

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Office of Management and Budget (OMB)

[1] OMB Proposes Peer-Review Guidelines for Federal Agencies

OMB has released [proposed guidelines](#) for independent peer review of the science underlying significant regulatory actions that all federal agencies would be required to follow. Public and agency comments are due on or before October 28, 2003. John Graham, who heads OMB's Office of Information and Regulatory Affairs, reportedly stated that the U.S. Department of Agriculture and the Army Corps of Engineers would be particularly affected by the proposal, which was made under Executive Order 12866. While industry has long sought and reportedly applauds a process of independent scientific review of the scientific documents on which agencies rely in their rulemaking, critics such as OMB Watch claim that the proposal could (i) open the process to "political manipulation," (ii) limit agencies' flexibility by making them adopt uniform, centralized peer-review procedures, and (iii) provide a legal basis for limiting agencies' ability to adopt precautionary action based on limited science. One critic was quoted as saying, "This would be another weapon for the administration and its corporate allies to use against protective regulation." See *Inside EPA*, August 29, 2003; *The Kansas City Star*, August 30, 2003.

European Union (EU)

[2] EU Wants Food and Beverage Names Protected by Global Trade Pact

Denying charges of protectionism by the United States, Canada and a group of Latin American countries, the European Union has issued a list of wine, cheese and meat products whose names it wants protected by a global trade pact sanctioned by the World Trade Organization. "This is not about protectionism, it is about fairness," EU Agriculture Commissioner Franz Fischler was quoted as saying. "It is simply not acceptable that the EU cannot sell its genuine Parma ham in Canada because the trademark 'Parma ham' is reserved for a ham produced in Canada," he said. Names on the 41-product list include Beaujolais, Champagne, Chianti, Madeira, Feta, Roquefort, and Prosciutto di Parma. See *Reuters* and *Associated Press*, August 28, 2003.

India

[3] Following Controversy Involving Pesticides in Soft Drinks, Indian Government to Amend Food Rules

Government officials in India have reportedly issued draft amendments to the Prevention of Food Adulteration Act to regulate the amount of allowable metals and pesticide residues in bottled water and soft drinks. Their action follows recent controversy generated by researchers who purportedly found excessive levels of four pesticides in soft drinks owned and marketed by Coca-Cola and PepsiCo. A news source indicates that the proposal sets



specific standards for allowable amounts of pesticide residues, copper, arsenic, and lead. After a public-comment period, the new rules will take effect January 1, 2004. See *rediff.com*, September 1, 2003.

State/Local Initiatives

[4] Espresso Tax Revenue in Seattle Would Fund Child Care Programs

A September 16, 2003, ballot initiative in Seattle would impose a 10-cent tax on espresso beverages to fund child care and early learning programs for low-income children. Advocates of [Initiative 77](#) apparently claim the tax could generate some \$6.5 million annually. “If you don’t want to pay it [the tax], you can buy drip coffee or tea,” a spokesperson for the Economic Opportunity Institute was quoted as saying. “But I believe people are more likely to want to consume espresso if their morning purchase doesn’t just go to giving them a buzz but goes to children,” he said. Those opposing the tax argue, among other things, that (i) no relationship exists between the tax and the programs it would fund, (ii) small businesses would face unfair administrative burdens and (iii) the measure would set a precedent for other specialty taxes. “Taxing a single product, taxing that way is a slippery slope for other products to be taxed,” a Starbucks spokesperson said. “We oppose it because we feel that it really is too important to fund these programs by being dependent on a single product.” See *The Seattle League of Women Voters’ Analysis of Initiative 77*, August 18, 2003; *The New York Times*, September 2, 2003.

Litigation

[5] Appellate Court Strikes Down Michigan Law Barring Direct-to-Consumer Wine Shipments

Examining the intersection between the dormant Commerce Clause and the 21st Amendment, the Sixth Circuit Court of Appeals has found discriminatory and unconstitutional a Michigan law that effectively precludes out-of-state wineries from shipping directly to consumers in the state. [Heald v. Engler, No. 01-2720 \(6th Cir. 8/28/2003\)](#). In so ruling, the court determined that “the proper approach in this case ... is to apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the ‘core concerns’ of the Twenty-first Amendment.”

According to the court, provisions that required out-of-state wineries to pay a higher license fee than a comparable Michigan winery and to sell their products only through Michigan wholesalers constituted direct discrimination against interstate commerce. Because the state failed to show that such discrimination furthers Michigan’s interest in “promoting temperance, ensuring orderly market conditions, and raising revenue,” or that “it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,” the court reversed the district court’s entry of summary judgment for the defendants and remanded the case for entry of judgment in favor of the plaintiff wine connoisseurs, wine journalists and a small California winery.

Some wine-industry interests applauded the decision, noting that it is the second such victory in recent months. The Fifth Circuit overturned a



similar law enacted in Texas, and, on August 25, 2003, the Texas Alcoholic Beverage Commission reportedly decided not to pursue an appeal in that case. Meanwhile, press reports indicate that Kenneth Starr is working on behalf of wineries and free-trade interests to challenge direct-shipment laws through the Coalition for Free Trade. States' rights advocates, such as Robert Bork and C. Boyden Gray, have apparently weighed in on the opposite side of the issue. The Federalist Society is reportedly planning a panel discussion on the matter, featuring a debate between these battling conservatives at the National Press Club on October 22. See *The New York Times*, August 24, 2003; *just-drinks.com*, August 27, 2003; *Wine Spectator Online*, August 28, 2003.

