

Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

From the Chair

BY LYNNE OSTFELD

As we transition out of the COVID restrictions, I hope that you find it filled with new possibilities. Zoom has provided great help these past two years while reminding us that in-person meetings provide so much more than simple information.

As lawyers, we learn how to do legal research, particularly when a client presents us with a problem.

What I provide below is a list of

resources to help us keep current with food and ag related issues. Some of these require a membership or a small subscription but many are free.

- AgWeb AM (Farm Journal): aginfo@farmjournal.com
- AgWeb Daily (Farm Journal): aginfo@farmjournal.com
- AgWeb Market Weekly (Farm Journal): aginfo@farmjournal.com

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Curbside Cocktails and Growlers® To-Go: Here to Stay, or Fading Off Into the Sunset?

HON. ANNA M. BENJAMIN

As the COVID-19 pandemic took the world by storm in the spring of 2020, restaurants, bars, and other businesses were struck by closures, occupancy limits and social-distancing. In response, the Illinois Legislature and the Illinois Liquor Control Commission provided alternative methods for the sale and delivery of alcoholic beverages. These changes included

allowing the sale and carry out of mixed drinks by retail licensees.¹ Even before the pandemic, there had been a push to give retail establishments more carry out options for alcoholic beverages, including the sale of beer in growlers and Crowlers®, which also resulted in new legislation.² Each of these provisions have fairly strict

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- Bubbly Dynamics (The Plant): info@bubblydynamics.com
- Candy & Snack Today: <https://candyusa.com/cst/>
- Events Food Chain: events@foodchainid.com
- FDLI (Food and Drug Law Institute) SmartBrief: fdli@smartbrief.com
- Fi Global Connect: figlobalconnect@go02.informamarkets.com
- Fi Global Insights: figlobalinsights@go02.informamarkets.com
- Food Processing E-news: news@foodprocessing.com
- Food Tank: www.foodtank.com
- Global Food Marketer eBulletin: foodexport@foodexport.org
- Illinois AgriNews: www.agrinews-pubs.com
- Illinois Soybean Association: ilsoy.org
- Illinois Specialty Growers Association: info@ifblistens.org
- Ingredients Network: ingredientsnetwork@go02.informamarkets.com
- Law Street Agriculture: alerts@lawstreetmedia.com
- NCA (National Confectionery Association) SmartBrief: nca@smartbrief.com
- PORK Daily (Farm Journal): aginfo@farmjournal.com
- Pro Farmer (Farm Journal): aginfo@farmjournal.com
- SIAL Paris (Int'l Food Show): <https://www.sialparis.fr>
- The Chicago Farmers: info@chicagofarmers.org
- Top Producer Summit (Farm Journal): AgInfo@farmjournal.com
- Trust in Food (Farm Journal): trustinfood@farmjournal.com
- University of Illinois Extension: <https://extension.illinois.edu>
- USDA Food Safety and Inspection: usfsis@public.govdelivery.com
- USDA, Foreign Agriculture Service, Global Agricultural Information Network (GAIN) Reports: FAS.USDA@service.govdelivery.com ■

Curbside Cocktails and Crawlies® To-Go: Here to Stay, or Fading Off Into the Sunset?

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regulations regarding the employees, containers, cleaning methods, and sealing required. Additionally, the provision related to the carry out of mixed drinks is set to sunset on January 3, 2024.³ The question for retail establishments will be, is the demand by consumers strong enough to justify the costs and requirements of these options? Here, we provide a closer look at the specific requirements to comply with these laws.

