

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### General Accounting Office (GAO)

##### [1] GAO Challenges USDA Cost Estimates for Country-of-Origin Labeling

According to GAO, the U.S. Department of Agriculture (USDA) “used assumptions that are questionable and not well supported in developing its \$1.9 billion estimate for the first year cost to industry to develop and maintain record-keeping systems for the voluntary country-of-origin labeling program.” Democratic leader Tom Daschle (S.D.) reportedly relied on the [GAO report](#) when he indicated he would ask for a Senate vote to ensure that such labels would appear on U.S.-meat products as scheduled in 2004, a move that will apparently place the Senate version of an agriculture funding bill at odds with the House version which would bar enforcement of the law in fiscal year 2003-2004. Further information about the House initiative appears in issue 37 of this Report, June 25, 2003. Senator Mike Enzi (R-Wyo.), who also supports the labeling program, was quoted as saying, “On shoes, they tell you what the country of origin is. On underwear they tell you what the country of origin is ... but I tell you those things that you wear can’t hurt you nearly as much as the things you put in your body.” While grocers, packinghouses and large livestock companies reportedly oppose the program as too cumbersome and costly, other food-producing interests support country-of-origin labeling. *See Reuters and Association Press*, September 10, 2003.

### Food and Drug Administration (FDA)

##### [2] FDA Demands Removal of “Hormone-Free” Claims from Dairy Products

FDA has warned four dairy manufacturers that their use of the statements “No Hormones” or “Hormone Free” on various product labels constitutes misbranding under section 403(a) of the federal Food, Drug and Cosmetic Act. According to the agency, companies whose products do not contain milk from cows treated with recombinant bovine somatotropin (rbST) may provide that information on labels provided the statements are not untruthful or misleading. FDA deems the statements “No Hormones” or “Hormone Free” as false claims “because all milk contains naturally occurring hormones, and milk can not be processed in a manner that renders it free of hormones.” FDA has promised “further action such as seizure and/or injunction” if the companies fail to revise the statements. *See FDA Press Release*, September 12, 2003.

### Australia

##### [3] Australian Government Issues Report on Nation’s Growing Waistline

A new Australian Institute of Health & Welfare [report](#) concludes that the nation’s rising rate of obesity is attributable not only to a combination of genetic, social, economic, and cultural factors, but to “the availability of high-calorie ‘fast foods’ and drinks and larger portion sizes.” The report esti-



mates that nearly 2.4 million Australian adults are obese, while another 4.9 million are overweight. In addition to discussing the various health effects of obesity, e.g., increased risk of developing cardiovascular disease and Type 2 diabetes, the report notes “more practical considerations” of obesity such as “the sizing of clothing; the sizes of chairs and seats in the home, at work and in public places such as cinemas and restaurants; the dimensions of cars and public transport vehicles; and so on.”

## State/Local Initiatives

### [4] Los Angeles School Board Imposes Irradiated Food Ban

The Los Angeles Unified School District has reportedly voted to prohibit the use of irradiated food in district cafeterias. “The consequences of using our children as guinea pigs, in the second-largest school district in the country, is very frightening to me,” one board member was quoted as saying. “I believe we need to err on the side of caution,” she said. Irradiation is a Food and Drug Administration-approved process used to prevent food-borne illness by exposing meat, fish, fruits, and vegetables to gamma rays to kill bacteria. Irradiated ground beef will be available through the National School Lunch Program as of January 2004. Various consumer groups, including Public Citizen, oppose the availability of irradiated meat through the program, citing a lack of research into the possible health effects of the food sanitation process. *See The Los Angeles Times*, September 10, 2003.

## Litigation

### Pesticide Residue

#### [5] Four Attorneys General Lead Lawsuits Challenging EPA’s Pesticide Residue Standards

Lawsuits filed by attorneys general in four states and a coalition of public interest groups against the U.S. Environmental Protection Agency (EPA) challenge the agency’s alleged failure to adopt pesticide residue standards that adequately protect children’s health. Filed September 15, 2003, in a New York federal court, the suits apparently seek an order requiring EPA to comply with the Food Quality Protection Act of 1996.

Under this law, EPA is required “in establishing, modifying, leaving in effect, or revoking a tolerance or exemption for a pesticide chemical residue” to “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue.” For these purposes, the agency is required to apply “an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure” “to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children.” EPA may “use a different margin of safety ... only if, on the basis of reliable data, such margin will be safe for infants and children.”

The attorneys general from New York, Connecticut, Massachusetts, and New Jersey are reportedly focusing in their suit on EPA’s alleged failure to use a tenfold infant and child protection safety factor for at least five pesticides used on food that children often eat, including alachlor (corn and peanuts), chlorothalonil (bananas, broccoli, carrots, and corn),

methomyl (apples, peaches, pears, and grapes), metribuzin (carrots, sugarcane, tomatoes, and wheat), and thiodicarb (corn and soybeans). EPA has apparently set residue exposure standards for those pesticides that are one to three times higher than the guidelines applicable for adults; the states claim that these limits are inadequate.

