that BPA is safe for use in baby bottles and should not be banned. According to a news source, the institute found, "[f]ollowing careful examination of all studies," that "the normal use of polycarbonate bottles does not lead to a health risk from bisphenol A for infants and small children." The institute also reportedly found "no indications of any carcinogenic effect" from the chemical, which it characterized as having "low acute toxicity." The German risk assessment body contends that the substance is more rapidly metabolized and eliminated in humans than in lab animals, thus appearing to dismiss concerns about its purported estrogenic effects. *See FoodNavigator-USA.com*, October 9, 2009.

Connecticut AG to Investigate "Smart Choices" Food Products

Connecticut Attorney General (AG) Richard Blumenthal has announced that his office will be investigating "a potentially misleading national food label program that deems mayonnaise, sugar-laden cereals and other nutritionally suspect foods 'Smart Choices.'" Targeting Hellman's Real mayonnaise (light and non-light), Breyer's ice cream, processed cereals, and Lipton beverages bearing the symbol, Blumenthal is seeking information from the organizations administering the program and major food companies that make the products. According to his press release, information sought includes "the consumer research and selection criteria driving the Smart Choice program; the process and fees involved in administering the program; and any payments or developmental role that major food manufacturers might have provided for the program." Kelly Brownell, director of the Rudd Center for Food Policy and Obesity at Yale, is quoted as saying, "It is very important that consumers have truthful and non-deceptive nutrition information if they are to make informed choices."

According to a news source, Smart Choices executives and PepsiCo have indicated that they plan to cooperate with the investigation. Among the products Blumenthal is apparently most concerned about are Froot Loops®, Lucky Charms® and Cocoa Puffs® cereals, which are marketed to children. Blumenthal's investigation could lead to charges that the labeling program violates a state consumer protection

law prohibiting false or misleading product claims. *See The New York Times* and *Connecticut AG Office Press Release*, October 15, 2009.

California, Michigan Enact Animal Welfare Laws

California and Michigan have adopted laws that animal welfare groups have reportedly heralded as landmark legislation. Governor Arnold Schwarzenegger (R-Calif.) signed a **bill** (S.B. 135) prohibiting tail docking of dairy cows, a " common and cruel mutilation," according to the Humane Society of the United States. The California bill takes effect January 1, 2010.

Michigan Governor Jennifer Granholm (D) signed a **bill** (H.B. 5127) requiring that certain farm animals be provided enough room to stand up, turn around and extend their limbs rather than being confined in cages that impede their movement. "All animals deserve humane treatment, including those raised for food," said the head of the humane society about the Michigan bill, which phases out veal crates for calves within three years, and battery cages for laying hens and gestation crates for breeding sows within 10 years. *See Humane Society of the United States Press Releases,* October 12, 2009.

North Carolina Raises Health Insurance Fees for Obese State Employees, Smokers

The North Carolina State Health Plan (SHPNC) has reportedly approved fee increases for state employees who use tobacco or whose body mass index (BMI) qualifies them as obese. Under the new arrangement, private contractors hired by SHPNC will monitor workers' weight and take saliva samples to test for cotinine, a nicotine derivative. The plan requires tobacco users to enroll in a more expensive insurance plan by July 2010, while members with a BMI exceeding 40 have until July 2011 to improve their overall health before seeing a cost increase.

According to SHPNC, these fees will help alleviate budget shortfalls that last year necessitated an emergency infusion of $250 million to cover claims. "Tobacco use and poor nutrition and inactivity are the leading causes of preventable deaths in our state," an SHPNC spokesperson told reporters. "We need a healthy workforce in this state. We're trying to encourage individuals to adopt healthy lifestyles."

Meanwhile, the State Employees Association of North Carolina has criticized the changes as unnecessarily invasive and unlikely to bolster a health plan in need of restructuring. Opponents have also pointed to a lack of incentives for enrollment in health behavior or wellness programs. "It's my understanding they're talking about testing [for tobacco use] in the workplace which, to me, would create a hostile environment," one state employee was quoted as saying. "And it's an invasion of privacy. This is America, the land of the free. I don't think [body mass index] is a very good measure. I know some folks who have a high body mass index because they're muscular." *See the Charlotte Observer,* October 7, 2009; *The Los Angeles Times,* October 8, 2009.

