

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] House Approves Bill to Roll Back Country-of-Origin Labeling

House members, by a 347-64 vote, have reportedly approved a U.S. Department of Agriculture (USDA) appropriations bill that includes a provision rescinding country-of-origin labeling requirements enacted in 2002. If the Senate agrees to the measure, it will block USDA implementation of such requirements as they relate to beef, pork and lamb products. But country-of-origin labels will still be required at final point of sale for fresh fruits and vegetables, seafood and peanuts. The issue has apparently divided the agricultural sector, with smaller food producers favoring the labels; labeling is said to have strong support in the Senate. See *Associated Press*, July 15, 2003; *Congress Daily*, July 14, 2003.

Meanwhile, Public Citizen has released [a report](#) critical of the government's system for inspecting meat and poultry imported from other countries. Titled *The WTO Comes to Dinner: U.S. Implementation of Trade Rules Bypasses Food Safety Requirements*, the report finds that agency officials are interpreting U.S. obligations under international trade agreements in a manner that is compromising the safety of the U.S. meat supply. Instead of educating other countries about U.S. inspection protocols, the report claims USDA personnel "are accepting other nations' food safety policies as our own without congressional

approval and often with little public notification and involvement." Public Citizen is calling for congressional intervention and involvement, increased resources to address the problem, and prompt implementation of country-of-origin labeling requirements, among other matters.

#### Food and Drug Administration (FDA)

##### [2] FDA Loosens Health-Based Claim Standards; Sets New Grading System

FDA has announced the release of a task force report and several guidance documents relating to health claims in the labeling of food and dietary supplements. The guidance, which became effective July 11, 2003, and will be applied to health claim petitions submitted after September 1, establishes a ranking system for health claims based on the quality of the science supporting the claims. A is for scientifically proven claims; B applies where the science is good but not conclusive; C represents limited science to support a claim; and D is for claims for which there is hardly any scientific support. While the agency is still considering whether the letter grades themselves will appear on product packages, grades of B, C and D are considered qualified and will require an explanation on the label. The new ranking system has drawn criticism from Representative Henry Waxman (D-Calif.) and the Center for Science in the Public Interest; it is generally supported by the food industry. FDA has also announced that it will be focusing on how best to inform consumers about the benefits of eating oily fish, fruits and vegetables, unsaturated fats, and nuts in place of saturated-fat-



containing sources of protein. See *Associated Press* and *CSPI Newsroom*, July 10, 2003; *Federal Register*, July 11, 2003; *The Wall Street Journal*, July 15, 2003.

## State/Local Initiatives

### [3] District of Columbia City Council Considers Nutritional Disclosure Mandate

Legislation introduced in the District of Columbia City Council last week would require chain restaurants or "similar retail food establishments" with 10 or more locations nationwide to provide information about the nutritional content of their foods and beverages. "If a customer is going to choose to eat the highest calorie and fat items, let that choice be informed and 100 percent on the customer," bill sponsor Phil Mendelson (D-At Large) was quoted as saying. Under the [Nutritional Information at Restaurants Act of 2003](#), restaurants would be required to post on menu boards or print in menus next to each item nutritional information about (i) calorie content, (ii) saturated fat and *trans*-fat content, (iii) carbohydrate content, and (iv) sodium content. Establishments included in the proposal's definition of "similar retail food establishments" include convenience stores, bakeries, "cookie counters," and ice cream shops. Should the bill be enacted, it would face a 30-day congressional review as provided in the District of Columbia Home Rule Act before taking effect.

The National Restaurant Association reportedly opposes the proposal, claiming consumers are not interested in nutritional information. "It's hard for me to believe that people wouldn't know that meat and dairy products are fattening or that certain foods are high in calories," an association spokesperson was quoted as saying. "You don't have good foods and bad foods, you have good diets and bad diets," he said. See *The Washington Post*, July 15, 2003.

## Litigation

### Artificial Growth Hormones

#### [4] Monsanto Challenges Dairy Product Labeling in Federal Court

In a lawsuit filed in a U.S. district court, the Monsanto Co. is challenging as misleading and deceptive a Maine dairy's product labels for allegedly appearing to disparage the use of artificial growth hormones in cows. Monsanto reportedly manufactures the only major artificial growth hormone, Posilac, which has been on the market since 1994 and is used in about one-third of the nation's dairy cows.

Milk producer Oakhurst Dairy Inc. uses the state's quality seal in its advertising, and its milk cartons state, "Our farmers' pledge: no artificial growth hormones." Maine apparently requires dairy farmers to provide affidavits pledging not to use the hormones in order for dairy processors to include the state's quality seal of approval in promotional material. A Monsanto spokesperson was quoted as saying, "We believe Oakhurst labels deceive consumers; they're marketing a perception that one milk product is safer or of higher quality than other milk. Numerous scientific and regulatory reviews throughout the world demonstrate that that's unfounded. The milk is the same, and the amount of protein, fats, nutrients, etc., are all the same." Monsanto is seeking an order enjoining Oakhurst's use of ads and labels referring to hormone-treated cows. See (Portland) *Press Herald*, July 8, 2003; *The New York Times*, July 12, 2003.



