

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Announces Strategy for Reducing Human Exposure to Dioxin

FDA has announced that it will be expanding its monitoring program “for determining dioxins in the U.S. food and animal feed supply,” managing “the risks to humans from dioxins” and “identifying opportunities to reduce human exposure.” According to its announcement, FDA “has been monitoring dioxin levels in finfish, shellfish and dairy products” since 1995. And in 1999, FDA “initiated dioxin analysis of foods collected under its Total Diet Study (TDS) survey. TDS is FDA’s annual survey of market baskets representing 265 core foods (ready-to-eat) in the U.S. food supply to assess levels of various pesticide residues, contaminants, and nutrients in foods and to estimate intakes of these substances in representative diets of specific age-sex groups in the U.S.”

Because dioxin analysis is costly and time consuming, data on background levels in most foods and feeds are apparently limited. Thus, FDA will broaden its monitoring program to obtain profiles of background levels to enable identification of “foods and feeds with unusually high levels of dioxins.” Other goals include “improving assessment of human exposure to dioxins” by providing better information about (i) “exposure trends over time,” (ii) “dioxin levels in foods that provide a significant portion of the total human exposure to dioxins,” (iii)

“exposure variations based on geographic region,” and (iv) “exposure variations based on type of diet.” Further information about the strategy can be accessed from FDA’s Web site, www.cfsan.fda.gov. See *FDA Press Release*, February 7, 2003.

U.S. Department of Agriculture (USDA)

[2] Meat Industry Concerned About Country-of-Origin Rules Cost

U.S. meat producers, processors and retailers have reportedly begun expressing concern about new rules that will require “country-of-origin” labels for meats on supermarket shelves. The labeling legislation was apparently hailed initially by cattle ranchers as a way to promote U.S. beef and by legislators who believe the rules will be effective at keeping tabs on foreign products. According to USDA estimates, the rules, which take effect October 1, 2004, are expected to cost the industry some \$2 billion annually, mostly for recordkeeping. The estimate does not account for some expenses such as inkjet printers that many will have to buy to create new labels. A National Cattlemen’s Beef Association spokesperson was quoted as saying, “One of two things is going to happen. Either consumers are going to pay more or producers are going to get less.” See *The Wall Street Journal Online*, February 17, 2003.



108TH Congress

[3] Appropriations Bill Gives Livestock Industry Potential Reprieve from Organic Feed Requirements

According to press reports, when Congress approved the fiscal year 2003 consolidated budget bill, it contained a provision added at the last minute by Speaker J. Dennis Hastert (R-Ill.) that will not allow funds to be used to enforce the 100 percent organic feed requirement for certified organic livestock operations unless a Secretary of Agriculture report confirms that organic feeds are commercially available at no more than twice the cost of conventionally produced feed. The report, which should be released later in February 2003, is reportedly expected to show that organic feed is commercially available in sufficient quantities and at prices below the exempting limitation. Nonetheless, an Organic Trade Association representative expressed outrage at “such underhanded methods used by those unwilling to play by the rules. This is an example of someone doing an end-run to manipulate the government, with disregard for the public’s wishes.” According to congressional officials, the provision was added at the request of a House member from Georgia, evidently following the unsuccessful efforts of a Georgia poultry operation to create an exemption from the 100 percent organic feed requirement when the certification standards were adopted in 2002. *See Organic Trade Association News Release*, February 13, 2003; and *The New York Times*, February 14, 2003.

Codex Alimentarius Commission

[4] WHO Trust Fund to Assist Developing Countries Draft Food Standards; Critics Charge Food Industry “Sellout”

The World Health Organization (WHO) has reportedly established a \$40 million trust fund to help the world’s least developed nations participate in the Codex Alimentarius Commission. The fund is apparently expected to run for 12 years and, by covering travel and other expenses, will assist officials from 120 developing countries take part in Codex proceedings during which international food safety, labeling and quality standards are produced. A recognized observer at Codex meetings reportedly criticized WHO’s decision to accept financial support from the food industry in creating the trust fund. According to Bruce Silverglade, president of the International Association of Consumer Food Organizations, “This represents a huge government sellout to the food industry. By paying the travel expenses of government officials from developing countries, the food industry will be gaining undue influence over those officials.” *See Center for Science in the Public Interest News Release*, February 12, 2003; *UN Food and Agriculture Organization News Release*, February 14, 2003.

