

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] Bipartisan Group Launches Food Safety Caucus .....1

#### Litigation

- [2] Litigation in Cross-Hairs of New Health Advocacy Organization; Inaugural Obesity Conference Slated for June 2003 .....1
- [3] *California v. Bennigans, et al.*, No. bc293749 (Cal. Super. Ct., Los Angeles County, 04/10/03); *California v. Benihana Inc., et al.*, No. cgc03419292 (Cal. Super. Ct., San Francisco County, 04/10/03).....2

#### Other Developments

- [4] USDA Adds Nutrient Database to Web Site.....3
- [5] FDA's Annual Science Forum to Include Food Topics .....3
- [6] Science and Health Council Examines Trace Levels of Environmental Chemicals .....3

#### Scientific/Technical Items

- [7] CDC Claims Alcohol Advertising Influences Incidence of Underage Drinking .....4
- [8] High Fish Consumption Blamed for Blood-Mercury Levels in Some Women.....4

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] **Bipartisan Group Launches Food Safety Caucus**

Citing a desire to ensure the safety of families and children, Representatives Rosa DeLauro (D-Ct.), Sherrod Brown (D-Ohio) and Tom Latham (R-Iowa) recently launched the Congressional Food Safety Caucus to tackle such issues as the incidence of foodborne illness, bio-engineered foods, risk management, and bioterrorism. Goals of the new group reportedly include educating the public and Congress about emerging food safety issues and enhancing legislative efforts to address them.

In a related development, the Food and Drug Administration (FDA) has scheduled a May 7, 2003, public meeting (via satellite downlink) to discuss proposed regulations implementing two sections of Title III of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Section 306 of the Bioterrorism Act authorizes FDA to require those involved in the manufacture, transport or distribution of food to maintain records for identifying its previous sources and the immediate subsequent recipients of food so that the agency can follow up on credible threats of serious adverse health consequences of the food's consumption; farms and restaurants are exempt from this record-keeping regulation. Section 303 of the Bioterrorism Act authorizes FDA to detain food if the agency

deems it a serious health threat to humans or animals. See *Congresswoman Rosa L. DeLauro Press Release* and *Federal Register*, April 8, 2003.

### Litigation

#### Obesity

##### [2] **Litigation in Cross-Hairs of New Health Advocacy Organization; Inaugural Obesity Conference Slated for June 2003**

Taking a page from the book on tobacco litigation, a group of New England lawyers and medical professionals has formed a "strategic alliance" known as the Public Health Advocacy Institute. Among the institute's missions is exploring "the potential for new legal strategies toward the goal of effectively reducing [the food industry's] contribution" to obesity.

The institute was established by a core grant from the Washington, D.C.,-based Bauman Foundation, which has been providing significant grants since 1994 to such entities as the Institute for Agriculture and Trade Policy, the Center for Science in the Public Interest and the Natural Resources Defense Council. The public health institute's board includes long-time anti-tobacco attorney Richard Daynard who created and chaired the Tobacco Products Liability Project and claims to be responsible for "successful anti-smoking litigation and legislation." The executive director is Ben Kelley, former president of the Institute for Injury Reduction and an apparent expert on motor vehicle injuries.



One of the institute's initial projects, titled "Law and Obesity," will kick off with its [First Annual Conference on Legal Approaches to the Obesity Epidemic](#), June 20-22, 2003, at the Northeastern University School of Law in Boston. While information about the agenda is sparse, Marion Nestle, author of *Food Politics*, is touted as the keynote speaker for the event whose aim is bringing together "public health advocates, experts, academics, and attorneys to examine the nature of the obesity epidemic and its dire implications for public health, and explore how the use of law – regulation, legislation and litigation – may contribute to ending the epidemic." The main conference sessions on June 21 are open to all registrants, but the June 22 legal strategy workshop is limited to those willing to sign an affidavit swearing (i) "not to appear as an expert witness or work as a consultant or in any other capacity for or in the food industry before December 31, 2006," and (ii) that "I, and any firm/organization for which I am working, am not currently retained by, and hereby commit myself and my firm/organization not to take as a client, any defendant in the food industry case before December 31, 2006."

Other institute projects include the development of strategies to oppose "protective orders and other obstacles to disclosure"; developing document archives about health hazards for analysis by public health professionals and use by attorneys and legislators; and "identifying and intervening in crucial court cases, legislative deliberations and regulatory proceedings on behalf of public health needs."

## Warnings

- [3] *California v. Bennigans, et al.*, No. bc293749 (Cal. Super. Ct., Los Angeles County, 04/10/03); *California v. Benihana Inc., et al.*, No. cgc03419292 (Cal. Super. Ct., San Francisco County, 04/10/03)

California's attorney general has filed lawsuits against 16 restaurant companies under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) seeking to require those serving swordfish, tuna and shark to post "clear and reasonable" warnings about mercury exposure. According to an attorney general fact sheet, methylmercury has been listed by the state as a reproductive toxin since 1987 and as a carcinogen since 1996 and is present in these types of fish at levels high enough to trigger Prop. 65's warning requirement. The attorney general is also seeking fines of \$2,500 per day for failure to post the warnings. Defendants include the corporate parents of the Cheesecake Factory, P.F. Chang's China Bistro, Red Lobster Seafood Restaurants, Outback Steakhouse, and McCormick & Schmick seafood restaurants.

Information about a similar lawsuit filed against California grocery chains appears in issue 15 of this Update, January 22, 2003. News sources have indicated that the grocery chains are beginning to post mercury warnings under a proposed settlement agreement. In addition, it has been reported that the restaurants sued on April 10 sought the attorney general's involvement after learning that an environmental group was considering bringing a Prop. 65 enforcement action. Several chains have apparently already agreed on proposed language for warnings.

