

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] Nebraska State Lawmaker Introduces Nutrition in Schools Act .....1

#### Litigation

- [2] Plaintiffs' Group Seeks Prop. 65 Enforcement Action over Cadmium Content of Heinz Ketchup .....1
- [3] American Meat Institute Challenges Cattle Ban .....2

#### Legal Literature

- [4] Law Review Author Compares Tobacco Cases to Potential Fast-Food Litigation .....2

#### Other Developments

- [5] CSPI Issues Guidelines for Responsible Marketing to Children; Kraft Announces Changes to Marketing Policies .....2
- [6] Dutch Health Insurer Offers Reimbursement for Cost of Cholesterol-Lowering Foods .....3

#### Media Coverage

- [7] "Facing Biotech Foods Without the Fear Factor," Jane Brody, *The New York Times*, January 11, 2005 .....3

#### Scientific/Technical Items

- [8] Excess Weight, Physical Inactivity Linked to Premature Mortality in Women .....4
- [9] Olive Oil Could Help Prevent Breast Cancer .....4

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### State/Local Initiatives

##### [1] Nebraska State Lawmaker Introduces Nutrition in Schools Act

Senator Arnie Stuthman (R-Platte Center) introduced a [bill](#) on Monday under which only “nutritious food and nutritious beverages” could be sold in school vending machines, school stores and through student organization fundraisers. The proposal would limit drinks to (i) water, (ii) plain or flavored low-fat or non-fat cow’s milk, (iii) low-fat or non-fat soy milk, (iv) 100 percent fruit juice with no added sweeteners, and (v) 100 percent vegetable juice in serving sizes no larger than 12 ounces. Food offerings would be limited to those deriving no more than (i) 30 percent of total calories from fat unless the item consists solely of nuts or seeds and (ii) 10 percent of total calories from saturated fat. No more than 35 percent of a food item’s total weight could be composed of sugar except for unsweetened fruits or vegetables.

### Litigation Warnings

##### [2] Plaintiffs’ Group Seeks Prop. 65 Enforcement Action over Cadmium Content of Heinz Ketchup

Environmental World Watch, Inc., (EEW) a Los Angeles-based organization often characterized as a “law-firm front group,” has served notice of its intent to sue H.J. Heinz Co. under California’s antitoxics law for failure to warn consumers of potentially high levels of cadmium in the company’s ketchup. Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, requires product manufacturers to warn the public about exposure to chemicals “known to the state to cause cancer or reproductive toxicity” and provides 60 days for the California attorney general to decide whether to join or take over the lawsuit. The law does not apply to low levels of chemicals that occur naturally in food. A lawyer associated with EEW was quoted as saying that a similar Prop. 65 notice targeting the Campbell Soup Company’s V8 100% Vegetable Juice will soon be forthcoming. *See Inside Cal/EPA*, January 7, 2005.



## Bovine Spongiform Encephalopathy (BSE)

### [3] American Meat Institute Challenges Ban on Importing Older Cattle

In a December 30, 2004, [complaint](#) filed in the U.S. District Court for the District of Columbia, the American Meat Institute (AMI) asserts that the agriculture department's May 2003 Initial Border Closing Order that included a prohibition on the "importation from Canada of live cattle 30 months of age or older for slaughter and processing at United States plants" is "arbitrary and capricious" and therefore violates the Administrative Procedure Act. AMI seeks an injunction against enforcement of the 2003 ban on importation of older cattle, alleging that the Initial Border Closing Order is improper because "the agency failed to explain its irrational distinction between importation of live cattle and importation of processed beef" and "failed to give proper consideration to the economic consequences" that the order would cause the U.S. beef industry.

Last week, USDA issued a [final rule](#) that reverses part of the 2003 order by establishing conditions under which the United States will allow imports of live cattle younger than age 30 months from countries "with effective BSE prevention and detection measures." The rule permits Canada to resume particular cattle exports on March 7, 2005.

## Legal Literature

### [4] "From Butts to Big Macs – Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?" John Zefutic, Jr. (Comment), 34 *Seton Hall Law Review* 1383 (2004)

This law student comment compares potential litigation against fast-food companies with claims against the tobacco industry, opining that the common thread between the cases is that plaintiffs' attorneys will use the litigation as a way to "tame, if not destroy" the industry and to "garner significant monetary awards." Obstacles to the success of fast-food lawsuits, he says, include "no scientific evidence that fast food itself is addictive," "a host of factors that contribute to obesity," and little evidence of fraud by the companies. He asserts that such litigation might be successful if plaintiffs' attorneys uncover evidence of fraud or if state attorney generals file recoupment actions.

## Other Developments

### [5] CSPI Issues Guidelines for Responsible Marketing to Children; Kraft Announces Changes to Marketing Policies

Claiming that advertising for high-calorie or low-nutrition food and drink undermines parents' attempts to control their kids' diets, the Center for Science in the Public Interest (CSPI) last week called on food manufacturers, the media and others to curb certain marketing techniques aimed at children. "Parents are outgunned by food companies and the toys, cartoon characters, celebrities, and psychological munition that food marketers



have at their disposal,” CSPI Nutrition Policy Director Margo Wootan was quoted as saying, “Parents try to get their kids to eat bananas, broccoli and whole wheat bread, but those messages get drowned out by marketing for French fries, cookies and candy. What we’re really asking is that marketers act responsibly and not urge kids to eat foods that could harm their health.”

