

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] Tests Verify Infected Dairy Cow Originated in Canada; Agency Introduces New Safeguards to Protect Against BSE

DNA tests now confirm that the Holstein cow in Washington state infected with bovine spongiform encephalopathy (BCE), or mad cow disease, was imported in 2001 from a dairy farm in Alberta, Canada; government officials are continuing efforts to trace the whereabouts of other cattle imported from the same herd. Since Agriculture Secretary Ann Veneman's December 23, 2003, announcement of a "presumptive positive" case for BSE, more than 30 countries have banned imports of U.S. beef. On December 30, Veneman announced additional food safety measures that include (i) prohibiting from the food chain so-called "downer" animals and particular risk material (e.g., brain, spinal cord and dorsal root ganglia from cattle older than age 30 months), (ii) discontinuing the practice of marking as "inspected and passed" any normal cattle targeted for BSE testing at slaughter until confirmation that such cattle has tested negative for BSE, (iii) prohibiting the air-injection stunning of cattle, (iv) prohibiting mechanically separated meat from the food supply, and (v) implementing a verifiable system of national animal identification. The American Dairy Association, National Dairy Council and U.S. Dairy Export Council have issued a statement reassuring the public that major health organizations worldwide have determined that milk and milk products do

not contain or transmit BSE. *See Dairy Management Inc. Press Release*, December 26, 2003; *USDA Press Release*, December 30, 2003; *Associated Press and Reuters*, January 6, 2003.

Food and Drug Administration (FDA)

[2] EWG Challenges Advisory Regarding Mercury in Seafood

The Environmental Working Group (EWG), a non-profit research and advocacy organization, has filed a [challenge](#) under the Data Quality Act to block a forthcoming health advisory from the FDA on mercury in seafood. The challenged health advisory recommends that women who are pregnant or who might become pregnant not eat shark, swordfish, king mackerel, or tilefish. The advisory also notes that "you can safely eat up to 12 ounces (2 to 3 meals) of other purchased fish and shellfish each week."

According to EWG, the agency's advice regarding mercury in seafood fails "to meet the standards for accuracy and scientific integrity of the Data Quality Act... [which] requires that all influential statements by the federal government to be accurate, reproducible, clear and based on the best peer-reviewed science." "It's just flat out wrong," an EWG spokesperson was quoted as saying. "If women follow this advice, 74 percent of them would be above safe levels of mercury." EWG recommendations for a corrected FDA mercury advisory include (i) conducting a comprehensive sampling program to define the mercury levels in species that represent what most people eat, (ii) providing "consumption advice that can be followed to the letter without appreciable risk



to health,” (iii) providing specific advice on canned tuna based on the amount of various types of the product that can be eaten without negligible risk of exceeding the reference dose for mercury, and (iv) providing specific advice on the amount of seafood young children can safely consume.

FDA has 60 days to respond to the challenge; if EWG decides the agency’s response is inadequate, it could file a lawsuit in federal court to require FDA to produce a scientifically sound advisory. *See BNA Daily Environment Report*, December 23, 2003.

State/Local Initiatives

[3] Florida Task Force on Obesity Epidemic Agrees on Draft Recommendations

A 16-member task force created by Florida Governor Jeb Bush (R) to address the state’s rising rates of overweight and obesity has drafted [21 recommendations](#) to submit to the governor in February 2004. The recommendations stress the collaborative roles of the family, community, health care providers, public health officials, schools, and employers in promoting lifelong physical activity and healthful nutrition. Specific recommendations include (i) encouraging the health insurance industry to offer incentives to those with healthier lifestyles, (ii) retrofitting communities with bicyclist and pedestrian pathways, (iii) requiring school districts to maintain independent nutrition advisory groups, and (iv) encouraging school districts to seek alternative funding for programs previously funded with resources provided by vending machine sales. *See Associated Press*, December 31, 2003.

Litigation

Artificial Growth Hormones

[4] Maine Dairy Changes Milk Carton Labels to Settle Lawsuit

A Maine dairy has reportedly agreed to change its product labels to settle a lawsuit brought by the Monsanto Co., manufacturer of the only major artificial growth hormone, Posilac. Oakhurst Dairy’s revised labels will evidently read: “FDA states: No significant difference in milk from cows treated with artificial growth hormones.” Product packaging will, however, continue to display the statement “Our Farmer’s Pledge: No Artificial Growth Hormones.” Monsanto accused Oakhurst of using product labels and advertising that disparaged the use of artificial growth hormones in dairy cows, alleging that such a message was deceptive and misleading. *See MaineToday.com*, January 4, 2004.

Hepatitis A

[5] Hepatitis Plaintiffs Push for Ability to Sue Chi-Chi’s Restaurant Chain

Attorneys for 58 people who allegedly contracted hepatitis A after eating at a Chi-Chi’s restaurant in Pennsylvania have requested that a bankruptcy court lift a stay preventing them from suing the chain and obtaining access to the company’s \$51 million in liability insurance. Blamed on tainted green onions, the hepatitis A outbreak killed three people and sickened more than 650. The Mexican restaurant chain previously filed for Chapter 11 bankruptcy protection “citing cash flow problems,” which automatically stayed any claims on the company. Chi-Chi’s evidently has “bankruptcy court permission to pay up to \$500,000 to victims for out-of-pocket medical expenses and lost wages,” although some claimants



also seek awards for pain and suffering. The court is expected to rule on the request during January 2004. *See Associated Press*, December 20, 2003.