Ireland Adopts GM-Free Zone, Voluntary GM-Free Food Label

The Irish government reportedly plans to **prohibit** the cultivation of all genetically modified (GM) crops and will introduce a voluntary GM-free label for meat, poultry, eggs, fish, crustaceans, and dairy products made without the use of GM animal feed. Echoing a similar move by Germany, the policy specifies that the government will "declare the Republic of Ireland a GM-Free Zone, free from the cultivation of all GM plants," according to a press release, which called the policy "a new dawn for Irish farmers and food producers."

The GM-crop ban and voluntary GM-free label "makes obvious business sense for our agri-food and eco-tourism sectors," said a spokesperson for GM-Free Ireland, a multi-stakeholder network of social, political and legal-action groups. "Everyone knows that U.S. and EU consumers, food brands and retailers want safe GM-free food, and Ireland is ideally positioned to deliver the safest, most credible GM-free food ban in Europe, if not the world." *See GM Free Ireland Network Press Release*, October 13, 2009.

British Ad Standards Authority Puts Stop to PETA "Meat Kills" Campaign

The U.K.'s Advertising Standards Authority has reportedly banned an advertising campaign launched by People for the Ethical Treatment of Animals (PETA), fearing that it would cause some readers to infer that eating meat causes swine flu. The ad stated in bold letters "Meat Kills: Go Vegetarian" and contained repeating background lines of text that said, "*E. Coli*, Mad Cow, Swine Flu, MRSA." The "Swine Flu" font was highlighted and made the disease more prominent. The advertising authority apparently determined that the ad was spreading "undue fear and distress" about swine flu. Other PETA ads have also reportedly caused controversy in Great Britain. *See MarketingWeek.co.uk*, October 14, 2009.

LITIGATION

Northeastern Dairy Farmers Bring Antitrust Litigation Against DFA and Dean Foods

A coalition of dairy farmers from the northeastern United States has reportedly filed a putative class action against the Dairy Farmers of America (DFA) and Dean Foods Co., alleging that they have monopolized the distribution of fluid milk in the Northeast, fixed prices and created an economic crisis in the industry. *Allen v. DFA*, No. n/a (U.S. Dist. Ct., D. Vt., filed October 8, 2009). Similar litigation is reportedly pending in a federal court in Tennessee.

According to plaintiffs' counsel, "Many dairy farmers have been forced to choose between joining DFA or DMS [Dairy Marketing Services] or going out of business. If they join, they have to pay a fee to continue to market to their own customers at prices fixed by DFA, DMS and other cooperatives. Meanwhile major milk processors Dean and HP Hood, which is part-owned by DFA, enjoy the economic benefits." He also reportedly said that the anticompetitive milk distribution system is the result of unlawful contracts, agreements and understandings that violate restrictions imposed by the Department of Justice and state attorneys general offices.

DFA reportedly responded to the complaint by saying it would "aggressively defend" its interests against the allegations, "as we believe them to be without basis." It also contends that its operations have achieved efficiencies in "field services, hauling and administration—all for the benefit of dairy farmers. We are continuously looking for additional ways to increase dairy farmer pay price and net returns, not suppress them, and have been successful in doing so." *See The BLT: The Blog of Legal Times*, October 9, 2009; *U.S. Agricultural & Food Law and Policy Blog*, October 12, 2009; *Syracuse.com*, October 14, 2009.

MDL Court Dismisses Several Claims in GM Rice Litigation

The federal court overseeing multidistrict litigation (MDL) brought by rice farmers alleging that a genetically modified (GM) strain of rice contaminated the U.S. commercial rice supply and led to bans on exports has reportedly dismissed several claims while allowing at least one to proceed. *In re: Genetically Modified Rice Litigation*, MDL No. 1811 (U.S. Dist. Ct., E.D. Mo., order entered October 9, 2009). The first bellwether trial, which involves the claims of Missouri plaintiffs seeking to recover economic damages purportedly caused by a precipitous drop in the worldwide market price for rice, is apparently scheduled to begin November 2, 2009.