Curbside Cocktails

Beginning in June 2020, retail licensees were able to sell cocktails, mixed drinks, and single servings of wine for curbside pickup.⁴ Employees making these sales must be 21

years or older, have the required responsible alcohol servers training (also known as BASSET training), and verify the age of the consumer picking up the beverages.⁵ If they cannot verify the age or sobriety of the consumer, the sale must be cancelled.⁶ Third party carriers (Grub Hub, Uber Eats, etc.) are not allowed to deliver the alcohol.⁷ The container must be rigid, brand new, tamper-evident, and with “a secured lid or cap designed to prevent consumption without removal of the lid or cap.”⁸ Lids with sipping holes, straws, and containers made of plastic, paper or foam are not allowed.⁹ This leaves limited options for containers, such as glass or steel. Tamper-evident means that the

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

container's lid or cover must be sealed with a method such as wax dip or heat shrink wrap.¹⁰

Additionally, unless the alcohol is still sealed in the manufacturer's original packaging, the cocktails or other alcoholic beverage containers must have a label stating the beverage's volume, ingredients, type, and name of the alcohol, as well as the name, address, and license number of the retail establishment.¹¹ The label must also include a verification that the container was filled less than seven days prior to the sale.¹² Finally, the alcoholic beverages must be placed in the trunk of the consumer's vehicle, or if the vehicle has no trunk, in the rear compartment and not readily accessible to the passenger area.¹³ Nothing within these provisions, however, was designed to prevent brew pubs, tap rooms, or distilling pubs from temporarily delivering alcoholic beverages pursuant to the guidance on temporary delivery by the Illinois Liquor Control Commission.¹⁴

Crowlers® and Growlers To-Go

Beginning in 2019, retail establishments such as bars and restaurants in Illinois were granted permission to sell beer to customers in Crowlers® and growlers. The Illinois Liquor Control Act defines a growler or a Crowler® as a "reusable rigid container that holds up to 128 fluid ounces of beer and is designed to be sealed on premises by the licensee for off-premises consumption."¹⁵ Although not detailed within the statute, a Crowler® is a "single-use container seamed at the point of dispense."¹⁶ Crowlers® are one-time use cans, typically of 32 fluid ounces, although other sizes are available. They require an automatic or semi-automatic machine seamer to properly affix the lid. While popular with craft breweries, these systems, at \$500 - \$2,800 each, may not be practical or cost-effective for retail establishments. To properly fill and seam Crowlers®, there are several safety protocols that should be in place as well,¹⁷ not all of which are outlined within the statute.

Growlers, on the other hand, are typically glass or stainless-steel containers, although other options such as ceramic and plastic also exist. Again, there are many safety issues not outlined within the statute that should be

considered. Retail establishments should be aware that "[f]illed growlers can shatter or explode," and "[m]any containers currently in use are not designed for carbonated beverages."¹⁸

Growlers and Crowlers® filled by retail licensees must be closed with a "twist-type closure, cork, stopper, or plug" and have "a one-time use tamper-proof seal."¹⁹ They must have a label that includes the brand name of the product, name of the brewer or bottler, the type of product, whether beer, ale, lager, bock, stout or other beverage, the net contents, the name and address of the business that filled it, and the date it was filled.²⁰ The retail licensee must purge the container with CO₂ and comply with sanitation requirements for both the container and the dispensing equipment.²¹ These requirements include washing the container manually in a three-compartment sink or in an appropriate dishwasher, or transferring the beer via a sanitized tube.²²

The Liquor Control Act specifies that "upon a consumer taking possession of a growler or crowler and its contents from an on-premises retail licensee, the growler or crowler and its contents are deemed to be in the sole custody, control, and care of the consumer."²³

Conclusion

While the provisions above provided several new options for retail establishments during the pandemic, only time will tell whether there is sufficient demand by consumers to make these options worthwhile for bars and restaurants going forward in the future. For curbside cocktails, perhaps new packaging products could make it easier for businesses to comply with the requirements. On the other hand, growlers and Crowlers® come with a host of safety considerations that should be reviewed carefully by retail establishments, in addition to the legal requirements. Ultimately, it is beneficial to businesses to have these options, especially for customers who prefer to-go options, and to help weather the storm of any future limitations. ■