The public interest groups, including the Natural Resources Defense Council, the Breast Cancer Fund, Physicians for Social Responsibility, the Farmworker Justice Fund, and the New York Public Interest Research Group, raise two additional claims, i.e., that EPA violated the law by (i) "failing to protect highly vulnerable or highly exposed people, including farmworkers' children and other children living on or near farms, who are more heavily exposed to pesticides than average children"; and (ii) "relying on a confidential, proprietary, industry-developed computer model to determine pesticide risks."

A trade association that represents pesticide manufacturers issued a statement indicating that while the suits had not yet been analyzed, "it appears these lawsuits are merely a continuation of the anti-pesticide activists' ongoing campaign to substitute litigation for science-based regulation." According to CropLife America, EPA's pesticide testing and risk assessments "very carefully consider risks to children" and court action is "inappropriate." An EPA source said it was too soon to respond to the litigation, but said that the agency has "not deviated from our ongoing effort to implement the Food Quality Protection Act" and that "some of our efforts to achieve the milestones laid out in the 1996 law are several years away from completion." See *Inside EPA*, Reuters and NRDC Press Release, September 15, 2003; *Greenwire* and *The New York Times*, September 16, 2003.

## E. coli

### [6] Meatpacker to Seek U.S. Supreme Court Review of Preemption Ruling

Excel Corp., a Cargill Inc. subsidiary that allegedly supplied beef contaminated with *E. coli* bacteria to a Sizzler restaurant in the Milwaukee area, has reportedly decided to seek U.S. Supreme Court review of a Wisconsin appeals court decision that reinstated personal injury actions against the company. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 665 N.W.2d 417 (Wisconsin Court of Appeals) (decided May 13, 2003; petition for Wisconsin Supreme Court review denied September 12, 2003). At issue in the appeal is whether the Federal Meat Inspection Act preempts common-law claims for death and injuries allegedly caused by the sale of contaminated beef. The appeals court ruled that such claims were "wholly congruent with the overarching purpose" of the Act. The plaintiffs, including 3-year-old Brianna Kriefall who died from *E. coli* poisoning complications, had apparently eaten foods such as watermelon that were prepared near a meat-grinding station at the restaurant. See *jsonline.com*, September 15, 2003.

## Media Coverage

### [7] Rowan Roebig, "Fighting the Fat," *Irish Examiner*, September 5, 2003

This article speculates that food and alcohol companies in Ireland could be vulnerable to the new types of products liability claims that are being filed or considered against the food industry in the United States. An Irish lawyer, who notes that tobacco opponents have been looking for "another possible area for action," is quoted as saying, "If I was advising a food company, I would say 'Don't believe that one of these cases won't succeed at some



stage.' This is not going to go away and it has to be taken on face value. The U.S. side of things will emerge into the Irish market." Some 15 to 20 percent of Irish children are estimated to be overweight, with an epidemic expected within 10 years.

## Scientific/Technical Items

### Acrylamide

#### [8] Swedish Study Provides More Data on Acrylamide Consumption

Swedish researchers estimate that adults in that country may be ingesting acrylamide at levels judged risky by public health authorities. K. Svensson, et al., "Dietary Intake of Acrylamide in Sweden," *Food and Chemical Toxicology* 41(11): 1581-1586, 2003. In April 2002, National Food Administration investigators discovered unexpectedly high levels of acrylamide, an animal carcinogen, in common foodstuffs. In an effort to gauge the extent to which the population might be exposed to the chemical produced as the result of high-temperature cooking processes, the same research team recently used food consumption data to assess dietary intake of acrylamide from a variety of foodstuffs, including processed potato products, breads, cereals, cookies, snacks, and coffee. They determined that, on average, adults in Sweden ingest 31 micrograms of acrylamide daily; ingesting more than 60 micrograms per day was not uncommon. The researchers conclude that U.S. Environmental Protection Agency and the World Health Organization risk assessments "imply that this dietary intake of acrylamide could be associated with potential health risks."

## Obesity

#### [9] Sedentary Lifestyle and Soft Drink Consumption Blamed for Obesity in Kids

Too much television and too many soft drinks are contributing to the epidemic of obesity in America's youth, according to a new study in the *Archives of Pediatrics & Adolescent Medicine*. J. Giammattei, et al., "Television Watching and Soft Drink Consumption: Associations With Obesity in 11- to 13-Year-Old Schoolchildren," *Archives of Pediatrics & Adolescent Medicine* 157(9): 882-886, 2003. Researchers in California examined nearly 400 sixth- and seventh-graders, assessing questionnaire data on lifestyle and calculating body mass index (BMI) based on measurements of height and weight. They determined that 35.3 percent of the adolescents studied had a BMI at or above the 85th percentile, considered overweight, and that one-half of these students actually fell at or above the 95th percentile, considered obese. They further found significant associations between BMI and both daily consumption of soft drinks and hours of television watched per evening. Among students who drank three or more soft drinks daily, 58.1 percent were judged overweight or obese, compared to 33.2 percent of those who drank fewer than three soft drinks per day. More than 47 percent of those who watched three or more hours of television every night were overweight or obese, while approximately 26 percent of those who watched fewer than two hours were judged such. The researchers conclude that their analysis "indicates that increased levels of television viewing and soda intake are associated with a higher prevalence of overweight and obesity among sixth- and seventh-grade school children, and overweight can lead to increased risk of developing chronic health conditions, such as type 2 diabetes."



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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](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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