

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] New Jersey Congressman Introduces Food Safety Legislation

Representative Frank Pallone (D-N.J.) has introduced two bills (H.R. 1495 and H.R. 1496) to ensure the safety of the U.S. food supply.

The [National Uniform Food Safety Labeling Act](#) (H.R. 1495) would amend the federal Food, Drug and Cosmetic Act “to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented.” Provisions of the proposal include disclosure of (i) the increased health risk of eating raw or partially cooked foods and unpasteurized juice and (ii) the country of origin.

The [Consumer Food Safety Act of 2003](#) (H.R. 1496) would establish “a comprehensive program to ensure the safety of food products intended for human consumption which are regulated by the Food and Drug Administration.” Elements of the Act address (i) a national system for the registration and quarterly inspection of food processing facilities and importers, (ii) establishment and enforcement of health-based standards for substances that may contaminate food, (iii) establishment and enforcement of health-based standards for safety and sanitation in the processing and handling of food

products, and (iv) development of public education and advisory programs.

Both bills have been referred to the House Committee on Energy and Commerce.

[2] Investigation into ConAgra Meat Recall Continues

Representative Henry Waxman (D-Calif.) and five other Democrats have called on Swift & Co. to provide documents concerning plant officials alerting the U.S. Department of Agriculture about *E. coli* problems at the Greeley, Colorado, plant that Swift purchased from ConAgra Foods Inc. after a massive recall of ground beef processed in Greeley that purportedly caused some 28 illnesses and one death. Waxman is reportedly considering asking the House Committee on Government Reform to schedule a hearing on the ConAgra recall. According to his letter, because the Greeley plant tested positive for *E. coli* 33 times before the outbreak of illness, “understanding how company and USDA officials responded is of paramount public interest.” A Swift spokesperson indicated that the company has been cooperative and provided much of the information Waxman seeks in a letter sent to Agriculture Secretary Ann Veneman in early March 2003. Further details about the recall appear in issue 24 of this Update, March 26, 2003. See *Reuters*, March 28, 2003.



Litigation

E. Coli

[3] Fast-Food Restaurant Sued for Beef Contamination

Alleging that California-based In-N-Out Burger took no action to prevent bacterial contamination of hamburger buns despite repeated warnings, a lawsuit filed on behalf of a 12-year-old girl with Hemolytic Uremic Syndrome (HUS) is seeking millions in medical expenses and future costs against the fast-food restaurant. Cayley Bowles, who apparently contracted an *E. coli* infection after eating a contaminated hamburger bun from the defendant's Kettleman City facility, claims to have spent 28 days in the hospital, undergoing multiple blood transfusions and 17 days of kidney dialysis after developing HUS. According to her attorney, who specializes in such litigation and has brought a number of successful actions against other burger chains, Cayley is at risk for long-term complications such as end-stage renal disease and kidney transplants. Kings County Health Department records allegedly indicate that the defendant toasted its buns next to cooking hamburgers where they were exposed to splatter with the potential for cross-contamination from raw meat. See *PRNewswire*, March 31, 2003.

Advertising Assessments

[4] Courts Split on Farmers' Coerced Payments for Product Promotion

In back-to-back rulings, U.S. district courts in Washington and Pennsylvania and a Florida state court have split over whether farmers can be compelled by government to subsidize product

promotion. In Pennsylvania, U.S. District Court Judge John Jones ruled that organic dairy farmers could be forced to contribute to a dairy-promotion campaign under the aegis of the U.S. Department of Agriculture's National Dairy Promotions Board. Tioga County farmers Joseph and Brenda Cochran had apparently argued that the promotions help companies whose agricultural practices they find objectionable while doing little to support organic products. In a March 24, 2003, ruling, the court rejected their claim that forced participation violates farmers' right to free speech. A news source indicates that the couple intends to appeal the decision.

[In a March 31 ruling](#), U.S. District Judge Edward Shea determined that the Washington Apple Commission could not legally impose similar assessments on the state's apple farmers. The commission brought the lawsuit in 2001, following a U.S. Supreme Court decision invalidating a Tennessee mushroom council's fee for generic advertising; the commission was apparently seeking an affirmation of its right to collect the mandatory assessments. The parties were ordered to discuss refunds and damages, which could amount to some \$50 million. According to a commission lawyer, the court will be asked to stay its decision to allow collection of the assessments to continue pending the outcome of an appeal.

The Florida case involved a "box tax" that funds generic citrus advertising. Polk County Circuit Court Judge Dennis Maloney has ruled in a case brought by several large Florida agribusinesses that the citrus commission's assessment, which has been levied since 1935 and amounted to some \$16 million since September 1999, violates the growers' First Amendment rights. The Florida Department of Citrus plans to appeal. Small growers were reportedly concerned that the March 31 ruling, which

affects only taxes paid on oranges and grapefruits processed for juice, will adversely affect them. Press reports indicate that similar litigation is pending in a number of other jurisdictions. See *Associated Press*, March 26, 2003; *PRNewswire*, March 31, 2003; *The New York Times* and *The (Lakeland, Florida) Ledger*, April 1, 2003.