1. 235 ILCS 5/6-28.8.
2. 235 ILCS 5/6-6.5.
3. 235 ILCS 5/6-28.8(h).
4. 235 ILCS 5/6-28.8(b).
5. *Id.*
6. 235 ILCS 5/6-28.8(b)(2).
7. 235 ILCS 5/6-28.8(c).
8. 235 ILCS 5/6-28.8(a).
9. *Id.*
10. *Id.*
11. 235 ILCS 5/6-28.8(b)(4).
12. *Id.*
13. 235 ILCS 5/6-28.8(b)(3).
14. 235 ILCS 5/6-28.8(f-5).
15. 235 ILCS 5/6-6.5(b).
16. The Brewers Association, "Growlers, Crowlers®: What you need to know about draught beer to go" Collab Hour Presentation at https://www.brewersassociation.org/wp-content/uploads/2020/11/Collab-Hour_Draught-Beer-To-Go_Presentation.pdf, slide 8 (last accessed March 10, 2022).
17. *Id.*
18. *Id.* at slides 24-25.
19. 235 ILCS 5/6-6.5(b)(4).
20. *Id.* at (b)(5).
21. *Id.*
22. *Id.*
23. 235 ILCS 5/6-6.5(d).

Report From the November 2021 AALA Conference

BY LYNNE R. OSTFELD

The American Agricultural Law Association (AALA) had its 2021 conference in Salt Lake City, Utah, this past fall. Attendees came from all over the United States. The four tracks this year were: Policy, Private Practitioner, Food Law, In-House/Corporate Counsel. All the presentations were excellent and informative, but two topics stood out: issues for the Native American and food issues.

Native Food

There was a special concentration on issues found on Indian Reservations. Janie Hipp, general counsel of the USDA, is also a member of the Choctaw Nation and a founding member of Indigenous Food Initiative. She talked about the food access problems they have, such as having over 5 million farmers in the 1980's and 2 million today. It may not be sustainable. There is a reduction in the people and services they need: big animal veterinarians, grocery stores, processing plants. It is more difficult to deliver food than staples. They also need agriculture tax specialists, having only 15 agricultural tax specialists, as well as needing jobs for young agricultural lawyers on the reservation, or even just in rural areas where they can help the farmer.

She joined Sarah Vogel¹ and Colby Duren² to discuss problems with the Native American Food Economies ("NAAF").

COVID-19 brought to the forefront the gaps and insecurity in the food structure. The pandemic showed the problem with the lack of broadband in Indian country. Their supplies and customers shut down immediately because they did not have access to broadband to work through the problems.

There are food hubs throughout Indian country. The goal is to use them to keep the food dollar value in the community. The goal is to build together so that the

burden and cost do not fall on just one tribal government.

A problem is that small- and mid-sized businesses are primarily what operate in Indian Country and it has been difficult to deal with the FDA because they are so small.

There is an increasing recognition of tribal sovereignty at the USDA, that they have to work through tribal law. Nothing happens without the tribal nations acting in their sovereignty. The Bureau of Indian Affairs has a lot of say about what goes on in Indian Country, but personnel often do not show up.

Now the Native Farm Coalition is trying to work with the USDA. It started with the 2018 Farm bill. The youth are starting to step up. There is cynicism to deal with the FDA and USDA but the youth are starting to step up and work with each other.

The tribes can insert their traditional ecological knowledge. There can be tribal values.

Tribal law is on a par with federal law and over state law. But if it wants to go interstate then it has to adhere to federal and state law.

Food Law Update

Susan Schneider³, gave an update on food law and talked about how we are in a changing world.

The pandemic showcased the inequities within the food system. Some people could stay home and order on-line. Some people worked within the system, like the Tyson worker, or the person who had to show up at the grocery store to work.

The pandemic showed that the affluent became more affluent and the poor became poorer. We saw how many people are one crisis away from hunger.

Many restaurants have closed.

We had supply chain problems throughout the COVID lockdown. The focus on efficiency can come at the expense of

resilience. There are many things that can go wrong in the system.

