

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Alcohol and Tobacco Tax and Trade Bureau (TTB)

##### [1] TTB Seeks Public Comment on Variety of Labeling and Advertising Issues

TTB has issued a lengthy [notice](#) requesting public input on possible changes to labeling and advertising requirements for wine, distilled spirits and malt beverages. With respect to nutrition and ingredient information, TTB invites responses to questions that include the following: (1) Should the agency mandate labeling that discloses calorie, fat, carbohydrate, and protein content? (2) Should the agency mandate labeling that discloses all ingredients, including processing aids? (3) Should the agency harmonize its alcohol beverage labeling rules with those of other major producing nations, e.g., Australia, Canada, European Union member states? and (4) Should such nutrition and ingredient disclosure also be required in product advertising? As for carbohydrate and calorie claims, TTB requests comments regarding whether the agency should promulgate regulations that define “low carbohydrate” products as those that contain no more than 7 grams of carbohydrates per standard serving size

as specified in Ruling 2004-1. The agency also asks stakeholders to suggest possible definitions of the terms “low calorie” and “reduced calorie.”

Other labeling issues about which TTB seeks information include the possibility of mandatory Alcohol Facts and Serving Facts panels and the disclosure of potentially allergenic substances, e.g., wheat, nut proteins. Comments are due by June 28, 2005. *See Federal Register*, April 29, 2005.

### State/Local Initiatives

##### [2] Kansas Governor Signs Obesity Litigation Legislation; Similar Federal Bills Await Action

Kansas Governor Kathleen Sebelius (D) recently signed obesity liability reform that will take effect upon publication in the *Kansas Register*. S.B. 75 exempts from civil liability, manufacturers, producers, distributors, carriers, sellers, marketers, and advertisers of a food for claims arising out of weight gain, obesity, health conditions associated with weight gain or obesity, or other conditions purportedly caused by long-term consumption of a food. The legislation allows lawsuits that allege violations of state or federal regulations pertaining to food content and labeling, or intentional violations of state or federal law applicable to the manufacturing, marketing, distribution, advertising, labeling, or selling of the food.

Obesity litigation reform has now been enacted in 18 states – Arizona, Colorado, Florida, Georgia,



Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, North Dakota, Ohio, South Dakota, Utah, Tennessee, Washington, and Wyoming. U.S. Senator Mitch McConnell (R-Ky.) recently reintroduced like-minded legislation (S. 908) in the Senate, while Representative Ric Keller (R-Fla.) reintroduced the Personal Responsibility in Food Consumption Act ([H.R. 554](#)) in the House of Representatives.

## Litigation

### Deceptive Trade Practices

#### [3] Consumer Advocacy Group Files Putative Class Action Challenging Meat Substitute

The Center for Science in the Public Interest (CSPI) has filed a purported class action in a Texas state court against Whole Foods, Inc. and Quorn Foods Inc. claiming that a product the companies market as a healthful alternative to meat “is an allergen or causes allergenic-like reactions in some people.” [Goodman v. Whole Foods Market, Inc., et al., Cause No. GW501575 \(District Court of Travis County, Texas\) \(filed May 2, 2005\)](#). “This is a case where both Quorn Foods and Whole Foods know that this particular product literally makes people sick, yet they do nothing to warn consumers,” CSPI Litigation Director Steve Gardner was quoted as saying. “The purpose of this lawsuit, and similar suits we intend to file, is to stop that kind of reckless corporate behavior.”

Manufactured by a U.S. division of Britain’s Marlow Foods Ltd., Quorn products are derived

from a fungus called *fusarium venenatum*, and Austin, Texas-based Whole Foods Market, Inc. is Quorn’s largest U.S. retailer. Product packaging describes the main ingredient as a mycoprotein related to mushrooms, truffles and morels. CSPI, however, contends “mycoprotein is made from a fungus that is more akin to mildew than mushrooms.”

The named plaintiff and purported class representative, Avery Goodman, alleges that he experienced five hours of severe gastrointestinal distress and an additional 48 hours of stomach pain after eating Quorn Naked Cutlets. Goodman reportedly filed the lawsuit after he was unable to convince defendants to include a label warning about Quorn’s “potential to cause an adverse response in susceptible individuals.” He asks the court to require labels disclosing that the primary ingredient in Quorn is a potential allergen and reimbursement for class members’ Quorn purchases.

CSPI has twice called on the Food and Drug Administration and Britain’s Foods Standards Agency to require allergen warnings for the meat substitute and maintains a [Web site](#) where consumers can register their complaints about Quorn products. “FDA has the authority to correct these kinds of deceptive claims on food labels, but despite our many complaints over many years, the agency has rarely acted,” said CSPI Executive Director Michael Jacobson. “So long as the FDA keeps napping, we’ll be hauling more and more



food companies into court to protect consumers from fraud,” he said. See *CSPI News Release* and *The New York Times*, May 3, 2005.

