

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

National Toxicology Program (NTP)

[1] NTP Includes Food Chemical in Carcinogens Report

The chemical 2-amino-3-methylimidazo[4,5-f]quinoline (commonly known as IQ) is one of 12 substances or groups of substances classified as “reasonably anticipated to be a human carcinogen” in NTP’s recently issued *10th Report on Carcinogens*. According to the report, IQ is one of many heterocyclic amines (HCAs) found primarily in meats, fish and eggs cooked at high temperatures. Estimated daily exposure of U.S. residents to IQ and other HCAs in food ranges from 100 ng. to 10 µg. depending on the food, cooking temperature and manner of preparation. Occupational exposure to IQ can occur if employees prepare or serve broiled or fried foods. Substances “reasonably anticipated to be a human carcinogen” are listed on the basis of “either limited evidence or carcinogenicity from human studies and/or sufficient evidence of carcinogenicity from experimental animal studies.” The report is available at <http://ntp-server.niehs.nih.gov/NewHomeRoc/AboutRoC.html>.

U.S. Environmental Protection Agency (EPA)

[2] Data Quality Act Violations Alleged in Atrazine Petition

The Center for Regulatory Effectiveness, the Kansas Corn Growers Association and the Triazine

Network have filed a petition with EPA under the Data Quality Act claiming that the agency’s environmental risk assessment for the herbicide atrazine relied on unvalidated scientific tests. According to the petition, EPA violated the Data Quality Act’s objectivity, reproducibility and utility standards by not using “validated tests to assess both human health and environmental endocrine effects.” The petition calls for EPA to correct the risk assessment “to state that there is no reliable evidence that atrazine causes ‘endocrine effects’ in the environment.” The risk assessment purportedly states that atrazine, which is applied at a rate of 75 million pounds annually, causes endocrine effects in various organisms including frogs. A news source has said that the petition is one of the first to be filed under the Data Quality Act, which reportedly allows administrative challenges to data used in regulatory decisions and permits appeals if the challenge is denied. See BNA *Daily Environment Report*, December 5, 2002; and <http://www.thecre.com> to obtain a copy of the petition.

Codex Alimentarius Commission

[3] Comments Sought on FAO/WHO Evaluation

The U.S. Codex office is requesting comments on the *Report of the Joint FAO/WHO Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work*. This report “contains 42 major recommendations, many of which could have a significant impact on the structures and procedures of Codex.” Some recommendations would apparently “have major resource implications for U.S. participa-



tion in Codex.” Comments should be submitted by January 3, 2002, to uscodex@fsis.usda.gov. The U.S. Code of Federal Regulations requires the Food and Drug Administration to review all food standards adopted by the commission and accept or reject them for application in the United States. See www.fsis.usda.gov/OA/codex/new.htm.

Mexico

[4] Chamber of Deputies Reaffirms Soft Drink Tax

Mexico’s 500-member Chamber of Deputies has reportedly voted to keep a contentious 20 percent sales tax on soft drinks that contain high fructose corn syrup. A news source indicates that the tax was imposed in January 2002 and has virtually prevented imports of U.S. corn syrup that compete with Mexican sugar for use in that nation’s soft drink industry. The tax has evidently hindered trade negotiations between the United States and Mexico over how much sugar Mexico can export to the United States and how much corn syrup the United States can send there. See *Reuters*, December 10, 2002.

Litigation

Acrylamide

[5] Plaintiffs Fail to Comply with Prop. 65 Notice Requirements

A Los Angeles superior court judge has reportedly agreed with McDonald’s Corp. and Burger King Corp. that the Council for Education & Research on Toxics (CERT) failed to comply with statutory notice requirements in this Proposition 65 enforcement action. *Council for Education and Research on Toxics v. McDonald’s Corp.*, No. BC 280980 (Superior Court,

Los Angeles County, California) (filed September 5, 2002). Further details about the case appear in issue 7 of this Update, November 20, 2002. According to a news source, the judge, who issued his ruling from the bench during a December 9 hearing, has not yet decided whether to allow CERT to amend and re-file the complaint, stay the decision until 2003, or dismiss the case entirely.

The fast-food defendants have apparently urged the court to stay the case until the state’s Office of Environmental Health Hazard Assessment (OEHHA) issues new regulatory standards for acrylamide sometime next year. While the current industrial acrylamide exposure limit is 0.2 micrograms daily, OEHHA is reportedly analyzing whether an “alternative risk level” can be established for food-related acrylamide ingestion, particularly when the substance is created “naturally” during the cooking process. A press report has indicated that Burger King has also urged the court to dismiss the case for CERT’s failure to identify its leader in case pleadings. CERT lawyer Raphael Metzger has indicated that he omitted this information to protect this individual, a college professor, from publicity, said a news source. See *latimes.com*, December 10, 2002; *Inside Cal/EPA*, December 13, 2002.

Filtered Water

[6] *Environmental Working Group v. Glacier Water Services* (Superior Court, San Francisco, California) (filed December 10, 2002)

An environmental and public health research organization known for bringing Proposition 65 enforcement actions in California, has reportedly sued the nation’s largest seller of filtered water from vending machines for violations of the state’s unfair competition law, claiming the company sells water purportedly “chemical-free” that actually contains



levels of chlorination by-products exceeding state standards. The suit is apparently based on an Environmental Working Group (EWG) and Environmental Law Foundation (ELF) study that showed one-third of Glacier machines produce water falling short of the 10 parts per billion state limit and two-thirds fall short of the company's marketing claims.

