

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Centers for Disease Control and Prevention (CDC)

[1] *Trans-Fatty Acids Will Likely Face Analysis in Upcoming CDC Reports*

Trans-fatty acids have been listed in the first group of chemicals likely to be analyzed in future editions of the *National Report on Human Exposure to Environmental Chemicals*. The reports are generally issued every two years and provide “an ongoing assessment using biomonitoring of the exposure of the noninstitutionalized, U.S. civilian population to environmental chemicals” in air, water, soil, dust, and food. The next report is expected sometime in 2005. According to CDC’s [Federal Register notice](#), upcoming reports might include exposure data for special populations – e.g., children, women of child-bearing age – and information culled from studies of adverse health effects resulting from exposure to various levels of the chemicals in question. See *Federal Register*, September 30, 2003.

Department of Health and Human Services (HHS)

[2] *Some Dietary Guidelines Committee Members Reject Gearing Advice to the Overweight*

Several members of the Dietary Guidelines Advisory Committee have reportedly rejected the agriculture department’s recent warning that if healthy people continue to be the target of the Food Guide Pyramid, the dietary recommendations “could promote consumption at a level that would increase weight or maintain weight above what is healthy.” “Really, this is not the best place [in the government dietary guidelines] to give clinical advice to people on how to lose weight,” panel member Benjamin Caballero, M.D., was quoted as saying. Instead, the Johns Hopkins University professor says overweight individuals should seek advice from their physicians on ways to manage their weight. Food industry critics apparently charge that the committee will avoid sending an “eat less” message by aiming their advice at healthy consumers. The 13-member panel held its first meeting on September 23-24, 2003, in Washington, D.C. See *Associated Press*, September 26, 2003.

Great Britain

[3] *FSA Calls for Debate on Food Advertising That Targets Children*

Britain’s Food Standards Agency (FSA) will reportedly convene a series of public meetings to discuss the promotion of food to children follow-



ing release of a report titled [Does Food Promotion Influence Children? A Systematic Review of the Evidence](#). Conducted for FSA by the University of Strathclyde's Center for Social Marketing, the study concludes that "advertising to children does have an effect on their preferences, purchase behavior and consumption, and these effects are apparent not just for different brands but also for different types of food." Labor MP Debra Shipley, who drafted legislation to prohibit television advertising for food to young children, was quoted as saying the report "is a damning indictment of the advertising industry's marketing strategies to children. It is now clear and unarguable that there is a direct relationship between food advertising to children, poor diet and rising levels of obesity and diabetes." See *BBC News*, September 25, 2003.

Switzerland

[4] Swiss Government Raises Taxes on Malt Beverages

Citing a desire to reduce consumption of malt beverages among young people, the lower house of Switzerland's Parliament, the Swiss National Council, has reportedly approved a US\$1.40 tax increase on every 0.275 liter bottle of the popular products. The tax measure has already been approved by the upper house of Parliament. Consumption of malt beverages in Switzerland reportedly rose from 28 million bottles in 2001 to 400 million bottles in 2002. See *just-drinks.com*, September 30, 2003.

Litigation

Health Claims

[5] Consumer Organizations Sue FDA for Allowing Qualified Health Claims on Foods

The Center for Science in the Public Interest (CSPI) and Public Citizen have filed suit in federal court challenging, as a violation of statutory notice-and-comment rulemaking procedures, the Food and Drug Administration's (FDA) latest plan to allow qualified health claims on food and dietary supplement labels. [CSPI v. FDA \(U.S. District Court, District of Columbia\) \(filed 9/23/03\)](#). Further information about FDA's A-B-C-D ranking system for health claims based on the quality of science supporting the claims appears in issue 33 of this Update, July 16, 2003.

According to the complaint, FDA violated the Administrative Procedure Act by issuing its health-claims guidance in July 2003 without notice-and-comment rulemaking. The complaint further alleges that the new, streamlined process by which food labels may include "qualified" health claims, i.e., those health claims that have been classified as Category B, C and D claims and must be accompanied by a disclaimer, are subject to the notice-and-comment requirements and substantive standards of the Nutritional Labeling and Education Act of 1990 (NLEA). The complaint alleges that under FDA's new process for reviewing and approving health claims, the organization's members "will not be able to rely on food labels to provide accurate and non-misleading information about the health benefits of foods and may be induced to make choices that adversely affect their health based on preliminary or misleading information."

Plaintiffs seek a declaration that FDA's policy (i) violates the NLEA and FDA regulations "insofar as it allows health claims for foods that are not supported by significant scientific agreement," and (ii) violates NLEA and regulatory procedural requirements "with respect to the process for review and approval of health claims for food." They also seek withdrawal of the guidance FDA issued in July 2003 and an order that FDA not "sanction health claims for foods other than claims approved" under NLEA and regulatory procedures and standards.

In a related development, FDA recently posted [guidance](#) on claims that can be made for conventional foods and dietary supplements and a [summary](#) of qualified health claims permitted with respect to a number of vitamins, minerals and foods such as nuts.

