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a commitment to phase out the use of mineral oils in paper products, including food contact materials. The decision followed widely publicized concerns about the safety of mineral oils used in printing inks. Studies found traces of mineral oils migrating into food from inks found on the printed surface of packaging and in recycled packaging papers.

Packaging experts in the United States, interviewed by *FCN* in 2011, were dismissive of the mineral oil scare in Europe. The Recycled Paperboard Technical Association (RPTA), based in Elgin, Ill., issued a statement referencing a study by the UK Food Standards Agency that found no cause for alarm (see *FCN* Dec. 23, 2011, Page 16).

The Commission says, in its response to MEP Franco, that its impact assessment will analyze the extent of the problem and consider different options for its solution, taking into account the availability of alternatives for mineral oil-containing printing inks. The study also will consider the impact on sustainability, with stakeholders being consulted.

China's food contact regulatory framework

The packaging industry and its lawyers also are carefully following changes to China's food contact regulatory framework. Thousands of companies in the United States, Europe, Japan and elsewhere export food to China, yet the

Asian giant's food packaging regulations are a maze (see *FCN* Aug. 3, 2012, Page 22).

In November 2011, the Chinese Ministry of Health (MOH) published a list of 107 approved food-contact resins from among those submitted as part of its "cleanup" process to catch up on food packaging standards, which were last revised in 2008, SPI's Mumbauer reports. The MOH, on May 11, 2012, published a list of 301 approved food-contact additives. A third and final batch of 261 food-contact additives approved under the "cleanup" process was released by MOH for public comment on Nov. 16, with final approvals anticipated early this year.

As of the finalization of the third batch, Mumbauer says, any substance not listed or otherwise approved in China will be unlawful and subject to enforcement action by Chinese authorities until it is approved under the Management Rules for the Administrative Approval of New Varieties of Food Related Products. Chinese national standard GB 9685 (*Hygienic Standards for Uses of Additives in Food Containers and Packaging Materials*) will be formally revised this year to incorporate substances approved through the "cleanup" process.

Mumbauer says SPI plans to engage in this revision process as a stakeholder, and the trade association also plans to engage in the MOH's forthcoming revisions of national standards for migration and soaking studies and for Good Manufacturing Practice (GMP).

LITIGATION**Top food industry litigator Brew predicts three bold trends in 2013**

By Jason Huffman

When it comes to handling the courtroom disputes brought on by pathogen-related outbreaks, there are few attorneys more experienced than Sarah Brew, a partner at Faegre Baker Daniels, in the firm's Minneapolis, Minn., office. Brew has served as national counsel to the food companies involved in nearly all of the industry's major outbreaks and recalls since 2005.

So, you might find it surprising that, when *Food Chemical News* recently asked this 22-year food industry attorney to predict what major trends might take root in the courts for food companies in 2013, Brew didn't spend much time talking

about lawsuits tied to incidents involving contamination. Instead she focused more on labeling and advertising claims.

Here are Brew's top three predictions for the year ahead:

Trend #1 More consumer fraud labeling lawsuits, expanding outside of California, but fewer "natural" challenges

"We will continue to see a steady stream of consumer fraud class-action lawsuits challenging the labeling of food

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products,” Brew predicts. “While ‘natural’ has been the easy target for so long, most recently resulting in claims that ‘GMO’ products cannot be so labeled, those suits will likely taper off as manufacturers have reformulated and/or relabeled products to address the risk associated with ‘natural’ claims.

“Consequently, plaintiff lawyers will continue to get more creative, targeting other label favorites, such as ‘wholesome,’ ‘homestyle,’ ‘sustainable,’ or ‘fresh.’ At the same time, plaintiffs will more intensely scrutinizing the technical and regulatory aspects of food labels -- a trend that we saw emerge last year with challenges to standards of identity and ingredient terminology. Plaintiffs will engage outside experts, and even laboratory testing, to argue that the composition of the product is inconsistent with what the regulations require on the label.

“More of these cases will start being filed outside of California, the long-preferred venue,” Brew suggests. “Recent decisions favorable to food companies, including *Mazza v. Am. Honda Motors Co.*, 666 F.3d 581 (9th Cir. 2012) and *POM Wonderful LLC v. The Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012), combined with the California state court system’s financial woes and related delays, have encouraged plaintiff’s attorneys to seek alternative venues for nationwide class actions.

“Two new recent venues include Minnesota and Colorado, in addition to the other usual suspects of Florida, New Jersey, New York, and Illinois.”

Trend #2 POM Wonderful decision will mean more lawsuits -- by consumers and competitors --and potential clarification of commercial free speech issues

“The POM Wonderful matters have been bubbling since 2010 and finally came to a head early this year when the Federal Trade Commission issued its decision and final order on Jan. 16,” Brew notes (see *FCN* Jan. 18, 2013, Page 1). “That decision, which requires POM to have two randomized and controlled human controlled trials (RCTs) to substantiate any claims that its products treat, prevent, or reduce the risk of diseases, will be broadly interpreted as requiring all food or dietary supplement companies making similar claims in advertising to have two RCTs for all disease-related claims.

“We see three potential significant outcomes in 2013 from this decision:

“First, while the FTC’s decision applies to advertising specifically, not labeling, we can expect plaintiff attorneys to begin citing the FTC case as the applicable standard when bringing consumer fraud class actions over food or dietary supplement labeling involving any implied or express disease-related claims, whether on labels or in advertising.

“Second, we expect an uptick in [Better Business Bureau

National Advertising Division] actions involving competitors bring actions against each other over lack of substantiation, citing the POM decision.

“And finally, we expect POM will appeal the matter to the U.S. Court of Appeals and, if it does not succeed there, to the U.S. Supreme Court.

“Regardless of whether POM wins, we expect some significant precedential case law (likely in 2014) clarifying FTC’s power to regulate certain commercial speech.”

Trend #3

New rapid diagnostic testing for foodborne illnesses will hinder the detection of outbreaks and change the face of litigation

“FDA’s recent approval of tests that can determine whether a patient has a foodborne illness in a matter of hours, not days, will lead to more frequent diagnosis and better treatment for those who are ill,” Brew predicts. “But because such rapid tests will replace the prior practice of culturing the bacteria in question, they will inhibit the identification of foodborne illness outbreaks, the determination of the food that is the source, and a plaintiff’s ability to maintain a successful lawsuit.

“Bacteria that were cultured could be identified by a so-called ‘genetic fingerprint’ test method,” she explains. “This allowed the Centers for Disease Control and Prevention to identify individuals who were ill with the exact same pathogen, to use epidemiological questionnaires to identify the likely source of the outbreak and, potentially, to find the pathogen with the same ‘fingerprint’ in that food.

“Rapid tests cannot identify ‘fingerprints.’ As a result, it will be harder to link patients with similar illnesses or to connect illnesses to a common food source,” she says. “That means foodborne illness plaintiffs will have a harder time proving their case. They can no longer simply present evidence that they are part of a CDC-confirmed outbreak, caused by a certain food, because they tested positive for the ‘fingerprint’ pathogen.

“On the one hand, the more difficult burden of proof will deter some litigation. On the other, some cases will remain but will involve much more contentious issues of causation and protracted litigation.”

