

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards Institute of Medicine (IOM)

[1] IOM Workshop to Target Marketing Strategies to Children and Youth

“Marketing Strategies That Foster Healthy Food and Beverage Choices in Children and Youth” is the title of a one-day workshop whose audio will be [webcast](#) live tomorrow from the National Academies in Washington, D.C. IOM’s Committee on Food Marketing and the Diets of Children and Youth is hosting the event to gather information for a comprehensive report expected to include recommendations for ways that various stakeholders can implement types of marketing that help children and youth make healthier food choices. The [workshop](#) will convene at 8:30 a.m. and include three different panels: (i) food industry perspectives from representatives of Kraft Foods, McDonald’s, PepsiCo, and General Mills; (ii) youth-focused media and marketing perspectives from representatives of Nickelodeon and two advertising agencies; and (iii) research perspectives from representatives of Pennsylvania State University, the University of Notre Dame and the Henry J. Kaiser Family Foundation.

U.S. Department of Agriculture (USDA)

[2] New Agriculture Secretary Vows to Make Resumption of Beef Trade with Japan His “Top Priority”

New USDA Secretary Mike Johanns pledged this week to focus his energies on negotiating with Japan to end that nation’s year-old ban on American beef. “The goal should be to make decisions about trade based on good science, mixed in with some good old common sense,” the 54-year-old Johanns said. Japan accounted for some \$1.4 billion of the \$3.86 billion in U.S. beef exports in 2003, but was one of more than 30 countries that abruptly ceased such imports after bovine spongiform encephalopathy was confirmed in a Washington state dairy cow in December of that year. While governor of Nebraska, Johanns reportedly helped increase the state’s agricultural exports to China and championed the use of ethanol and biodiesel fuels. *See CQ. Today*, January 21, 2005; *The Washington Post*, January 25, 2005.

[3] Biotechnology Committee to Discuss Traceability and Labeling Issues

USDA’s Advisory Committee on Biotechnology and 21st Century Agriculture has scheduled a [public meeting](#) on February 7-8, 2005, in Washington, D.C., to discuss (i) a draft report on biotechnology impacts on American agriculture and (ii) a final report on the increasing number of



traceability and mandatory labeling regulations for biotechnology-derived products in other countries and steps that U.S. industry is taking to address those requirements. The 18-member committee was established in 2003 and is charged with evaluating the long-term effects of biotechnology on the U.S. food and agriculture system. Members of the group include representatives of the biotechnology and food industries, farming interests and environmental organizations. See *Federal Register*, January 24, 2005.

U.S. Congress

[4] **Bipartisan Senate Legislation Would Prevent Canadian Cattle Imports Until COOL Regulations Take Effect**

Legislation (S. 108) introduced this week by Senators Tim Johnson (D-S.D.) and Mike Enzi (R-Wyo.) would keep the U.S.-Canadian border closed to imports of live Canadian cattle until mandatory country-of-origin labeling (COOL) regulations for meat are implemented. "I am hopeful that the new secretary of agriculture will see the importance and benefit of fully implementing COOL," Johnson was quoted as saying. "It is imperative that we prevent the flow of diseased animals across our borders to ensure that our food supply is not at risk."

The agriculture department intends to resume imports of live cattle younger than age 30 months on March 7 despite two recently confirmed cases of bovine spongiform encephalopathy (BSE). Canadian government and USDA investigators reportedly suspect that the affected cows were exposed to feed containing ruminant meat and

bone meal that was produced before Canada's 1997 ban on such feed. Country-of-origin labeling regulations were mandated in the 2002 farm bill and are currently scheduled for implementation by September 2006. See *The Wall Street Journal*, January 25, 2005.

European Union (EU)

[5] **EU Health Commissioner Threatens Food Industry with Legislation Absent Self-Regulation to Curb Advertising Aimed at Youth**

In an interview with London's *Financial Times* last week, EU Health and Consumer Protection Commissioner Markos Kyprianou called for "urgent" action to address Europe's childhood obesity problem and warned the food industry that the European Commission would initiate legislation regulating advertising within a year if the industry fails to implement its own policies with respect to marketing unhealthy products to children. "I would like to see the industry not advertising directly to children any more," Kyprianou was quoted as saying. "The signs from industry are very encouraging, very positive. But if this [self-regulation] doesn't produce satisfactory results, we will proceed to legislation." The Cypriot commissioner reportedly plans to meet with food company representatives in March 2005 to discuss self-regulatory targets that he would like to have in place by the end of this year or by early 2006. He has also called on manufacturers to revise food package labeling so that it is "more easily under-



stood by a consumer who doesn't have a Ph.D. in chemistry." See *The Financial Times*, January 19, 2005; *Reuters*, January 20, 2005.

