

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Trade Commission (FTC)

##### [1] **FTC Encourages FDA to Allow Health Claims on More Foods**

“Revising its regulations to allow food marketers to provide greater and more accurate health-related information will assist consumers in selecting from a wider range of foods as they attempt to construct healthful diets,” concludes recent [comments](#) that FTC staff submitted in response to a Food and Drug Administration (FDA) request for input on expanding the use of health claims on certain foods. FDA sought information on permitting “unqualified health claims on certain foods that do not contain 10 percent or more of certain required nutrients, the proposed amendments to provide criteria that FDA would consider in determining whether to grant an exemption from disqualifying nutrient levels related to unqualified health claims of certain nutrients, and the proposed amendments to retain the word ‘may’ or ‘might’ in unqualified health claims.” 69 *Federal Register* 24541 5/4/04.

FTC recommendations include: (i) allowing foods that contribute significantly to healthy diets, but do not meet the current requirements to include attendant health claims, to make such claims if the foods meet a nutrient density standard, (ii) evaluating

health claims on a case-by-case basis for foods that do not meet either the minimum nutrient contribution requirement or a nutrient density standard if such claims would help consumers make healthier food choices, (iii) conducting research to determine consumers’ understanding of health claims, and (iv) permitting the use of non-misleading synonyms in health claims as long as they meet the same requirements for using the relevant defined terms. *See FTC Press Release*, July 30, 2004.

### France

##### [2] **New French Law Takes Aim at Vending Machines, Snack Foods, Flavored Malt Beverages**

Claiming that 16 to 19 percent of French youth are obese, France’s Parliament last Friday passed a comprehensive public health law that prohibits vending machines in middle and secondary schools as of September 2005. The new law will also reportedly require snack food and soft drink manufacturers to either (i) include health warnings in television advertisements for their products or (ii) pay a tax equivalent to 1.5 percent of their advertising budgets. The annual \$15.7 million projected income from the taxes is slated to fund a national health institute charged with promoting healthy eating. Other provisions of the law include a yet-to-be-determined “dissuasive” tax on flavored malt beverages. *See Associated Press*, July 30, 2004.



## State/Local Initiatives

### [3] Illinois Governor Enacts Obesity Litigation Legislation

Late last week, Governor Rod Blagojevich (D) signed the [Illinois Commonsense Consumption Act](#). The measure prohibits lawsuits for damages against sellers of food for weight-related illnesses, but permits civil actions if food is adulterated or mislabeled. See *Chicago Tribune*, July 31, 2004.

Obesity litigation reform has now been enacted in 12 states – Washington, Idaho, Utah, Arizona, Colorado, South Dakota, Missouri, Tennessee, Louisiana, Georgia, Florida, and Illinois – and is pending in six others. The Personal Responsibility in Food Consumption Act ([H.R. 339](#)) has passed the U.S. House of Representatives, while the Commonsense Consumption Act ([S. 1428](#)) is pending in the U.S. Senate.

## Litigation

### Advertising & Marketing

#### [4] Confidential Settlement Resolves Challenge to Potato Chip Taste-Test Ads

Two competing potato-chip makers announced Monday that they have settled a lawsuit in which a regional plaintiff accused a national defendant of advertising a taste test in a way that was false and misleading. The settlement's terms are confidential.

At issue were Frito-Lay's claims that "Chicago prefers the taste of Lay's over Jays." Chicago-based Jays Foods Inc. claimed that Frito-Lay conducted its

taste tests at suburban shopping malls outside the city limits, included the opinions of tasters who did not live in the Chicago area, and labeled the test chips differently (Lay's as "classic" and Jays as "unflavored"). Frito-Lay maintained that its test results were "scientifically correct."

Last week, a federal judge in Chicago issued a temporary restraining order requiring Frito-Lay to remove a downtown billboard and halt radio advertising. The settlement preceded an injunction hearing, which was scheduled for August 5, 2004.

The settlement has no effect on Frito-Lay's similar comparative advertising campaigns involving regional brands of potato chips in Baltimore, Boston, New York, Minneapolis/St. Paul, and Philadelphia. No lawsuits are reported in the other jurisdictions. See *The Wall Street Journal*, July 29 and August 2, 2004; *Chicago Tribune*, August 3, 2004.

## Other Developments

#### [5] FTC to Co-Host Class Action Workshop in September

The Federal Trade Commission (FTC) and the *Georgetown Journal of Legal Ethics* are co-hosting a workshop titled "[Protecting Consumer Interests in Class Actions](#)" on September 13-14, 2004, in Washington, D.C. Topics at the two-day event will include (i) coupon compensation and other non-pecuniary redress, (ii) ways of ensuring that settlements are "fair, reasonable and adequate," (iii) clear notices, claims administration and market makers, (iv) attorney's fees, (v) class action trends, and (vi) class actions as an alternative to regulation.



