

Food & Beverage

LITIGATION UPDATE

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Table of Contents

Legislation, Regulations and Standards

- [1] House Lawmakers Introduce Obesity-Related Legislation Aimed at Youth1
- [2] Companion Bills Address Pathogens in Raw Meat and Meat Products; Recall Legislation Introduced in House.....1
- [3] Bill Would Increase Taxes on Alcoholic Beverages2
- [4] U.S. Delegates Schedule Public Meeting; Commission Requests Comments on Various Proposals.....2

Legal Literature

- [5] John Cohan, "Obesity, Public Policy and Tort Claims Against Fast-Food Companies," *Widener L.J.*, 2003.....2
- [6] Charles Browning, "Insurance Coverage Issues Arising From Large Exposure Contaminated Food Claims," *Defense Counsel Journal*, April 2003.....2

Other Developments

- [7] U.K. Chicken Farmers Quietly Resume Antibiotic Use3
- [8] New Poll Indicates Public Awareness of Childhood Obesity3
- [9] Johns Hopkins to Open Department of Behavior and Health3
- [10] McDonald's Launches Global Advisory Council on Healthy Lifestyles4

Scientific/Technical Items

- [11] CDC Releases Report on Adult Physical Activity4
- [12] New York Research Finds No Neurodevelopmental Risk from Prenatal Methylmercury Exposure.....4

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] House Lawmakers Introduce Obesity-Related Legislation Aimed at Youth

Representative Lois Capps (D-Calif.) has introduced legislation that would authorize the Centers for Disease Control and Prevention to offer grants to local educational agencies to support the purchase or lease and use of vending machines stocked with healthy foods and beverages in schools. [H.R. 2225](#) defines “healthy foods and beverages” as those that derive (i) 30 percent or less of total calories from fat, (ii) 10 percent or less of total calories from saturated fat and *trans* fat, and (iii) 35 percent or less of total calories from sugar, excluding that occurring naturally in fruits, vegetables and dairy products. The legislation also sets forth maximum portion sizes for the items offered in qualified vending machines, e.g., three ounces for bakery goods, including muffins.

Proposed legislation sponsored by Representative Michael Castle (R-Del.) would encourage school-based activities to help reduce and prevent childhood obesity. [The Obesity Prevention Act](#) (H.R. 2227) would (i) provide grants to state educational agencies for nutrition education and physical fitness programs, (ii) incorporate obesity prevention treatment and services into state children’s health insurance programs, and (iii) establish a commission to oversee federal research and policy activities.

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

[2] Companion Bills Address Pathogens in Raw Meat and Meat Products; Recall Legislation Introduced in House

Bills introduced in the House ([H.R. 2203](#)) and Senate ([S. 1103](#)) on May 22, 2003, would require the U.S. Department of Agriculture (USDA) to prescribe “performance standards for the reduction of pathogens in meat, meat products, poultry, and poultry products” and “enforce the Hazard Analysis and Critical Control Point (HACCP) System requirements.” and Titled the “Meat and Poultry Pathogen Reduction and Enforcement Act,” the legislation would also require the USDA secretary to (i) identify and publish a list of “pathogens that make a significant contribution to the total burden of foodborne disease associated with” meat and poultry products, (ii) initiate “surveys to determine the current levels and incidence of contamination” of meat and poultry products with these pathogens, and (iii) establish a national advisory committee for “microbiology criteria for foods.” The bills have been referred to agriculture committees in the House and Senate and to the House Committee on Energy and Commerce.

Meanwhile, the “Unsafe Meat and Poultry Recall Act” ([H.R. 2273](#)) would require anyone suspecting that a meat product is “adulterated, misbranded or otherwise in violation of this Act” to immediately notify the USDA secretary “of the identity and location of the meat product.” The proposed legislation further addresses voluntary and mandatory recalls



and requires notice to consumers, “to the extent the Secretary considers necessary.” This bill, also introduced on May 22, has been referred to the House Committee on Agriculture.