CSPI’s [“Guidelines for Responsible Food Marketing to Children”](#) urge companies not to target kids with ads for “low-nutrition” soft drinks or sports drinks. The companies could, however, market drinks containing 50 percent fruit juice with no added caloric sweeteners, unsweetened water, and low-fat or non-fat milk products. Among other things, the guidelines recommend that foods marketed to children contain less than 30 percent of total calories from fat, less than 25 percent of calories from sugar and no more than 150 milligrams of sodium per serving of snack items. Other CSPI recommendations: (i) no television advertising for low-nutrition foods on programs where more than 25 percent of the audience is children; (ii) no product placements in media aimed at kids, e.g., movies, video games, Web sites; (iii) no licensing agreements or cross-promotions with movies or TV shows aimed at kids; and (iv) no school-based sales or marketing of junk foods. See *CSPI News Release*, January 5, 2005.

Meanwhile, Kraft announced today that the company will begin changing the mix of products it advertises in television, radio and print media viewed mostly by kids ages 6 to 11. Such advertising in 2005 will focus on products that qualify for the company’s new Sensible Solutions labeling program in which “flags” designate foods that meet “better-

for-you” criteria the company has established for each category of products. See *Kraft Press Release*, January 12, 2005.

#### [6] Dutch Health Insurer Offers Reimbursement for Cost of Cholesterol-Lowering Foods

In an effort to reduce the company’s expenditures for cholesterol-lowering drugs, Dutch health insurer VGZ has announced plans to reimburse policyholders up to 40 euros annually (\$50.41) to subsidize the purchase of Unilever’s Becel pro-active margarine and other dairy products. Studies have reportedly shown that the plant-derived sterols contained in the products reduce LDL cholesterol by 10 percent. According to a press source, VGZ’s decision will likely set a precedent for other health insurers to reimburse policyholders for the costs of functional foods. See *Reuters and NutraIngredients.com*, January 5, 2005.

## Media Coverage

#### [7] “Facing Biotech Foods Without the Fear Factor,” Jane Brody, *The New York Times*, January 11, 2005

“Nearly every food we eat has been genetically modified, through centuries of crosses, both within and between species, and for most of the last century through mutations induced by bombarding seeds with chemicals or radiation. In each of these techniques, dozens, hundreds, even thousands of genes of unknown function are transferred or modified to produce new food varieties,” says Jane Brody in this lament of many Americans’ misconceptions about genetically modified foods. Brody claims that gene splicing,



a technique in which only a small number of genes are transferred to another organism, is a safer method of genetic modification than crossbreeding or induced mutations and turns to the co-author of [The Frankenfood Myth](#) to corroborate her arguments. “There hasn’t been a single untoward event documented, not a single ecosystem disrupted or person made ill from these [gene-spliced] foods,” Henry Miller is quoted as saying. “That is not something that can be said about conventional foods, where imprecise methods of genetic modification actually have caused illnesses and deaths.” According to Brody, “without better public understanding and changes in the many arcane rules now thwarting development of new gene-spliced products, we will miss out on major improvements that can result in more healthful foods, a cleaner environment and a worldwide ability to produce more food on less land – using less water, fewer chemicals and less money.”

## Scientific/Technical Items

### Obesity

#### [8] Excess Weight, Physical Inactivity Linked to Premature Mortality in Women

Overweight and obese women run a higher risk of death from all causes than their leaner counterparts. (F. Hu, et al., “Adiposity as Compared with Physical Activity in Predicting Mortality Among

Women,” *New England Journal of Medicine* 351: 2694-703, 2004). The study followed 116,000 women in the Nurses’ Health Study for 24 years and found that mortality rates from all causes increased as body-mass-index values increased; adiposity predicted a higher risk of death regardless of the level of physical activity reported. The authors suggest that excess weight and physical inactivity combined could account for as much as 31 percent of premature mortality in women, with 59 percent of deaths attributable to cardiovascular disease and 21 percent to cancer among nonsmoking women.

### Breast Cancer

#### [9] Diets Rich in Olive Oil Could Help Protect Against Development of Breast Cancer

Recent research at Northwestern University suggests that a key ingredient of olive oil, oleic acid, might reduce the risk of developing breast cancer. Published in last week’s *Annals of Oncology*, the study examined the effect of oleic acid on breast cancer cells and found that it blocked the activity of a cancer-causing oncogene called HER-2/neu. The oncogene is found in about 30 percent of breast cancer patients. Javier Menendez and colleagues reported that oleic acid not only suppressed the action of the oncogene, but also improved the effectiveness of the breast cancer drug Herceptin. See *Reuters*, January 9, 2005.



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## LITIGATION UPDATE

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Mark Cowing and Mary Boyd in the Kansas City office of SHB.  
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