Meanwhile the Food and Drug Administration (FDA) has recently confirmed a March 2001

methylmercury advisory which recommends that pregnant women and women of childbearing age who may become pregnant not eat shark, swordfish, king mackerel, and tilefish. FDA also advises that nursing mothers and young children should refrain from eating these fish varieties as well. In other news, a British committee on food toxicity has found that mercury in baby food is exposing infants from four to 12 months to twice the levels recommended by government agencies. Warnings are apparently being considered in the U.K. See *FDA Press Release*, April 8, 2003; *The Guardian*, April 9, 2003; *Sacramento Business Journal*, *San Jose Mercury News* and *Reuters*, April 11, 2003; *Associated Press*, April 12, 2003; *BNA Daily Environment Report*, April 14, 2003.

## Other Developments

### [4] USDA Adds Nutrient Database to Web Site

The U.S. Department of Agriculture (USDA) has made a searchable nutrient database available free-of-charge on its Web site. "[The National Nutrient Database for Standard Reference](#)," which can be downloaded onto personal computers and laptops, contains information about some 6,000 foods and data on 117 nutrients. According to the company that developed the software, the database "will provide convenient widespread access to accurate food and nutrition data that will provide actionable information to the user. Tools such as this can have a positive impact on the obesity epidemic that is threatening the lives of millions." The program can be searched by full description or common name, and users can adjust portion sizes to appropriately scale the nutritional information. See *PRNewswire*, April 15, 2003.

### [5] FDA's Annual Science Forum to Include Food Topics

The Food and Drug Administration's (FDA's) [Ninth Annual Science Forum](#) in Washington, D.C., will reportedly include discussions of such food-related issues as the application of risk assessment to food safety problems, multiresidue screening for pesticides in food, and bioterrorism and the U.S. food supply. Speakers at the April 24-25, 2003, event will include various officials from FDA, the Environmental Protection Agency and the National Institutes of Health. See *FDA Talk Paper*, April 1, 2003.

### [6] Science and Health Council Examines Trace Levels of Environmental Chemicals

The American Council on Science and Health (ACSH) has updated its report, *Traces of Environmental Chemicals in the Human Body: Are They a Risk to Health?*, and concludes that the small amounts of chemicals detected in humans by improved analytical techniques "are well below the levels of concern for the general public." The report is based on a review of research involving, among other matters, contaminants in the food supply such as DDT and dieldrin. The authors suggest that efforts to further decrease exposure to contaminants already found at trace levels in humans will not likely improve public health. Rather, the report recommends focusing on "those populations that still experience high exposure." Commenting on the report, ACSH President Elizabeth Whelan noted, "The human body has numerous mechanisms built in to deal with environmental chemicals. Merely because a substance can be detected does not mean that it poses any real risk to health. Indeed, there are almost no studies documenting an adverse human health effect due to trace levels of chemicals."



## Scientific/Technical Items

### Alcoholic Beverages

#### [7] CDC Claims Alcohol Advertising Influences Incidence of Underage Drinking

A new [CDC study](#) concludes that ubiquitous advertising for alcohol in retail establishments frequented by youth -- convenience stores, small grocery stores and gas stations -- might promote underage drinking and drunken driving. Point-of-purchase (POP) alcohol advertising was found in 94 percent of 3,961 retailers in 329 communities throughout the United States. CDC researchers are especially concerned about (i) the presence of low-height POP advertisements in the sight line of children, (ii) the placement of single cans or bottles of beer near checkout stands and (iii) alcohol-branded objects at checkout stands (e.g., penny trays with alcohol company logos). They recommend that policy makers and public health agencies work with liquor-control boards to regulate such advertising.

Meanwhile, a Georgetown University Center on Alcohol Marketing and Youth (CAMY) [report](#) concludes that American youth (ages 12 to 20) heard more radio commercials for beer and distilled spirits during 2001 and 2002 than did people of legal drinking age. "What our study shows is that if you are under 21, you are a target for the alcohol industry's radio ads," CAMY Director Jim O'Hara was quoted as saying. "In fact, 20 of the 160 brands delivered more radio advertising to underage youth than to young adults ages 21-34, an age group the alcohol industry routinely describes as its target audience."

Study findings include (i) underage youth hear more ads for beer and malt alternative products than adults ages 21 and older, (ii) alcohol ads are placed on radio stations with "youth" formats and (iii) youth

in African-American and Hispanic communities are overexposed to radio commercials for alcoholic beverages. See *CAMY News Release*, April 2, 2003.

### Mercury Exposure

#### [8] High Fish Consumption Blamed for Blood-Mercury Levels in Some Women

According to a newly published study, 8 percent of American women have potentially hazardous levels of mercury in their blood which is likely attributable to their consumption of fish. "Blood Mercury Levels in US Children and Women of Childbearing Age, 1999-2000," S.E. Schober, et al., *Journal of the American Medical Association* 289(13): 1667-1674, 2003. Centers for Disease Control and Prevention researchers assessed sociodemographic characteristics, fish consumption and blood mercury levels in a sample of children and women of childbearing age in an attempt to detail the extent of exposure to mercury in these populations. They found that, on average, blood mercury levels were almost three-fold higher in women compared to children. They report that while most women have acceptable levels of mercury in their blood, one in 12 has concentrations higher than the acceptable limit set by the U.S. Environmental Protection Agency. The researchers note that those women who had eaten three or more servings of fish in the past 30 days had four-fold higher levels of mercury than those who had eaten no fish. They advise that pregnant women or those who intend to become pregnant follow federal and state advisories on fish consumption.



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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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