Other Developments

[6] American Academy of Pediatrics Issues Policy on Soft Drinks in Schools

“Overweight is now the most common medical condition of childhood, with the prevalence having doubled over the past 20 years,” according to a new American Academy of Pediatrics [policy statement](#) that attributes part of the nation’s childhood obesity epidemic to the presence of sweetened drinks – “fruitades, fruit drinks, soft drinks, etc” – in schools. “Soft Drinks in Schools,” *Pediatrics* 113(1): 152-154, 2004. The policy provides information on nutritional pitfalls tied to childhood consumption of sweetened drinks and draws an association between the increased consumption of soft drinks and the decreased consumption of milk, a principle source of calcium. It calls on pediatricians to “emphasize the notion that every school in every district shares a responsibility for the nutritional health of its student body” in recommending (i) creation of school nutrition advisory councils, (ii) public discussion before school districts enter into pouring rights contracts with soft drink companies, (iii) modification of existing pouring rights contracts to prevent overconsumption of soft drinks by students, and (iv) policies forbidding consumption or advertising of sweetened drinks in classrooms. The National Soft Drink Association reportedly responded to the policy by calling it “misguided” and saying “Soft drinks can be a part of a balanced lifestyle and are a nice treat.” *See Associated Press*, January 5, 2004.

[7] Frozen-Dessert Chain Accused of False Advertising

The New York City Department of Consumer Affairs has reportedly cited the CremaLita chain of frozen-dessert stores for falsely advertising that its products are low-calorie, fat-free and cholesterol-free. According to department officials, CremaLita advertises that its standard small serving constitutes 4 fluid ounces with 60 calories while laboratory tests have indicated the 4-ounce serving contains 154 to 181 calories. Department officials also noted that the small serving sold at the company’s eight outlets in fact constitutes 6 fluid ounces with 235 to 271 calories. If the company fails to agree to the advertising changes the consumer affairs department seeks and to pay a fine, it will reportedly face a lawsuit and possible fines of up to \$500 per count for each of 61 charges. *See The New York Times*, December 31, 2003.

Media Coverage

[8] Eric Schlosser, “The Cow Jumped Over the U.S.D.A.,” *The New York Times*, January 2, 2004

In this editorial, the author of *Fast Food Nation* cites the number of former meat industry officials now employed by the U.S. Department of Agriculture (USDA) as “a fine symbol of all that is wrong with America’s food safety system. Right now you’d have a hard time finding a federal agency more completely dominated by the industry it was created to regulate.” In reviewing USDA’s new safeguards against bovine spongiform encephalopathy, he claims the new food safety measures seem to have been “largely motivated by the desire to have foreign countries lift restrictions on American beef imports” and criticizes the department’s decision not to implement a large-scale program to test American cattle for the disease. He advocates mandatory recall



powers for the federal government with respect to meat and creation of an independent food safety agency “whose sole responsibility is to protect the public health.”

[9] Kelly Jane Torrance, “Food Fight: Anti-fat Police Are Ready to Bust Heads,” *Reason Online*, December 23, 2003

In this account of the American Public Health Association’s annual meeting held November 15-19, 2003, in San Francisco, a [Center for Consumer Freedom](#) analyst describes the event as “ground zero for planning Public Health’s ‘next big thing.’” Torrance reports that several speakers at the meeting focused on the role of individual responsibility in making food choices, quoting a Pesticide Action Network representative as saying “the idea of personal responsibility” is only “a cultural construct.” Edward Bolen, a staff attorney at California’s [Public Health Institute](#), evidently likened potential restrictions on food to those on tobacco, calling for price controls, minimum-age requirements for purchase of certain foods, zoning rules for fast-food restaurants and convenience stores, and outright bans on certain food products. Torrance concludes by saying “People laughed a few years ago when *The Onion* ran a spoof titled ‘Hershey’s Ordered to Pay Obese Americans \$135 Billion.’ It was obviously silly to think that society would deem chocoholics blameless for their own overindulgence. But after spending a few days listening to the people staffing our nation’s Public Health infrastructure, I’m not laughing anymore.”

Scientific/Technical Items

Obesity

[10] New Study Claimed to Bolster Evidence That Fast Food Contributes to Obesity in Youth

Nearly one-third of all children and adolescents living in the United States eat fast food every day, resulting in six extra pounds during a given year, according to a new study in the journal *Pediatrics*. S.A. Bowman, et al., “Effects of Fast-Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey,” *Pediatrics* 113(1): 112-118, 2004. Using nationally representative surveys from 1994 to 1996 and 1998, researchers examined data from 6,212 children and adolescents ages 4 to 19, analyzing associations between fast-food consumption and measures of dietary quality. They found that on a typical day, 30.3 percent of their subjects reported eating fast food. Further, children who ate fast food were also more likely to consume fats, carbohydrates, sugars, and sweetened beverages and less likely to consume milk, fruits and starchy vegetables. Data show the fast-food eaters consumed an extra 187 calories per day, extra calories estimated to equate to about six pounds annually.

In an editorial accompanying this study, Yale University’s Kelly Brownell suggests the study bolsters evidence that fast food contributes to increased consumption and obesity in children. Brownell claims the results refute a July 2003 report from the U.S. National Chamber of Commerce that asserted “fast food restaurants are not a chief culprit in the fattening of America.” He notes that fast-food companies are involved in chambers of commerce across the country, highlighting Cola-Cola and PepsiCo executives who serve on the board of directors of the National Chamber of Commerce.



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Food & Beverage Litigation Update is distributed by Mark Cowing 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 mcowing@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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