Food insecurity is better in 2021 than in 2020. However, one in eight people in the U.S. will experience food insecurity—12.9 percent or 42 million, and 17.9 percent or 13 million children. There is incredible racial disparity: whites, 11.1 percent; blacks, 21.3 percent. It is even higher in Indian country than among the black population. Food insecurity is 13.3 percent in rural counties versus 12.1 percent in urban counties.

Programs are increasing to help both the farmer and the consumer. Local economies have benefitted from SNAP programs: \$1 SNAP converts to \$1.80 local economic activity. Both Walmart and Dollar General in rural areas have seen a benefit to the local economy because SNAP cards can be used there.

As to diet related problems, half of the American population is considered pre-diabetic or diabetic. Obesity is a serious problem: 40 percent of Americans are obese; 70 percent are overweight or obese. Obesity is why 71 percent of Americans cannot get into the military. Further, diet related diseases pose a major risk for COVID-19 but the US over-looks them.

The Senate held a hearing in November 2021 about the problems with ultra-processed foods, addictive qualities of food formulations, marketing problems, and empty calories.

There are a lot of important issues with advertising and whether and how it should be regulated.

President Nixon had a Whitehouse Conference on Food, Nutrition, Hunger and Health to end hunger for all time. There is a new call for another one. Most of today's policies came from the Nixon conference.

Food labeling is also a big issue. A lot of things are going on with food labeling but not so much with the FDA. It is a slow

process. Pharmaceuticals have taken more attention.

Questions go to what it means to be healthy? What claims can food labels make. The FDA is working on a symbol for “healthy,” but we do not really know what “healthy” is.

There are issues regarding labels for things that are other than what tradition has held them to be, such as milk and almond milk. In September, the FDA did a notice of comment about labelling. What should cell cultured products be called? The FDA has not defined natural and is steadfastly opposed to wasting their time on this issue. The FDA will take charge of the initial stages but then the USDA will take over. USDA will take charge of meats and poultry but there are other foods like seafood and eggs. Who will regulate what? The FDA regulates shell eggs but USDA regulates eggs in other forms.

There has been an explosion in food labeling litigation. Sometimes the lawyers

make the money and the consumer only gets a coupon to buy something. But this is a means to beat back fraudulent labeling.

Food safety is a constant issue. There are two petitions before the USDA arguing that something needs to be done about salmonella in fish and poultry products. We are trying to figure out how to do it better.

The new term is “pre-harvest” control: too many chickens coming through the system with a lack of control. The USDA does not have control over the farm, just the processor. But many processors also own the poultry farm.

Finally, we have the ever-discussed issue of food and climate change. We do not have water supplies to continue farming like we do.

The food system is a significant contributor to green-house gases.

The 2022 conference will be held in New Orleans, November 10-12, 2022. ■

Lynne R. Ostfeld is a solo practitioner in Chicago with a secondary office in Peoria Co., IL and an associated office in Paris France. She is currently Chair of the ISBA Food Law Section Council, a member of the ISBA Ag Law Section Council, Vice Chair for Communications for the ABA International Law Section Food, Agriculture & Cannabis Committee, Secretary of the Union Internationale des Avocats International Sale of Goods Commission. She currently concentrates her practice on issues involving French-American inheritance, and contracts.

1. Sarah Vogel, Sarah Vogel Law, Bismark, ND. She is author of “The Farmer’s Lawyer, the North Dakota Nine and the Fight to Save the Family Farm.” (2021).
2. Colby Duren, Intertribal Agriculture Council/Native Farm Bill Coalition, Billings, MT.
3. Susan Schneider teaches at the Arkansas School of Law and serves as the Director of the law school’s advanced degree program, the L.L.M Program in Agricultural & Food Law. sschneid@uark.edu.

People You Should Know: Lynne Ostfeld

Lynne Ostfeld has a general civil practice and concentrates on legal assistance to small and medium sized companies and individuals. This is in the area of business law and contracts, estate planning and probate, and dispute resolution. She is particularly focused on French-American issues with inheritance and contracts.

She is also general manager of a family limited partnership involved in the production of corn, soybeans and rice in Illinois, Iowa and Louisiana, along with a hog operation in Iowa.