[3] Bill Would Increase Taxes on Alcoholic Beverages and Earmark Funds for Abuse Prevention

Representative Eleanor Holmes Norton (D-D.C.) has introduced legislation ([H.R. 2252](#)) that would (i) increase taxes on wine and beer, (ii) index alcoholic beverage tax rates after 2004 to cost-of-living adjustments, and (iii) require the creation of a trust fund with the increased taxes for alcohol abuse prevention programs. Titled the “Alcohol Tax Equalization Act of 2003,” the bill has been referred to the Committees on Ways and Means and on Energy and Commerce.

Codex Alimentarius Commission

[4] U.S. Delegates Schedule Public Meeting; Commission Requests Comments on Various Proposals

In preparation for the 26th session of the Codex Alimentarius Commission in Rome, Italy, June 30 – July 7, 2003, a public meeting to discuss U.S. draft positions and agenda items has been scheduled for June 10 in Washington, D.C. In addition, proposals to reform commission processes based on a recently concluded World Health Organization evaluation are open to public comment until June 2. Comments are also being solicited on proposed meat-hygiene standards until May 31. Further information about the meeting and proposed drafts can be obtained from www.fsis.usda.gov/OA/codex/new.htm.

Legal Literature

[5] John Cohan, “Obesity, Public Policy and Tort Claims Against Fast-Food Companies,” *Widener L.J.*, 2003

Claiming that there is merit in imposing tort liability for obesity on fast-food manufacturers and retailers, this article, while acknowledging that bad dietary habits are established early in life, makes the case for applying today’s criteria for addiction to fast foods. Obesity- and acrylamide-related litigation is discussed as the article explores legal theories and defenses in such cases and compares fast-food products to tobacco. Among the similarities, according to the article, are the harms these products cause, the public costs they impose, the targeted advertising and product placements they are subject to, and the attraction to children they represent. The article also suggests that tort law flexibility, jury nullification and factfinder outrage could lead to successful outcomes for plaintiffs seeking to “deter corporate misconduct” and “change corporate practices.” Concluding that fast-food companies could be forced to “offer educational conferences on how to treat and prevent obesity,” motivational counseling and product labeling about fat, salt and sugar, the article also recommends that taxes earmarked for nutritional advertising and higher insurance rates for the obese would also help “overcome a pervasive health problem such as obesity.”

[6] Charles Browning, “Insurance Coverage Issues Arising From Large Exposure Contaminated Food Claims,” *Defense Counsel Journal*, April 2003

Using standard insurance-agreement language, this article discusses issues that arise when a third party seeks coverage for a contaminated-food claim under a commercial-liability policy. While there are



evidently few appellate court decisions pertaining to contaminated-food claims, those that exist deal with whether (i) “bodily injury” or “property damage,” as contemplated by the insurance policy, has occurred, (ii) exclusions will preclude coverage for certain claims or risks, and (iii) a government-mandated product recall will affect coverage. The article notes that “detailed claim investigations often are required” when “product recall expense endorsements and first-party contaminated products insurance” are involved and concludes that “large-exposure contaminated food claims almost always are complex.”

Other Developments

[7] U.K. Chicken Farmers Quietly Resume Antibiotic Use to Enhance Growth

According to a press report, one in five poultry companies in the United Kingdom that had stopped using antibiotics to make chickens grow faster have resumed the practice despite public unease. Veterinarians, producers and retailers were apparently concerned that liver damage and diarrhea in chickens were on the rise without the use of antibiotics. Critics, who claim that bacteria in humans become resistant to antibiotics from this practice, have reportedly responded to the news by expressing concerns about the government relying on voluntary changes in the industry. Because the European Union reportedly allows the use of such antibiotics only to spur growth and not for the control of disease, the environment secretary has requested an investigation. The EU will prohibit all antibiotic uses by 2006. See *The Guardian*, May 27, 2003.

