

Food & Beverage

LITIGATION UPDATE

Issue 23 • March 19, 2003

Legislation, Regulations and Standards

- [1] Dioxin Reassessment Could Be Delayed Another Two Years 1
- [2] Food Labeling Meeting Scheduled; Comments on Codex Documents Requested 1
- [3] EU Considers Pesticide Residue Level Regulation 2
- [4] Maine Committee Rejects Proposal to Ban Soft Drinks, Candy in Schools 2
- [5] California Agency Seeks Input for Acrylamide Workshop 2

Other Developments

- [6] Concern Mounting About Children's Diets and Heart Disease 2
- [7] Food Industry Takes Aim at Atkins 3
- [8] GMA Survey Reveals Outlook on Obesity, Acrylamide 3
- [9] Advertising Paramount in New TNT Program 3

Media Coverage

- [10] Michael Jacobson, "A Time to Sue?," *Nutrition Action Healthletter*, March 2003; Sally Satel, "Fast Food 'Addiction' Feeds Only Lawyers," *USA Today*, March 11, 2003 4

Scientific/Technical Items

- [11] Larger Portions Linked to Increasing Rates of Overweight and Obesity 4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Environmental Protection Agency (EPA)

[1] Dioxin Reassessment Could Be Delayed Another Two Years

According to a news source, EPA's dioxin risk assessment, begun in 1991, could be further delayed if federal agencies do not reach consensus on the draft document within the next 60 days. A provision in the omnibus appropriations bill adopted in February 2003 apparently requires EPA to contract with the National Academy of Sciences to review the dioxin reassessment if that consensus is not achieved. Chemical and food industry groups are reportedly tracking the reassessment carefully given its conclusion that higher exposures beyond current levels could be harmful and concerns that the risk data will alert the public to dioxin's presence in meat and dairy products. Environmentalists are apparently urging EPA to release the document, pointing to a recent Food and Drug Administration recall of farm-raised fish found to be dioxin contaminated. Further details about the reassessment and ongoing negotiations relating to its release appear in issues 4 and 8 of this Update, October 30 and November 27, 2002. See *Inside EPA*, March 14, 2003.

Codex Alimentarius Commission

[2] Food Labeling Meeting Scheduled; Comments on Codex Documents Requested

The U.S. delegate to the Codex Committee on Food Labeling has announced that a public meeting will be held March 20, 2003, in College Park, Maryland, to "review and discuss agenda items" for consideration during the committee's 31st session in Ottawa, Canada, scheduled for April 28 – May 2. Various labeling guidelines and standards that address prepackaged foods, health and nutrition claims, genetically modified foods, organic foods, and country of origin are on the agenda. The delegate has also called for comments on Codex guidelines and amendments relating to organic and prepackaged food labeling. Further information about the meeting and request for comments can be found at www.fsis.usda.gov. See *Federal Register*, March 14, 2003.

Meanwhile, the Consumers Union has made available on its Web site an information paper that was presented by Consumers International to the Codex Committee on Residues of Veterinary Drugs in Foods during its 14th session, March 4-7, in Washington, D.C. The paper, titled "Presence of Antimicrobial-Resistant Pathogens in Retail Poultry Products: A Report on Tests by CI Members in Australia and the United States," can be accessed at www.consumersunion.org.



European Union (EU)

[3] EU Considers Pesticide Residue Level Regulation

The EU has reportedly adopted a draft regulation aimed at harmonizing the maximum residue levels (MRLs) of pesticides permitted in plant and animal products. MRLs represent the upper legal limits of pesticide residues, not toxicological limits, and violations are reportedly not necessarily of concern for public or animal health. In addition to harmonizing MRLs among EU member states, the new regulation evidently gives the European Food Safety Authority responsibility for risk assessment tasks and the EU responsibility for risk management tasks by setting the MRLs. Before taking effect, the measure must first be approved by the European Parliament and Council. See *just-food.com*, March 14, 2003.

State/Local Initiatives

[4] Maine Committee Rejects Proposal to Ban Soft Drinks, Candy in Schools

A legislative committee in Maine has reportedly rejected proposed legislation (L.D. 104) that would have prohibited the sale of soft drinks and candy in school vending machines and stores. A news report indicates that the Education and Cultural Affairs Committee voted 12-0 to “carry over” the bill until 2004, allowing state education and health officials time to propose nutrition guidelines for foods and beverages sold in schools. Nearly 20 states are evidently evaluating similar legislation as a way of addressing the rising rate of childhood obesity. In August 2002, the Los Angeles Unified School District extended an existing ban on soft drink sales in elementary schools to the district’s middle and high schools. See *Portland Press Herald*, March 18, 2003.

[5] California Agency Seeks Input for Acrylamide Workshop

The California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment (OEHHA) has issued a public notice seeking input on possible agenda items for a future workshop focusing on Safe Drinking Water and Toxic Enforcement Act (Prop. 65) regulatory options for acrylamide. The byproduct of high-temperature cooking processes is currently listed as a carcinogen “known to the state to cause cancer” under Prop. 65. Submissions should be sent to OEHA c/o Cynthia Oshita by April 14, 2003. See http://www.oehha.ca.gov/prop65/CRNR_notices/pdf_zip/Acrylamideworkshop.pdf.

Other Developments

[6] Concern Mounting About Children’s Diets and Heart Disease

Companion articles in *The Wall Street Journal* highlight a trend in children’s diets toward foods such as chicken nuggets that are thought to be nutritious but actually contain high levels of fat and carbohydrates; this trend is being blamed for the emergence of heart disease precursors in children as young as age 2. Chicken nuggets, which some children evidently eat four or five times per week, are reportedly higher in fat, including *trans* fats, than a simple hamburger at McDonald’s. According to a nutritionist, energy needs may be met by nuggets and soft drinks, but nutritional needs will not, and “Who knows when the ramifications of these kinds of food choices in childhood are going to show up later in life.”

