

Food & Beverage

LITIGATION UPDATE

Issue 15 • January 29, 2003

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Florida Lawmaker Wants to Prevent Lawsuits Against Restaurants

Representative Ric Keller (R-Fla.) has introduced legislation (H.R. 339) that would “prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverages that comply with applicable statutory and regulatory requirements.” “We believe there should be common sense in a food court, not blaming other people in a legal court whenever there is an excessive consumption of fast food,” Keller was quoted as saying. “We think that most people understand that it’s common sense that if you eat unlimited amounts of supersize fries and milkshakes and Big Macs... that can possibly lead to obesity and things like diabetes and cardiovascular disease.” The Personal Responsibility in Food Consumption Act has been referred to the House Judiciary Committee; Senator Mitch McConnell (R-Ky.) is reportedly expected to introduce similar legislation in the Senate. *See Associated Press*, January 27, 2003.

Federal Aviation Administration (FAA)

[2] FAA to Collect Passenger Weight Information for Small Aircraft

The FAA has reportedly ordered 24 airlines that operate small airplanes to request passengers’ weights because federal investigators apparently

suspect that excessive weight might have contributed to a small aircraft crash in Charlotte, North Carolina, on January 8, 2003. Standard agency guidance apparently allows passenger weight estimates of 180 pounds for each adult in winter and 175 pounds in summer, including clothing, shoes and 20 pounds for carry-ons. Children ages 2 through 12 are apparently assumed to weigh 80 pounds at any time of year. This guidance was reportedly developed before obesity became a public health problem, and may be revised if the agency finds the averages are too low. While documentation for the Charlotte plane showed it was within 100 pounds of its maximum load, investigators have hypothesized that it would have been overweight if passengers or their bags weighed more than assumed. The airlines will apparently begin weighing bags and adding 10 pounds to reported passenger weights on a sampling of flights during a monthlong survey. *See The New York Times and CNN.com*, January 28, 2003.

U.S. Department of Agriculture (USDA)

[3] Food Labeling Comment Deadline Approaches

USDA’s Food Safety and Inspection Service (FSIS) has announced that it plans to extend until January 1, 2006, the effective date for the requirements “that individual meat and poultry products bearing the claim ‘healthy’ (or any other derivative of the term ‘health’) contain no more than 360 milligrams (mg) of sodium; and that meal-type products bearing the claim ‘healthy’ (or any other derivative of the term ‘health’) contain no more than 480 mg of sodium.”



Written comments on the extension must be submitted to FSIS by February 5, 2003. The agency apparently decided to extend the effective date of this interim final rule to maintain consistency with Food and Drug Administration labeling regulations and due to continuing joint agency efforts (i) “to reevaluate appropriate sodium levels associated with the use of the term ‘healthy’”; and (ii) “to fully consider all options that preserve the public health intent while providing manufacturers with the opportunity to use the term on food labeling consistently with dietary guidelines.” According to FSIS, “as the agencies consider whether alternative levels may be more appropriate, it would be contrary to the public interest to require manufacturers to comply with the second-tier sodium levels within the ‘healthy’ definition by the current effective date of January 1, 2003.” See *Federal Register*, January 6, 2003.

Food and Drug Administration (FDA)

[4] Pew Report Raises Policy Issues About Genetically Modified Fish

The Pew Initiative on Food and Biotechnology has released a report that suggests FDA efforts to regulate genetically modified fish as drugs may not survive a legal challenge. While the report, titled *Future Fish: Issues in Science and Regulation of Transgenic Fish*, does not take a position on genetic engineering, it does discuss benefits such as more productive fish farming and potential hazards such as the endangerment of native species. According to the report, FDA has announced its intention to regulate “transgenic animals, including fish,” as “new animal drugs.” While lauded as having the potential to keep unsafe products from the market, an FDA-approval process raises “legal uncertainty about the scope of FDA’s authority under the new animal drug laws to deny approval or impose restrictions on the basis of

potential environmental impacts that do not directly affect the health of humans or of the transgenic fish itself.” The report, which can be downloaded from www.pewagbiotech.org/research/fish, also notes that this process “provides very little opportunity for notice or public participation; indeed, the very existence of an application for approval remains confidential unless disclosed by the applicant.” Press reports note that Aqua Bounty Farms Inc. in Massachusetts has filed the first application for a bioengineered salmon. See *The New York Times*, January 15, 2003; *BNA Daily Environment Report*, January 16, 2003.

Litigation

Food Safety

[5] Nebraska Beef Company Reaches Settlement with USDA

According to a news source, a company that operates a beef slaughtering plant in Omaha, Nebraska, has entered an agreement with the U.S. Department of Agriculture (USDA) that will allow it to remain open while addressing sanitation issues which had prompted the agency to seek a court ruling that would have closed the plant. Nebraska Beef Ltd. had apparently convinced a federal judge to issue a temporary restraining order against the suspension of USDA inspections and allow it to continue to operate pending a hearing in the matter. The company had reportedly claimed it would lose \$2.7 million daily and be driven out of business if USDA suspended its inspections. Citing the company’s repeated problems with fecal contamination, unsanitary practices and condensation, consumer advocates criticized the agreement, claiming USDA “put the concerns of the company, and the cattlemen that supply it, and the

stockholders ahead of public health," said a press report. Critics also apparently argue that the case demonstrates an essential weakness in the food safety system, i.e., the government's apparent inability to enforce health safety rules in the meat and poultry industry. See *The New York Times*, January 23, 2003; and *Reuters*, January 24, 2003.

