

# Food & Beverage

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] California Lawmaker Introduces Obesity-Related Legislation

Legislation proposed by Representative Mary Bono (R-Calif.) on February 12, 2003, would amend the Public Health Services Act to address obesity-related issues.

H.R. 716, the Improved Nutrition and Physical Activity Act (IMPACT Act), notes that an estimated 300,000 deaths per year are associated with being overweight or obese and that “the estimated direct and indirect annual cost of obesity in the United States is \$117 billion, which exceeds the cost of tobacco-related illnesses. ...” H.R. 716 would establish grants to provide health services for improved nutrition, increased physical activity and obesity prevention. Specific provisions of the proposed legislation include (i) analyzing Department of Agriculture food and nutrition programs to determine how they could better address weight-related issues, (ii) creating a Medicare demonstration project to reduce obesity in older Americans, (iii) providing grants to local health care systems for obesity prevention programs, and (iv) establishing a national campaign that targets children’s health behaviors.

The bill mirrors legislation introduced late in the 107<sup>th</sup> Congress (H.R. 5412 and S. 2821); it has been referred to the Committee on Energy and Commerce in addition to the Committees on Agriculture and Ways and Means.

##### [2] Some in Congress Endorse Stronger Safety Rules for Meat and Poultry

“Why are people still dying from contaminated food?” That question is the title of a February 2003 report in which an advocacy group named Safe Tables Our Priority (STOP) calls on Congress to strengthen food-safety laws and streamline their enforcement.

Four congressional Democrats joined STOP in releasing its report earlier this month. Senator Tom Harkin (D-Iowa), ranking member of the Senate Agriculture and Nutrition Committee, said he would introduce legislation to give the Department of Agriculture authority to close meatpacking plants where inspectors find contaminated meat. Representative Rosa DeLauro (D-Conn.) said she was preparing similar legislation called the Safe Food Act. Also participating in the report’s release were Representative Jan Schakowsky (D-Ill.) and Senator Richard Durbin (D-Ill.). Neither Harkin’s nor DeLauro’s bill has yet to be introduced.

The American Meat Institute, an industry trade group, applauded STOP’s determination but suggested a different approach. “We need more and better science that will give us the tools we need to destroy harmful bacteria,” an institute spokesperson was quoted as saying. See *Harkin Press Release*, February 10, 2003; *MeatPoultry.com* and *MeatAMI.com*, February 11, 2003; *The New York Times*, February 12, 2003; and *Stop-usa.org*.



## National Cancer Institute (NCI)

### [3] NCI Attacked for Funding Decisions and Alleged Industry Ties

NCI is under attack for its research priorities. Democrats in Congress, together with an advocacy group named the Cancer Prevention Coalition, allege that the institute has buckled under to industry interests, failed to focus on cancer prevention and failed to develop alternatives to cancer-causing chemicals.

On February 20, 2003, the coalition issued a report which claims that “NCI’s escalating budget over the last three decades is paralleled by the escalating incidence in cancer [unrelated to smoking].” Among the report’s food-related allegations is a claim that beef frankfurters and whole milk are among the “mainstream industry consumer products” that “contain multiple carcinogenic ingredients and contaminants in the absence of any label warnings.” The report also alleges that “excess consumption of high animal fat fast foods, highly contaminated with industrial pollutants and pesticides” is associated with excess cancer rates in African Americans. The report is available at [http://www.preventcancer.com/publications/Stop\\_Cancer\\_Book.pdf](http://www.preventcancer.com/publications/Stop_Cancer_Book.pdf).

According to a news article, Representative Janice Schakowsky (D-Ill.) has asked the General Accounting Office to investigate the institute’s funding decisions. Representative John Conyers (D-Mich.), a founding member of the congressional black caucus, is said to be particularly interested in the report’s environmental-justice allegations. See InsideEPA.com, February 21, 2003.

## U.S. Food and Drug Administration (FDA)

### [4] FDA Committee Targets Ways of Limiting Acrylamide in Food

Government and industry scientists convened February 24-25, 2003, in Beltsville, Maryland, to discuss FDA’s action plan for addressing alleged health risks related to the presence of the chemical acrylamide in food. Acrylamide apparently forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. Many scientists speculate that acrylamide forms when the naturally occurring amino acid, asparagine, is heated with sugars like glucose. Press reports indicate that Frito-Lay nutritionist Robert Brown asserted during the meeting that “there are no obvious quick fixes in this issue because acrylamide is going to be so widespread in the entire food supply.” He and Proctor & Gamble scientist David Zyzak evidently discussed the possibility of removing asparagine from food products, preventing acrylamide formation by adding the amino acid cysteine or minerals like calcium to food, or modifying cooking techniques. See Reuters, February 24, 2003; *The New York Times*, February 25, 2003.

## Litigation

### Warnings

#### [5] *California v. Safeway, Inc.* (Superior Court, San Francisco County, California) (filed January 17, 2003)

In response to a consumer-protection lawsuit filed against them in January 2003, some of California’s largest grocery chains have begun posting warnings



for mercury in fresh tuna, shark and swordfish, according to a news article.