Litigation

Obesity

[6] Appeals Court Reinstates Overweight New York Teenagers' Lawsuit Against McDonald's

The Second Circuit Court of Appeals has held that an obesity-related lawsuit brought by two teenagers against McDonald's can proceed under a section of the New York Consumer Protection Act. [*Pelman v. McDonald's Corp., No. 03-9010 \(2nd Cir. 1/25/2005\)*](#).

"The decision opens the door not only to many more obesity lawsuits, but also to unearthing previously secret documents which may help plaintiffs persuade juries to hold fast-food companies liable for their fair share of the expenses of the obesity to which they contribute," said George Washington University's John Banzhaf, a longtime proponent of health-related claims against food manufacturers.

A spokesperson for McDonald's, however, was quoted as saying that "common sense tells you this particular case makes no sense. We are confident this frivolous suit will once again be dismissed. The key issue remains personal responsibility and making informed choices."

Plaintiffs brought claims on behalf of a putative class of consumers under both sections 349 and 350 of the New York Consumer Protection Act. The district court dismissed the amended

complaint's § 349 claims, stating that plaintiffs did not make a connection between their alleged injuries and their consumption of McDonald's food. The § 350 claims were dismissed because plaintiff failed to plead reliance.

The Second Circuit concluded that plaintiffs abandoned their appeal of the dismissed § 350 claims because their appellate brief did not include any argument that the district court erred in dismissing those claims. The appeals court reinstated and remanded the § 349 claims to the district court, based on the conclusion that those claims met the notice pleading requirements of Federal Rule 8(a). Although a showing of reliance is not necessary under § 349, the district court had held that plaintiffs' § 349 claims could not proceed because the amended complaint did not address issues such as other foods consumed by plaintiffs, plaintiffs' level of exercise, or the possibility of a family history of the diseases allegedly caused by McDonald's food. The appellate court held that this is the sort of information that is appropriately sought during discovery. The Second Circuit did not comment on the merit of the claims in holding that the amended complaint as to the § 349 claims was sufficient for purposes of Federal Rule 8(a) and could proceed in the district court. See *Press Release of John Banzhaf*, January 25, 2005; *Bloomberg News*, January 26, 2005.

Media Coverage

[7] "Got (Enough) Milk? New Government Guidelines Inflamm the Debate over Dairy," Claudia Kalb, *Newsweek*, January 24, 2005

According to this article, the government's new recommendation that individuals ages 9 and older consume three cups of low-fat or fat-free



dairy products daily has “heightened concern among some scientists, who say the powerful dairy industry overstates milk’s attributes, understates possible health risks and wields too much influence over consumers.” Despite University of Tennessee studies that link high-dairy diets to weight loss and calcium’s positive role in helping strengthen bones and teeth, Harvard’s Walter Willet questions the evidence of consuming large amounts of dairy products. Among other things, he reportedly “worries” about studies that suggest high-dairy consumption may be linked to an increased risk of prostate cancer, even though other studies have suggested that dairy products may help prevent colon cancer.

[8] **“Weak Links in the Food Chain: Why Uncle Sam Won’t Tell You What Not to Eat,” Michele Simon, *The San Francisco Chronicle*, January 19, 2005**

In this criticism of the recently released *Dietary Guidelines for Americans 2005*, Simon claims the guidelines’ emphasis on weight loss “conveniently puts the onus for dietary change on the individual and avoids talk of reining in the food industry’s multi-billion-dollar marketing budget for unhealthy foods. The very definition of food has been transformed by industry, yet the dietary guidelines don’t reflect that. If they did, it would be a major threat to a \$500 billion-a-year processed foods industry whose voice is heard loud and clear in Washington.” The author is a public-health lawyer and director of the California-based [Center for Informed Food Choices](#).

Scientific/Technical Items

Obesity

[9] **Penn State Study Says Federal Guideline for Children’s Sugar Intake May Lead to Poorer Nutrition**

Research on the diets of more than 5,400 preschool children by Penn State University scientists reports that youngsters who consume 25 percent or more of their calories from added sugar also eat fewer grains, vegetables, fruits, and dairy products. (S. Kranz, et al., “Adverse Effect of High Added Sugar Consumption on Dietary Intake in American Preschoolers,” *Journal of Pediatrics* 146(1): January 2005). The study’s objective was evaluating the effect of the Institute of Medicine’s 2002 recommendation that added sugars constitute no more than 25 percent of children’s caloric intake. Researchers concluded that a majority of children consumed less than 25 percent of energy from added sugar sources; the primary sources of added sugar were fruit, soft drinks and desserts. Added sugar consumption paralleled decreasing nutrient and food group intakes, and calcium intake was found to insufficient in children who consumed 16 percent or more from added sugar sources.



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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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