

# Food & Beverage

## LITIGATION UPDATE

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# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Department of Health and Human Services (HHS)

##### [1] CSPI Alleges Potential Conflicts of Interest Among Members of New Dietary Panel

A Washington, D.C., -based public health advocacy organization has called on HHS to replace seven members of the newly appointed 13-member Dietary Guidelines Advisory Committee (DGAC).

In an [August 19, 2003, letter](#) to HHS Secretary Tommy Thompson, Center for Science in the Public Interest Director Michael Jacobson says that while “*de minimus* affiliations with industry need [not] disqualify otherwise qualified scientists from advising the government, the tight affiliations that numerous members of the DGAC have with the food, drug, and dietary-supplement industries cast doubt on their ability to provide the government (and public) with the best, unbiased advice.” The federal panel is charged with preparing by 2005 the revised Dietary Guidelines for Americans, a report whose findings will affect, among other things, proposed changes to the Food Guide Pyramid. A Grocery Manufacturers of America spokesperson was quoted as saying the trade group believes those chosen for the dietary panel are unbiased experts and “highly regarded scientists in their field of interest and nutrition both here and abroad.” See *Reuters*, August 19, 2003.

### Food and Drug Administration (FDA)

##### [2] FDA Bioterrorism Regulations May Hamper Some Wine Imports

Wine importers that rely on the “gray market” to purchase small-production, sought-after vintages are apparently concerned that proposed FDA regulations requiring the identification of foreign product sources by means of registration numbers that are not publicly available will devastate their businesses. According to a news source, such importers do not deal directly with foreign wine producers that generally use large wholesalers which dominate distribution to keep prices high by limiting availability. Instead, the small U.S. wine importers buy, without the producers’ knowledge or approval, from auctions and middlemen to keep prices down. Importers are apparently hoping that, when finalized in October 2003, FDA’s bioterrorism regulations will incorporate appropriate changes. See *The Wine Spectator Online*, August 12, 2003.

### Ireland

##### [3] Revised Law Prohibits Happy Hour in Ireland

An amended federal statute in Ireland that took effect August 18, 2003, now prohibits licensed venues from selling alcohol at reduced prices for limited periods, i.e., happy hour. The [Intoxicating Liquor Act 2003](#) also forbids licensees from supplying alcohol to a drunken person or to any person for consumption by a drunken person at the risk of



1,500-euro fines for the first offense and 2,000-euro fines for subsequent infractions. The law defines “drunken person” as anyone “who is intoxicated to such an extent as would give rise to a reasonable apprehension that the person might endanger himself or herself or any other person.” Other provisions of the revised measure prohibit the presence of minors in bars after 9 p.m. and move closing time on Thursdays from 12:30 a.m. to 11:30 p.m. Justice Minister Michael McDowell was quoted as saying the new law “demonstrates the determination of the government to urgently address the public order and public health worries arising from excessive alcohol consumption.” See *The Washington Times*, August 15, 2003.

## European Union (EU)

### [4] EU Considers Standards for Cadmium in Phosphate Fertilizers

Recognizing that phosphate fertilizer is a significant source for the cadmium in foodstuffs, the European Commission has issued [draft legislation](#) that would gradually reduce the cadmium levels permitted in fertilizers. If approved by the European Council of Ministers and the European Parliament, the legislation would, over 15 years, ultimately reduce the amount of cadmium to 20 milligrams per kilogram of phosphorous oxide. The EU will accept comments on the proposal until September 26, 2003.

While the EU already has legislation regulating the cadmium content in foods, the proposal is described as “an appropriate complement” that would ensure “agricultural land does not become unfit for food production,” according to a news source. Cadmium is a heavy metal that accumulates in soil primarily from phosphate fertilizer and is absorbed by crops. When ingested in food, cadmium accumulates in the kidneys and, according to the EU, “may eventually lead to kidney dysfunction in vulnerable

groups.” Litigants in California have alleged that chocolate contains lead and cadmium and thus requires Prop. 65 warnings. Additional information about the lawsuit against Mars, Inc. appears in issue 1 of this Update, October 9, 2002. See *BNA Daily Environment Report*, August 13, 2003.

## Legal Literature

### [5] D. Mark Jackson, “Why the First Amendment Protects a New England Dairy’s Right to Use a Milk Label Proclaiming Its Product to Be Growth-Hormone-Free,” *FindLaw*, August 14, 2003

This article discusses the litigation involving Monsanto and a Maine dairy that advertises its products as free of artificial growth hormones. Further details about the case appear in issue 39 of this Update, July 16, 2003. According to the author, an attorney with the U.S. Department of Labor, the court should “quickly grant” the dairy’s motion to dismiss because the First Amendment protects truthful statements. The article includes additional discussion about (i) the fact that long-term research has not yet been done on the safety of dairy products from cows treated with artificial growth hormones, (ii) only three countries, the United States, Mexico and Brazil, allow the use of artificial growth hormone, and (iii) consumers have the right to make an informed choice about “which foods are free from new high-tech ingredients.” The article concludes by speculating that more cases like Monsanto’s can be anticipated given recent developments such as McDonald’s switch to beef from cattle raised without antibiotics and the European Union’s new labeling requirements for genetically modified foods.