Genetically Modified Products

[5] **Bush Administration Pressured to Challenge GM Moratorium Before WTO**

House Speaker Dennis Hastert (R-Ill.) has called on the U.S. government to take a case “immediately” to the World Trade Organization (WTO) challenging the European Union’s (EU) moratorium on new genetically modified products. In prepared testimony to the House Agriculture Committee, Hastert claimed that the EU moratorium amounts to a trade barrier “because we [American farmers] are technologically superior.” Hastert, who represents major corn and soybean producers in Illinois, and a number of other lawmakers also apparently wrote to President George W. Bush earlier in the year urging a WTO challenge.

Meanwhile, an organization in South Africa has concluded that GM foods pose more risks to the environment than to humans or animals. According to a South African Development Community (SADC) report, “The risks are more related to the impact of unintended release into the environment, [including] unintended gene flow to other crop varieties, plants, animals, and macro-organisms.” The report was apparently undertaken after many SADC member states refused to accept GM foods as part of food-aid packages. Recommendations on handling GM foods will be forwarded to the SADC Council of Ministers in August. See *Reuters* and *Food Ingredients First*, March 26, 2003.

Other Developments

[6] **Lawsuit Strategists and Food Industry Representatives to Square Off During Food Policy Conference**

Tobacco-control activist John Banzhaf and National Restaurant Association President Steven Anderson will reportedly meet for a debate titled “Courtrooms – The New Obesity Battleground?” during the [Annual National Food Policy Conference](#) on May 8-9, 2003, in Washington, D.C. Additional obesity-related sessions at the conference will feature Center for Science in the Public Interest Director Michael Jacobson and *Washington Post* reporter Sally Squires. Other topics of discussion will include the Food and Drug Administration’s food policy agenda, acrylamide, food recalls, the debate over fast food and soft drinks in public schools, food labeling, and the federal Meat Inspection Act. Held at the National Press Club, the annual event is coordinated by the Consumer Federation of America’s Food Policy Institute.

Media Coverage

[7] **Sabrina Eaton, “Ding Dongs Don’t Kill People...,” *Mother Jones*, March 3, 2003.**

In light of emerging obesity-related litigation, this short editorial claims that food manufacturers have launched “a PR campaign to convince Americans that it’s not the food’s fault that you’re fat.” In particular, the author targets the [Center for Consumer Freedom](#), an organization she says has received at least \$2 million in funding from Philip Morris (now Altria Group Inc.) and utilizes “opinion pieces, magazine ads, websites, and talk shows to attack what it calls the ‘food police.’”



[8] Sheryl Gay Stolberg, "Conquer Fat," *AARP The Magazine*, March-April 2003

Centers for Disease Control and Prevention researchers have apparently found that senior citizens experienced the highest increase in obesity of any age group in the United States during the last decade. Physicians and geriatricians who previously did not regard obesity in the aged as a dangerous health problem are now rethinking the issue. This article explores theories about obesity causation, diets that are currently in vogue and current research on new medications to help people shed excess weight.

Scientific/Technical Items

Polycarbonate Plastic

[9] Researchers Link Plastic Containers to Birth Defects

A [study](#) published in the April 1, 2003, issue of *Current Biology* is raising concerns about the plastic used in food and drink containers. Case Western Reserve University researchers discovered that the unknown agent causing a dramatic increase in chromosomal abnormalities in the eggs of their laboratory mice was bisphenol A, a chemical that leached out of the polycarbonate cages in which the mice lived and the bottles from which the mice drank water. When such abnormalities occur in humans, they can cause miscarriages or mental retardation. Similar conclusions were drawn by researchers who published a study in February in *Environmental Health Perspectives*. In light of these mouse studies, scientists are reportedly concerned about the validity of toxicity test assays and are suggesting that regulators assume that human exposure

to bisphenol A will cause the same chromosomal abnormalities. An American Plastics Council spokesperson called the studies "interesting" and said they warrant more research. See *Reuters*, March 31, 2003; *BNA Daily Environment Report*, April 1, 2003.

Obesity

[10] Obesity Likely Increases Risk of Cardiovascular Disease

The higher levels of systemic oxidative stress (cell-damaging "free radicals") generally found in obese individuals likely increases their risk of developing cardiovascular disease. "Obesity and Systemic Oxidative Stress: Clinical Correlates of Oxidative Stress in the Framingham Study," J.F. Keaney, et al., *Arteriosclerosis, Thrombosis, and Vascular Biology* 23(3): 434-439, 2003. John Keaney and colleagues from the Boston University School of Medicine tested nearly 3,000 men and women for the presence of 8-epi-PGF (2 alpha), a chemical marker of oxidative stress, and then assessed relationships between oxidative stress levels and various cardiovascular risk factors. The researchers determined that, in general, the higher a person's body mass index, the higher their levels of 8-epi-PGF (2 alpha) and therefore oxidative stress.



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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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