

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Initiatives

[1] Delaware Lawmaker Introduces “Obesity Prevention Act”

Representative Michael Castle (R-Del.) introduced the Obesity Prevention Act (H.R. 5659) on October 16, 2002. The proposed legislation would (i) amend the National School Lunch Act by creating grants to fund model nutrition education and physical fitness programs in no more than 20 states, (ii) incorporate obesity prevention treatment and services into state children’s health insurance programs, (iii) create a federal Commission on Obesity Treatment and Prevention to oversee research and policy formation, and (iv) grant “President’s Health and Fitness Awards” and “President’s Health and Fitness Teacher Achievement Awards” to outstanding physical fitness and nutrition education programs in elementary and secondary schools and those individuals involved in such programs. The bill has been referred to the Committee on Education and the Workforce as well as the Committee on Energy and Commerce.

[2] USDA Responds to Organic Program Petition; Peer Review Panel a Priority

The U.S. Department of Agriculture (USDA) has reportedly announced that its next organic labeling program priority will be to establish a peer-review

panel that will assist the secretary in accrediting those entities seeking to become certifying agents. The announcement was apparently made in response to a petition filed by the Center for Food Safety and several other public interest groups concerned about the integrity of the “organic” label. More details about the petition appear in issue 3 of this Update, October 23, 2002. According to a USDA spokesperson, “The Agricultural Marketing Service has always planned to establish a peer review panel. That’s always been in their plan. It has not been put in place yet because the immediate focus of AMS has been on implementing the national standards. Now that we’ve reached this deadline of Oct. 21, the National Organic Program is working on this next step of establishing that peer review panel.”

Until the panel is officially established, a four-person committee, consisting of a scientist, certifying agent, consumer advocate, and food retailer, will serve as unofficial peer reviewers, said a news source. To date, of 122 applications received from states and foreign and domestic companies, the National Organic Standards Board has approved the applications of 11 states, 33 U.S. companies and 13 foreign companies. *See Greenwire*, October 24, 2002.

[3] FDA to Convene Workshop on Food Safety Issues

Food security and recalls will be discussed in a Food and Drug Administration (FDA) public workshop on November 19, 2002, in Columbus, Ohio. Aimed at food manufacturers, repackers and importers, the event will reportedly target the “impact of



U.S. bioterrorism legislation on the food industry, FDA and U.S. Department of Agriculture food safety and security guidance and procedures, product tampering investigations, tamper evident packaging in the food industry, preparing for and conducting a food recall, and opportunities to improve food security. The event will be held at the University Plaza Hotel from 8 a.m. to 4:15 p.m. More information can be obtained from Marie Falcone at (215) 597-2120, *See Federal Register*, October 18, 2002.

[4] EPA's Dioxin Reassessment Cleared for Interagency Review

According to a press report, the Environmental Protection Agency (EPA) will be able to circulate its dioxin reassessment to other agencies, following deals struck by EPA, the Office of Management and Budget and members of Congress. While some have been pressing for immediate release of the study, which reportedly concludes for the first time that dioxin is a known human carcinogen, others have been calling for review by the National Academy of Sciences (NAS), a move that could delay the study's release for several years. EPA has apparently agreed to submit the reassessment to NAS if other agencies, particularly the U.S. Department of Agriculture and the Food and Drug Administration, raise strong scientific concerns by January 2003. Meanwhile, House members reportedly agreed to remove language from an EPA spending bill that would have required the NAS review. *See Inside EPA*, October 25, 2002.

State/Local Initiatives

[5] Proposed Ordinance in Berkeley, California, Would Restrict Sale of Brewed Coffee Beverages

On November 5, 2002, voters in Berkeley, California, will vote on a proposed law requiring that all brewed coffee sold in the city be derived from beans that are shade-grown, organic, have been purchased at "Fair-Trade" prices, or a combination thereof. Business vendors violating the ordinance would face fines not exceeding \$100 or imprisonment not exceeding six months or both. Supporters of Measure O claim it would provide environmental benefits and less exploitation of coffee farmers, while opponents claim the proposal would raise coffee prices in most Berkeley venues and cost more than \$100,000 annually to enforce. National coffee chains Starbucks and Peet's Coffee & Tea have reportedly given more than \$16,000 to a political action committee formed to oppose the ordinance.

Meanwhile, several residents of Iowa City, Iowa, have reportedly drafted and filed a similar ordinance with the city clerk. According to a news source, the organizers of "Brewing Grounds for Change" must gather 2,700 signatures within six months before the city council either adopts the ordinance or places it on a ballot for voters to decide. *See New York Times*, July 7, 2002; *Iowa City Press-Citizen*, October 25, 2002; *Kansas City Star*, October 27, 2002.

Other Developments

[6] European Food Policy Conference to Include Discussion of Health Claims

Food manufacturers and policymakers will convene in Brussels, Belgium, on November 25-26, 2002, for the 2nd Annual Conference on Future



Food Policy. Topics to be addressed include (i) food labeling and health claims, (ii) functional and fortified foods, (iii) food safety legislation, (iv) the role of the food industry in promoting healthy diets and lifestyles, and (v) goals of the newly established European Food Safety Authority. The conference keynote speaker will be European Union Health and Consumer Protection Commissioner David Byrne. The event is co-sponsored by the *European Voice* newspaper in association with Kraft, Tesco, Bird Life International, the Confederation of the Food and Drink Industries of the European Union (CIAA), and Hill & Knowlton. See www.ciaa.be.