Legal Literature

[6] ABA Section Explores EU and U.S. Perspectives on GM Foods

Back-to-back articles appearing in the publication of an American Bar Association section devoted to environment, energy and resources address genetically modified (GM) foods and agricultural biotechnology from the differing perspectives of the European Union and the United States. A British solicitor lays out the basis for continuing consumer anxiety about GM foods in the European Union and discusses the regulations that have effectively limited the introduction of GM crops or animal feeds there. She speculates that recent changes to existing procedures should remove any legal bar to GM products in the market, but notes that "currently there is no demand for GM foods within the EU" and suggests that the successful launch of such products may depend on whether they can be shown to have some added health benefit. The article on the U.S. perspective focuses on the legal disputes that can arise from

the development of crops resistant to insects, blight and other adverse environmental conditions and outlines the regulatory mechanisms in place to keep biotech crops segregated. According to this article, "experience to date indicates the difficulty of basing successful tort actions upon demonstrated adverse health or environmental impacts." Yet, the article concludes that "interesting compliance and liability matters" will continue for years to come since "the technology is here to stay." See *Natural Resources & Environment*, Summer 2003.

Other Developments

[7] Insurers Raise Premiums for Food and Drinks Sector; Coverage Exclusions Under Consideration

According to a news source, public liability insurance in the United Kingdom is getting more expensive for the food and drink industry as insurance companies re-examine risks in light of recent high-profile and threatened litigation in the United States. The head of public liability for Zurich London, which plans additional premium increases and may begin applying exclusions for known risks, was quoted as saying, "We are urging the food and drink sector to revisit their risk management policies, as insurers will be looking more closely than ever before at what the food and drink sector is doing to demonstrate that they are being socially responsible." A liability risk manager for Norwich Union said his company was looking at the issue and was "concerned it might be a problem in the future. This is the latest step in the growth of the compensation culture and if there is one claim, more will follow like a domino effect." Insurers are also apparently worried about drinking-related claims and expect that alcoholic beverages in the United Kingdom will soon



carry health warnings like their counterparts in the United States. See *Telegraph.co.uk*, September 1, 2003.

[8] Nutritional Experts Debate Labels for “Good” and “Bad” Carbohydrates

Experts, who are convinced that the failure to consider where a carbohydrate falls on the glycemic index (GI) -- the rate at which the digestive system breaks down carbohydrates into sugar molecules -- are reportedly calling for labeling carbohydrates as good or bad. The World Health Organization has apparently endorsed the good carb/bad carb concept but it remains controversial in the United States, having been dismissed by organizations such as the American Heart Association and the American Diabetes Association. While some experts argue that the consumption of carbohydrates which break down rapidly and have a high GIs can result in making us ravenous and lead to overeating, others believe that this theory is “ridiculous” and that classifying foods as good and bad is unnecessarily complicated for the public. See *KansasCity.com*, August 31, 2003.

Media Coverage

[9] Mike Mitka, “Food Fight over Product Label Claims: Critics Say Proposed Changes Will Confuse Consumers,” *Journal of the American Medical Association*, August 20, 2003

This article discusses the Food and Drug Administration’s (FDA’s) new “Health Claims Report Card” that will rate food product label claims based on the quality of the science supporting them. 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 little scientific support. According to Mitka, opponents of the new rating system – e.g., the American Medical Association, American Council on

Science and Health, and the Center for Science in the Public Interest – are considering suing FDA to block implementation of the initiative, asserting that it protects food companies and producers at the expense of public health.

Scientific/Technical Items

Cardiovascular Disease

[10] Four Major Risk Factors Influence Development of Heart Disease

Two studies recently published in the *Journal of the American Medical Association* challenge the long-held belief that only about 50 percent of coronary heart disease (CHD) may be attributed to conventional risk factors. They claim, instead, that 80 to 90 percent of CHD and related coronary events can be traced to four major risk factors – elevated cholesterol, hypertension, smoking, and diabetes. In the first study, researchers examined data on risk for fatal and nonfatal heart attacks from three large cohorts, totaling nearly 400,000 subjects. P. Greenland, et al., “Major Risk Factors as Antecedents of Fatal and Nonfatal Coronary Heart Disease Events,” *JAMA* 290: 891-897, 2003. Among those who suffered fatal heart attacks, approximately nine of 10 first exhibited one of the four major risk factors. These factors were also found in 92 percent of the men and 87 percent of the women who suffered nonfatal attacks. In the second study, an analysis of more than 120,000 CHD patients from various nations, roughly 85 percent of those studied exhibited at least one of the four risk factors. U.N. Khot, et al., “Prevalence of Conventional Risk Factors in Patients With Coronary Heart Disease,” *JAMA* 290: 898-904, 2003. Lead author Umesh Khot noted that “It is increasingly clear that the four conventional risk factors and their resulting health risks are largely preventable by healthy lifestyle.”



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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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