

Food & Beverage

LITIGATION UPDATE

Issue 36 • June 18, 2003

Table of Contents

Legislation, Regulations and Standards

- [1] New Senate Legislation Promotes Healthy Lifestyles Among Teenagers1
- [2] Notice Provides Information and Solicits Comments on Codex Activities1

Other Developments

- [3] Conferences Consider Proposals to Reduce Obesity.....1
- [4] Employers' Lobbying Organization Establishes Obesity Institute2
- [5] British Physicians Reject "Fat Tax" Proposal; Australia to Consider Similar Idea2
- [6] Biotechnology Conference Explores Interplay of Industry, Media and Public Policy2
- [7] International Science Group Issues Report on GM Foods3

Media Coverage

- [8] "Caffeinated Kids," *Consumer Reports*, July 20033

Scientific/Technical Items

- [9] U.S. Diabetes Rates Are Steadily Increasing.....3
- [10] New Study Implicates Cadmium as Inhibitor of DNA Repair4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] New Senate Legislation Promotes Healthy Lifestyles Among Teenagers

Claiming that “insufficient physical activity and poor nutrition play roles in obesity, coronary heart disease, stroke, hypertension, type 2 diabetes and some cancers,” Senator Lindsey Graham (R-S.C.) has introduced legislation to promote healthy lifestyles among teenage youth. The [YMCA Healthy Teen Act](#) (S. 1201) would provide funds for local YMCAs to implement physical activity and nutrition education programs as well as initiatives aimed at reducing alcohol and tobacco use among teens. The bill has been referred to the Committee on Health, Education, Labor, and Pensions.

Codex Alimentarius Commission

[2] Notice Provides Information and Solicits Comments on Codex Activities

The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has published [a notice](#) informing the public of all standard-setting activities of the Codex Alimentarius Commission and its 16 committees, various task forces and regional coordinating committees. Those interested are asked to submit comments on pending proposals and to submit recommendations for new standards.

The commission serves as “an international mechanism for promoting the health and economic interests of consumers while encouraging fair international trade in food” by developing food standards, codes of practice and other guidelines. The U.S. Code of Federal Regulations requires the Food and Drug Administration to review all food standards adopted by the commission and accept or reject them for application in the United States. *See FSIS News Release*, June 6, 2003.

Other Developments

[3] Conferences Consider Proposals to Reduce Obesity

Politicians, authors, professors, and public health officials gathered at two unrelated conferences last week to present proposals for dealing with obesity in the United States. The debates included assertions that being overweight is at least as deadly as smoking, and that legislation and litigation may be viable methods to control Americans’ weight.

“Obesity, Individual Responsibility, and Public Policy,” sponsored by the American Enterprise Institute for Public Policy Research, took place June 10, 2003, in Washington, D.C. “[Focus on Obesity](#),” a Harvard Forum on Health, was held June 11 in Cambridge, Massachusetts.

Panelists at the American Enterprise Institute’s conference reportedly discussed emerging food litigation in some detail. According to a news article, one panelist called claims that food can be addictive an “untested weapon in obesity lawsuits”; another



predicted that “soft-drink manufacturers will be targeted by class-action suits,” and “it won’t be too long before state attorney generals get in on this. There’s too much money on the table.” See *The Washington Times*, June 11, 2003.

At its forum, Harvard released results of a national survey reportedly indicating “that in the mind of the public, the epidemic of obesity now constitutes a more serious health problem than smoking, with 79 percent of those polled citing it as a major medical issue.” Roughly 60 percent of the 1,002 adults who shared their opinions apparently said they support banning some foods from school vending machines and limiting television food ads aimed at children. About 40 percent favored special taxes on certain types of food, while 62 percent endorsed a requirement that restaurants provide nutritive information, including calories, on menus. See *USA Today*, June 11, 2003; *Reuters* and *The Boston Globe*, June 12, 2003.

[4] Employers’ Lobbying Organization Establishes Obesity Institute

Estimating that obesity-related health care costs account for \$12 billion of U.S. companies’ budgets, a lobbying group for 175 large employers has launched the Institute on the Costs and Health Effects of Obesity. “This [obesity] is like smoking 30 years ago,” Helen Darling, president of the [Washington Business Group on Health](#), was quoted as saying during a June 17, 2003, press conference. “Even small, inexpensive initiatives such as posting nutritional information in company cafeterias or encouraging workers to take the stairs contribute to worker health,” she said. Various health professionals will reportedly consult with the institute’s member companies in their evaluation of the impact of obesity on the workplace and ways of dealing with the issue. Companies participating in the institute include Ford, General Mills and Pfizer. See *Reuters*, June 17, 2003; *The New York Times*, June 18, 2003.

[5] British Physicians Reject “Fat Tax” Proposal; Australia to Consider Similar Idea

Physicians attending a June 10, 2003, British Medical Association conference for general practitioners reportedly rejected a proposal advocating a 17.5 percent value-added tax on foods high in saturated fats. Supporters of the tax claimed that its revenue would help the National Health Service cover the estimated £500 million cost of treating obesity-related illnesses in Britain, while opponents reportedly argued that such a tax would disproportionately affect low-income families that tend to consume larger amounts of inexpensive, high-fat foods.

Meanwhile, Australia’s health ministers will reportedly consider sometime during July an Australian Medical Association proposal for a tax on foods and beverages that are high in fat or sugar content. A recent association survey evidently indicated that nearly 60 percent of Australians are overweight or obese. See *Reuters*, June 9, 2003; *Ananova*, June 10, 2003.