State/Local Initiatives

[5] States Move Forward with Obesity-Related Legislation

Lawmakers across the United States are unveiling legislation aimed at slimming down the population. In New York, Assemblyman Felix Ortiz (D-Brooklyn) is reportedly poised to introduce a bill that would require fast-food and other restaurant chains to disclose fat, calorie and sodium levels on menu boards

or regular menus. "While fast-food meals are not the only contributors to obesity, they are commonly eaten by children," Ortiz said. "And the chains target children with advertising and toy giveaways." Similar legislation requiring chain restaurants to disclose the nutritional content of their foods has been proposed by Maine Representative Sean Faircloth (D-Bangor). Other bills authored by Faircloth would establish a public health commission to study the causes of obesity and direct the state department of education to prohibit sales of candy, fatty foods and soft drinks in schools. And in Texas, the Schoolchildren's Nutrition and Health Act, sponsored by Senator Eddie Lucio (D-Brownsville), would create an advisory council to help school districts battle childhood obesity by limiting access to vending machines and expanding the use of certain Texas agricultural products in school breakfasts and lunches. See *The Wall Street Journal Online*, February 13, 2003; *Dallas Morning News* and *Reuters*, February 14, 2003; *The New York Post*, February 18, 2003.

Other Developments

[6] ACS Sponsors "Great American Weigh-In"

Asserting that one-third of cancer deaths are related to diet and inactivity, the American Cancer Society (ACS) has launched a new campaign to increase public awareness of purported links between overweight and obesity; the Great American Weigh-In is slated for March 5, 2003. Modeled after the group's Great American Smokeout, the weigh-in campaign asks people to measure their body mass index (BMI) and consider improving their dietary and exercise habits to lower their risks of colon, breast (among postmenopausal women), gallbladder, esophageal, pancreatic, and kidney cancer. Funding for the initiative has reportedly been

provided by Weight Watchers. See *Associated Press*, February 13, 2003.

[7] McDonald's-U.K. to Provide Nutritional Information

McDonald's in the United Kingdom has reportedly decided to disclose nutritional information on all of its food and drink packaging. McDonald's in the United States has not announced similar plans. According to McDonald's-U.K. Web site, a Big Mac contains 493 calories; a super-sized Coca Cola, 323 calories; a super-sized order of fries, 486 calories; and an apple pie, 230 calories. See *CNN.com*, February 10, 2003.

Media Coverage

[8] John Mason, "Producers Risk Being Sued over Fried Foods;" Neil Buckley, "Unhealthy Food Is Everywhere, 24 Hours a Day, and Inexpensive;" *Financial Times*, February 11 and 18, 2003

Mason's article discusses the possibility of litigation against food companies and retailers if they fail to deal with the purported health risks of acrylamide. Freshfield's lawyer Paul Bowden was quoted as saying that "the science has already reached a point where the clock is ticking for the [food] industry" and that companies should avoid litigation by making "clearly documented efforts" to monitor new scientific evidence and make precautionary responses.

Buckley's article highlights obesity-related litigation and the interest being given to the issue by lawyers such as John Banzhaf and Richard Daynard who have made their names in litigation against cigarette manufacturers. The article notes that "the parallels between tobacco-related illnesses



and obesity, at least as a healthcare problem, are striking." While the article observes that it may be difficult to win cases against the food industry given the multi-factorial causes of obesity, the author suggests that if only one case proceeds to discovery, information in company files could show (i) awareness of dangers, (ii) suppression of evidence, and (iii) youth targeting. One unnamed company executive reportedly said that the industry should not blame obesity entirely on unhealthy lifestyles and deny all responsibility as cigarette manufacturers chose to do 20 years ago. He was quoted as saying, "You can see the collision course that is coming. It's either going to be regulation, legislation or litigation."

[9] "The Stealth Fat," *Consumer Reports*, March 2003

This article discusses the "most heart-unfriendly fat of all," *trans* fat, a substance primarily created through the manufacturing process of partial hydrogenation and provides an analysis of the *trans* and saturated fat content of 30 "top-selling" foods. The Harvard School of Public Health's Walter Willett reportedly asserts that the incidence of cardiovascular disease and type 2 diabetes could be greatly reduced if food manufacturers decreased or eliminated *trans* fat from their products and replaced it with unsaturated fat. Food companies evidently cite the high costs of reformulating products and difficulty finding alternative oils as reasons for their use of hydrogenated oils.

Scientific/Technical Items

Obesity

[10] Teenage Obesity May Later Affect Need for Hip Replacement

Recently published research indicates that obese teenage girls are more likely to need hip replacement in later life. Elizabeth Karlson, M.D., and colleagues from Brigham and Women's Hospital in Boston examined data from the Nurses' Health Study, a continuing study of women's health started in 1976, in an attempt to identify those factors associated with an increased risk of hip replacement due to arthritis. ("Total Hip Replacement Due to Osteoarthritis: The Importance of Age, Obesity, and Other Modifiable Risk Factors," E.W. Karlson, et al., *The American Journal of Medicine* 114(2) 93-98, 2003) They found that women who were highly overweight at age 18 were five times as likely to need the surgery when compared to those of normal weight. Obesity generally was associated with a twofold increase in risk. Karlson cautions that further research is needed to answer whether overweight causes arthritis, or arthritic individuals become overweight because they are unable to get enough exercise.



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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 back-up materials, 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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