

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Kucinich Introduces GM Crop Legislation

Shortly before the start of Congress's summer recess, Representative Dennis Kucinich (D-Ohio) introduced legislation (H.R. 2921) that would attempt to avoid contamination of the food supply by prohibiting open-air cultivation of genetically engineered pharmaceutical and industrial crops. The [Genetically Engineered Pharmaceutical and Industrial Crop Safety Act of 2003](#) would also (i) ban the use of "common human food or animal feed as the host plant for a genetically engineered pharmaceutical or industrial chemical," (ii) establish a tracking system for pharmaceutical and industrial crops and their byproducts and (iii) require the National Academy of Sciences to submit to Congress a report about alternative methods of cultivating such crops in controlled settings. The bill has been referred to the House Committee on Agriculture.

Department of Health and Human Services (HHS)

[2] HHS Names Group to Revise Dietary Guidelines

HHS Secretary Tommy Thompson and U.S. Department of Agriculture Secretary Ann Veneman have announced the appointment of the 13 indi-

viduals chosen to serve on the Dietary Guidelines Advisory Committee. The group is charged with preparing by 2005 the revised Dietary Guidelines for Americans, a report Thompson deems "the cornerstone of nationwide nutritional and dietary programs and policies." A recent press report opines that the panel will likely focus on the role of added sugar and carbohydrates in the obesity epidemic. Those named to the panel include Lawrence Appel, M.D., of Johns Hopkins University School of Medicine; Yvonne Bronner, Sc.D., of Morgan State University; Benjamin Cabellero, M.D., of Johns Hopkins Bloomberg School of Public Health; Carlos Carmargo, M.D., of Harvard Medical School; Fergus Clydesdale, Ph.D., of the University of Massachusetts; Vay Liang W. Go, M.D., of the University of California-Los Angeles; Janet King, Ph.D., of the Children's Hospital Oakland Research Institute; Penny Kris-Etherton, Ph.D., of Pennsylvania State University; Joanne Lupton, Ph.D., of Texas A&M University; Theresa Nicklas, Dr.P.H., of the Baylor College of Medicine; Russell Pate, Ph.D., of the University of South Carolina; F. Xavier Pi-Sunyer, M.D., of the Columbia University College of Physicians and Surgeons; and Connie Weaver, Ph.D., of Purdue University. See *The Wall Street Journal*, August 8, 2003; *USDA Press Release*, August 11, 2003.



Litigation

Contamination

[3] Indian Court Orders Government to Conduct Independent Tests on Soft Drinks

Following the controversy generated when researchers purportedly found excessive levels of four pesticides in soft drinks owned and marketed by Coca-Cola and PepsiCo in India, the cola giants have reportedly sought and obtained a court order directing the government to conduct tests on product samples and submit a report by the beginning of September 2003. The court also calls for the government to prescribe pesticide limits for soft drinks; apparently current regulations do not address the issue. Filed by Pepsico India Holding Pvt Ltd., the petition giving rise to the order apparently claimed that the laboratory which conducted the tests was unaccredited and that its methods were “suspect.”

As a result of the research conducted and announced by the Center for Science and Environment (CSE) on August 6, Indian shopkeepers have reportedly experienced drastic reductions in soft drink sales, some retail shops in a northern state have been attacked, and activists have defaced product posters and smashed bottles in Bombay. According to a news source, several states are conducting their own tests on the soft drinks which, in India, are manufactured using ground water that in many places is contaminated with pesticides. CSE apparently published a similar report about bottled water in February 2003, and that report resulted in the establishment of government standards for such products. *See The Guardian*, August 7, 2003; *Reuters* and *BBC News*, August 8, 2003; *Reuters* and *EconomicTimes.com*, August 11, 2003.

Obesity

[4] Obese Job Seekers Bring Disability Discrimination Claims

Fast-food restaurants have not only been the targets of suits by those blaming their obesity on fat-laden and sugary foods, they are also apparently being sued by obese individuals who apply for jobs, are hired and then told they cannot start to work until specially ordered uniforms arrive. These and related obesity-bias claims have reportedly been filed recently in Connecticut, Missouri and California under state and federal laws protecting the disabled from discrimination in employment. *See The New York Times*, August 4, 2003.

Commenting on the Connecticut litigation which involves a 420-pound man who has yet to start working for McDonald’s for lack of appropriately sized pants, [Jacob Sullum](#), a journalist and magazine editor, compares the nation’s ambivalence toward smokers with their ambivalence toward the obese. Both are viewed as victims, seduced by sinister corporations, and as leeches, costing taxpayers billions annually, a claim Sullum disputes for failing to “take into account long-term savings on health care and Social Security.”

According to Sullum, “Other things being equal, raising the cost of being overweight ought to reduce the incidence of obesity, which suggests that fat people should be treated as shabbily as possible – for their sake as well as the sake of those who might otherwise be inclined to follow their example. This is the logic that has been applied to smokers, who are taxed, vilified, and ostracized for their own good.” Sullum suggests that any reluctance to take a “tough-love approach with fatties” may have something to do with the fact that “overweight Americans represent a majority of the population – a majority



that includes Kelly Brownell," the director of the Yale Center for Eating and Weight Disorders, an individual Sullum identifies as an obesity expert who supports "junk food" taxes. See *Reasononline.com*, August 5, 2003.

