

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Department of Health and Human Services (HHS)

##### [1] **Compounds Formed During High-Temperature Cooking Processes Added to Biennial Report on Carcinogens**

The National Toxicology Program (NTP) issued its [11th Edition of the Report on Carcinogens](#) on Monday, adding 17 substances to the government's official list of cancer-causing agents. The report lists agents, substances, mixtures, or exposure circumstances in two categories: "known to be human carcinogens" and "reasonably anticipated to be human carcinogens." NTP has added to the "reasonably anticipated" category three heterocyclic amine compounds that form when meats and eggs are cooked or grilled at high temperatures, i.e., MeIQ, MeIQx and PhIP. Their listing in the report is based on findings of animal studies that indicated the compounds caused cancer in various organs as well as several human studies whose findings suggested that consumption of broiled or fried foods containing the compounds was linked to increased risks of breast and colorectal cancer. In a fact sheet accompanying the updated report on carcinogens, NTP emphasizes that the document "identifies *potential* cancer hazards. A listing in the

RoC does not by itself establish that a substance presents a cancer risk to an individual in daily life." Risk assessments fall under the purview of various regulatory and research agencies. See *NIEHS Press Release*, January 31, 2005.

#### Government Accountability Office (GAO)

##### [2] **GAO Report Recommends Increased Monitoring of Meatpacking Plants; Human Rights Watch Accuses Industry of Harsh Working Conditions, Abusive Employment Practices**

Though acknowledging that illness and injury rates in the nation's meat and poultry processing plants have declined over the past decade, GAO issued a [report](#) last Friday that recommends the Occupational Safety and Health Administration (OSHA) and department of agriculture bolster their efforts to improve worker safety and health. Among other things, the report recommends: (i) changes to the criteria OSHA uses to select plants for inspections and audits, (ii) changes to OSHA's data collection methods that would allow better evaluation of the effectiveness of various workplace safety programs, and (iii) a National Institute of Occupational Safety and Health study that would analyze the effect of production line speed on the risk of specific illnesses and injuries to workers.



Meanwhile, a new [report](#) from Human Rights Watch condemns the U.S. government and the meat and poultry industry for failing to protect the basic human rights of workers. “Meatpacking is the most dangerous factory job in America,” said Lance Compa, author of the report titled *Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants*. “Dangerous conditions are cheaper for companies, and the government does next to nothing.” Recommendations in the report include (i) passage of federal and state laws mandating slower production lines and ergonomic standards to reduce repetitive stress injuries, (ii) stronger worker compensation laws and enforcement mechanisms, (iii) federal labor laws that comply with international standards, and (iv) new laws and policies that protect the human rights of immigrant workers, regardless of their legal status. J. Patrick Boyle, president of the American Meat Institute, dismissed the report’s accusations, saying the document was “replete with falsehoods and baseless claims. There are so many refutable claims and irresponsible accusations contained in this 175-page report that it would take another 175 pages to correct the errors.” See *Human Rights Watch and American Meat Institute Press Releases*, January 25, 2005; *The New York Times*, January 26, 2005.

## Italy

### [3] Italian Parliament Passes Law Requiring Separation of Genetically Modified and Conventional Crops

The Italian Parliament has reportedly passed “co-existence” legislation that provides a legal framework for ensuring that conventional and

organic crops are not contaminated by neighboring crops that are genetically modified. Each of Italy’s 20 regions will be able to expand the law, and many have reportedly indicated that they intend to maintain a ban on GM crops entirely. Agriculture Minister Gianni Alemanno was quoted as saying the legislation was the result of wanting to “guarantee freedom of choice for Italian producers, while heading off the risk of diffuse and uncontrolled contamination by GM organisms,” while advocates of GM crops called the law a “medieval-flavored decision.” See *Reuters*, January 27, 2005.

