

Food & Beverage

LITIGATION UPDATE

Issue 40 • July 23, 2003

Table of Contents

Legislation, Regulations and Standards

- [1] Commonsense Consumption Act Would Shield Manufacturers from Liability.....1
- [2] Bipartisan Legislation Addresses Food Choking Hazards to Children1
- [3] NTP Committee Seeks Comments on Food Constituents Nominated for Study1
- [4] Committee Seeks Comments on GM Labeling Proposal2
- [5] European Commission Proposes Ban on Health and Nutritional Benefit Claims2
- [6] Seattle School Board Renews Pouring Rights Contract with Stipulations; Coke Announces New Marketing Policy.....2

Litigation

- [7] Beverage Industry in Great Britain to Face Addiction Claims in Court3
- [8] EU Files Lawsuits Against Member States for Refusing to Lift GM Moratorium.....3

Other Developments

- [9] Survey Shows Lack of Public Support for Obesity Litigation.....3
- [10] Researchers Confirm That Portion Sizes Have Grown Larger.....4

Scientific/Technical Items

- [11] Boston Researchers Link Fat Intake to Incidence of Breast Cancer4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Commonsense Consumption Act Would Shield Manufacturers from Liability

Senator Mitch McConnell (R-Ky.) has introduced legislation ([S. 1428](#)) to protect lawful food and non-alcoholic beverage manufacturers and sellers from liability in new or continuing weight-related lawsuits. “We are overweight as a society, but to seek to blame this on sellers is an absurd trend in litigation that needs to stop before it gets started,” McConnell said. The bill has been referred to the Committee on the Judiciary. Similar legislation in the House of Representatives ([H.R. 339](#)) was introduced in January 2003 by Representative Ric Keller (R-Fla.). See *Knox News*, July 15, 2003; *Senator Mitch McConnell Press Release*, July 17, 2003.

[2] Bipartisan Legislation Addresses Food Choking Hazards to Children

A bipartisan bill (H.R. 2773) introduced in the House of Representatives on July 17, 2003, would require the Food and Drug Administration (FDA) to establish an Office of Choking Hazard Evaluation to protect children from foods that pose potential choking hazards. Representatives Mike Honda (D-Calif.) and Mike Ferguson (R-N.J.) reportedly introduced the [Food Choking Prevention Act of 2003](#) after learning of children in their districts who had choked to death on gel candies or hot dogs. The

legislation would authorize the new FDA office to (i) mandate warning labels on foods that pose a high choking risk to children and (ii) recall foods determined to pose choking hazards to the general public. The office would also be charged with producing educational materials for distribution to physicians and health care facilities as well as establishing a national database of food choking incidents. The bill has been referred to the Committee on Energy and Commerce.

National Toxicology Program (NTP)

[3] NTP Committee Seeks Comments on Food Constituents Nominated for Study

NTP’s Interagency Committee for Chemical Evaluation and Coordination (ICCEC) is seeking public comment on two food substances [recommended](#) for toxicological studies to better evaluate the substances’ potential human health hazards. [Acrylamide](#), a byproduct of high-temperature cooking processes, was nominated for study by the Food and Drug Administration. [Trans-Resveratrol](#), a polyphenol found in grape products (e.g., red wine) and peanuts was nominated for study by the National Institute of Environmental Health Sciences. Available in capsule form as a dietary supplement, many in the scientific community believe Resveratrol has anti-cancer and anti-inflammatory effects. See *Federal Register*, July 16, 2003.



Codex Alimentarius Commission

[4] Committee Seeks Comments on GM Labeling Proposal

The U.S. delegate to the Codex Committee on Food Labeling is requesting proposals on options for the management of agenda items relating to the labeling of foods obtained through genetic modification and genetic engineering. More information can be obtained from the [Food Safety and Inspection Service \(FSIS\)](#).

Meanwhile, FSIS has announced that a public meeting will be held September 16, 2003, in College Park, Maryland to receive public comments on agenda items and draft U.S. positions to be discussed at the 25th session of the Codex Committee on Nutrition and Foods for Special Dietary Uses to be held in Bonn, Germany, November 3-7. Among the items on the agenda are guidelines for use of nutrition claims, guidelines for vitamin and mineral supplements and draft revised standards for processed, cereal-based foods for infants and young children. Pre-registration is required by September 1. See *Federal Register*, July 10, 2003.

European Union (EU)

[5] European Commission Proposes Ban on Health and Nutritional Benefit Claims

Hoping to crack down on vague and misleading claims on food labels, the European Commission was poised July 15, 2003, to introduce a proposal that would set new standards for the food and beverage industry. According to a news source, the new rules would permit a "low fat" label on foods with less than 3 grams of fat per 100 grams. A high fiber claim could be made only when a product has at least 6 grams of fiber per 100 grams. The snack-food

sector is expected to be hit hard by the proposal, and health claims on alcoholic beverages would apparently be ruled out, with the exception of "light" or "alcohol free." While all health claims will have to be supported with an independent scientific assessment by the European Food Safety Authority under the proposal, the commission will be putting together a list of allowable claims based on "long-established" and "non-controversial" science. See *The Scotsman*, July 15, 2003.