## Other Developments

### [6] Public Health Advocacy Institute Issues Warning for “Fat Peddlers”

Claiming that the food industry is clearly faced “with the threat of lawsuits and regulation,” the executive director of the Public Health Advocacy Institute has urged food companies to make drastic changes in their “obesity-encouraging practices and products.” Ben Kelley asserts in a [Washington Post op-ed piece](#) that more compelling parallels exist between the food industry and the auto industry than between “dangerously fattening foods” and cigarettes. According to Kelley, the food industry does not face a “fight-or-die” choice like the tobacco industry because the latter makes “only one commodity, which by its nature is extremely hazardous to health.” The better parallel, says Kelley, “is found in the history of auto safety regulation and litigation. ... Cars, like food and unlike cigarettes, are essential.” Kelley suggests that the food industry should not follow Detroit’s lead by fighting regulation, but instead should carry out reforms “with vigor, commitment and transparency” so as to “blunt demands for legal action, improve the industry’s reputation, and – most important – begin to address the obesity epidemic.”

### [7] Research Group Claims Independent Tests Confirm Indian-Produced Soft Drinks Contain Excess Pesticide Levels

The Center for Science and Environment (CSE), which recently provoked a widespread rejection of cola products in India by announcing that they contained excess pesticide levels, has reported that independent tests confirm its results. CSE has also apparently defended its methodology in the face of industry criticism. Further details about the controversy involving Coca-Cola and PepsiCo appear in

issue 43 of this Update, August 13, 2003. Meanwhile, the Indian Supreme Court has reportedly rejected Coca-Cola’s request to order the government to set uniform soft drink testing standards. *See Business Standard*, August 18, 2003; and *Sify.com* and *Reuters*, August 13, 2003.

### [8] Chocolate Industry Seeks to Halt Child Labor in West Africa

According to a news source, chocolate manufacturers have been taking steps to reduce the number of children working on West African farms where 70 percent of the world’s cocoa is produced. The industry has apparently committed to introducing a certification system by July 2005 that would allow consumers to select chocolate produced without abusive labor practices. It is reportedly estimated that some 284,000 children work in hazardous conditions on West African farms, carrying heavy loads, wielding machetes and spreading pesticides without any protection. According to the chocolate industry, the best way to stop child labor would be to raise farm income; training sessions are currently underway to help farmers adopt responsible labor practices and innovative farming techniques that could increase their incomes. A lawsuit against the U.S. customs department seeking to enforce laws that ban the import of cocoa picked by slave children in Ivory Coast is pending, said a press report. *See Reuters*, August 19, 2003.

### [9] WHO Encourages Reduced Use of Antibiotics in Animal Feed

Citing purported success in a Danish program that limits antibiotic use in the pork and poultry industries to the targeted treatment of sick animals, a new [report](#) from the World Health Organization (WHO) advocates discontinuing the use of antibiotics in healthy animals as a way of promoting growth.



The widespread use of antibiotics in healthy animals is believed by many to account for drug-resistant bacteria that can allegedly be passed on to humans who consume pork and poultry products. An Animal Health Institute spokesperson reportedly responded to WHO's recommendation for curtailing antibiotic use by saying the WHO report "didn't make a compelling case that there will be a big improvement in human health." See *The New York Times*, August 14, 2003.

## Media Coverage

### [10] Richard Reeves, "How Fat Became a Political Issue," *New Statesman*, August 18, 2003

Acknowledging that obesity rates in the United Kingdom are increasing faster than anywhere else in the world, this article discusses why the government has been reluctant to tackle the issue. The main obstacles to government action, according to this article, are (i) "obesity has no single cause and thus no single solution," (ii) "the fear of stigmatizing overweight people," and (iii) "the liberal argument that the state has no right to interfere with choices freely made by individuals and which have negative consequences only for those individuals." Regarding the latter obstacle, the author notes that government has the right to intervene to protect nonsmokers from cigarette smoke, but that similar grounds do not exist to justify intervention in the case of obesity. Yet, the case can be made, according to this article, for intervention on the ground that "the choices people make which lead them to be overweight or obese are not free ones at all." Pointing to "the bombardment of advertising" and "super-sizing of portions," Reeves notes that some believe that the food and beverage industry promotes a fiction about free choice "to justify its failure to take responsibility." He calls for a multi-pronged approach to the

issue and concludes "Will the seven-minute miler Bush and the treadmill-pounding Blair have the guts to fight the battle of the bulge?"

## Scientific/Technical Items

### Obesity

#### [11] American Adults Still Not Exercising, CDC Says

Even with new broader standards of what constitutes an appropriate amount of physical activity, the Centers for Disease Control and Prevention (CDC) reports that the majority of adult Americans still do not meet minimum exercise standards. "Prevalence of Physical Activity, Including Lifestyle Activities Among Adults – United States, 2000 – 2001," *Morbidity and Mortality Weekly Report* 52(32): 764-769, 2003. Traditionally, guidelines have recommended that to increase cardiorespiratory fitness, adults should participate in vigorous-intensity activity for at least 20 minutes, three times per week. In 1995, however, the CDC and American College of Sports Medicine concluded that similar health benefits could be gained with 30 minutes of moderate-intensity activity on most days. With this shift, a variety of household, transportation and leisure-time activities became "exercise" (e.g., vacuuming, gardening or brisk walking). In 2001, the Behavioral Risk Factor Surveillance System (BRFSS), used to measure leisure-time physical activity since 1986, reflected this looser definition of exercise for the first time. According to recently released data from this survey, only 45.4 percent of adults in the United States were active enough to meet recommendations. While that figure has increased from 26.2 percent in 2000, health officials note it is still too low, particularly because the recommendations only reflect the minimum activity required to help prevent the development of chronic disease.



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## 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](mailto:dwalker@shb.com) or [mboyd@shb.com](mailto: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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