

# Food & Beverage

## LITIGATION UPDATE

Issue 54 • October 22, 2003

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA Workshop to Target Relationship Between Food Labeling and Weight Management

FDA will host a public workshop titled “Exploring the Connections Between Weight Management and Food Labels and Packaging” on November 20, 2003, in Bethesda, Maryland. According to the *Federal Register* notice, the event was convened “in response to the growing concern about obesity in the United States” and will “look at available data to identify options (and pros and cons) about FDA’s food labeling and food packaging requirements that are relevant to consumer weight management.” Information about the event is available at (301) 436-1689. See *Federal Register*, October 17, 2003.

##### [2] Report to Congress Outlines Research on Food Adulteration Detection

Noting that rapid detection of adulterated food at ports of entry was a priority when Congress passed the Bioterrorism Act in 2002, the FDA has submitted its first annual [report](#) outlining current research projects that involve the development of tests and sampling methodologies to detect food adulteration. According to FDA, a number of the 90 active research projects are aimed at “improving existing technology in terms of accuracy, timing and costs.” In its report, FDA identifies the sources of food

contamination, whether intentional or unintentional, as including “biological pathogens and toxins (e.g., bacteria, viruses, parasites), biologically derived toxins (e.g., mycotoxins, ciguatera toxin, paralytic shellfish poison, ricin), pesticides, toxic metals, and TSE-type diseases (e.g., bovine spongiform encephalopathy).” Portable kits to test for such contaminants are apparently under development.

#### Environmental Protection Agency (EPA)

##### [3] Dioxin Reassessment Expected to Undergo Broad NAS Review

EPA officials have reportedly indicated that the White House will submit the agency’s long-awaited dioxin reassessment to the National Academy of Sciences (NAS) for a broad scientific review that could delay finalization of the study for another two years. EPA science managers have been seeking narrow review in hopes of speeding release of the document, which has been under development since 1991 and characterizes dioxin as a “known” human carcinogen. Food interests and others have reportedly been concerned about the reassessment’s release because meat and dairy product consumption is a major pathway of dioxin exposure, and tough new regulations and tort liability claims could be triggered when the reassessment is finalized. According to a news source, fundamental questions about the study, including EPA’s cancer risk estimates, modeling assumptions, uncertainties and variabilities surrounding those estimates, and whether human studies support EPA’s risk conclusions, are expected to be



approved by an interagency task group that meets on October 25, 2003. *See Inside EPA*, October 20, 2003.

## U.S. Department of Agriculture (USDA)

### [4] GM Critics Call for Federal Oversight in Light of Crop Field Test Infractions

According to information released by [Monsanto Co.](#) and USDA's [Animal and Plant Health Inspection Service](#), field tests of genetically engineered crops violated federal biotechnology regulations 115 times from 1990 to 2001, with Monsanto responsible for 44 of the compliance infractions, at a cost to the company of \$64,000 in fines. The violations, which apparently involved missing paperwork, dirty farm machinery and insufficient isolation from conventional crops, involved less than 2 percent of all regulated field tests. Nonetheless, biotechnology critics have called for "much greater oversight and regulatory presence for the federal government to ensure that the biotechnology industry doesn't indirectly harm the environment or the public." *See Greenwire*, October 20, 2003; *just-food.com* and *Reuters*, October 21, 2003.

### [5] Agency Seeks Nominations for Meat and Poultry Inspection Committee

USDA has [announced](#) that it is seeking nominations for membership on the National Advisory Committee on Meat and Poultry Inspection, a group that provides recommendations to the USDA secretary regarding meat and poultry inspection programs and addresses food-safety concerns and policy issues affecting the agency. Nominations will be accepted through November 19, 2003. *See Federal Register*, October 20, 2003.

## U.S. Congress

### [6] New Senate Bill Aims to Make School Lunches Healthier

Finding that obesity rates among American children have doubled over the last 20 years, Senator Jeff Bingaman (D-N.M.) has introduced legislation (S. 1750) that would amend the Child Nutrition Act and Richard B. Russell National School Lunch Act to improve the nutrition and health of youth. The Better Eating for Better Living Act of 2003 would require the USDA secretary to review the lunch program's nutritional guidelines with respect to the calories, added sugars, fat, sodium, and fiber contained in the foods offered; it would also fund attendant nutrition education programs. The proposal has been referred to the Committee on Agriculture, Nutrition and Forestry.

## European Food Safety Authority (EFSA)

### [7] Cancer Concerns Lead to Recommendations for Food Packaging Technology

Europe's food safety agency has issued a semicarbazide (SEM) risk assessment that apparently confirms preliminary advice issued in July 2003 regarding the presence of SEM in foods packaged in glass jars or bottles with metal lids that incorporate plastic vacuum seals. According to EFSA, small quantities of SEM in products such as baby food, pickles, fruit juices, mayonnaise, mustard, sauces, and ketchup, are "produced during the heat treatment of an approved blowing agent (azodicarbonamide) utilized to make sealing gaskets in the lids of glass jars and bottles and that [SEM] migrates from the gaskets into foods." While consumers are not being warned to change current dietary habits, EFSA has called on the industry to "implement alternative packaging



solutions” and recommended that the European Commission monitor the industry, placing an immediate priority on baby foods. According to EFSA, the chemical has “weak carcinogenic activity in animals and weak genotoxic activity.” Because SEM levels in foods are so low, EFSA’s scientific panel “concluded that the risk associated with eating foods containing semicarbazide is very small.” See *Food Ingredients First*, *BBC News*, and *newsday.com*, October 16, 2003.