#### [6] **USDA Conference to Target Obesity Prevention**

The social, economic and behavioral causes of “poor dietary choices” will be the focus of discussions during the U.S. Department of Agriculture’s [National Obesity Prevention Conference](#) scheduled for October 25-27, 2004, in Bethesda, Maryland. Preliminary information about the agenda indicates that specific topics at the conference will include children’s diets, exercise and energy balance, economic incentives to encourage healthier eating, and the role of the food industry.

#### [7] **FAO/WHO Issue *Listeria* Risk Assessment**

The Food and Agriculture Organization of the United Nations and the World Health Organization have issued a [Risk Assessment of \*Listeria Monocytogenes\* in Ready-to-Eat Foods](#) under a mandate from the Codex Alimentarius Commission’s Committee on Food Hygiene. Among other things, the risk assessment estimates (i) the risk of serious illness from *Listeria monocytogenes* for consumers in different susceptible populations (e.g., the elderly, pregnant women) and (ii) the risk of serious illness from *L. monocytogenes* in foods that support its growth and foods that do not support its growth under specific storage and shelf-life conditions.

## Scientific/Technical Items

### Obesity

#### [8] **Many Pediatricians Fail to Identify Childhood Obesity**

Pediatricians routinely fail to identify a child as overweight or obese, according to a study involving children seen at the Children’s Hospital of Pittsburgh over a three-month period in 2001 and

2002. S. O’Brien, et al., “Identification, Evaluation, and Management of Obesity in an Academic Primary Care Center,” *Pediatrics* 114: 154-159, August 2004. For children who met the study’s definition of obesity, providers documented obesity in only one-half of the reviewed visits. The majority of charts (69%) contained an adequate dietary history, but only 15 percent included a description of the child’s activity level or television viewing habits. Only 7 percent of pediatricians ordered laboratory tests, which are recommended by the American Academy of Pediatrics, to screen for weight-related problems. The study’s authors observed that “only a small number of providers (5%) recommended a decrease in television viewing to their obese patients, despite evidence linking television viewing and pediatric obesity. This finding is of concern because obesity is known to be a multi-factorial disease that responds only to significant changes in both dietary and activity behaviors.”

## Alcohol

#### [9] **Government Study Reports Co-occurrence of Alcohol, Drug, Mood, and Anxiety Disorders**

Results from the National Institutes of Health/National Institute on Alcohol Abuse and Alcoholism’s 2001-2002 *National Epidemiologic Survey on Alcohol and Related Conditions* indicate that nearly one-tenth (9.4%) of American adults — 19 million people — meet the clinical criteria for a substance use disorder, either alcohol- or drug use-related. (Reported in the current issue of *Archives of General Psychiatry* 61: August 2004). The study reported that 19 million adults meet the diagnostic criteria for independent mood disorders such as depression or manic disorder, while 23 million



meet criteria for independent anxiety disorders. The survey results show substantial co-morbidity between substance use disorders and mood/anxiety disorders in the general U.S. population. Nearly 20 percent of people with a current substance use disorder, according to the survey, experience a mood or anxiety disorder during the same time period. Lead author Bridget Grant noted, however, that, "this study does not resolve questions about causal mechanisms that may underlie relationships between *DSM-IV* substance use and mood and anxiety disorders." The survey's next phase, to be conducted in 2004-2005, will be directed toward examination of causal connections between substance abuse and mood/anxiety disorders.

## Transmissible Spongiform Encephalopathies

### [10] Aberrant Protein Linked to Mad Cow Disease

Findings reported in the most recent issue of *Science* magazine indicate the successful transmission of an infectious disease in experimental animals through the use of aberrant or misfolded

proteins called prions. G. Legname, et al., "Synthetic Mammalian Prions," *Science*: 305: 673-676, July 30, 2004. The research supports the hypothesis that a given kind of protein, acting alone without the help of DNA or RNA, can be a cause of certain kinds of infectious disease. Classical infectious disease theory teaches that only bacteria and viruses containing genetic information can spread infectious diseases. The concept that a misfolded prion could trigger infectious disease has been gaining acceptance within the scientific community but has, to date, never been conclusively proven. In this study, researchers created an artificial prion and injected it into mouse brains and produced disease. The tissue from the diseased mice was then injected into other mice which subsequently developed the same disease. The study's authors predict that the protein-only theory of infectious disease transmission could lead to more effective ways to diagnose and treat the family of deadly diseases known as "transmissible spongiform encephalopathies," including mad cow disease, which many believe are caused by aberrant or misfolded proteins.



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## LITIGATION UPDATE

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