

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] **USDA Ends Mad Cow Investigation; International Panel Urges SRM Ban in All Livestock Feed; EPA to Regulate Prions Under FIFRA**

USDA has ended its [field investigation](#) of a case of bovine spongiform encephalopathy (BSE) in a Washington dairy cow, concluding that any unidentified cattle from the infected cow's birth herd in Canada "represent very little risk." Last week, a panel of five international experts presented USDA officials with their findings on the risk of BSE in American cattle, and many of the group's conclusions are reportedly contrary to those in the [Harvard study](#) heavily relied on by the government in setting BSE policies. According to news accounts, Panel Chair Ulrich Kihm, a Swiss veterinarian, told USDA "the disease will spread, spread all over the place" unless the government mandates more BSE testing at slaughter in addition to other safeguards. The panel's recommendations include (i) testing all "at risk" cattle older than age 30 months, i.e., those that die on the farm or during transport to slaughter plants, downer animals and those sent to "emergency slaughter," (ii) excluding specified risk material (SRM) from all animal feed, including pet food, and (iii) banning brain and spinal cord from all cattle older than age 12 months (instead of 30 months) in human food. A National Cattlemen's Beef Association spokesperson was quoted as saying, "We believe the international review team exaggerated the risks of BSE."

Meanwhile, the Environmental Protection Agency (EPA) has determined that prions are considered pests under the federal Insecticide, Fungicide & Rodenticide Act, thereby allowing the agency to regulate products that claim to kill the infectious proteins. The agency is also developing recommendations on ways to dispose of infected animals. *See Reuters*, February 4 and 9, 2004; *The Wall Street Journal*, February 5, 2004; *The New York Times*, February 5 and 6, 2004; *Inside EPA*, February 6, 2004.

Codex Alimentarius Commission

[2] **U.S. Delegates Schedule Public Meetings; Request Comments on Various Hygiene and Dairy Issues**

The U.S. Department of Agriculture and Food and Drug Administration have announced a February 24, 2004, public meeting in College Park, Maryland, to discuss draft positions to be presented at a March 29-April 3 meeting of the Codex Committee on Food Hygiene in Washington, D.C. Agenda items for the February 24 meeting include discussion papers targeting *Listeria monocytogenes*, enterohemorrhagic *E-coli* in ground beef and pork, and *salmonella* in poultry.

The same two agencies have scheduled an April 13 meeting in Washington, D.C. to review draft positions to be presented during an April 26-30 meeting of the Codex Committee on Milk and Milk



Products in Auckland, New Zealand. Issues to be discussed at the April 13 meeting include proposed standards for various types of cheese and cheese products as well as proposed standards for products in which vegetable fat replaces milk fat. See *Federal Register*, February 3, 2004.

Litigation

Deceptive Trade Practices

[3] Purported Class Action Accuses Breweries of Targeting Underage Consumers

America's largest breweries, Anheuser-Busch and Miller, are accused of targeting underage consumers through product development and marketing in a purported class action filed February 3, 2004, in Los Angeles County Superior Court. "This multifaceted assault on California's youth has been waged on many fronts: including placement of television, magazine, and radio advertisements whose context is appealing to teenagers," the complaint alleges. "The teenage campaign also includes the release of new products such as 'alcopops' that are particularly appealing to teenagers, sponsorship of school activities, promotional activities in college towns, the manufacture and sale of beer toys, and the innovative use of websites, all of which are influencing underage drinking."

Named plaintiffs are Californians Lynne and Reed Goodwin, whose 20-year-old daughter was allegedly "killed by a drunk driver who was 18 years old at the time of the accident." The Goodwins purport to represent a class that consists of "all current residents of the State of California who during the four years preceding the filing of this Complaint purchased alcoholic beverages manufactured by any of the defendants while they were under the age of 21." Plaintiffs' two counts against defendants are ti-

tled "Violations of the Unfair Competition Law" and "Violations of the Law of Public Nuisance." Their prayer for relief includes requests that defendants (i) "provide an accounting of all monies received as a result of acts and practices found to constitute unfair competition" and (ii) be ordered "to pay restitution and/or damage to the Class."

Attorneys for plaintiffs include Steve Berman, a Seattle attorney who represented the state of Washington in its attorney-general reimbursement action against tobacco companies in the late 1990s. Berman and his firm placed a copyright notice on the complaint. The notice states that "this writing/publication is a creative work fully protected by all applicable laws, as well as by misappropriation, trade secret, unfair competition and other applicable laws. The authors of this work have added value to the underlying factual materials herein through one or more of the following: unique and original selection, coordination, expression, arrangement, and classification of the information."

Hepatitis A

[4] Judge Allows Liver Transplant Plaintiff to Seek Damages from Chi-Chi's

A U.S. bankruptcy court judge has paved the way for a Pennsylvania man, who after eating at a Chi-Chi's restaurant last fall allegedly contracted hepatitis A and thereafter required a liver transplant, to sue the restaurant chain for damages. Blamed on tainted green onions, the hepatitis A outbreak killed three people and sickened more than 650. The Mexican restaurant chain previously filed for Chapter 11 bankruptcy protection, which automatically stayed any claims on the company. The court is expected to consider allowing lawsuits by other victims at a February 17, 2004, hearing. See *Knight-Ridder Tribune* and *Pittsburgh Post-Gazette*, February 5, 2004.