The EWG/ELF report, *Is Water From Vending Machines Really 'Chemical-Free'?*, which can be obtained electronically at www.ewg.org, notes that the chemical contaminants tested, trihalomethanes, are associated with cancer, miscarriages, birth defects, and low birth weight. The report points out that consumers who buy vended water pay 10,000 percent more for it than for tap water and that California law requires vended water to be cleaner than tap water. See *Los Angeles Daily News*, December 9, 2002; *Greenwire* and *EWG News Release*, December 10, 2002.

Other Developments

[7] Sanitation Problems Linked to Listeria; Consumers Union Finds Antibiotic-Resistant Bacteria in U.S. Poultry

Following reports that sanitation problems and lax inspections may have long pre-dated a *listeria* outbreak that killed eight persons and led to the recall of some 27 million pounds of Pilgrim's Pride poultry products, Representative Henry Waxman (D-Calif.) has apparently requested the disclosure of U.S. Department of Agriculture (USDA) inspection reports and interviews with those who were inspecting the Pennsylvania poultry plant under investigation. A federal inspector has reportedly claimed that the plant had persistent sanitation problems and that recommendations to close the plant were ignored, while some inspectors gave plant officials early notification of inspections, giving the company

an opportunity to prepare for the government visits. Company spokespersons have apparently insisted that the plant is safe and any problems have been fixed. See *The New York Times*, December 11 and 12, 2002.

Meanwhile, Consumers Union has reported the results of a nationwide study of raw chicken purchased in supermarkets. According to findings published in the January 2003 issue of *Consumer Reports*, 42 percent of the chicken was contaminated with campylobacter and 12 percent with salmonella. Moreover, the study found that 90 percent of the campylobacter and 34 percent of the salmonella were resistant to one or more commonly used antibiotics. Relying on its findings, Consumers Union has written to Bayer Corp. asking it to "end Bayer's opposition to the proposed Food and Drug Administration (FDA) ban on the use of Bayer's antibiotic, Baytril, in treating chickens and turkeys." See *Reuters*, December 10, 2002.

[8] ATF Weighs in on New Warning Labels; AMA Calls for Alcohol Ad Restrictions

The Bureau of Alcohol, Tobacco and Firearms (ATF) has reportedly rejected a request that warning labels on beer, wine and liquor containers be made more visible with bright colors. The request was apparently made by the Center for Science in the Public Interest; after 18 months of study and some 900 public comments opposing the change, ATF agreed that current warnings are sufficient. See *fresnobee.com* and *The New York Times*, December 11, 2002.

Meanwhile, the American Medical Association's (AMA) House of Delegates, has reportedly adopted a recommendation that (i) television broadcasters keep all beer, wine and liquor ads off the air before 10 p.m., and (ii) networks and cable broadcasters stop running alcoholic-beverage commercials with mascots and cartoon characters that appeal to children. See *cnn.com*, December 11, 2002.



[9] National Press Foundation Hosts Food Seminar

The National Press Foundation reportedly hosted a four-day seminar on food-related issues December 15-18, 2002, in Washington, D.C. Underwritten by the Kiplinger Foundation, the event was scheduled to feature discussions about food policy, obesity, food politics, genetic engineering, nutrition research, and the way food is portrayed in the media. Speakers reportedly included former Assistant Agriculture Secretary Carol Tucker Foreman, Harvard University Professor Graham Colditz, M.D., Marion Nestle, Ph.D., and Center for Science in the Public Interest's Margo Wootan, D.Sc. More details about the event will be included in a future issue of the Update. See nationalpress.org.

Media Coverage

[10] **Emily Heller, "Fat Suit' Weighs In,"** *The National Law Journal*, December 11, 2002; **Ellen Goodman, "The Big Fat Case Against Big Macs,"** *The Washington Post*, December 14, 2002

Heller's article reports on purported similarities between tobacco litigation and new lawsuits targeting fast food as the cause of obesity. Public-interest lawyer John Banzhaf is quoted as saying that if the lawsuit filed by obese New York teenagers against McDonald's (*Pelman v. McDonald's Corp.* No. 24809/02 (Bronx County, New York, Supreme Court)) is successful, "it'll make the asbestos [litigation] look like a walk in the park."

According to Goodman, toys included in McDonald's Happy Meals include safety warnings, "but the nutritional information for this beginner meal – 20 fat grams and 36 sugar grams – is nowhere to be seen. It is stashed under the counter and printed in agate that's off the eye chart." She acknowledges

that while parents are in part responsible for their children's health, food corporations are responsible "for what and how they market." Public-interest lawyer Richard Daynard is quoted as saying that "food companies have very sophisticated motivational people on their payroll to figure out how to get kids to use their product."

Scientific/Technical Items

Polycyclic Aromatic Hydrocarbons (PAHs)

[11] **U.K. Food Survey Shows Drop in Levels of Harmful Chemical**

According to the United Kingdom's (U.K.'s) Food Standards Agency, people are consuming fewer dietary PAHs than they were 20 years ago. Produced during combustion, PAHs do not degrade easily and are widespread in the environment, including in low levels in foods. They have long been monitored in an attempt to ascertain their carcinogenic potential. Benzo(a)pyrene, benz(a)anthracene and dibenz(ah)anthracene are among those PAHs commonly identified as of greatest concern and, thus, served as focal point for the current survey. The Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment (COT), which advises the Food Standards Agency, measured dietary intakes and found that they were two to five times lower than they were in 1979 for benzo(a)pyrene and benz(a)anthracene. Levels of dibenz(ah)anthracene were below the limits of detection. In general, the highest remaining concentrations of PAHs were found in breads, cereals, fats and oils, and fish. COT experts suggest that as intakes of these PAHs decrease, any associated risk of cancer will also decrease. See www.foodstandards.gov.uk.



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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 supporting documentation, please contact us by e-mail at dwalker@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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