Meanwhile, the American Heart Association is reportedly planning to publish its first-ever guidelines for preventing cardiovascular disease in children. Recent studies have apparently found

enlarged hearts in obese teenagers and indicators of heart disease risk, including high rates of insulin resistance, elevated blood fats and low levels of good HDL cholesterol, in children as young as age 9. Physicians and public health officials are reportedly calling for cardiovascular screening tests beginning at age 3 and programs that encourage families to increase exercise and reduce calories. *See The Wall Street Journal*, March 18, 2003.

[7] Food Industry Takes Aim at Atkins

With low-carbohydrate Atkins-diet books at the top of best-seller lists and sales of carbohydrate-laden foods falling, food industry groups are reportedly taking action to defend the role of bread, cereals, rice, and pasta in a healthy diet. The Wheat Foods Council, an industry consortium that includes ConAgra, General Mills and Kellogg Co., is apparently planning to participate in revisions to the nation's Food Guide Pyramid now underway. The council has also prepared a fact sheet, available at www.wheatfoods.org purportedly providing evidence that diets high in protein and low in carbohydrates may not be healthy and, in fact, could be responsible for the exponential increase in obesity since their introduction in the early 1970s. *See Reuters*, March 17, 2003.

[8] GMA Survey Reveals Outlook on Obesity, Acrylamide

The Grocery Manufacturers of America (GMA) sponsored a survey in February 2003 addressing such issues as consumer purchasing decisions, acrylamide awareness and responsibility for obesity. Of 1,000 adults surveyed, eight in 10 had never heard of acrylamide in food. Meanwhile, 83 percent of respondents apparently blamed obesity on individually controlled factors like a lack of exercise, watching television or poor food choices. In

a similar survey conducted a year earlier, 86 percent had indicated that overweight and obese Americans had only themselves to blame. Five percent of those surveyed in 2003 reportedly blamed obesity on fast food or larger portions, and 4 percent held food manufacturers responsible. Some 16 percent either "strongly" or "somewhat" agreed that "overweight and obese Americans are not solely responsible for their food choices, because restaurants and grocery stores do not offer enough healthy food alternatives." According to a GMA spokesperson, "The results indicate that Americans clearly prescribe a dose of personal responsibility as a solution to the issue. The role of the food industry ought to be to offer smart choices to the public and then help the public select those choices, which we will continue to do." *See GMA Foods*, March 5, 2003.

[9] Advertising Paramount in New TNT Program

In what many in the advertising industry evidently contend represents the "next frontier in advertising," Atlanta-based Turner Network Television (TNT) is reportedly launching a new program titled the "Diet Coke MovieFest." According to a news report, the program will feature old movies introduced by aspiring actors delivering dialogue from the films and taking occasional swallows of the diet soft drink. Similar product placements are also evidently being incorporated into reality shows such as "American Idol" and "All American Girl." *See Atlanta Journal-Constitution*, March 13, 2003.



Media Coverage

[10] Michael Jacobson, "A Time to Sue?," *Nutrition Action Healthletter*, March 2003; Sally Satel, "Fast Food 'Addiction' Feeds Only Lawyers," *USA Today*, March 11, 2003

These articles address the growing interest of litigators in obesity-related lawsuits against food producers. Jacobson, who is executive director of the Center for Science in the Public Interest, contends that Congress and several federal agencies have been ineffective "thanks to opposition from the food industry," at adopting legislation and programs that would promote healthier eating habits. Stating that he is "glad that lawyers have begun to consider litigation," Jacobson suggests that they consider (i) deceptively labeled and advertised foods, (ii) youth marketing, (iii) sales of soft drinks and junk foods in schools, and (iv) the failure of restaurant menus to list calories and nutrients. As long as litigation results in helpful programs and research and is not limited to enriching attorneys, Jacobson supports this "solution" to "the obesity epidemic."

Satel, on the other hand, refers to such litigation as "spurious," and, from her perspective as a psychiatrist who treats drug-addicted individuals, finds claims that fast food can be addicting to be "flatly offensive." She states "The effects of true addiction are far more devastating than the results of too many Happy Meals. In my drug-treatment clinic, I see a daily parade of battered men and women who have lost their families, jobs and homes. Many are infected with HIV / AIDS and hepatitis. There is no comparison between these casualties of addiction and kids who eat too much.... The word 'addiction' is perilously close to losing any meaning. If lawyers

can turn fast food into an addiction and pin liability on restaurants, it won't be long before adulterers sue *Sports Illustrated*, claiming its swimsuit issue led them astray."

Scientific/Technical Items

Portion Management

[11] Larger Portions Linked to Increasing Rates of Overweight and Obesity

New study results reportedly confirm that many food products are now larger than when they first came on the market. "Expanding Portion Sizes in the U.S. Marketplace: Implications for Nutrition Counseling," L.R. Young and M. Nestle, *Journal of the American Dietetic Association* 103(2): 231-234, 2003. Concerned that the greater energy content of larger foods may be contributing to increasing rates of overweight and obesity, New York University researchers examined commonly consumed foods to determine portion size, identify changes in these sizes with time and compare portions with federal standards. They found that over time the sizes of pre-packaged, ready-to-eat foods have increased substantially. Portions at fast-food chains, for example, are now two to five times larger than the original size. The researchers also found that current marketplace portions exceed federal standard serving sizes by as much as eight times. They suggest that these discrepancies between marketplace portion size and standard servings as established by dietary guidelines highlight the need to focus on portion when approaching weight maintenance.

Food & Beverage

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 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.

Shook,
Hardy &
Bacon_{L.L.P.}™

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

