

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] **USDA Committee to Discuss Impacts of Agricultural Biotechnology**

USDA's Advisory Committee on Biotechnology and 21st Century Agriculture has scheduled a [public meeting](#) for October 24-25, 2005, in Washington, D.C. Discussions at the two-day meeting will focus on completion of the group's paper examining the impacts of agricultural biotechnology on U.S. agribusiness and USDA over the next five to 10 years. Established in 2003, the 19-member committee includes representatives of the biotechnology and food industries, farming interests and environmental organizations. *See Federal Register*, October 11, 2005.

State/Local Initiatives

[2] **Schwarzenegger Vetoes COOL Legislation; Approves Bills Calling for Regulation of Imported Candy and Disclosure of Carcinogenic Ingredients in Cosmetics**

California Governor Arnold Schwarzenegger (R) last week vetoed legislation (A.B. 1058) which would have required statewide labeling that disclosed beef products' countries of origin. In

rejecting the measure, Schwarzenegger said the COOL program "would be unworkable, costly and impossible to enforce while providing no improvement in public health protection or additional benefits to the consumer." Federal country-of-origin labeling regulations were mandated in the 2002 farm bill and are currently scheduled for implementation by September 2006.

The governor approved a measure requiring Cal/EPA's Office of Environmental Health Hazard Assessment to develop an allowable lead level for candy. Impetus for the law came from recent investigations which allegedly revealed that certain hard candies imported from Mexico contain high levels of lead. According to the Food and Drug Administration, "the adverse health effects of elevated lead levels in children are well-documented and may have long-lasting or permanent consequences." In spring 2004, the agency announced its intention to establish more stringent guidance for considering regulatory action against candy products that contain lead, but has yet to take action on the issue.

Schwarzenegger also approved the California Safe Cosmetics Act of 2005. The new law will require cosmetics manufacturers to report to state health officials any ingredients in their products known to cause cancer or reproductive toxicity. Manufacturers will also be required to submit relevant health effects data and studies as requested. *See Reuters*, October 7, 2005; *Orange County Register*, October 8, 2005; *San Francisco Chronicle*, October 9, 2005.



Litigation

Warnings

[3] Advocacy Group Sues Dairy Groups on Behalf of Lactose-Intolerant Consumers

The Physicians Committee for Responsible Medicine (PCRM) has filed a putative class action against dairy producers and retailers on behalf of District of Columbia residents who are lactose intolerant. [*Milton Mills, M.D., et al., v. Giant of Maryland, et al., No. 05-0008054 \(Superior Court of the District of Columbia\) \(filed 10/6/05\)*](#). “The health of Americans of color has been sacrificed on the altar of dairy industry profits,” lead plaintiff Milton Mills, a 47-year-old African-American physician, said during an October 6 press conference convened to announce the filing of the lawsuit. “Millions of Americans are being misled and made to suffer unnecessary illness by industry marketing campaigns that are masquerading as health information,” Mills asserted.

The 10 named plaintiffs are bringing the action on behalf of themselves and “all District of Columbia residents who, unaware of their lactose intolerance, have unwittingly been subjected to gastrointestinal pain and discomfort by purchasing and consuming milk sold by defendants.” Plaintiffs seek no more than \$100,000 in total damages for themselves and a permanent injunction requiring defendants to provide product labeling that describes the purported risks of lactose intolerance. According to the complaint, such warnings could include “Warning – If you experience diarrhea or stomach cramps after consuming milk, you may be lactose intolerant. Check with your physician.” and

“Warning – Lactose intolerant individuals may experience bloating, diarrhea, or other gastrointestinal discomfort from consuming milk. Check with your physician.”

The lawsuit names as defendants Giant of Maryland, LLC; Safeway Inc.; Horizon Organic; Dean Foods Co.; Nestle Holdings, Inc.; Farmland Dairies, LLC; Shenandoah’s Pride, LLC; Stonyfield Farm, Inc.; and Cloverland Farms Dairy, Inc.

Among other things, plaintiffs allege, “While some members of the general public have some knowledge about lactose intolerance, the true scope of the problem has been covered up by the milk industry and government’s marketing efforts. The industry’s milk marketing campaign, combined with government support of milk, gives the false impression that cows’ milk is a necessary part of a healthy diet, both for children and adults. Milk manufacturers, including defendants, are part and parcel of this marketing effort – they pay for it, control the message, and go to great lengths to stifle contrary information, despite being well aware of the misleading messages being conveyed to the American public ... For humans, cows’ milk consumption causes a host of problems that make it anything but a healthy beverage.” In light of 2000 census data and studies which allegedly indicate that Asian-Americans, Native Americans, African-Americans, and Hispanic-Americans are often lactose-intolerant, plaintiffs also claim defendants “knew, or should have known, that a substantial portion of the residents of the District of Columbia are likely lactose intolerant.”

