

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Class-Action Reform Legislation Advances to Senate Floor

Citing the trend toward class action lawsuits against tobacco and gun manufacturers and “big fast food” companies, Senator Mitch McConnell (R-Ky.) has been speaking in support of legislation intended to prevent “plaintiff-friendly county courts [from setting] national, regulatory policy.” Sometime after its Easter break, the full Senate is expected to take up the [Class Action Fairness Act \(S. 274\)](#), which passed the Judiciary Committee on April 11, 2003, by a vote of 12-7.

As amended by the committee, S. 274 would permit class actions to be removed from state to federal court if (i) the amount in controversy is at least \$5 million and (ii) less than two-thirds of the plaintiffs are from the same state as the key defendant. The measure would also regulate class counsel’s fees, discourage coupon settlements, require settlement terms to be explained in plain English, and prohibit settlements favoring plaintiffs according to their place of residence or proximity to the courthouse.

Judiciary Committee Chair Orrin Hatch (R-Utah) says it is unclear whether supporters of the legislation have the 60 votes needed to prevent a filibuster. A sticking point for some Democrats is the absence of exemptions for certain types of lawsuits such as

those against manufacturers of cigarettes and guns, or violators of environmental and civil rights laws.

Similar legislation, [H.R. 1115](#), has been pending in the House of Representatives since March. See *Reuters*, *Associated Press* and *Business Insurance Daily*, April 11, 2003; *Washington Post* and *Washington Times*, April 12, 2003; *CNS News.com*, April 15, 2003.

Other tort reform measures Congress is now considering pertain to asbestos, gun and medical-negligence lawsuits.

National Toxicology Program (NTP)

[2] NTP to Evaluate Acrylamide as Reproductive Toxicant; Artificial Sweetener Reports Near Peer Review

The National Toxicology Program’s Center for the Evaluation of Risks to Human Reproduction (CERHR) has announced that it will convene an expert panel to evaluate the reproductive and developmental toxicities of acrylamide. According to an April 18, 2003, [Federal Register notice](#), acrylamide was selected for review “because of recent public concern for human exposures through its presence in starchy foods treated at high temperatures, e.g., french fries and potato chips. In addition, recent data are available on occupational exposure, bioavailability, and reproductive toxicity.” CERHR also seeks qualified scientists to serve on the panel that will conduct the acrylamide evaluation. Panel nominations and acrylamide-related information should be forwarded to CERHR by July 17, 2003.



Meanwhile, a subcommittee of NTP's Board of Scientific Counselors will meet May 22 in Research Triangle Park, North Carolina, to peer review six draft NTP technical reports of rodent toxicology and carcinogenesis studies, including reports on the artificial sweeteners aspartame and acesulfame potassium. Plans are apparently underway to make the meeting available for viewing on the Internet. Those wishing to attend are asked to register with NTP Executive Secretary Dr. Mary S. Wolfe at wolfe@niehs.nih.gov. Those wishing to make a presentation should contact Dr. Wolfe by May 14.

U.S. Department of Agriculture (USDA)

[3] Agency Releases Data on Salmonella Sampling

USDA's Food Safety and Inspection Service (FSIS) has released data showing that the incidence of *salmonella* in raw meat and poultry is decreasing. While 26.4 percent more samples were taken in fiscal year 2002 than in 2001, the percentage testing positive for *salmonella* for all commodities dropped from 5.0 to 4.3 percent. Only ground chicken showed an increase in positive test results.

In a related development, FSIS has announced that it will post the results of all completed sampling sets on its Web site. Rejecting a request by the Center for Science in the Public Interest to post the results along with plant-specific information, FSIS will instead provide testing results to individual establishments as they become available for remedial action and will identify the results on its Web site only by state and district locations. Plant-specific information will be released in response to individual requests. FSIS is seeking comments on these modifications to the handling of its *Salmonella* testing results. See *Federal Register*, April 16, 2003.

Environmental Protection Agency (EPA)

[4] USDA Concerns About Dioxin Reassessment May Trigger NAS Review

According to a news source, the U.S. Department of Agriculture (USDA) has continuing concerns about EPA's long-delayed dioxin reassessment. Congressional conferees directed in EPA's 2003 appropriations report that unless the concerns of other agencies could be worked out before April 21, 2003, the report would be sent to the National Academy of Sciences (NAS) for review, which could further delay its release. Because consumption of meat and dairy products is a major pathway of dioxin exposure, USDA officials, during an April 11 interagency meeting, reportedly flagged for concern (i) how EPA describes exposure in children and (ii) EPA's characterization of dioxin as a "known" human carcinogen. Other agencies apparently support the reassessment and may limit the NAS review should that become necessary. See *Inside EPA*, April 15, 2003.

World Health Organization (WHO)

[5] WHO Resists Industry Pressure to Modify Recommendation on Sugar Intake

Despite criticism from U.S. and European associations representing the sugar and soft drink industries, WHO will reportedly issue a report titled [*Diet, Nutrition and the Prevention of Chronic Diseases*](#) on April 23, 2003, in Rome, Italy. Among other recommendations, the report advocates limiting sugar to 10 percent of daily dietary intake. "We have not found anything in the sugar industry's argument that makes us reconsider any findings," a WHO spokesperson was quoted as saying. Industry apparently supports dietary limits of 25 percent of added sugars as suggested in a 2002 report from



the Institute of Medicine. *See Reuters*, April 22, 2003. More details about the WHO report appear in issue 21 of this Update, March 5, 2003.

