

# Food & Beverage

## LITIGATION UPDATE

Issue 100 • October 20, 2004

### Table of Contents

#### Legislation, Regulations and Standards

- [1] Congress Urges Insurance Companies to Promote Healthy Lifestyles .....1
- [2] FDA Issues Produce Safety Action Plan .....1
- [3] European Commission Increases Budget for BSE Testing in 2005 .....1

#### Litigation

- [4] Alleging Retaliation, Montana Meat Processor Sues USDA .....2

#### Legal Literature

- [5] "Comment: Is Ronald McDonald the Next Joe Camel?" Lee Munger (student author) 3 *Conn. Pub. Int. L.J.* 456 (2004) .....2

#### Other Developments

- [6] Obesity Litigation Advocate Squares Off with Former Pizza CEO in Chamber of Commerce Debate .....3
- [7] North Carolina Insurer Expands Obesity-Related Coverage .....3
- [8] Companies to Revise Nutrition Labeling on Certain Products .....4

#### Media Coverage

- [9] Bill Pennington, "Reading, Writing and Corporate Sponsorships," *The New York Times*, October 18, 2004 . .4

Shook,  
Hardy &  
Bacon LLP®

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] Congress Urges Insurance Companies to Promote Healthy Lifestyles

Noting that 120 million American adults are overweight and that Department of Health and Human Services Secretary Tommy Thompson has “called current policies of insurance companies ‘wrongheaded’ for not doing more to encourage people to stay healthy to prevent expensive illnesses,” the House of Representatives and the Senate have passed a concurrent resolution ([H. Con. Res. 34](#)) urging private insurers to help reduce health care costs by offering incentives to customers who actively pursue healthier lifestyles. Sponsored by Representative Karen McCarthy (D-Mo.), the resolution calls on insurance companies to provide discounted premiums to individuals who exercise regularly and encourages the companies to cover frequent screening for diseases that are easily treatable if detected at an early stage.

### Food and Drug Administration (FDA)

##### [2] FDA Issues Produce Safety Action Plan

FDA this week issued its [2004 produce safety action plan](#) to provide guidance on ways of minimizing foodborne illness associated with the consumption of fresh produce. The plan addresses all parts of the food chain from farm to table where produce could be contaminated by bacteria, viruses or parasites. Covering fresh, unpeeled fruits and vegetables and freshly cut products, the plan aims to (i) prevent contamination of produce with pathogens; (ii) minimize public health impacts when contamination does occur; (iii) improve communications with producers, packers, processors, transporters, distributors, preparers, and consumers; and (iv) support research relevant to the produce contamination issue. *See FDA Talk Paper*, October 18, 2004.

### European Commission (EC)

##### [3] European Commission Increases Budget for BSE Testing in 2005

Reportedly aiming to boost consumer confidence in Europe’s beef industry, the European Commission announced last Friday that it will spend nearly 100 million euros (\$123.9 million) next year on testing



cattle for bovine spongiform encephalopathy (BSE) throughout the 25 nations comprising the European Union. Current EU regulations require BSE testing for all cattle more than 30 months old, dead cattle and those animals deemed “suspect.” The Commission has also budgeted 32.8 million euros (\$41 million) to test sheep and goats for scrapie, a brain-wasting disease similar to BSE. *See Reuters*, October 15, 2004; *Food Production Daily.com*, October 18, 2004.

## Litigation

### Food Safety

#### [4] **Alleging Retaliation, Montana Meat Processor Sues USDA**

A meat processor in Montana has sued the U.S. Department of Agriculture (USDA), charging the agency with violating his free speech and retaliating against him for criticizing the department’s response to an *E. coli* outbreak in 2002. [\*Munsell v. U.S. Department of Agriculture, No. 1:04CV01745 \(U.S. District Court, District of Columbia\) \(filed 10/13/04\)\*](#). Plaintiffs John Munsell and Montana Quality Foods, a closely held corporation, seek unspecified monetary damages and an order requiring USDA to delete from its files information alleged to be incorrect and defamatory. One of the named defendants is a district office manager for the Food Safety and Inspection Service who is sued in his individual capacity.

In 2002, Munsell blamed the USDA for not acting more swiftly to prevent hamburger contaminated with *E. coli* from being shipped across the western United States. Plaintiffs allege that the department

incorrectly cited Montana Quality Foods as a contamination source and retaliated against Munsell by repeatedly forcing him to rewrite his food safety plan and threatening to withdraw inspectors who provide the USDA-inspected label.

## Legal Literature

#### [5] **“Comment: Is Ronald McDonald the Next Joe Camel?” Lee Munger (student author), 3 *Conn. Pub. Int. L.J.* 456 (2004)**

“Anti-fast food advocates must present legal solutions to balance adult free-speech rights and vulnerable children’s right to protection from exposure to fast-food advertisement,” concludes the author of this article, which is subtitled “Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic.”