[8] New Poll Indicates Public Awareness of Childhood Obesity Problem

A recent poll conducted by *The New York Times* and CBS News reportedly revealed that two-thirds of the 642 adults surveyed agree with public health experts that overweight children and teenagers are a major health problem. “There is no one single factor, but the deck is stacked toward excessive weight gain in our society with the access to high-calorie food and engaging sedentary activities in every direction,” Nancy Krebs, M.D., chair of the American Academy of Pediatrics’ Committee on Nutrition, was quoted as saying. Those surveyed blamed the nation’s childhood obesity problem on a combination of decreasing levels of physical activity among youth, consumption of fast food and the proliferation of high-fat convenience foods. See *The New York Times*, May 13, 2003.

[9] Johns Hopkins to Open Department of Behavior and Health

With funds from an anonymous donor, the Johns Hopkins School of Public Health will soon establish a new department to study unhealthful behaviors, including poor eating habits, and the strategies that have worked to modify those behaviors. According to public health dean Alfred Sommer, one approach being considered is to study strategies that have reduced smoking rates in the United States and apply the lessons to other public health problems such as obesity, stress and domestic violence. A series of seminars will launch the program during the 2003-2004 academic year; thereafter, some 25 faculty members will eventually be recruited to staff the department, which will include a doctoral program. See *The Baltimore Sun*, May 7, 2003.



[10] McDonald's Launches Global Advisory Council on Healthy Lifestyles

McDonald's Corp. has established an independent group of fitness and nutrition experts to advise the company "on activities that address the need for balanced, healthy lifestyles." Members of the nine-member group include former Olympic athlete Jackie Joyner-Kersey; James Hill, Ph.D., director of the University of Colorado's Center for Human Nutrition; and Jane Delgado, Ph.D., president of the National Alliance for Hispanic Health. *See McDonald's Corporate Press Release, May 21, 2003.*

Scientific/Technical Items

Physical Activity

[11] CDC Releases Report on Adult Physical Activity

Data from 32,000 interviews conducted by the Centers for Disease Control and Prevention (CDC) in 2000 have been compiled and analyzed in a new report titled [Physical Activity Among Adults: United States, 2000](#). According to the report, approximately one in five adults engage in a high level of overall physical activity, including work and leisure time, while one in four adults have little or no regular physical activity. Factors that CDC found associated with physical activity included gender, race, education, income, marital status, and geography. According to CDC, "regular physical activity has been associated with decreased risk of coronary heart disease, obesity, noninsulin-dependent diabetes mellitus, osteoporosis, and post-menopausal endometrial cancer." Discussing the report, Health and Human Services Secretary Tommy Thompson claimed that any physical activity is "essential to good health" and was further quoted as saying,

"This study helps give us an even fuller picture of our physical activity status. It confirms that we need to pay more attention to getting adequate physical activity and reversing the alarming rise in obesity that we've experienced nationally during the past decade."

Mercury Exposure

[12] New York Research Finds No Neurodevelopmental Risk from Prenatal Methylmercury Exposure from Ocean Fish Consumption

A newly published study concludes that eating saltwater fish with standard levels of mercury causes no harm to the fetus. G.J. Myers, et al., "Prenatal Methylmercury Exposure from Ocean Fish Consumption in the Seychelles Child Development Study," *Lancet* 361(9370): 1686-1692, 2003. Researchers from the University of Rochester Medical Center examined 779 mother-infant pairs residing in the Seychelles Islands to determine whether prenatal exposure to methylmercury in fish adversely influences neurodevelopment. On average the women in the study consumed 12 servings of fish per week, approximately 10 times the consumption of the average citizen in the United States. Even at these high levels of exposure, researchers found little association with development in the children examined. In a battery of tests given at age 9, children whose mothers had higher mercury levels scored slightly higher on one test and slightly lower on another; the majority of tests yielded no significant differences. The researchers caution that while they found no harm in eating saltwater fish, freshwater fish could have higher levels of mercury and other toxins.



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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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