

Food & Beverage

LITIGATION UPDATE

Issue 163 • March 22, 2006

Table of Contents

Legislation, Regulations and Standards

- [1] Pennsylvania Senator Advocates Criminal Liability for Product Defects1
- [2] Soy Products Are Safe, Says NTP Expert Panel2
- [3] Expert Panel to Discuss EPA's Draft Nanotechnology White Paper2

Litigation

- [4] Fourth Circuit Dismisses Challenge to Salt Data Under Information Quality Act2

Media Coverage

- [5] "Interview with Richard Daynard on Parallels with Tobacco," *Informed Eating: A Newsletter of Food Politics & Analysis*, March 20063

Scientific/Technical Items

- [6] Caffeine Allegedly Linked to Heart Attack Risk3
- [7] Wilson Center Develops Data Base of Consumer Products Engineered with Nanotechnology3

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Pennsylvania Senator Advocates Criminal Liability for Product Defects

The U.S. Senate Judiciary Committee recently heard testimony on proposed legislation that would “penalize the knowing and reckless introduction of a defective product into interstate commerce.” As proposed by Senator Arlen Specter (R-Pa.), the [bill](#) would define a defective product as one that is dangerous to human life and limb due to a flaw in design, manufacture, assembly, or instruction and would hold criminally liable any person or business entity that introduced a defective product into commerce through manufacture, assembly, importation, sale or any other product transfer. To be held liable, the person or business entity must either know that the product is capable of causing bodily injury or death, or intentionally fail to disclose the defect to the appropriate regulatory agency. Depending on the injury, the responsible party could face a fine or imprisonment.

Senator Patrick Leahy (D-Vt.) opened the March 10, 2006, hearing by asserting that strict liability and enhanced whistleblower statutes have been insufficient in curbing the introduction of dangerous products into the marketplace. “While individual

cases and class actions can provide some accountability,” Leahy said, “Congress must change the incentives to discourage this particularly harmful aspect of corporate behavior.”

Witnesses opposed to criminalizing product liability voiced concerns over the due process implications the proposed bill presents, as well as its potential harm to American competitiveness. Speaking on behalf of the U.S. Chamber Institute for Legal Reform and the American Tort Reform Association, Victor Schwartz, chair of Shook, Hardy & Bacon’s Public Policy Practice, [testified](#) that it would be improper for Congress to impose criminal sanctions based on civil tort law standards because they would introduce unpredictability and the application of unduly vague principles into criminal law. On this basis, prior attempts to criminalize tort law have been defeated. Moreover, according to opponents of the proposed bill, the present atmosphere in American civil law relating to product liability raises questions whether additional deterrence is necessary through criminal law. “Criminal law should address specific crimes and punish them appropriately,” while “tort law, with all of its flaws, should be left to deal with product liability,” Schwartz concluded. See *U.S. Senate Committee on the Judiciary Hearing Notice and Institute for Legal Reform Press Release*, March 10, 2006.



National Toxicology Program (NTP)

[2] Soy Products Are Safe, Says NTP Expert Panel

Despite the “paucity of available human data on exposure to purified genistein,” an expert panel organized by NTP’s Center for the Evaluation of Risks to Human Reproduction last week expressed “negligible concern for reproductive and developmental effects from exposure of adults in the general population.” In addition, the group of 14 independent scientists expressed “negligible concern for adverse effects in neonates and infants who may consume up to 0.01-0.08 mg/kg bw/day of genistein aglycone contained in soy formula” and concluded that insufficient human or animal data “permit[s] a determination of the developmental or reproductive toxicity of soy infant formula.” Genistein is a phytoestrogen contained in several legumes, including soybeans. The compound is found in such food products as tofu, soy milk and soy infant formula as well as some dietary supplements. The expert panel expects to issue its final reports on genistein and soy formula in May 2006. A summary of the group’s March 15-17, 2006, meeting is available [here](#).

