

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA to Evaluate Significance of Low Levels of Furan in Food

FDA is [soliciting](#) data and information about the occurrence of furan, a chemical byproduct of heat treatment techniques – e.g., canning and jar-ring – to determine whether long-term exposure to the low levels of furan found in a variety of food products poses any carcinogenic risk to humans. The International Agency on Cancer considers furan “possibly” carcinogenic to humans based on high-exposure studies that concluded the chemical is carcinogenic to rodents. An [exploratory FDA survey](#) has detected low levels of furan in products such as coffee, beans, spaghetti sauce, baby foods, and fruit juices. The agency is emphasizing, however, that its “preliminary estimate of consumer exposure is well below the level that would be expected to cause harmful effects” and therefore recommends no changes in consumers’ diets.

FDA’s evaluation of furan in foods will be the topic of a June 8, 2004, [public meeting](#) of the Food Advisory Committee’s Contaminants and Natural Toxicants Subcommittee in Bethesda, Maryland. Future steps FDA expects to take with respect to furan include expanding the food survey, devising potential strategies to reduce furan levels in food and/or commissioning toxicology studies. *See FDA Press Release*, May 7, 2004; *Federal Register*, May 10, 2004.

### National Toxicology Program (NTP)

##### [2] NTP Panel to Review Evidence of Acrylamide’s Reproductive and Developmental Risks

An expert panel from NTP’s Center for the Evaluation of Risks to Human Reproduction will convene for a [public meeting](#) on May 17-19, 2004, in Alexandria, Virginia, to discuss (i) the group’s forthcoming report on acrylamide, (ii) data gaps and (iii) research needs. Acrylamide forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. *See NIEHS News Release*, May 10, 2004.

### Great Britain

##### [3] British Government Issues Proposed Priorities for Food and Health Action Plan

Late last week, British Public Health Minister Melanie Johnson issued a consultation paper titled [Choosing a Better Diet: A Consultation on Priorities for a Food and Health Action Plan](#). Comments regarding the document received by June 30, 2004, will reportedly influence the content of a forthcoming government white paper targeting specific ways that various stakeholders can improve the nation’s health. Proposed key goals set forth in the consultation paper include (i) reducing salt, fats and added sugar in processed foods, (ii) increasing the availability of healthy foods in schools, and (iii) implementing consumer health education campaigns. The proposals have reportedly been



criticized by Tories who called the government's approach to obesity "disastrously muddled" and a Consumers' Association spokesperson who claimed the consultation document failed to address "the misleading way that food and health messages are promoted." See *The Guardian*, May 7, 2004.

## State/Local Initiatives

### [4] Tennessee Enacts Obesity Litigation Legislation; Florida Bill Awaits Governor's Signature

Tennessee Governor Phil Bredesen (D) signed obesity liability reform early last week. S.B. 2379 prohibits lawsuits for damages against manufacturers, distributors, sellers, or advertisers of food claiming weight gain or obesity caused by long-term consumption of the food unless the alleged weight gain is a direct result of violation of state or federal regulations on food content and labeling, or is a direct result of intentional violation of state or federal law on manufacturing, marketing, distribution, advertising, labeling, or selling the food.

In Florida, similar legislation awaits Governor Jeb Bush's (R) signature. S.B. 1394 prohibits lawsuits against manufacturers, restaurants and distributors for weight-related illnesses, but permits civil lawsuits if food is mislabeled or contains misleading information that leads to injury.

Obesity litigation reform legislation has now been enacted in seven states – Washington, Idaho, Utah, Arizona, South Dakota, Louisiana, and Tennessee -- and has been introduced in 19 others. A like-minded bill titled the "Personal Responsibility in Food Consumption Act" ([H.R. 339](#)) has passed the U.S. House of Representatives, while the "Commonsense Consumption Act" ([S. 1428](#)) is pending in the U.S. Senate.

## Litigation

### Youth-Marketing Claims

#### [5] Ohio Parents File Fourth Purported Class Action Against Alcohol Companies

A class-action complaint just filed in state court in Cleveland, Ohio, alleges that manufacturers of spirits, beer and flavored malt beverages have engaged in "a long-running, sophisticated, and deceptive scheme . . . to market alcoholic beverages to children and other underage consumers." *Eisenberg v. Anheuser-Busch, Inc.*, No. CV 04 529102 (Court of Common Pleas, Cuyahoga County, Ohio) (complaint filed April 30, 2004).

Three named plaintiffs, Steven and Joanne Eisenberg and Daniel Leary, allege that they are "parents of children who have been subject to and are being subjected to defendants' unlawful and unjust marketing of alcohol to children and adolescents." Plaintiffs purport to represent two classes: a guardian class "consisting of all persons who were or are parents or guardians of children whose funds were used to purchase alcoholic beverages marketed by defendants which were consumed without their prior knowledge by their children under the age of 21 during the period 1982 to the present"; and an injunctive class "consisting of the parents and guardians of all children currently under the age of 21.

Plaintiffs identify two statutory theories of recovery: (1) corrupt activity under the state's Pattern of Corrupt Activity Law and (2) unfair and deceptive trade practices under Ohio's Consumer Sales Practices Act. In addition, plaintiffs seek recovery under the common-law theories of unjust enrichment, negligence and civil conspiracy.