According to [Center for Science in the Public Interest \(CSPI\)](#), a letter from Sugar Association President Andrew Briscoe to WHO Director Gro Brundtland warned that adoption of the 10 percent-recommendation would lead the association to ask “congressional appropriators to challenge future funding of the U.S.’s \$406 million contributions” to WHO. CSPI also reports that Briscoe’s letter was attached to a letter co-authored by Senators Larry Craig (R-Idaho) and John Breaux (D-La.) asking two Cabinet secretaries “to help quash the WHO report.”

State/Local Initiatives

[6] California Agency Gears up to Review Acrylamide Health Hazards

The Office of Environmental Health Hazard Assessment (OEHHA) of California’s Environmental Protection Agency has begun receiving comments on its plan for a workshop to discuss “all appropriate Prop. 65 regulatory options regarding the chemical created by cooking foods, including the adoption of alternative risk levels.” The attorney for a group that brought a Prop. 65 enforcement action against Burger King and McDonald’s over acrylamide in french fries has suggested that the workshop be expanded to explore the “various pathways by which acrylamide is formed in foods, and the means of eliminating or reducing the acrylamide content of foods by alternative growing, processing and cooking practices.” A food toxicology and safety consultant has submitted comments on behalf of a number of fast-food chains that apparently hope OEHHA will consider “temporary regulatory relief to exempt acrylamide from Prop. 65 notice and other requirements pending completion of more scientific

research concerning exposure and risk assessment.” The companies are also seeking an alternative to the no-significant-risk level of 0.2 micrograms per day. *See Inside EPA*, April 18, 2003.

Media Coverage

[7] Jim Armitage, “Fat Fears Weigh on Food Giants,” *Evening Standard*, April 17, 2003; John Mason and Neil Buckley, “Sweets Makers Could Find Obesity Sours Their Business,” *Financial Times*, April 19/20, 2003

These articles discuss investment bank JP Morgan’s recent warnings to food manufacturers that obesity-related “litigation risks ... should not be underestimated.” According to bank analysts, confectionary and soft drink makers have the most to fear; with rates of obesity ever-increasing, the financial community is concerned about the effect on stock prices of litigation and increased regulation involving labeling, advertising and distribution. JP Morgan’s analysis, “Obesity – the big issue,” also forecasts that government and consumer pressures will force companies to invest billions in research and product development. Investors are advised to back companies that produce “healthy” foods. Some food and beverage interests have responded by claiming it is wrong to blame food manufacturers for a disease that results from a host of complex factors including individual consumer choice. Other companies, such as Kraft Foods, Coca-Cola, Pepsi, and McDonald’s, are responding by promoting healthier lifestyles. The *Financial Times* article concludes by noting that “the political momentum is growing for bans or restrictions on advertising, stiffer labeling requirements and restricting distribution.”



Scientific/Technical Items

Obesity

- [8] **Shawna L. Mercer, et al., "Possible Lessons From the Tobacco Experience for Obesity Control," *American Journal of Clinical Nutrition* (Suppl.), April 2003**

This article explores how smoking rates have been reduced by a combination of educational, regulatory, clinical intervention, and economic approaches and suggests that a similar strategy could be applied to control obesity. In addressing the issue, the article acknowledges that "specific foods or dietary practices have not yet been indubitably linked to obesity. Therefore, most regulatory strategies that might affect food consumption cannot yet be justified. Nonetheless, the identification of these linkages must remain a high priority. A better case exists for physical activity."

Further recognizing "important differences between tobacco control and obesity control," the article maintains that policies and regulations which "make healthful choices the easy choices" can nevertheless work to reverse unhealthful trends. The article concludes, "The worst fears of many food manufacturers, journalists, policymakers, practitioners, and lay members of the public when they hear of the interest in applying the lessons of

tobacco control to diet and physical activity is that attempts will be made to control food and exercise with heavy-handed legal restrictions and environmental controls. For example, concerns have been expressed that the food industry could be vilified as the tobacco industry has been." To avoid this result, the authors recommend collaborative initiatives involving a full panoply of obesity-control elements.

[9] **Calcium Intake May Affect Weight**

Increasing calcium intake may rev up the body's fat burning ability, according to Dr. Michael Zemel and colleagues from the University of Tennessee. "Dairy (Yogurt) Augments Fat Loss and Reduces Central Adiposity During Energy Restriction in Obese Subjects," M.B. Zemel, et al., Abstract #6828 Presented at Experimental Biology 2003 – Translating the Genome, April 11-15, 2003. The researchers suggest that obese subjects who incorporate calcium-rich yogurt into their diets lose significantly more weight than those who simply reduce their caloric intakes. They examined the impact of consuming 1,100 milligrams of calcium, or approximately three servings of yogurt, in a reduced-calorie diet, finding that yogurt eaters lost more weight, body fat and inches around their waists. According to Zemel, changes in the body's calcium level signal fat cells, thereby triggering the burning of fat and reducing the amount of new fat produced.

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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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