Lynne R. Ostfeld is a solo practitioner admitted to practice in the State of Illinois and before the Supreme Court of the United States of America, the United States Court of Appeals for the Seventh Circuit, and the United States District Court for the Northern District of Illinois.

Her primary office is in Chicago but she has a second office on a family farm in Peoria County, Illinois, and is associated with the

law firm DMALEX Avocats in Paris, France.

Currently, she is chair of the Illinois State Bar Association Food Law Section Council and a member of the ISBA Agriculture Law Section Council. She has been adjunct professor of international agri-business law at the John Marshall Law School (now University of Illinois Chicago Law School).

In 2017 Ostfeld was awarded the Medal of Knight of the French National Order of Merit for her work for the French in the Midwest. She continues as legal advisor to the Consulate of France in Chicago.

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People You Should Know: Claire Manning

Claire A. Manning, who practices law with Brown, Hay + Stephens, LLP, an Illinois law firm whose roots date back to Lincoln, focuses her practice in the fields of environment and energy, natural resources, agriculture, and administrative law. Having had key roles in government prior to entering private practice in 2002, including a decade as Chair of the Pollution Control Board, Manning is recognized as one of the top environmental lawyers in Illinois. She currently chairs the Environment, Energy and Natural Resources Practice Group for Meritas, a global alliance of leading independent law firms.

Manning has successfully represented clients in federal and state courts throughout Illinois and before a variety of state and federal administrative agencies. She regularly counsels clients regarding specific laws and

legislation, assisting them in making and implementing strategic business decisions related to permitting, licensing, regulatory compliance, due diligence, and appeals of government administrative decisions.

Manning's legal practice areas, as well as her Illinois farm heritage and love of food, have coincided with her interest in being involved with the Illinois State Bar Association's new Food Law Section Council, which she now chairs. An active member of the bar, Manning has served on various bar committees, including: Judicial Evaluation for Judges Outside Cook County (Chair); Administrative Law (Chair); Women and the Law (Chair); Environmental Law; and Agricultural Law. She sits on the Board of Directors of the Illinois Bar Foundation, the Board of Trustees for Loyola Law School Alumni and the Board of Trustees of The

Lincoln Academy. Previous Board capacities included Illinois Institute for Continuing Legal Education, Land of Lincoln Legal Aid, and the Illinois Equal Justice Foundation.

Upon appointments by the Illinois Supreme Court, Manning had served in many capacities with the Attorney Registration and Disciplinary Commission, including Chair of the Hearings Review Board. In 2007, Manning was awarded the prestigious Laureate Award from the Illinois bar, an honor bestowed on lawyers "who have established and maintained the highest principles of the profession as demonstrated by their pervasive record of service to the law and the public." ■



ISBA 8TH ANNUAL
MEMBER

APPRECIATION MONTH

May 1-31 | Membership Renewal Incentive

Renew by May 31 to be entered into a drawing to win one of five Apple iPads with Apple Pencil (or cash-equivalent VISA gift card)

May 3-14 | Illinois Bar Journal Caption Contest

May 3 | Free 1.5 Hour, Live CLE Webcast

12-1:50 p.m. | 2022 Celebration of Women as Leaders in the Profession

May 5 | Free 1 Hour, Live CLE Webcast

12-1 p.m. | Wellness Series - Part 2: Building Your Resilience Bank Account

May 9-21 | Bookstore Sale - 25% off All ISBA Books!

May 11 | Free 1.5 Hour, Live CLE Webcast

1-2:30 p.m. | Running to the Roar: Why We Need Courageous Conversations

May 16-21 | Facebook Contest - Win a \$100 Visa Gift Card

May 23-28 | Instagram Contest - Win a \$100 Visa Gift Card

May 24-27 | Member Discount Vendor Giveaways

May 26 | Free 1 Hour, Live CLE Webcast

12-1 p.m. | Wellness Series - Part 3: Building Your Prevention Toolbox



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