## Litigation

### Deceptive Trade Practices

#### [8] Jam Lawsuit Spreads to California

A woman who claims her sensitive palate told her that J.M. Smucker’s “Simply 100% Fruit” fruit spread did not taste right has reportedly filed a lawsuit in a California state court on behalf of anyone who purchased the brand in the past four years, alleging violations of state false advertising and deceptive practice laws, and federal food labeling regulations. *Schwebel v. J. M. Smucker Co.* (Los Angeles Superior Court) (filed 10/16/03).

Like similar actions filed in Wisconsin, Missouri (*Henderson v. J.M. Smucker Co.*, No. 03CV221421 (Jackson County Circuit Court) (filed 8/4/03)), and Kansas (*Super v. The J.M Smucker Co.*, No. 03CV05516 (Johnson County District Court) (filed 8/6/03)), the suit apparently claims that tests on “Simply 100%” strawberry jam show that the spread contains less than 30 percent actual strawberries. Further details about the Wisconsin case appear in issue 48 of this Update, September 10, 2003.

The California plaintiff’s attorney has apparently indicated that he expects the company to refund customers at least \$1 if the lawsuit prevails or to

make a charitable contribution. He was quoted as saying, “They have been advertising this for years. Everybody who paid more for this fruit product was gypped, and they shouldn’t have paid more for it.” See *Reuters*, October 17, 2003; *just-food.com*, October 20, 2003.

#### [9] Nestle Puts Forward \$12 Million to Settle Poland Spring Water Claims

News sources indicate that Nestle SA has offered \$12 million to settle class-action claims filed in Illinois state court, alleging that Nestle’s Poland Spring water is not naturally pure spring water from the Maine woods, but water from Maine wells. While admitting no wrongdoing, Nestle is reportedly offering to settle the case to put the litigation, one of 12 pending class-action suits, behind it. Further details about similar litigation filed in Connecticut appear in issue 37 of this Update, June 25, 2003. Under the proposed settlement which must be approved by the court, consumers will be given \$8.05 million in discounts and coupons over the next five years, and Poland Spring will make charitable donations of \$2.75 million. Plaintiffs’ counsel will be paid \$1.35 million, and the named plaintiff will receive \$12,000. See *The Morning Call*, October 21, 2003.

## Other Developments

#### [10] Consumer Group Asks “Sesame Street” to Drop McDonald’s Sponsorship

A group of health advocates led by the nonprofit organization Commercial Alert has charged the producers of “Sesame Street” with allowing the popular children’s television program to “become yet another advertising vehicle for McDonald’s to hook a generation of children on its high calorie junk food.” In an October 13, 2003, [letter](#) to Sesame



Group President and CEO Gary Knell, the coalition asks the executive to remove “sponsorship messages” for McDonald’s that air before or after the program. Co-signers of the letter include Yale University’s Kelly Brownell, authors Greg Critser and Frances Moore Lappe, New York University’s Marion Nestle, and Center for Science in the Public Interest Director Michael Jacobson. Knell was quoted as saying that McDonald’s sponsorship messages do not promote its products and that the company provides “critical funding” for the show’s educational content. *See Ad Age*, October 14, 2003.

## Media Coverage

### [11] Marguerite Higgins, “Food Fight,” *The Washington Times*, October 19, 2003

This article provides an overview of ongoing regulatory and legal approaches to America’s expanding waistline. A products liability attorney with a national law firm is quoted as saying she expects obesity-related litigation against food companies to progress through the courts, citing the number of lawyers and public health advocates who attended a June 2003 conference on crafting such lawsuits. “You don’t get that many plaintiffs’ lawyers and advocates together without some serious plans of going forward and making an impact,” she said. Details about the conference appear in issue 37 of this Update, June 25, 2003.

## Scientific/Technical Items

### Foodborne Illness

#### [12] Bottled Water, Salad Vegetables Implicated in Common Gastrointestinal Illness

Welsh researchers have identified two new risk factors for gastrointestinal campylobacter infection: bottled water and salad vegetables. M.E. Evans, et al., “Hazards of Healthy Living: Bottled Water and Salad Vegetables as Risk Factors for Campylobacter Infection,” *Emerging Infectious Diseases* 9(10): 1219-1225, 2003. Long associated with undercooked chicken, campylobacteriosis is one of the most common foodborne illnesses in the Western world, affecting more than two million people in the United States and more than 50,000 in England and Wales each year. In an effort to detail its causes, a research team in Wales compared data on several dietary, medical and contact factors in subjects who tested positive for the condition and those who did not. They determined that eating chicken, eating food from a fried chicken outlet, eating salad vegetables, drinking bottled water, and direct contact with cows or calves were all independently associated with campylobacter infection. Salad vegetables and bottled water have not previously been implicated in development of the illness. While the researchers speculate that cross-contamination (e.g., use of a contaminated cutting board to prepare foods) most likely accounts for the salad-induced illnesses found, they were unable to provide any specific explanation for the water-induced infections, suggesting further testing to determine the microbial content of such waters.

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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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