Fraud

[6] Fraudulent Nutritional Labels Lead to 15-Month Jail Term

An executive whose company sold doughnuts, cookies and rolls to health-food stores claiming they were low-fat has reportedly pleaded guilty to mail fraud in Chicago, Illinois, and was sentenced to 15 months in prison. According to a federal prosecutor, Robert Ligon's Nutrisource Inc. doughnuts were labeled as carob-covered and containing 3 grams of fat and 135 calories, when they were actually chocolate-glazed and contained 18 grams of fat and 530 calories. After the hearing, the prosecutor was quoted as saying, "He got what he deserved for fooling people, for lying to them and taking advantage of the trust people put in those labels." See *Bloomberg News*, September 24, 2003.

Other Developments

[7] Observers Respond to Underage Drinking and Flavored Malt Beverage Reports

While those critical of the National Academy of Sciences (NAS) report on reducing underage drinking claim that nine of the 12 experts who produced the report have "ties to anti-alcohol activists," supporters are lauding its recommendations and claim that "the report has exciting implications for grassroots activists around the country." Cato Institute scholar and media columnist Steven Milloy criticized the NAS report's recommendation that excise taxes on alcoholic beverages be raised to reduce consumption by minors as "part of an ongoing effort by neo-prohibitionists to reduce alcohol consumption in general." He cited a 2000 report of the National Institute on Alcohol Abuse and Alcoholism that apparently presented research reporting that higher beer taxes had no effect on college student drinking. Milloy was particularly concerned about NAS panel members' ties to the "prohibitionist Robert Wood Johnson Foundation." See *Fox News*, September 26, 2003.

Meanwhile, the Center for Science in the Public Interest (CSPI) found much to praise in the NAS report and particularly highlighted the calls for a national media campaign, opposition to excise tax reductions, and alcohol advertising reforms. CSPI has posted on its Web site a [guide](#) for community groups to take action "to best capitalize on the report's buzz." Although the NAS report received kudos in CSPI's [Washington Report](#), the Federal Trade Commission's report to Congress on malt beverage advertising was found to fall "far short of what is needed to meaningfully assess the impact of alcohol advertising on underage youth." Details about both reports appear in issue 48 of this Update, September 10, 2003.



[8] Obesity Class Actions in Canada Likely Face Significant Hurdles

Senior litigators in Canada apparently believe that obesity-related class action lawsuits will not be legally or economically viable any time soon in that country. The class action device is still apparently fairly new, and concerns about manageability and a predominance of individual causation issues are seen as standing in the way of class claims. Financing is another major stumbling block, according to some analysts, in a legal system where contingency fees are not available and firms bringing class claims are small and insufficiently funded unlike their U.S. counterparts who made fortunes suing cigarette manufacturers. Still, some Canadian food companies are said to “be keeping an uneasy eye” on related developments in U.S. courts. See *Financial Post*, September 24, 2003.

[9] Pew Initiative Survey Finds Public Knowledge About GM Foods Remains Low

According to a new [analysis](#) of consumer views in the United States, knowledge about biotechnology and genetically modified (GM) foods continues to remain low, opinions about safety are split, and Americans rely on the Food and Drug Administration, which does not test GM products for safety, to verify whether such products are safe. Only 24 percent of the 1,000 consumers polled in August 2003 said they had eaten GM foods despite the fact that more than one-half of the products in grocery stores are produced with some form of biotechnology or genetic modification. Twenty-seven percent said that GM foods are “basically safe,” while 25 percent say that they are “basically unsafe.” Pew researchers concluded that “while the American public has yet to roundly accept genetically modified food, intense opposition has not formed in the United States.”

Scientific/Technical Items

Obesity

[10] Stress Linked to Consumption of “Comfort” Food

The tendency to overeat when faced with chronic stress is biologically driven, according to new research conducted in California. M.F. Dallman, et al., “Chronic Stress and Obesity: A New View of ‘Comfort Food,’” *Proceedings of the National Academy of Sciences* 100(20): 11696-11701, 2003. When combating stress, the brain signals the adrenal glands, which release a cascade of “stress hormones.” In a sudden or acute situation (e.g., being cut off on the highway), the body goes into fight-or-flight mode, setting off a feedback system that quickly shuts down signals from the brain, keeping anxiety in check. When stress becomes chronic, however, the accompanying stress hormones remain elevated, continuing to reinforce a message of anxiety in the brain.

In an attempt to explain how chronic stress might get “turned off,” University of California at San Francisco researchers exposed rats to varying levels of stress and stress hormones, finding that rats under chronic stress were more likely to seek out foods high in fat and calories and, in turn, more likely to develop fat deposits in their abdominal areas. The researchers suggest that such fat cells signal the brain and thereby cease production of stress hormones. In extrapolating their data to humans, they propose “that people eat comfort food in an attempt to reduce the activity in the chronic stress-response network with its attendant anxiety.”



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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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