PCRM began its search for potential plaintiffs in June 2005 when it launched advertisements in D.C. public transportation venues that read, “Got lactose intolerance? 75 percent of people do, particularly



people of color. If you're lactose intolerant, you may have grounds for a lawsuit." The advocacy group also established a Web site titled MilkMakesMeSick.org where potential plaintiffs could read about the symptoms of lactose intolerance and access studies that allegedly link milk consumption to the development of prostate and ovarian cancers.

A spokesperson for the International Dairy Foods Association was quoted as saying the purported class action is "just another attempt on the part of an animal rights group to attack dairy and milk products. They're trying a new strategy of suing people right and left, and it's unfortunate to see that when it has to do with an issue of nutrition." See *PCRM News Release and Associated Press*, October 6, 2005; *The Washington Post*, October 7, 2005.

Meanwhile, PCRM's executive director and general counsel, Mindy Kursban, recently said "the dairy industry is going to go the way of Big Tobacco" and that industry has "pretty much lied" to the public about the purported benefits of milk consumption. Kursban made the remarks during a session at a Public Health Advocacy Institute conference held September 24-25, 2005, in Boston.

Negligence

[4] Southwest Missouri Popcorn Plant Workers Settle Lawsuits with Flavoring Manufacturer

Nineteen current and former workers at a Jasper County, Missouri, popcorn plant last week reportedly reached undisclosed settlement agreements with New York-based International Flavors & Fragrance and its subsidiary Bush Boake Allen Inc. Plaintiffs claimed exposure to diacetyl, a butter

flavoring used in the manufacture of microwave popcorn, caused them to develop the irreversible lung disease bronchiolitis obliterans. They also alleged the flavoring manufacturer knew diacetyl was hazardous and failed to warn the plant employees about the dangers associated with the product or provide adequate safety instructions.

"I think the defendants recognized that overall we'd be successful at trial and were therefore willing to reach settlement in all pending cases," plaintiffs' attorney Kenneth McClain of the Independence, Missouri-based firm Humphrey, Farrington & McClain, was quoted as saying. "This has virtually been an unregulated industry that has ignored the risks of their products," he said. Similar cases now on appeal have resulted in jury awards of nearly \$53 million to four plaintiffs. See *The Joplin Globe*, October 5, 2005.

Scientific/Technical Items

Nanotechnology

[5] New Report Targets Potential Effects of Exposure to Nanomaterials

A [report](#) published last week in the journal *Particle and Fibre Technology* outlines the components of a screening strategy to evaluate the potential toxicity of nanomaterials. "This is just looking at the human health effects, not how to test the impact on the broader environment," co-author Barbara Karn said. "That's also very important, but eco-toxicity involves different types of tests." The U.S. Environmental Protection Agency and the ILSI Research Foundation/Risk Science Institute provided funding for the study.



Nanotechnology applications with respect to food include packaging, contaminant detection and supply chain tracking. See *The New York Times*, October 6, 2005; *Food Production Daily.com*, October 12, 2005.

Obesity

[6] Most Americans at High Risk of Becoming Overweight or Obese

Most Americans will become overweight as they become middle-aged, according to a National Heart, Lung, and Blood Institute (NHLBI) study published last week which found that nine of 10 men and seven of 10 women became overweight over a 30-year period. (S. Ramachandran, et al., "Estimated Risks for Developing Obesity in the Framingham Heart Study," *Annals of Internal Medicine* 143(7): 473-480, October 4, 2005.) Researchers followed 4,000 Caucasian adults ages 30 to 59 for some 30 years and assessed the participants' body mass indices (BMIs) every four years. By the conclusion of the study, more than one in three individuals had become obese, with a body mass index of 30 or higher. Half of the men and the women participating in the study who had no weight problems in early adulthood eventually became overweight by the end of the study.

"National surveys and other studies have told us that the United States has a major weight problem, but this study suggests that we could have an even more serious degree of overweight and obesity over the next few decades," NHLBI Director Elizabeth Nabel was quoted as saying. The researchers noted that being overweight increases the likelihood of developing diabetes, high blood pressure, heart disease, asthma, sleep apnea, cancer, osteoarthritis,

and gall bladder disease. See *NIH News Release*, October 3, 2005; *Associated Press*, October 4, 2005.

Pancreatic Cancer

[7] Red and Processed Meat Consumption Allegedly Linked to Pancreatic Cancer

Eating large amounts of red and processed meat is associated with a statistically significant increased risk of developing pancreatic cancer, allege researchers from the Cancer Research Center of Hawaii and the University of California-Los Angeles. (U. Nothlings, et al., "Meat and Fat Intake as Risk Factors for Pancreatic Cancer: The Multiethnic Cohort Study," *Journal of the National Cancer Institute* 97(19): 1458-65, October 5, 2005). Their study noted no associations of pancreatic cancer risk with intake of poultry, fish, dairy products, or eggs. Total fat and saturated fat intake from meat was associated with increases in pancreatic cancer risk, but fat intake from dairy products was not. The researchers suggest that carcinogenic substances related to meat preparation methods (e.g., grilling, frying or curing) likely play a role in the positive association with pancreatic cancer.



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