*Eisenberg* is the fourth purported class action filed against alcoholic-beverage manufacturers since November 2003. The other three cases are pending in the District of Columbia, Colorado and California.

## Other Developments

### [6] Obesity-Related Topics Highlight National Food Policy Conference

Shook, Hardy & Bacon partner [Victor Schwartz](#) participated in a panel discussion titled “Obesity Lawsuit Litigation: Needed or Not?” during last week’s National Food Policy Conference at the National Press Club in Washington, D.C. “Litigation is not a solution to the complex issue of obesity among some Americans,” Schwartz was quoted as saying. Other sessions at the two-day forum addressed the food industry’s response to the obesity issue, the World Health Organization’s report on obesity, bioterrorism and food security issues, labeling and health claim issues, and traceability. See *National Restaurant Association News Release*, May 6, 2004.

### [7] Upcoming Conferences Target Various Aspects of Obesity Issue

The ways that the [built environment](#) contributes to obesity via access to food and opportunities for physical activity are the focus of a May 24-26, 2004, conference sponsored by the National Institute of Environmental Health Sciences. Confirmed speakers at the Washington, D.C. event include HHS Secretary Tommy Thompson; James Hill, Ph.D., of the University of Colorado Health Sciences Center; Adam Drewnowski, Ph.D., of the University of Washington’s Center for Public Health Nutrition; and Louis Sullivan, M.D., president of the Morehouse School of Medicine and former secretary of the Department of Health and Human Services. Conference sessions will address (i) federal activi-

ties with respect to environment and obesity, (ii) the relationship between poverty and obesity, (iii) food marketing to children in schools, (iv) school food environments generally, and (v) using medical claims cost analysis to guide obesity prevention strategies in the workplace.

St. Joseph University in Philadelphia will host a conference titled [“Obesity: Understanding Issues, Seeking Solutions,”](#) on June 4. Topics will include causes of the childhood obesity epidemic, obesity-related litigation and food industry challenges.

[“Obesity in Society: Will Your Company Be Held Responsible?”](#) is the title of a June 6-7 conference sponsored by the Pennsylvania State University. Speakers at the State College event will include Rick Berman, executive director of the [Center for Consumer Freedom](#), a representative of the public relations firm Burson-Marsteller, Inc., and faculty members from Penn State’s School of Hotel, Restaurant and Recreation Management. Topics will include (i) ways of framing the obesity issue and (ii) the influence of portion size and calorie density on the amount consumed.

Public health policy makers, lawyers and practitioners will convene in Atlanta on June 14-16 for [“The Public’s Health and the Law in the 21st Century.”](#) Co-sponsored by the Centers for Disease Control and Prevention and the American Society of Law, Medicine & Ethics, the conference will include sessions titled (i) “Innovative Legal Tools to Prevent Obesity,” (ii) “Commercial Speech & the Public’s Health: Regulating Advertisements of Tobacco, Alcohol, High-Fat Foods & Other Potentially Dangerous Products,” (iii) “Public Health in Court: Who’s to Judge,” (iv) “Legal Frameworks for Chronic Disease Prevention,” “Reducing Underage Drinking: The Role of Law,” and (v) “The Pros & Cons of Litigation in Public Health.” Speakers will include various law professors, attorneys general and public health professionals.



## Scientific/Technical Items

### Obesity

#### [8] Tulane University Researchers Link Rising Blood Pressure Levels Among Youth to Rising Rates of Obesity

A study published last week in the *Journal of the American Medical Association* attributes the increase in average blood pressure levels among children and adolescents over the past decade to the increased prevalence of childhood obesity. (P. Muntner, et al., "Trends in Blood Pressure Among Children and Adolescents," *JAMA* 291: 2107-2113, 2004). The study compared blood pressure levels in youth ages 8 to 17 from two nationally representative samples and found that both systolic and diastolic blood pressure levels rose over the 12-year study period. The increase, according to the authors, translates to a 10 percent greater risk of hypertension as a young adult. Mexican-American and African-American children had average readings that were two to three points higher than those of Caucasian children.

## Soft Drinks

#### [9] Soft Drink Consumption Purportedly Linked to Risk of Hypertension in African-American Teens

Caffeinated soft drinks raise the risk of hypertension in African-American teenagers, according to researchers at the Medical College of Georgia. (M. Savoca, et al., "The Association of Caffeinated Beverages with Blood Pressure in Adolescents," *Arch Pediatr Adolesc Med* 158: 473-477, May 2004). The study involved African-American and Caucasian teens who were placed on a sodium-controlled diet and categorized according to levels of caffeine intake. African-American youth consuming the most caffeine -- more than 100 milligrams per day, the equivalent of four 12-ounce soft drinks -- had higher systolic blood pressure levels than the other teens participating in the study. Lead author Margaret Savoca was quoted as saying that the study's findings indicate "that the concern about soda consumption in children and teens should not be limited to the fact that soft drinks add more calories to the diet."



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## LITIGATION UPDATE

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](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto: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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