State/Local Initiatives

[6] Seattle School Board Renews Pouring Rights Contract with Stipulations; Coke Announces New Marketing Policy

Despite threatened litigation from George Washington University Law Professor John Banzhaf for breach of fiduciary duties to district students, the Seattle School Board reportedly voted 4-3 on July 17, 2003, to renew a five-year vending machine contract with Coca-Cola. News sources indicate that terms of the contract mandate water and 100-percent fruit juice in three slots of every vending machine and the school board's right to terminate the contract at any time. The contract is evidently expected to generate some \$345,000 annually for middle and high school activities; middle-schoolers' access to vending machines, however, will be limited to after-school hours only. Banzhaf reportedly reacted to news of the school board's vote by claiming that a lawsuit was still possible and that he would help any Seattle attorney interested in suing the school district. See *The Seattle Post-Intelligencer* and *The Seattle Times*, July 18, 2003.

Meanwhile, Coca-Cola has reportedly adopted a new policy regarding product advertising and promotion to children. Provisions of the policy evidently include (i) not aiming ads for any brand (i.e.,

soft drink, water or fruit juice) to children younger than age 12; (ii) not showing children younger than age 12 drinking Coca-Cola-owned products in ads unless the kids are depicted with adults; and (iii) making school classrooms “commercial-free zones.” Soft drink sales in school vending machines and the placement of Coke signs on school scoreboards will not be affected by the new policy. *See The Atlanta Journal-Constitution*, July 19, 2003.

Litigation

Alcohol

[7] Beverage Industry in Great Britain to Face Addiction Claims in Court

Glasgow solicitors, armed with addiction-related legal theories successfully used in litigation against cigarette manufacturers in the United States, are reportedly planning to bring a groundbreaking action against beverage makers in the United Kingdom on behalf of 12 individuals who claim they are addicted to alcohol. An application for legal aid will be made, and a test case will apparently be brought before the Court of Session in Edinburgh, said lawyer Jim Price with solicitors Ross Harper. According to a news source, the plaintiffs, who range in age from 18 to 60, will claim that alcohol caused health and relationship problems, loss of employment, and other adverse effects. Their claims will be based on the failure of drinks manufacturers to provide warnings to consumers. *See Daily Record*, July 21, 2003.

Genetically Modified Food

[8] EU Files Lawsuits Against Member States for Refusing to Lift GM Moratorium

The European Union (EU) has reportedly filed lawsuits against 11 member countries for continuing to maintain a moratorium against testing and licensing genetically modified organisms. The lawsuits, filed against France, Luxembourg, Belgium, the Netherlands, Germany, Italy, Ireland, Greece, Spain, Austria, and Finland, are apparently being undertaken to placate the United States, which has challenged the continuing moratorium before the World Trade Organization. EU Environment Commissioner Margot Wallstroem was quoted as saying, “I have been repeatedly inviting member states to live up to their obligations, and I am disappointed that this has produced few results.” *See Associated Press*, July 15, 2003.

Other Developments

[9] Survey Shows Lack of Public Support for Obesity Litigation

The Gallup Organization has polled Americans on who bears the responsibility for the increasing incidence of obesity in the country and reports that only about one-third of respondents believe the fast-food industry is to blame. Some 41 percent believe that the industry is “not responsible at all.” Yet, about three-quarters of adult respondents believe that the food served in fast-food restaurants is either “not too good for you,” or “not good for you at all.” While the responses were apparently fairly uniform across different gender, age and other demographic groups, the survey did show that less educated Americans were twice as likely as college graduates to say that fast food is “good for you.” The most frequent fast-food diners are younger men, while the



least frequent are older women. The [survey](#) involved 1,006 randomly selected adults and was conducted July 7-9, 2003.

[10] Researchers Confirm That Portion Sizes Have Grown Larger

During an American Institute for Cancer Research (AICR) press conference, a Pennsylvania State University researcher recently discussed research that confirms (i) portion sizes have gotten larger in the United States, and (ii) larger portions encourage overeating. Dr. Barbara Rolls also apparently outlined the methodology that can be used to track these trends.

While she stressed that foods high in fat and calories also contribute to the American obesity epidemic, Rolls and her colleagues determined in controlled trials that participants will consume more calories when they are served larger portions of food. The researchers have apparently tested a variety of foods, and find that not only do people eat more when they are served more, but that they do not compensate by eating less at other meals during the day. Other research suggests that portion size can induce sustained overeating over long periods of time. Consulting with researchers in other countries, Rolls et al. have apparently determined that the American versions of foods from Poland, France and Mexico “have ballooned in size, weight and caloric content.”

AICR has released a [report](#), titled *Awareness and Action: AICR Surveys on Portion Size, Nutrition and Cancer Risk*, that summarizes the recent data, which among other matters, show that most Americans clean their plates when dining out. Reporting on this data, a recent *New York Times* article notes, “Today’s blueberry muffin could, in an earlier era, have fed a family of four.” See *The New York Times*, July 22, 2003.

Scientific/Technical Items

Fat

[11] Boston Researchers Link Fat Intake to Incidence of Breast Cancer

Young women who eat more red meat and high-fat dairy foods might be at an increased risk for developing breast cancer, according to a recently published study authored by researchers from Harvard Medical School and Brigham and Women’s Hospital. E. Cho, et al., “Premenopausal Fat Intake and Risk of Breast Cancer,” *Journal of the National Cancer Institute* 95(14): 1079-1085, 2003. Eunyong Cho and colleagues followed more than 90,000 premenopausal women for eight years, monitoring dietary intake and breast cancer diagnosis. Over that period, 714 of the women studied developed breast cancer. The researchers concluded that the women who consumed the highest levels of animal fat, through sources like red meat and full-fat dairy products, were 33 percent more likely to develop breast cancer than those who consumed the lowest levels. Women identified as high-risk obtained, on average, 23 percent of their calories from animal fat, compared to 12 percent in low-risk women.



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.

