

Food & Beverage

LITIGATION UPDATE

Issue 86 • June 30, 2004

Table of Contents

Legislation, Regulations and Standards

- [1] Nutrition Disclosure, Increased FTC Authority over Marketing Aimed at Kids Included in Harkin's Wellness Initiative; House and Senate Pass Child Nutrition Legislation1
- [2] House Proposal Would Create Task Force to Promote Agricultural Biotechnology Abroad1
- [3] FDA Seeks Comments on CFSAN Program Priorities for 20052
- [4] FSA Launches Public Consultation on Allergenic Ingredient Disclosure2

Litigation

- [5] Southwest Missouri Jury Rules in Favor of Butter Flavoring Manufacturers2

Other Developments

- [6] "Tobacco and Obesity Epidemics: Not So Different After All?" Mickey Chopra and Ian Darnton-Hill, *British Medical Journal*, June 26, 20042
- [7] PHAI to Host Second Annual Conference on Legal Approaches to the Obesity Epidemic3
- [8] Investors Should Consider Economic Effect of Obesity Claims on Insurers and Reinsurers, Says European Investment Bank3

Scientific/Technical Items

- [9] Thresholds for Liver Damage Differ for Men and Women4
- [10] Hunger Hormone Might Explain Obesity4

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Nutrition Disclosure, Increased FTC Authority over Marketing Aimed at Kids Included in Harkin's Wellness Initiative; House and Senate Pass Child Nutrition Legislation

Comprehensive legislation ([S. 2558](#)) sponsored by Senator Tom Harkin (D-Iowa) strives to provide “all sectors—child care centers, schools, workplaces, and communities—with the tools they need to reach the goal of making America a healthier place.” Title III of the voluminous Healthy Lifestyles and Prevention America Act (HeLP America Act) would (i) require chain restaurants with more than 20 locations to provide nutritional information on menus and menu boards; (ii) require vending machine operators to post nutritional information on their machines; (iii) authorize the Federal Trade Commission (FTC) to restrict the marketing or advertising of foods and beverages to youth younger than age 18 if FTC “determines that there is evidence that consumption of certain foods and beverages is detrimental to the health of children or it determines advertising to children to be unfair or deceptive”; and (iv) authorize the secretary of agriculture to prohibit food and beverage advertising in schools participating in the federal lunch or

breakfast programs if the secretary determines that consumption of the advertised products “has a detrimental effect on the diets or health of children.”

Other provisions of Harkin’s proposal expand the fruit and vegetable program in schools, authorize the agriculture secretary to regulate the sale of snack foods in schools, provide tax incentives to employers that offer wellness programs, and augment federal funding for obesity research.

Meanwhile, both the House and Senate last week passed the [Child Nutrition and WIC Reauthorization Act of 2004](#). Under provisions authored by Senator Harkin, schools participating in the lunch or breakfast programs must establish “wellness policies” that include guidelines for vending machine offerings and targets for physical activity.

[2] House Proposal Would Create Task Force to Promote Agricultural Biotechnology Abroad

A House proposal ([H.R. 4651](#)) sponsored by Representative Nick Smith (R-Mich.) would create a federal interagency task force “to develop and disseminate accurate written scientific information outside the United States on the benefits, safety, and potential uses of agricultural biotechnology.” Members of the proposed task force would include the secretary of state, agriculture secretary, commerce secretary, U.S. trade representative, the administrator of the U.S. Agency for International Development, and the director of the National Science Foundation. The group’s mandate would include periodic reports to Congress on the success of their efforts.



Food and Drug Administration (FDA)

[3] Agency Seeks Comments on CFSAN Program Priorities for 2005

FDA is seeking [public comments](#) on new program areas or activities that should be considered high priorities for the Center for Food Safety and Applied Nutrition (CFSAN) in 2005; comments are due by August 9, 2004. The format of the 2005 CFSAN workplan is expected to be similar to that of [2004](#), with sections titled “Assuring Food Safety and Security,” “Improving Nutrition and Dietary Supplement Safety,” “Assuring Food and Cosmetic Safety,” and “Assuring Food Safety: Crosscutting Areas.” See *Federal Register*; June 24, 2004.

United Kingdom (UK)

[4] FSA Launches Public Consultation on Allergenic Ingredient Disclosure

Britain’s Food Standards Agency (FSA) has launched a [public consultation](#) on draft labeling regulations requiring the disclosure of specified allergens in certain food products. Under the new rules expected to take effect in November 2004, the labels of pre-packed foods and alcoholic beverages will have to indicate the presence of gluten (in cereals only), crustaceans, eggs, fish, peanuts, nuts, soybeans, milk, celery, mustard, sesame, and sulfur dioxide at levels above 10 mg/kg or liter. The regulations will apply to England only; separate allergen labeling rules are being prepared in Scotland, Wales and Northern Ireland. Comments are due by September 13. See *FSA News Release*, June 21, 2004.

Litigation

[5] Southwest Missouri Jury Rules in Favor of Butter Flavoring Manufacturers

A jury in Jasper County, Missouri, decided Monday that New York-based International Flavors & Fragrance and its subsidiary Bush Boake Allen Inc., were not responsible for the lung disease of three former workers and one current employee of the Gilster-Mary Lee popcorn plant in Jasper. Plaintiffs alleged that (i) inhalation of the butter flavoring used to manufacture microwave popcorn resulted in bronchiolitis obliterans, an irreversible lung disease, and (ii) the manufacturers failed to warn workers about the purported dangers associated with the flavoring or provide adequate safety instructions. The jury’s decision is in contrast to that of another Jasper County jury who earlier this year awarded \$20 million to a former Gilster-Mary Lee employee and his wife for similar claims. The National Institute of Occupational Safety and Health has linked inhalation of vapors emitted by diacetyl, a chemical constituent of the butter flavoring, to the development of bronchiolitis obliterans. See *Associated Press* and *The Joplin Globe*, June 29, 2004.