## Hepatitis A

### [4] Chi-Chi’s to Pay \$800K to Those Receiving Inoculations After Hepatitis A Outbreak

The bankrupt Mexican restaurant chain Chi-Chi’s and its subsidiaries have reportedly agreed to a class action settlement of \$800,000 to compensate some 9,500 individuals who received immune globulin shots following a fall 2003 hepatitis outbreak linked to food served at a Chi-Chi’s restaurant in western Pennsylvania. State and federal health officials blamed contaminated green onions shipped from Mexico for the incident, which killed four people and sickened more than 600. The Pennsylvania Department of Health encouraged family members of those sickened and people who had eaten at the restaurant in weeks leading up to the outbreak to get the shots. Plaintiffs’ attorney William Marler reportedly expects about 30 percent of those who were inoculated to file claims with the U.S. Bankruptcy Court in Delaware. See *Pittsburgh Tribune-Review* and *Associated Press*, April 30, 2005.

## Other Developments

### [5] European Heart Network Targets Food Marketing Aimed at Kids in New Report

Information gathered across 20 European countries indicates that children “are exposed to the marketing of ‘unhealthy’ food on a massive scale

and stresses the need to protect children from such marketing as an important measure to address one critical influence on childhood obesity,” according to a new [report](#) from the European Heart Network. The group’s recommendations include (i) having stakeholders and European Union (EU) health officials agree on a definition of “unhealthy” foods; (ii) prohibiting TV advertising of such foods to children; and (iii) implementing EU-wide regulation of other venues that manufacturers use to market their products, e.g., Internet, schools, cell phone text messaging. See *European Heart Network News Release*, April 28, 2005.

## Media Coverage

### [6] “Is a Trip to McDonald’s Just What the Doctor Ordered?” Melanie Warner, *The New York Times*, May 2, 2005

This article discusses the alleged conflicts that could result from the addition of prestigious physicians and nutrition scientists on the advisory boards of food companies such as Kraft, McDonald’s and Coca-Cola. According to the author, the consultants’ “dual roles have created a deep divide in the scientific community. Some critics say that working for a large food company compromises the credibility of scientists’ research and makes them look like part-time company representatives. They say advisory



boards and tacit endorsements from health gurus do more to make companies look good and help them sell products than inspire change.” Dean Ornish, M.D., a widely published advocate of low-fat diets to prevent cardiovascular disease and a paid consultant to McDonald’s, PepsiCo and ConAgra Foods, refutes such criticisms. “A lot of colleagues were puzzled at first by my decision [to consult for the food companies],” he said, “but now they see it as a logical extension of what I’ve been doing my whole career. It’s an amazing platform to make a difference.”

## Scientific/Technical Items

### Obesity

#### [7] New Government Study Contradicts Previous CDC Estimate of Obesity-Attributable Deaths

New findings from researchers at the Centers for Disease Control and Prevention (CDC ) suggest that official government estimates of excess mortality due to obesity are in error. Last year, the CDC created controversy by initially claiming that obesity kills as many as 400,000 Americans each year, making it the No. 2 cause of death in the United States. CDC later revised that figure to 365,000. The new analysis concludes that obesity’s actual death toll is closer to 26,000 excess deaths annually. (K. Flegal, et al., “Excess Deaths Associated with

Underweight, Overweight, and Obesity,” *Journal of the American Medical Association* 293(15): 1861-1867, April 20, 2005). In the latest analysis, researchers assessed mortality against body mass indices (BMI) and estimated that severe obesity (a BMI greater than 30) accounted for some 112,000 annual deaths among Americans, but they also found that being overweight (defined as a BMI between 25 and 30) was negatively associated with excess mortality (i.e., 86,000 fewer deaths were estimated for overweight compared to normal-weight individuals).

CDC Director Julie Gerberding, M.D., was quoted as saying the agency is “not going to use the brand-new figure of 25,814 [deaths] in its public awareness campaigns and is not going to scale back its fight against obesity.” In an April 19 [letter](#), the industry-backed Center for Consumer Freedom called on Gerberding to retract the 2004 statistics on obesity-attributable deaths, claiming they have “become the rallying cry for trial lawyers pursuing obesity lawsuits against restaurants and for the self-appointed food police seeking regulations and taxes.” *The Washington Times* quoted litigation proponent John Banzhaf as saying the new statistics are “irrelevant and would not affect obesity litigation.” See *Associated Press*, April 19, 2005; *The Washington Times*, April 20, 2005.



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## 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](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto: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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