

# Food & Beverage

## LITIGATION UPDATE

Issue 102 • November 3, 2004

### Table of Contents

#### Legislation, Regulations and Standards

- [1] FDA Approves Qualified Health Claim for Olive Oil .....1
- [2] USDA Seeks Nominations for Membership on Microbiological Committee .....1
- [3] French Food Safety Agency Targets “Hidden” Sugars in Processed Foods .....1

#### State/Local Initiatives

- [4] Chicago School Board Bans Soft Drinks in Vending Machines .....2

#### Litigation

- [5] Florida Man Claiming Heart Damage from Atkins Diet Followed “Perverse Version” of High-Protein Regimen, Say Defense Attorneys .....2

#### Other Developments

- [6] Health Advocacy Group and Filmmaker Urge Congress to Support the Healthy Lifestyles Act .....3
- [7] Industry’s Role in Obesity Epidemic Topic of U.K. Conference .....3

#### Media Coverage

- [8] Eric Schlosser, “Order the Fish,” *Vanity Fair*, November 2004; Madeline Drexler, “What She Ate Almost Killed Her,” *Good Housekeeping*, November 2004 .....3

#### Scientific/Technical Items

- [9] New Federal Data Indicate Americans Are Taller and Heavier Than 40 Years Ago .....4
- [10] Red Wine May Help Protect Against Lung Cancer .....4

Shook,  
Hardy &  
Bacon LLP®

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

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA Approves Qualified Health Claim for Olive Oil

FDA announced on Monday that labels on olive oil may state that “limited and not conclusive” evidence suggests that consumers can reduce their risks of developing cardiovascular disease by replacing saturated fats in their diets with olive oil. “Since coronary heart disease is the no. 1 killer of both men and women in the U.S., it is a public health priority to make sure that consumers have accurate and useful information on reducing their risk,” FDA Commissioner Lester Crawford said. Olive oil labels may now state: “Limited and not conclusive scientific evidence suggests that eating about 2 tablespoons (23 grams) of olive oil daily may reduce the risk of coronary heart disease due to the monounsaturated fat in olive oil. To achieve this possible benefit, olive oil is to replace a similar amount of saturated fat and not increase the total number of calories you eat in a day.” FDA has approved similar health claims for walnuts and omega-3 fatty acids in the past year. *See FDA News Release*, November 1, 2004; *The New York Times*, November 2, 2004.

#### U.S. Department of Agriculture (USDA)

##### [2] USDA Seeks Nominations for Membership on Microbiological Committee

The agriculture department’s Food Safety and Inspection Service is [soliciting nominations](#) for membership on the National Advisory Committee on Microbiological Criteria for Foods. The committee provides advice to the agriculture and HHS secretaries on the development of microbiological criteria by which to gauge food safety, i.e., criteria that indicate whether food has been processed using good manufacturing practices. USDA is interested in nominees with expertise in epidemiology, food technology, microbiology (food, clinical, predictive), risk assessment, infectious diseases, biostatistics, and other related sciences. Nominations must be received by November 22, 2004. *See Federal Register*, October 22, 2004.

#### France

##### [3] French Food Safety Agency Targets “Hidden” Sugars in Processed Foods

Noting that more than 70 percent of sucrose consumption comes from processed foods, the Agence française de sécurité sanitaire des aliments (AFSSA, the equivalent of the Food and Drug Administration) has reportedly called for improved product labeling to more accurately disclose the



sugar content of processed food products. In a recent report, AFSSA advocates using the terms “complex,” “simple” and “added” to define sugar content on labels and help consumers “distinguish between sugars naturally present in foods (the fructose in fruit or lactose in milk) and those added for reasons of formulation or taste.” The report also recommends removing vending machines in schools and restricting food advertising aimed at children. More than 40 percent of French adults are reportedly overweight or obese. *See Food Production Daily.com*, October 20, 2004.

## State/Local Initiatives

### [4] Chicago School Board Bans Soft Drinks in Vending Machines

The Chicago Board of Education voted last week to replace Coca-Cola products in school vending machines with water, fruit juices and non-carbonated sports drinks – e.g., Snapple, Welch’s and Gatorade products. “This is an important step in making sure we’re sending students the right message when it comes to being healthy,” the school board’s president was quoted as saying. “Combined with the policy that bans junk food from snack vending machines, this shows students that their health is important to us,” he said. Under the new vending contract, American Bottling Co. is reportedly expected to pay the school district at least \$6.4 million in guaranteed revenue over the next five years. *See Chicago Public Schools Press Release*, October 27, 2004; *The Chicago Tribune*, October 28, 2004.

## Litigation

### Atkins Diet

#### [5] Florida Man Claiming Heart Damage from Atkins Diet Followed “Perverse Version” of High-Protein Regimen, Say Defense Attorneys

Lawyers seeking to dismiss a [consumer-deception lawsuit](#) against Atkins Nutritionals, Inc. and the estate of Robert Atkins, M.D., reportedly told a Florida state court last week that plaintiff Jody Gorran followed a “perverse version” of the diet that included “a peculiar regimen of pastrami and cheesecake,” non-approved foods for those following the Atkins plan. *Gorran v. Atkins Nutritionals, Inc.*, Case No. Unknown (County Court for Palm Beach County, Florida) (filed May 27, 2004.) According to a news source, Atkins’ lawyer, Martin Reeder, also told Palm Beach County Judge Susan Lubitz that Gorran has a “very significant family history of heart disease.” *See South Florida Sun-Sentinel*, October 27, 2004.