## Soft Drinks

### [5] Federal Government to Investigate Former Coca-Cola Employee's Claims

Federal and state lawsuits filed by former Coca-Cola employee Matthew Whitley in May 2003 with allegations against the company about fraud, accounting improprieties and the presence of metal residue in frozen beverages has reportedly spawned an informal investigation by the Securities and Exchange Commission, an internal company audit, a Burger King investigation, and now a federal grand jury probe. Further information about the lawsuits appear in issue 32 of this Update, May 21, 2003. Whitley reportedly filed an amended complaint in May with new charges involving inflated revenues and more extensive metal-residue contamination. According to a news source, while Coca Cola is cooperating in the investigations, it has filed motions to dismiss Whitley's lawsuits, characterizing his claims as "frivolous" and "made-for-TV." See *Reuters*, June 26, 2003; *The Atlanta Journal-Constitution*, July 11 and 12, 2003.

## Legal Literature

### [6] Ross Petty, et al., "Regulating Target Marketing and Other Race-Based Advertising Practices," *Michigan Journal of Race and Law*, Spring 2003

Claiming that "many of the messages we receive in advertising are inferentially racist," this article suggests that race-based targeted marketing contributes to racial tension. The authors examine the federal government's role in preventing "the dissemination of racist messages through advertising" by reviewing the development and use of targeted marketing techniques and examining existing laws

that regulate advertising generally, including Federal Trade Commission authority to prohibit unfair advertising and laws that address discriminatory advertising for specific products and services.

The article cites as examples of deceptive race-based advertising certain advertisements for milk, cigarettes, alcoholic beverages, and fast food. "The FTC could attempt to prove, for example, that alcohol, tobacco, or fast food advertising targeted to minorities is likely to cause more consumption (and therefore serious health risks) than without such targeted advertising," the authors suggest. Co-author Ross Petty gave a presentation titled "Food Marketing and Supersized Americans: The Effectiveness of Regulation" during the Public Health Advocacy Institute's June 20-22, 2003, conference on legal approaches to the obesity epidemic. Further details about the conference appear in issue 37 of this Update, June 25, 2003.

## Other Developments

### [7] England's Top Health Official Deems Obesity "Health Time Bomb"

In his recently issued [annual report](#) on the state of England's health, Sir Liam Donaldson concludes that obesity "is a health time bomb with the potential to explode over the next three decades into thousands of extra cases of heart disease, certain cancers, arthritis, diabetes, and many other problems. Unless this time bomb is defused, the consequences for the population's health, the costs to the NHS [National Health Service] and losses to the economy will be disastrous." More specifically, the report blames obesity for 9,000 premature deaths in England and costs of £2.5 billion to the NHS and wider economy annually. Donaldson's recommendations for addressing the obesity issue include (i) encouraging



food manufacturers to disclose sugar, fat and salt content on product labels; (ii) asking industry “to take a more responsible approach” to advertising aimed at children; and (iii) encouraging various stakeholders to promote increased levels of physical activity.

#### [8] WHO Experts Agree on New Intake Levels for Methylmercury and Cadmium

Meeting recently in Rome, a panel of scientists from 17 nations convened by the World Health Organization (WHO) and the U.N. Food and Agriculture Organization reviewed safe intake levels for food additives and contaminants and are recommending reducing by half methylmercury exposure levels to 1.6 µg per kg. body weight per week. The new level was set to better protect fetuses for whom the neurotoxin is a development inhibitor. Putting the new standard in context, a 132-pound woman of childbearing age who eats 12 ounces of canned white albacore tuna in a week would exceed the [WHO recommendations](#) by nearly two times, according to a spokesperson for the Mercury Policy Project, a Vermont-based advocacy organization. This organization apparently tested cans of albacore tuna purchased in supermarkets and found that one of every 20 cans “should be recalled as unsafe for human consumption.” A [report](#) containing its findings was released in mid-June 2003. The WHO experts did not find sufficient evidence to change the recommended cadmium intake level.

## Scientific/Technical Items

### Overweight/Obesity

#### [9] New Study Purportedly Links School Food Offerings to Dietary Behaviors

Schools that offer students pizza, fries and soft drinks might encourage children to eat poorly not

just during school hours but also at home, according to new findings in the *American Journal of Public Health*. M.Y. Kubik, et al., “The Association of the School Food Environment With Dietary Behaviors of Young Adolescents,” *American Journal of Public Health* 93(7): 1168-1173, 2003. University of Minnesota researchers combined data on school food environment (i.e., standard, vending and “a la carte” options) with 24-hour dietary recall from students at 16 different middle schools in the Minneapolis-St. Paul area. They concluded that “the primarily high-fat snacks and calorie-dense beverages offered and sold to students via a la carte programs are displacing fruits and vegetables in the diets of young teens and contributing to total and saturated fat intakes that exceed recommended levels.”

#### [10] Swedish Study Asserts Connection Between Weight and Alzheimer’s Disease

Swedish researchers have concluded that overweight women may be at higher risk of developing Alzheimer’s disease. D. Gustafson, et al., “An 18-Year Follow-Up of Overweight and Risk of Alzheimer’s Disease,” *Archives of Internal Medicine* 163(13): 1524-1528, 2003. The research team followed 392 men and women ages 70 to 88, chronicling those who developed dementia. Among the women studied, they apparently found a “striking relationship” between being overweight, as measured by body mass index, and dementia. Those women who developed the disease between the ages of 79 and 88 were consistently measured as heavier than their non-demented counterparts at ages 70, 75 and 79. Of note, those who developed Alzheimer’s were shown to exhibit an even higher degree of overweight. Similar associations were not found among the men studied. The researchers speculate that vascular factors most likely mediate the relationship between overweight and dementia, suggesting that their results might have profound implications for preventing the debilitating disease.



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## LITIGATION UPDATE

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](mailto:dwalker@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.

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