The author depicts “anti-fast food litigators” as crusaders “in the name of suffering overweight and obese people of the United States.” These advocates, the author anticipates, “will encounter many of the same roadblocks anti-tobacco once faced: public hostility, scientific doubt, political disregard, and more. Advocates remain hopeful, however, as they focus on the one group that undeniably needs their support and protection: children. Because children spend too much time in front of the television, not enough time exercising, and continue to eat too many meals at fast food establishments, the percentage of overweight and obese children is rising at a disturbing rate. Moreover, children are particularly vulnerable to the infiltration of fast food marketing, which



research shows directly affects children's eating habits. The question remains, if anti-tobacco litigators can fight Joe Camel and win, surely anti-fast food litigators can fight Ronald McDonald. Or, can they?"

## Other Developments

### [6] Obesity Litigation Advocate Squares Off with Former Pizza CEO in Chamber of Commerce Debate

George Washington University Law Professor John Banzhaf reportedly continued his dramatic advocacy of lawsuits against the food industry last week in a U.S. Chamber of Commerce legal-reform summit event titled "Whose Fault Is It? A Debate of the Role of Individual Responsibility in a Litigious Society." Facing motivational speaker [Herman Cain](#), Banzhaf touted litigation as a way of holding food companies partly responsible for the nation's obesity problem, claiming that trial lawyers will allege misrepresentation in nutrition labeling disclosure and "addictive properties" of fatty foods in forthcoming lawsuits against the industry. Cain, a former president and CEO of Godfather's Pizza, reportedly responded to Banzhaf by arguing that obesity-related lawsuits would ultimately undermine consumers' food choices and raise prices. "If we allow these suits to go forward, we will become a society of uncontrollable, parasitic response," Cain was quoted as saying.

Banzhaf reportedly presented Cain with a "legal notice" warning Godfather's Pizza of potential liability for failing to post health warnings about the possible addictive qualities of its products and other informational notices about its foods. In June 2003, Banzhaf sent [similar notices](#) to U.S. and British fast food companies that cited research about "possible

addictive-like effects of many fast foods" and suggested the companies review their policies and practices to ensure they were doing nothing to "enhance the possible addictive properties" of their products, such as manipulating the fat content, adding sugar or "secretly adding appetite stimulants." See *The Washington Times*, October 15, 2004.

### [7] North Carolina Insurer Expands Obesity-Related Coverage

Blue Cross and Blue Shield of North Carolina last week announced plans to provide preventive weight management and medical treatment options for its members in an effort to curb the escalating costs of obesity. "This is the public health crisis of the 21st century," Robert Greczyn, president and chief executive of the company, was quoted as saying. "We believe making a greater investment in fighting obesity is the right thing to do," he said. In 2003, the insurer reportedly spent some \$83 billion to treat the obesity-related medical problems of more than one-half of its 3 million members.

New benefits available to beneficiaries in 2005 will include coverage of (i) four doctors' visits and attendant testing to diagnose any weight-related problems, (ii) two prescription weight-loss drugs, Meridia and Xenical, (iii) nutrition counseling with licensed dietitians, and (iv) bariatric surgery for those who are deemed morbidly obese. See *The Wall Street Journal* and *The Washington Post*, October 13, 2004.

In July 2004, the federal Centers for Medicare & Medicaid Services fell short of classifying obesity as a disease, but expanded Medicare benefits to cover bariatric surgery, behavioral therapy and diet programs.



## [8] Companies to Revise Nutrition Labeling on Certain Products

Coca-Cola Co. and PepsiCo. Inc. last week announced plans to revamp their products' labeling by augmenting per-serving information with caloric and other nutritional content for the entire bottle. For example, a 20-ounce bottle of Coke will not only disclose that it contains 2.5 servings and 100 calories per serving, but 250 calories for the entire bottle. "The FDA made a recommendation to food and beverage companies to revise their packaging, so we decided to go ahead and proactively and voluntarily make that move," a Coca-Cola spokesperson was quoted as saying.

Kraft Foods recently announced similar changes to some of its products' labeling. Labels on Kraft snack and beverage products containing two to four servings will now state the total number of servings on the front of the package and provide nutrition information for the entire package. See *Kraft Press Release*, October 6, 2004; *Reuters* and *The Atlanta Journal-Constitution*, October 15, 2004; *The Wall Street Journal*, October 18, 2004.

## Media Coverage

### [9] Bill Pennington, "Reading, Writing and Corporate Sponsorships," *The New York Times*, October 18, 2004

This article discusses the growing number of financially strapped school districts across the United States that are selling naming rights to their facilities. "Companies desperately want to get into high schools because they know they are getting a captive audience with disposable income that is about to make decisions of lifelong preference, like Coke versus Pepsi," a California sports marketing executive was quoted as saying. "So the commercialism is coming to a school near you: the high school cheerleaders will be brought to you by Gatorade, and the football team will be presented by Outback Steakhouse." Among other things, opponents of corporate sponsorship in schools argue that it violates the public trust by not protecting impressionable youth and influences children's food choices. "We have an enormous problem in this country with overweight kids, who have poor diets lacking nutrition, and that contributes to the early onset of diabetes as well," Alex Molnar, an Arizona State University education policy professor said. "So how is a school district helping that problem by selling Pepsi ads all over the football stadium scoreboard? Why don't they just let Jack Daniels advertise on it, too?"



---

# Food & Beverage

## 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.

Shook,  
Hardy &  
Bacon<sup>LLP</sup>

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