Legal Literature

[5] Nuisance Theory in Vogue for Crop Contamination

According to an *ABA Journal* article, public nuisance and anticipatory nuisance theories are being used against companies alleged to be responsible for contaminating the food supply with bioengineered crops. The class action that was settled earlier in 2003 for \$110 million against the company that developed StarLink corn was apparently brought by commercial farmers who claimed that drifting StarLink pollen contaminated their crops and created a private nuisance. They also reportedly characterized the contaminated food supply as a public nuisance that interfered with their ability to sell crops. The article notes that an attorney representing a growers' association threatened to use the anticipatory nuisance theory to get an injunction against a company selling genetically modified soybeans in the late 1990s. That company apparently decided not to sell the seeds following negotiations with the attorney's client. Environmental lawyers hope that biotech companies have learned a lesson from the StarLink episode and are now focused on regulatory compliance and crop containment. See *ABA Journal*, August 2003.

Other Developments

[6] Bush Administration Asks for WTO Panel in GM Dispute

Taking the next step in its challenge to the European Union's (EU) moratorium on genetically modified (GM) foods, the Bush administration has reportedly issued a formal request to the World Trade Organization (WTO) for the creation of a dispute panel to hear arguments in the controversy. Contending that the EU's action in July 2003 requiring that GM foods be labeled will not resolve U.S. claims, U.S. Trade Representative Robert Zoellick was quoted as saying, "This trade barrier harms farmers and consumers around the world by denying them the benefits of productive, nutritious and environmentally friendly biotech products." An EU spokesperson, responding to news about the latest U.S. action, expressed regret and claimed that "our system of GMO [genetically modified organism] authorization is clear, transparent and nondiscriminatory and complies with WTO rules." Including appeals, the WTO case should be concluded in about 18 months. See *Greenwire* and *CNN.com*, August 8, 2003; *just-food.com* and *The Wall Street Journal*, August 11, 2003

[7] American Fast Food Blamed for Rising Rates of Obesity in Latin America

According to a press report, obesity is sweeping through Latin America, with a recent survey in Mexico classifying 28 percent of adult women and 19 percent of adult men obese. An additional 36 percent of adult women are apparently overweight. The trend is reportedly blamed on the arrival of American fast-food restaurants in the early 1990s and on increased urbanization and genetic traits. See *Food Ingredients First*, August 12, 2003.



Media Coverage

[8] Laura Bradford, "Fat Foods: Back in Court," *Time*, August 3, 2003

The author of this article opines that while the pending lawsuit filed by obese New York teenagers against McDonald's Corp., might not succeed, subsequent food-related suits based on claims of deceptive advertising and aggressive marketing to children "could pose a serious threat" to food manufacturers. A Morgan Stanley analyst is quoted as saying that "obesity and liability are a place to watch over the next five to seven years" and that "it would be a mistake to underestimate the creativity of plaintiffs' lawyers."

Scientific/Technical Items

Obesity

[9] Medical Journal Devotes Entire Issue to Childhood Obesity

The August 2003 of the *Archives of Pediatrics & Adolescent Medicine* purports to be the journal's first-ever issue devoted exclusively to research on childhood obesity. *Archives of Pediatrics & Adolescent Medicine* 157(8): 714-832, 2003. Editorial and scientific comment in the special issue covers a variety of related topics, ranging from factors that influence participation in physical activity to the emotional well-being of overweight and obese children. Results from several studies include: (i) Nearly 30 percent of overweight adolescents exhibit signs of metabolic syndrome, a cluster of symptoms that University of Rochester researchers believe can lead to diabetes and heart disease. By their estimates, almost 1 million teens might be affected by this disorder.

(ii) A study of Minneapolis-area teenagers found that those teased about their weight were more likely to develop depressive symptoms and suicidal tendencies. (iii) Weight report cards sent home by Boston schools were reported to have effectively engaged parents in addressing the issues of overweight and obesity. and (iv) Adolescents on a reduced-glycemic load diet -- one that focused on a reduction in the carbohydrates often associated with diabetes -- were able to lose more weight and fat mass than those on a conventional diet.

[10] Prenatal Care Purportedly Linked to Obesity Later in Life

New research from New Zealand adds to the growing body of literature that purportedly links the prenatal environment to obesity and obesity-related disorders. M.H. Vickers, et al., "Sedentary Behavior During Postnatal Life is Determined by the Prenatal Environment and Exacerbated by Postnatal Hypercaloric Nutrition," *American Journal of Physiology – Regulatory, Integrative and Comparative Physiology* 285: R271-R273, 2003. Using mice, a team from Auckland University reportedly demonstrated that offspring born to undernourished mothers were significantly less active than those born to mothers able to eat their fill. Such lethargy was further exacerbated by hypercaloric intake, or overeating, and extended into adult life. The researchers assert that the *in utero* environment predisposed the mice to post-natal protective behavior, storing fat in anticipation of going hungry. They claim their findings could explain why diet and exercise campaigns are often ineffective, suggesting that health care funding might be better "spent on improving pregnancy care rather than waiting until metabolic and cardiovascular disorders manifest in adults years or decades later."



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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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