## Litigation

### Deceptive Trade Practices

#### [4] Los Angeles Judge Dismisses Purported Class Action Accusing Breweries of Targeting Underage Consumers

A state trial-court judge in Los Angeles County has granted a motion for judgment on the pleadings filed by defendant breweries accused of targeting underage consumers. [Goodwin v. Anheuser-Busch Cos., No. BC310105 \(Superior Court of Los Angeles 1/28/05\)](#). Plaintiffs were denied leave to amend. A primary basis for the decision was that the court lacked subject-matter jurisdiction because the Department of Alcoholic Beverages Control “is vested with the authority to oversee all aspects of alcohol sales, including advertising.” Plaintiffs’ counsel Steve Berman said plaintiffs would appeal the ruling.



## Legal Literature

[5] **“Litigation Communications in the Age of Trial by Media,”** Phil Goldberg, *For the Defense* (January 2005)

This article examines the media’s “tremendous impact on how individual lawsuits are resolved.” The [author](#), a member of Shook Hardy & Bacon’s Public Policy Group, asserts that the media affects litigation in two ways: (1) media coverage that negatively affects the defendant’s business can influence the defendant’s litigation strategy, motion practice and settlement options; and (2) “media coverage can change the dynamics in the courtroom” if the jury is already familiar with the themes from pre-trial publicity. Goldberg says that the media’s storytelling style creates an inherent bias for the plaintiff. He then references studies showing that even a little pre-trial publicity can prejudice potential jurors against defendants and notes that plaintiffs’ lawyers are better at using the media to achieve their strategic objectives than defense lawyers.

Goldberg acknowledges that some defense attorneys may not make public statements about pending litigation for fear of prejudicing the judicial proceeding. These attorneys may simply state, “No comment,” or “the charges are without merit and the company is going to fight them vigorously.” Goldberg argues that these statements do not mitigate the legal or business pressures that can influence the litigation, and that “the only way some lawyers can offer clients a fair trial is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment.” After examining the law relevant to the ethics of responding in the media, he

concludes that because courts cannot control trial publicity, defense lawyers and litigants have a right to engage the media. Finally, the article discusses the case law relevant to hiring outside litigation communications support under the attorney-client and work-product doctrines. The article is available [here](#).

## Media Coverage

[6] **“Don’t Blame the Burgers” and “Lawsuits Can Fight Fat,”** *USA Today*, January 31, 2005

These opposing editorials were inspired by last week’s Second Circuit decision allowing two overweight New York teenagers to pursue their claims against McDonald’s under the New York Consumer Protection Act. [Pelman v. McDonald’s Corp., No. 03-9010 \(2nd Cir. 1/25/05\)](#). *USA Today* asserts that “it’s a stretch to suggest that McNuggets are as addictive or dangerous as nicotine. ... lawsuits and government edicts are no way to trim the nation’s midsection. Market forces and public education work better.” An opposing editorial, however, champions legal action over public education as a way to combat the nation’s escalating rates of obesity. George Washington University Law Professor John Banzhaf opines that “personal responsibility by itself simply hasn’t worked for obesity any better than it did for smoking ... and isn’t likely to. ... Juries continue to rule that, while smokers must bear much of the responsibility for their own health, Big Tobacco must share some responsibility if its misconduct contributed to it. Surveys suggest that juries will apply the same principle in obesity cases, especially where young children are the innocent victims.”



## Scientific/Technical Items

### Obesity

#### [7] **Obesity May Distort Results of Prostate Cancer Screening Test**

Obesity may obscure the results of a common test used to detect prostate cancer, according to a study slated for publication in the March 2005 issue of the journal *Cancer*. (J. Baillargeon, et al., “The Association of Body Mass Index and Prostate-Specific Antigen in a Population-Based Study,” *Cancer*, March 2005). The study was reportedly spurred by other research that suggests obese men have lower survival rates for prostate cancer and are more apt to be diagnosed in later stages of the disease. Researchers evaluated samples from nearly 2,800 prostate cancer-free men and found that levels of prostate-specific antigen (PSA), a blood protein used to identify the disease in its earliest stages, decreased as body mass index levels rose. In particular, men with body mass index levels of 40 or more exhibited PSA readings that were roughly one-third lower than men of normal weight.



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