Environmental Protection Agency (EPA)

[3] Expert Panel to Discuss EPA’s Draft Nanotechnology White Paper

EPA announced this week that a contractor for external peer review is convening a panel of experts to discuss the agency’s draft nanotechnology white paper at a [public meeting](#) slated for April 19-20, 2006, in Washington, D.C. The [draft document](#) targets risk management and risk assess-

ment concerns and makes recommendations on next steps for addressing science policy issues and research needs. EPA reportedly intends to publish a final white paper on nanotechnology in mid-2006. See *Federal Register*, March 21, 2006.

Litigation

Information Quality Act

[4] Fourth Circuit Dismisses Challenge to Salt Data Under Information Quality Act

The Fourth Circuit Court of Appeals has dismissed a lawsuit under the Information Quality Act and its requirement that interested parties have the right to question the accuracy of reports and information cited or produced by federal agencies. [Salt Institute v. Leavitt, No. 05-1097 \(4th Cir. 3/6/06\)](#). The Salt Institute and the U.S. Chamber of Commerce filed the suit in response to National Heart, Lung and Blood Institute (NHLBI) findings that suggested all Americans could lower their blood pressure by reducing salt consumption. Plaintiffs claimed the data did not meet the standards for data quality set forth in the Act and sought a correction to the data used in the studies. Their petition also asked NHLBI to “make publicly available” the data allegedly supporting the agency’s recommendations. In dismissing the challenge for lack of standing, the court held that the Act does not create a legal right to information or correctness of that information.



Media Coverage

- [5] **“Interview with Richard Daynard on Parallels with Tobacco,” *Informed Eating: A Newsletter of Food Politics & Analysis*, March 2006**

Similarities between tobacco and food include “government and health authority complicity,” says Richard Daynard in this interview with public health lawyer Michele Simon. According to Daynard, “The public health authorities did believe that low-tar cigarettes were much safer because they didn’t realize how deceptively the products were made. I think this is similar to low-fat products. There has been a belief for a long time that low-fat products are substantially safer, but these products were made low-fat by adding high-fructose corn syrup and other sweeteners so that they are no better for you. The fantasy the public health community had was everything else being equal, low fat is probably a good thing. But everything else isn’t equal, the companies proceeded to put other equally dangerous stuff in the food as substitutes for fat.”

Daynard is chair of the Tobacco Products Liability Project and director of the Public Health Advocacy Institute’s Law and Obesity Project at Northeastern University in Boston. The interview is available [here](#).

Scientific/Technical Items

Caffeine

- [6] **Caffeine Allegedly Linked to Heart Attack Risk**

Coffee drinkers with a genetic trait that causes the body to slowly metabolize caffeine may be at higher risk for heart attack. (M. Cornelis, et al.,

“Coffee, CYP1A2 Genotype, and Risk of Myocardial Infarction,” *JAMA* 295(10): 1135-1141, March 8, 2006.) The research was conducted on 4,000 people in Costa Rica, one-half of whom carried the genetic trait of slow caffeine metabolism. Slow metabolizers who drank two to three cups of coffee daily exhibited a 36 percent increased risk of having a nonfatal heart attack compared to those who consumed little or no coffee. The risks were higher for those younger than age 59. Coffee drinking in the other half of the study group, whose members were characterized as “fast caffeine metabolizers,” appeared to reduce the risk of heart attack. An American Heart Association spokesperson was quoted as saying the study “doesn’t say you can’t have caffeine, but drinking several cups of coffee daily is probably excessive for some people.” See *Associated Press*, March 8, 2006.

Nanotechnology

- [7] **Wilson Center Develops Data Base of Consumer Products Engineered with Nanotechnology**

The Woodrow Wilson International Center for Scholars has launched the [Nanotechnology Consumer Products Inventory](#), a publicly available online inventory of nanotechnology consumer products. The current inventory contains information on 212 products from 15 countries, including cooking oil and dietary supplements. Nanoscale particles measure 100 nanometers or smaller -- a nanometer is one-billionth of a meter or about one-100,000th the width of a human hair.



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 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.

Shook,
Hardy &
Bacon^{LLP}

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.