[6] Biotechnology Conference Explores Interplay of Industry, Media and Public Policy

On the premise that “no policy group has extensively explored the formation of public opinion around commercial exploitation of biotechnology,” the American Enterprise Institute hosted a [conference](#) June 12, 2003, to focus on how the genetic-modification debate originated; “how the dialogue has shaped public policy around the world; how it impacts the commercial realities of companies engaged in developing products; how it might alter the future course of scientific research; and what strategies might be utilized to encourage less rancorous and more constructive discussion over the costs and benefits of genetic manipulation, with the hope of developing more rational public policy.”



Biopharming, the name given to using biotechnology to produce medically important substances, was among the subjects discussed. Robert Paarlberg, a political science professor at Wellesley College, reportedly discussed the “opportunities, risks, media coverage, and regulatory challenges of various pharming systems.”

Other [speakers](#) at the conference, titled “Biotechnology, the Media and Public Policy,” included Lester Crawford, deputy commissioner of the Food and Drug Administration, and Andrew Natsios, administrator of the U.S. Agency for International Development, along with reporters, public relations consultants, academics, and industry representatives. Speakers’ topics included global stakeholders’ views on biotechnology, Monsanto’s experience in the GMO debate, and Aqua Bounty Farms’ experience in the commercialization of transgenic salmon.

[7] **International Science Group Issues Report on GM Foods**

The risks and benefits related to genetically modified (GM) foods are the topic of a new report issued by the International Council for Science (ICSU). Titled [New Genetics, Food and Agriculture: Scientific Discoveries – Societal Dilemmas](#), the report poses five questions: “Who needs GM foods? Are GM foods safe to eat? Will GMOs affect the environment? Are the regulations adequate? [and] Will GMOs affect trade?” The ICSU is a nongovernmental interdisciplinary research organization based in Paris, France.

Media Coverage

[8] **“Caffeinated Kids,” *Consumer Reports*, July 2003**

This [article](#) discusses the caffeine content of 25 products analyzed by *Consumer Reports* magazine and claims that “because foods and drinks are not required to list how much caffeine they contain, it can be hard to gauge how much you or your kids are getting.” According to the article, for example, “A 9.5-fluid ounce bottle of Starbucks Coffee Frappuccino, a sweet, milky drink, delivers almost as much caffeine as three 12-ounce cans of Coke.” Given that caffeine apparently has the same stimulating effects on children as on adults, the article advocates limiting children’s caffeine intake and urging the Food and Drug Administration to require food and beverage labels to disclose caffeine content.

Scientific/Technical Items

Diabetes

[9] **U.S. Diabetes Rates Are Steadily Increasing**

Data newly issued by the Centers for Disease Control and Prevention (CDC) indicate that one in three Americans born in the year 2000 will develop diabetes. Diabetes, sometimes attributed in part to obesity and lack of physical exercise, has been of increasing worry for decades. According to the CDC’s chief of diabetes epidemiology, diabetes rates increased by nearly 40 percent in the 1990s. Based on national trends in lifestyle and disease rates from 1984 to 2000, Dr. Venkat Narayan predicts that a man born in 2000 will have a 33 percent chance of developing diabetes in his lifetime, while a woman born in the same year will have a 39 percent chance



of developing the disease. Specific minority groups will be at even greater risk. For Hispanics, the odds will be closer to 1 in 2; 45 percent of Hispanic men and 53 percent of Hispanic women are projected to develop diabetes. For African-Americans, the numbers are 40 percent and 49 percent, respectively. If these predictions are accurate, approximately 29 million Americans will be diagnosed with diabetes and another 10 million will have developed undiagnosed cases of the disease by 2050. Narayan says such diagnoses will likely result in significant loss of life -- by current estimates, a man diagnosed with diabetes by age 40 will lose approximately 12 years and a woman with the same diagnosis, 15 years. See *Reuters*, *The Washington Post* and *The Wall Street Journal*, June 16, 2003.

Cadmium

[10] New Study Implicates Cadmium as Inhibitor of DNA Repair

Researchers from the National Institute of Environmental Health Sciences (NIEHS) have determined that cadmium -- a naturally occurring metal found in food, water and cigarette smoke -- may represent a new kind of mutagen that causes cancer by inhibiting DNA repair rather than directly damaging the DNA. Y.H. Jin, et al., "Cadmium is a Mutagen that Acts by Inhibiting Mismatch Repair," *Nature Genetics* published online June 8, 2003, doi: 10.1038/ng1172 (subscription required). The NIEHS

team used cadmium, judged a "known human carcinogen" by the National Toxicology Program, to demonstrate the impact of environmental exposures on DNA mismatch repair, a natural process by which DNA replication errors are corrected.

According to the study, initial work with yeast cells demonstrated that cadmium-induced hypermutability, the duplication of DNA mistakes in cell after cell, is likely caused by the inability of cells to correct small misalignments and mismatches in the DNA. Further research with extracted human cells also showed that cadmium inhibited at least one step in the mismatch repair process. Based on this evidence, the NIEHS team concluded that exposure to cadmium may hinder the body's natural mutation-avoidance system, potentially leading to cancer.

The research team noted two points of additional interest. First, the strong mutagenic action of cadmium was seen at environmentally relevant concentrations. While those occupationally exposed receive some of the highest levels of cadmium, the general population can be exposed from many sources, including cigarette smoke, drinking contaminated water or eating foods containing small amounts of cadmium such as cocoa beans, cereals, fruits, and vegetables. Second, the inhibition of DNA repair is most likely not unique to cadmium and may also be found with other environmental exposures.



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.}TM

Geneva, Switzerland

Houston, Texas

Irvine, California

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