Media Coverage

- [7] **Monte Morin, "Lawyers Who Sue to Settle,"** *Los Angeles Times*, October 26, 2002

This article highlights attorneys such as Los Angeles-based Morse Mehrban who have used Proposition 65 (Prop. 65) enforcement lawsuits to reap millions in settlements with businesses that pay just to have the suits go away. Prop. 65 requires businesses to warn the public about products or activities that cause exposure to substances known to the state to be carcinogens or reproductive hazards. The number of Prop. 65 lawsuits has apparently mushroomed from 50 in 1988 to more than 5,000 in 2001. Recent suits have targeted lead and cadmium in chocolate and acrylamide in bread and french fries. More details about these cases appear in issue 1 of this Update, October 9, 2002.

Many suits are brought on behalf of nonprofit groups closely tied to the lawyers who file them, and the suits generally target hundreds or thousands of businesses at one time. Individual settlements may be modest, but they reportedly add up quickly. A new law requires plaintiffs to submit a "certificate

of merit" with the attorney general before filing an enforcement action. The attorney general's office cannot stop such actions from proceeding, but its opinions apparently hold weight with judges, some of whom view the suits as little better than "rack-teering." Since the new law took effect, the attorney general has apparently identified more than 4,000 cases that lack a scientific foundation or sufficient evidence of wrongdoing, including 400 cases filed by Mehrban.

Scientific/Technical Items

Soft Drinks

- [8] **"Intake of Soft Drinks, Fruit-Flavored Beverages, and Fruits and Vegetables by Children in Grades 4 Through 6,"** K.W. Cullen, D.M. Ash, C. Warneke, and C. de Moor, *American Journal of Public Health* 92(9): 1475-1478, 2002

Researchers recently published in the *American Journal of Public Health* purport to be among the first to examine associations between sweetened beverage consumption and both caloric intake and consumption of fruits and vegetables. Among the school-aged children studied, those with the highest consumption of sweetened beverage ingested approximately 330 extra calories per day when compared with children who did not drink any sweetened beverage. Children in this high consumption group were also less likely to eat fruit and more likely to eat high-fat vegetables, e.g., fried.

The authors suggest that sweetened beverage consumption may be a marker for poor dietary habits or may reflect "meal sources with few fruit selections and many high-fat food selections (e.g., fast-food restaurants)." They note that consumption patterns



developed in childhood may persist into adulthood and encourage further research into the association between sweetened beverage consumption and food intake given that diet has been linked to both obesity and chronic disease.

Obesity

- [9] **“Overweight, Obesity, and Cancer Risk,”**
F. Bianchini, R. Kaaks, and H. Vainio,
Lancet Oncology 3(9): 565-574, 2002

Research gathered on overweight, obesity and cancer risk during a February 2001 International Agency for Research on Cancer meeting was recently reviewed in *Lancet Oncology*. According to the investigators involved, the past several decades have been characterized by significant changes in lifestyle that have led to increases in body weight and obesity. They note a growing body of epidemiologic data linking weight gain and cancer risk. Examination of the literature available through 2000 led them to conclude that sufficient evidence indicates that adiposity can cause cancers of the breast (in postmenopausal women), colon, endometrium, kidney, esophagus, kidney and gastric cardia.

The authors recommend balancing caloric intake and physical activity to achieve a healthy body weight and avoid excess risk; specifically, they warn against large portions and calorie-dense foods high in fat and refined sugars. The authors acknowledge the difficulty in individual efforts at improving diet and increasing exercise, suggesting that “governmental and nongovernmental organizations, the food industry, media, worksites, schools, health professionals, and educators all have a responsibility to work together to produce an environment less conducive to weight gain.”

Food Additives

- [10] **Study Reveals Elevated Levels of Lead, Sulfites and Arsenic in Imported Dried Garlic**

Americans for Wholesome Foods (AWP) has released a report showing that dried garlic, used extensively by food processors in “value-added” products, such as pizza, soup, prepared dinners, and condiments, can contain significantly elevated levels of lead, added sulfites and arsenic when processed using direct exposure to coal fires or grown in contaminated soil. Evidently, the problem is particularly prevalent in dried garlic products from China; measured lead levels for these products are 2,900 percent higher than in domestic samples, arsenic levels are 586 percent higher, and added sulfites are 2,840 percent higher. According to the AWP report, *When Dehydrated Foods Differ: For Garlic Buyers, the Drying Process is Key*, such levels should require labeling under existing Food and Drug Administration guidance, but “there is little confidence that labeling is consistently applied.” AWP warns that serious health risks can result from exposures to such substances and cautions that science has yet to pinpoint the doses that can provoke allergic or other reactions. See www.facts-about-food.org, October 17, 2002.



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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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