Other Developments

[6] British Public Health Expert Calls on Food Industry Firms to Sign Code of Conduct

An epidemiologist from London's Institute of Preventative Medicine is reportedly calling on the establishment of a code of conduct between government and the food industry that would require marketing and production practices designed to improve health. According to news sources, Dr. Malcolm Law wants (i) reductions in portion sizes of convenience foods and snacks, (ii) the elimination of sales promotions that encourage the British to buy more and overeat, and (iii) reductions in the fat, salt and hydrogenated vegetable oil content of processed foods. See *The Independent*, January 19, 2003; *BBC News*, January 21, 2003; *Food Ingredients First*, January 22, 2003.

[7] Harvard University Economists Weigh In on Obesity Debate

A Harvard Institute of Economic Research discussion paper suggests that the rising incidence of obesity in the United States and some other industrial nations has more to do with the ready availability of processed foods than with sedentary lifestyles or super-sized fast food portions. Noting that increases in median weight during the past two decades required only a net caloric imbalance of about 100 to 150 calories per day, Edward Glaeser,

et al. studied food and activities diaries and food production records to discover that "most of the increase in calories is from calories consumed during snacks." According to the research, "food variety has increased significantly in recent decades, and people eat many more times during the day." While Americans are not consuming any more calories today at mealtime than they did 20 years ago, snack calories have nearly doubled. This increase in food consumption is related, the authors contend, to "a host of technological innovations in food production and transportation.... The result of this change has been a significant reduction in the time costs of food." To illustrate changes in "time costs of food," the report compares the effort required before World War II to prepare french fries at home with centralized preparation today that simply requires reheating the product in a microwave.

[8] ACSH Publishes Literature Review on Beef in American Diets

The American Council on Science and Health (ACSH), a consortium of scientists and physicians "dedicated to consumer education on public health issues," has published a report titled *The Role of Beef in American Diets*. According to the January 2003 report, beef is a wholesome food "that makes nutritious contributions to the American diet." Surveying the scientific literature, ACSH points to instances of scientific uncertainty and equivocation regarding health risk claims involving blood cholesterol levels, cancer, microbial contamination, and drug residues from the use of antibiotics and growth hormones in beef cattle. The report claims that beef is an important source of zinc, iron and other vitamins and minerals and that the amount of trans-fatty acids in beef is small. The report can be downloaded from www.acsh.org.



Meanwhile, the National Cattlemen's Beef Association has launched a Web site (www.cool-2b-real.com) targeting teenage girls. The site asserts that "real girls are 'keepin' it real' by building strong bodies and strong minds" and offers online greeting cards, a chat room and recipes for such after-school snacks as nacho beef dip, cheeseburger mac, and pizza pie with mashed potatoes.

Scientific/Technical Items

Acrylamide

[9] New Study Does Not Link Cancer to Acrylamide Consumption

Researchers in Sweden and the United States have reportedly determined that high intake of acrylamide in food does not pose an increased risk of intestinal, bladder or kidney cancer. The study, published in the January 28, 2003, issue of the *British Journal of Cancer*, was apparently conducted by researchers from the Karolinska Institute and Harvard University who looked at the effect of eating high-acrylamide-content foods on 1,000 cancer cases and 500 healthy controls. According to a Swedish professor of social medicine, the results are not conclusive and should be considered with caution. He reportedly indicated that consensus has always been that any health risk would be small and difficult to disprove.

Meanwhile, German food manufacturers have apparently agreed to recommend that potato chips be cooked at lower temperatures to avoid high acrylamide concentrations. Packaging labels in the future will reportedly recommend frying potato chips at 175 degrees Celsius or baking at 180-190 degrees Celsius. See *just-food.com*, January 27 and 28, 2003.

Obesity

[10] Larger Portions Contribute to Americans' Girth

Over the past 20 years, food portion sizes have increased at home, in restaurants and at fast food establishments, according to a new study published in *The Journal of the American Medical Association* ("Patterns and Trends in Food Portion Sizes, 1977-1998," S.J. Nielson and B.M. Popkin, *JAMA* 289: 450-453, 2003). University of North Carolina researchers analyzed dietary intake data from national surveys conducted in 1977, 1989 and 1996 to determine trends in food portion by food source and eating location. They tracked foods considered to be at the core of many American diets (i.e., salty snacks, desserts, soft drinks, fruit drinks, french fries, hamburgers, cheeseburgers, pizza, and Mexican food) and determined portion consumed by eating location (home, restaurant or fast food establishment). The researchers found that between 1977 and 1996, food portion sizes and the resulting caloric intakes increased both inside and outside the home in all food categories except pizza. The average hamburger increased from 5.7 to 7.0 ounces, resulting in an extra 97 calories, for example. Describing the increases found as "substantial," Nielson, et al. explain that because an added 10 calories per day of unexpended energy equals one extra pound of weight per year, the potential impact of increases in portion size ranging from 49 to 133 calories may be great.



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Food & Beverage Litigation Update is distributed by Dale Walker 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 dwalker@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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