Other Developments

[6] “Tobacco and Obesity Epidemics: Not So Different After All?” Mickey Chopra and Ian Darnton-Hill, *British Medical Journal*, June 26, 2004

Fighting obesity by focusing on the need for individuals to change their behavior “is generally ineffective,” according to the authors of this article. Therefore, they argue, global control strategies “similar to those used against the tobacco industry”



are “now needed to tackle the rising prevalence of obesity.” Both authors work in the area of public health nutrition. The summary points they offer for their argument are as follows: (1) “Large multinational companies control much of what we eat”; (2) “the convenience and availability of energy dense foods is contributing to the obesity epidemic”; and (3) “the food industry is resisting public health attempts to change current practices.”

Possible international standards for food companies “might cover issues such as marketing restrictions for unhealthy food products, restrictions on the advertising and availability of unhealthy products in schools, standard packaging and labeling of food products, or potential price or tax measures to reduce the demand for unhealthy products,” the authors say.

[7] PHAI to Host Second Annual Conference on Legal Approaches to the Obesity Epidemic

The Public Health Advocacy Institute (PHAI) will host its [second annual conference](#) on legal approaches to the obesity issue on September 17-19, 2004, at Northeastern University School of Law in Boston. Preliminary information about the event indicates that specific sessions will target legislative, regulatory and litigation strategies that could effect changes in the “food environment”; confirmed speakers include Yale University’s Kelly Brownell, Ph.D., Harvard University’s David Ludwig, M.D., and Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson, Ph.D.

PHAI was established in 2003 by a core grant from the Washington, D.C.-based Bauman Foundation, which has been providing significant grants since 1994 to such entities as the Institute for Agriculture and Trade Policy, CSPI and the Natural

Resources Defense Council. Its board of directors includes long-time antitobacco attorney Richard Daynard who created and chaired the Tobacco Products Liability Project and claims to be responsible for “successful antismoking litigation and legislation.” Other institute projects include developing strategies to oppose “protective orders and other obstacles to disclosure”; developing document archives about health hazards for analysis by public health professionals and use by attorneys and legislators; and “identifying and intervening in crucial court cases, legislative deliberations and regulatory proceedings on behalf of public health needs.”

[8] Investors Should Consider Economic Effect of Obesity Claims on Insurers and Reinsurers, Says European Investment Bank

“Litigation is in its infancy in the U.S. and may remain so if personal responsibility arguments hold, but if contributory negligence or misrepresentation is found in the courts, this could change, and parallels with tobacco litigation could emerge,” according to a report authored by an insurance research team at the European investment bank Dresdner Kleinwort Wasserstein. The speculation about the potential for liability claims against food and restaurant companies and their insurers and reinsurers echoes that found in reports issued earlier in 2004 by the Insurance Information Institute, UnumProvident and the Swiss Reinsurance Co. *See* issues [66](#), [69](#) and [75](#) of this Update respectively. Short-term disability claims attributed to obesity have reportedly increased tenfold over the past decade, with obesity-related disabilities costing U.S. employers an average of some \$8,720 per employee annually. The Dresdner report concludes that “it’s too early to forecast how obesity may develop for insurers, but we don’t expect the issue to go away any time soon,



despite the 'common-sense' arguments, and given the potential enormity of the issue, it is one to watch."

See *Lloyd's List*, June 24, 2004; *Insurance Day*, June 25, 2004.

Scientific/Technical Items

Alcohol

[9] **Thresholds for Liver Damage Differ for Men and Women**

A study published in the June issue of *Alcoholism: Clinical & Experimental Research* (S. Stranges, et al.) reports that men can consume three drinks per day before their livers begin to show signs of damage, while the apparent threshold for women is only two drinks daily. The study also found that potential liver damage varied not only by gender, but also depended on how and when people drink. Levels of an enzyme called gamma-glutamyltransferase (GGT), which is released in large quantities by damaged liver cells, were found to be the highest in men who drink every day. Among women, levels of GGT were highest among weekend drinkers. Women who drank on an empty stomach had higher levels of GGT in their blood than women who drank with meals or snacks. Among men, food apparently made no apparent difference in enzyme levels. The authors of the study could only speculate as to the reasons for the gender gap in liver damage markers. According to the study's lead author, metabolic

differences between genders might play a role, as might the influence of female reproductive estrogen levels on liver function. See *Los Angeles Times*, June 28, 2004.

Obesity

[10] **Hunger Hormone Might Explain Obesity**

New research claims to have found a reason why some individuals find it so difficult not to eat and why some obese people always claim to be hungry. Published in the June 28, 2004, issue of the *Proceedings of the National Academy of Sciences*, the study found that levels of the hormone ghrelin, which makes a person feel hungry, as well as levels of the hormones leptine and adiponectin, vary dramatically in thin and overweight people. In lean individuals, researchers found that levels of ghrelin vary throughout the day and peak at night, whereas in overweight people, the hormone stays constant throughout the day, without a noticeable peak. The research team was unable to determine if the differences in hormone levels in the lean and obese study participants were a result of obesity or the cause of obesity, but the lead researcher opined that "changing someone's hormone profile could impact weight loss or the ability to keep weight off." Similarly, a New York bariatric surgeon said the study "shows that obesity is a genuine physiological brain-mediated thing. It is good to show evidence that some of the causes of obesity are intrinsic in people." See *Health Day News*, June 28, 2004.



Food & Beverage

LITIGATION UPDATE

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.

Shook,
Hardy &
Bacon^{LLP}

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