Food Safety

[5] **French and Italian Regulations Contravene EU Food Laws, Says European Court of Justice**

The European Court of Justice (ECJ) has determined that food safety rules in both France and Italy hinder the free movement of goods and directed those countries to amend the offending laws or face heavy court-imposed fines. Current French law evidently imposes a tough authorization procedure to decide whether foods enriched with particular nutrients manufactured and marketed in EU member states are fit for human consumption. In finding the French authorization measures “not readily accessible, not transparent” and “subject to unreasonable delay,” the court ruled that authorization applications can be refused only for food items that pose “a real risk to public health.” The court deemed an Italian law requiring “notification and labeling conditions for the marketing of sports food” difficult, expensive and unjustified. See *Eupolitix.com Press Review*, February 5, 2004; *European Commission Press Release*, February 9, 2004.

Other Developments

[6] **G-77 Nations Critical of WHO Obesity Strategy; Consumer Groups Oppose Emphasis on Role of Personal Responsibility**

A Columbian delegation speaking on behalf of the 134 developing nations known as the Group of 77 has reportedly told the United Nations Food and Agriculture Organization that the scientific report underlying the World Health Organization’s (WHO’s) *Draft Global Strategy on Diet, Physical Activity and Health* “concludes, without any scientific evidence, that bad food is the main cause of chronic diseases. This arbitrary conclusion, apart from its

shaky scientific foundation, is indeed prejudicial.” WHO is accepting public comment on the controversial strategy until February 29, 2004.

The Columbian delegation’s criticism of the strategy as unscientific is similar to that of the Bush administration, whose comments also targeted the plan’s lack of emphasis on the role of personal responsibility in choosing a diet “conducive to individual energy balance, weight control and health.” A WHO spokesperson was recently quoted as saying the debate over personal responsibility in the obesity issue was the ultimate reason WHO’s executive board extended the comment period to the end of February. Last week, a coalition of EU and U.S. consumer groups meeting in Brussels for a one-day obesity conference reportedly urged members to lobby national governments to reject any language in the WHO dietary guidance that emphasized personal responsibility. Speakers at the Trans Atlantic Consumer Dialogue event included Northeastern University’s Richard Daynard and Yale University’s Kelly Brownell, outspoken proponents of holding food and beverage companies liable for obesity and its attendant health effects. Trans Atlantic Consumer Dialogue recently issued a Resolution on Food Advertising & Marketing to Children that calls on EU and U.S. regulators to adopt rules ensuring “that food advertising does not undermine progress towards national dietary improvement by misleading or confusing consumers or by unfairly setting bad examples. In particular, advertisements, either individually or collectively, should not encourage excessive consumption of foods that are high in fat, sugar and/or salt.” See *Obesity Policy Report*, February 2004; *Associated Press*, February 9, 2004.



[7] Indian Parliament Upholds Pesticide Report on Soft Drinks

Urging compliance with European Union safety standards, an Indian parliamentary panel has reportedly upheld a report that claims beverages manufactured by Coca-Cola and PepsiCo contain pesticides. In the August 2003 report, the New Delhi-based Center for Science and Environment (CSE) blamed the use of ground water on the purportedly high levels of pesticides detected in the companies' soft drinks. Both Coca-Cola and PepsiCo denied the findings and maintained that their products were safe.

According to the panel, the "CSE findings are correct on the presence of pesticide residues . . . in respect of three samples each of 12 brand products of PepsiCo and Coca-Cola." Officials at Coca Cola responded to the panel's conclusions by saying the company would comply with "whatever standards the government concludes are the most appropriate" for soft drinks in India, while Pepsi representatives said they were reviewing the lawmakers' findings and were confident that "scientific, health-based" standards could be established by the government, industry and technical experts. *See Reuters and BBC News, February 4, 2004.*

Scientific/Technical Items

Obesity

[8] CDC Blames Carbs for Dramatic Increase in Calorie Consumption

Americans, particularly women, are consuming more calories than they did three decades ago, mirroring drastic increases in obesity seen over the same period, according to new data from the Centers for Disease Control and Prevention (CDC). The new data further indicate carbohydrates are likely responsible for such increases. "Trends in Intake of Energy and Macronutrients – United States, 1971-2000," *Morbidity and Mortality Weekly Report* 53(4): 80-82, 2004. To assess trends in the intake of total calories, protein, carbohydrates, total fat, and saturated fat, the CDC analyzed national survey data from four different periods, covering 1971 to 2000. They found that on average women consumed 1,877 calories per day in 2000, a 22 percent increase from 1971. Men were shown to have experienced an 8 percent increase, to 2,618 calories per day. Closer examination of the source of these calories showed that during the same time period, the percentage of daily calories from carbohydrates rose from 45.4 to 51.6 percent in women and from 42.4 to 49.0 percent in men. While the CDC did not go so far as to examine specific foods or situations responsible for the increases found, they note that previous research has identified salty snacks, soft drinks, pizza, consumption of food away from home, and increased portion sizes as all partially responsible for increased consumption.



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Food & Beverage Litigation Update is distributed by Mark Cowing 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 mcowing@shb.com or mboyd@shb.com. You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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