The 53-year-old Delray Beach resident alleges that he followed the Atkins diet from May 2001 through October 2003, all the while relying on defendants’ assurances and representations, including “the promise” that “you can eat all you want, lose weight and stay healthy, so long as you restrict carbohydrates.” Gorran further claims that after just two months on the Atkins plan, his total cholesterol had risen from a safe level “to the danger range, well over 200 mg/dl.” Eventually, he alleges, he developed severe chest pain and required angioplasty and a stent.



Gorran seeks damages “of less than \$15,000” under Florida’s Deceptive and Unfair Trade Practices Act as well as common-law claims of negligent misrepresentation and product liability. He also requests “a permanent injunction preventing [defendants] from promoting and marketing their diet and products unless each such product and all marketing materials used have warnings deemed adequate by the Court to advise consumers of the risks of the Atkins diet.”

## Other Developments

### [6] Health Advocacy Group and Filmmaker Urge Congress to Support the Healthy Lifestyles Act

The [Physicians Committee for Responsible Medicine](#) (PCRM) and filmmaker Morgan Spurlock last week reportedly distributed DVD copies of Spurlock’s controversial documentary “Super Size Me” to every member of Congress. The DVDs were accompanied by a letter from PCRM President Neil Barnard that called on the lawmakers to support bipartisan legislation ([S. 2399](#)) that would fund obesity prevention programs and shift responsibility for federal nutrition guidelines from the agriculture department to the independent National Institute of Medicine. “America is fat,” Barnard said. “Health care costs have shot into the trillions of dollars in this country. Imagine what they’ll be in 10, 20, 30 years when the fallout from a generation raised on fatty foods hits the national health care system.”

“Super Size Me” recounts a month of Spurlock’s having purportedly consumed nothing but food from McDonald’s and the alleged attendant health effects of that diet. See *PCRM News Release*, October 27, 2004.

### [7] Industry’s Role in Obesity Epidemic Topic of U.K. Conference

A London [conference](#) set for November 22-23, 2004, will focus on the implications of the obesity epidemic for the food and beverage industries. Supported in large part by the British Hospitality Association and the Food and Drink Federation, the event will feature sessions targeting (i) government and industry roles in preventing obesity, (ii) development of healthier products, (iii) regulation of food advertising, (iv) imposition of fat taxes, and (v) improvements in product labeling. Speakers will include representatives of the British government, Food and Drink Federation, European Commission, World Health Organization, and Grocery Manufacturers of America.

## Media Coverage

### [8] Eric Schlosser, “Order the Fish,” *Vanity Fair*, November 2004; Madeline Drexler, “What She Ate Almost Killed Her,” *Good Housekeeping*, November 2004

In this article, the author of *Fast Food Nation* indicts the U.S. Department of Agriculture (USDA) and the meatpacking industry for purportedly jeopardizing food safety. “I think that the USDA,” Schlosser says, “offers a fine example of a government agency that has been thoroughly captured and corrupted. At a time when newly emerged pathogens such as *E. coli* 0157:H7 and mad-cow disease threaten the nation’s food supply, the USDA has failed to adopt effective measures to test for contaminated meat, trace it, and recall it. As a result, ordinary Americans, both Republican and Democrat, are paying the price with their health and, sometimes, their lives.”



Meanwhile, *Good Housekeeping magazine* chronicles the experience of a 5-year-old girl from central Missouri who nearly died in 2002 after eating ground beef contaminated by *E. coli* 0157:H7 that originated from a ConAgra facility in Greeley, Colorado. According to the magazine, “Every year, millions of people become ill from eating contaminated food. Thousands die. Yet even when food is recalled, consumers cannot get vital information to protect their health: Often, they cannot find out if their local supermarkets or restaurants carried the dangerous item.” *Good Housekeeping* invites readers to sign a petition urging USDA to change its recall policies, particularly memoranda of understanding with states under which states agree not to publicly identify the locations where potentially tainted products have been distributed or sold.

## Scientific/Technical Items

### Obesity

#### [9] New Federal Data Indicate Americans Are Taller and Heavier Than 40 Years Ago

Americans are getting a little taller and much heavier, according to the National Center for Health Statistics and the Centers for Disease Control and Prevention. (“Mean Body Weight, Height and Body Mass Index, United States 1960-2002,” *Advance Data from Vital and Health Statistics* 347: October 27, 2004). The [report](#) found that adults are nearly an inch taller than they were in the early 1960s and nearly 25 pounds heavier. In 1960-1962, the average man weighed 166 pounds and the average woman 140 pounds, but by 1999-2002, their weights escalated to 191 pounds and 164 pounds,

respectively. Trends were similar for children: typical 10-year-old girls and boys weighed nearly 11 pounds more in 1999-2002 than they did 40 years ago.

## Alcohol

#### [10] Red Wine May Help Protect Against Lung Cancer

While a number of studies have suggested that red wine consumption helps to reduce the risk of heart disease, a Spanish research team from the University of Santiago de Compostela has found that red wine consumption also has an apparent protective effect on the development of lung cancer in men. (A. Ruano-Ravina, et al., “Type of Wine and Risk of Lung Cancer: A Case-Control Study in Spain,” *Thorax*: 59, 981-985, 2004). The researchers surveyed 132 individuals with lung cancer and asked them about their diet, smoking habits, occupation, and the type and quantity of alcohol they drank each day. A slight and statistically nonsignificant association was observed for the risk of lung cancer and white wine consumption, while red wine consumption was negatively associated with the development of lung cancer. The risk of lung cancer was reduced by some 13 percent for each glass of red wine consumed daily, while consumption of beer, spirits or rosé wine appeared to have no effect. The researchers suggest that the beneficial affects of red wine may be due to the presence of tannins, antioxidants found in red grapes, and resveratrol, an inhibitor of tumor growth and development.



---

# 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.