According to a news source, the court dismissed the plaintiffs' claims for negligence per se, public nuisance and violations of the North Carolina Unfair Trade Practices Act. Claims for private nuisance will, however, proceed. The court also apparently granted plaintiffs' motion for summary judgment as to some of the defendants' affirmative defenses and limited the testimony of defendants' expert witnesses. The court was quoted as saying," I have determined as a matter of law that the regulations under the Plant Protection Act do not allow for low level or adventitious presence of regulated genetically modified rice in the commercial rice supply, and so I will not allow any of defendants' expert witnesses to opine to the contrary."

The GM rice has been deregulated, but in 2006, when the contamination occurred, it was not apparently approved for human consumption. *See Product Liability Law 360*, October 13, 2009.

Mexico Turns to WTO in Challenge to COOL Regulations

Shortly after Canada filed its challenge to U.S. country-of-origin labeling (COOL) requirements, Mexico apparently followed suit, asking the World Trade Organization (WTO) to establish a panel to undertake a dispute settlement process. Mexico's agricultural authority reportedly contends that the rules may unfairly discriminate against the country's meat industry by requiring U.S. meat processors to segregate imported meats. This has allegedly led some U.S. processors to stop buying meat from Mexico or Canada. The panel request is reportedly scheduled to be considered during an October 23, 2009, meeting of WTO's Dispute Settlement Body. *See Product Liability Law 360*, October 12, 2009.

MEDIA COVERAGE

Paul Voosen, "Agriculture: Courts Force U.S. Reckoning with Dominance of GM Crops," *Greenwire*, October 8, 2009

In the first of a series of reports, this article discusses the sugar beet growers from Oregon's Willamette Valley involved in litigation that has, to date, successfully challenged U.S. Department of Agriculture decisions to de-regulate genetically modified (GM) sugar beets without conducting appropriate environmental impact assessments. Organic farmers risk the loss of their EU markets if their crops become contaminated with GM strains, and GM farmers have apparently been unwilling to flag the location of their fields, fearing ecoterrorism and burned crops. The standoff reportedly led to the litigation which was brought by the Center for Food Safety, whose executive director is quoted as saying, "Every farmer should have the right to grow non-GMO crops and not fear contamination. Farmers shouldn't be out there in constant fear that they're going to be contaminated."

The article notes that while Europeans have been resistant to GM crops, U.S. consumers are largely unaware that vast percentages of some crops are now bioengineered. According to *Greenwire* author Paul Voosen, "Partially, this is due to the federal organic standard. While the standard requires farmers to use conventional seeds, it is process-oriented and requires no testing for GM material in certified organic products."

Voluntary standards are apparently being adopted by retailers such as Whole Foods Market Inc., but the thresholds for GM presence are (i) more lenient than European standards and (ii) difficult for growers to meet "because it is the nature of genes to flow. Cross-pollination between plants is a driver of evolution, and pollen can move large distances, aided by wind or buzzing bees. The buffer, or isolation, distance needed between crops is poorly understood and variable." Organic farmers in the United States are apparently calling for a system similar to one adopted in Europe that would place the financial burden of keeping GM and conventional crops effectively separate on the companies that develop and the farmers that use GM seeds.

OTHER DEVELOPMENTS

Study Questions Effectiveness of South Los Angeles Fast-Food Restaurant Ban

A new Rand Corporation **study** claims that South Los Angeles' 2008 ban on new or expanded fast-food restaurants is unlikely to improve residents' diets or reduce obesity because the area actually has a lower concentration of these establishments per capita than other areas of the city. Researchers apparently discovered that South Los Angeles has an abundance of small food stores and other food outlets where residents consumed significantly more "discretionary" calories from sugary or salty snacks and soft drinks compared to residents of wealthier neighborhoods.

The ban, approved by the Los Angeles City Council in August 2008, "may have been an important first by being concerned with health outcomes, but it is not the most promising approach to lowering the high rate of obesity in South Los Angeles," the

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study's lead author was quoted as saying. "It does not address the main differences we see in the food environment between Los Angeles neighborhoods nor in the diet of residents."

Researchers said that the density of small food stores in South Los Angeles was about double that of the county average and more than three times the number in West Los Angeles. They also said that South Los Angeles residents are more like to purchase items from a food cart or mobile vendor and less likely to eat in a sit-down restaurant. *See Rand Corporation News Release,* October 6, 2009.

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