Meanwhile, the chains are reportedly negotiating with California's attorney general over the details in the warning's wording and possible penalties for failure to warn earlier. A key element of the negotiations is whether a warning will be required for canned (in addition to fresh) tuna. The chains said they have no plans to post warnings in stores outside California. See *San Francisco Chronicle*, February 21, 2003.

California's attorney general alleges that some seafood sold in defendants' stores contains unsafe levels of methyl mercury, and that the chains must warn the public accordingly. The basis for the lawsuit is the state's Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65, which requires warnings to the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity." Details about the filing of the lawsuit appear in issue 14 of this Update, January 22, 2003.

## Legal Literature

[6] **Barton Aronson, "My Big Fat Class Action: Why the Lawsuit Against McDonald's Is Not a Good Candidate for Class Action Treatment,"** *FindLaw.com*, February 25, 2003

Even if the amended complaint filed last week in *Pelman v. McDonald's Corp.* survives a motion to dismiss, plaintiffs' inevitable motion for class certification "should be roundly rejected," according to this commentary by FindLaw columnist Barton Aronson, an attorney in Washington, D.C.

"There is a mismatch between what the plaintiffs say they seek, and what they actually have to prove to get what they seek," Aronson says. Though he

does not cite authority for his analysis, he lists a number of common-sense evidentiary items that would vary among plaintiffs, such as how often they eat at McDonald's, what they eat there, what other fast foods they eat, what they eat at home, what they knew about the health aspects of McDonald's foods, and what genetic factors may be in play.

Lawsuits, Aronson concludes, "are about finding the responsible parties – fixing blame, assigning liability. And in most cases – and certainly in this one – that can only be done one person, one company, and one Happy Meal at a time."

*Pelman* is pending in the U.S. District Court for the Southern District of New York. Plaintiffs' amended complaint, filed February 19, 2003, is summarized in issue 19 of this Update, February 20, 2003. The trial judge's order dismissing plaintiffs' original complaint without prejudice is discussed in issue 14, January 22, 2003.

## Other Developments

[7] **Journalist's Book on Youth Marketing Raises Controversy**

The advertising industry has apparently taken note of Alissa Quart's book *Branded: The Buying and Selling of Teenagers* and defended allegations of invasive youth marketing techniques. Among other matters, Quart's book reportedly addresses corporate sponsorships that result in high school textbooks featuring name brand products and high school gymnasiums bearing corporate logos. The author also apparently claims that youth marketers intend to make a sale "even if it means playing on kids' fears of being social outcasts or physically unappealing." Advertising industry representatives have reportedly defended their practices, calling the



book “just one person’s opinion.” In a recent article, Quart expresses concern that academic research in psychology is often “hitched” to the commercial marketplace. See *wired.com*, December 2002; *adage.com*, February 13, 2003.

## Media Coverage

- [8] Michael Weisskopf, “Can Cold Cuts Kill? The USDA May Be Dragging Its Feet on Inspections and Favoring the Industry,” *Time*, February 24, 2003

According to Weisskopf, “The processed-meat industry is patting itself on the back for getting the Bush Administration to water down a new plan aimed at keeping a deadly bacterium, *Listeria monocytogenes*, out of deli meats.” He asserts that the U.S. Department of Agriculture’s (USDA’s) original plan of mandating federal inspections in the processing plants of every producer of ready-to-eat meat and poultry products was subverted by the lobbying efforts of the National Food Processors Association, “the voice of the \$500 billion industry and a major Republican donor.” USDA’s final directive on ready-to-eat products limits inspections and testing to manufacturers of high-risk products (e.g., those sliced at deli counters) that do not conduct their own testing, or those manufacturers that do conduct testing but choose not to provide results to the agency. USDA Under Secretary for Food Safety Elsa Murano reportedly acknowledged consulting the White House and industry before issuing the

final directive, “but insisted it was ‘fine-tuned’ solely to advance public health.”

## Scientific/Technical Items

### Caffeine

- [9] High Coffee Consumption May Increase Likelihood of Stillbirth, Study Says

Danish researchers report that high coffee consumption may increase the risk of stillbirth. “Maternal Consumption of Coffee during Pregnancy and Stillbirth and Infant Death in First Year of Life: Prospective Study,” K. Wisborg, et al., *British Medical Journal* 326: 420, 2003. Aarhus University scientists examined data from more than 18,000 women in an attempt to discern any association between coffee consumption during pregnancy and risk of stillbirth or infant death in the first year of life. They report that pregnant women who drink eight or more cups of coffee per day double their risks of stillbirth when compared with pregnant women who do not drink coffee. No association was found between coffee consumption and infant death in the first year. The researchers stated that pregnant women who drink large quantities of coffee are more likely to engage in other behaviors that may adversely affect pregnancy outcome, including smoking, drinking alcohol and eating a poor diet. They acknowledged that further research is needed to prove any real coffee effect.

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## LITIGATION UPDATE

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](mailto:dwalker@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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