



French Fry Rule Survives Court Challenge

By David A. Adelman

The United States Department of Agriculture's ("USDA") new rule which effectively defines a french fry as a fresh vegetable has withstood its first court challenge. On June 7, 2004, Judge Richard A. Schell of the United States District Court for the Eastern District of Texas denied a challenge to the rule brought by the Fleming Companies, Inc. and granted the USDA's Motion for Summary Judgment on the issue.

The Fleming Companies, Inc. ("Fleming"), an Oklahoma corporation with its principal place of business in Texas, buys and sells battered and coated french fries, claimed the USDA's new rule would force it to suffer severe hardship by requiring it to pay PACA trust claims while Fleming is trying to emerge from bankruptcy.

The rule, promulgated by the USDA on May 2, 2003 and made effective on June 2, 2003 establishes that battered and coated potato products are considered to be "fresh vegetables" under the Perishable Agricultural Commodities Act ("PACA") 7 U.S.C. §499e. The process of battering and coating joins a host of other processes to which the USDA previously gave its blessing.

The Court overruled Fleming's challenges to the USDA's rule-making process and the rule's reasonableness. In doing so, the Court found the rule resulted from reasoned decision making. The rule's purpose was found to be logical and evident since the USDA believed battering and coating are processes similar to those the USDA previously allowed. The Court therefore found that USDA sufficiently articulated its reasons for the new rule. Further, the USDA's thirty-day period for comments and objections was deemed sufficient.

The judicial support for the rule marks another victory by produce suppliers. Defining battered and coated vegetables, which includes french fried potatoes, as fresh vegetables extends PACA trust protection to an additional 26% of all frozen potato products which were previously unprotected and which have a market value over \$800 million.

The lawsuit was Fleming Companies, Inc. v. United States Department of Agriculture, Case Number 4:03-CV-380 in the U.S. District Court for the Eastern District of Texas.

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