

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Initiatives

[1] Reassessment Concludes 1,3-Butadiene Is Carcinogenic by Inhalation

The U.S. Environmental Protection Agency (EPA) has conducted a reassessment of 1,3-butadiene and concludes that the substance is “carcinogenic to humans by inhalation, based on the total weight of the evidence.” Some three billion pounds of 1,3-butadiene are produced annually in the United States, with major sources identified as industrial, i.e., the production of various chemicals, as well as emissions from gasoline- and diesel-powered vehicles and equipment. EPA reports that some cooking oils also release butadiene into the air when heated.

The report, *Health Assessment of 1,3-Butadiene* (October 2002), estimates that the “unit cancer risk” is 0.08 ppm, a figure that incorporates an adjustment factor of 2 to account for sensitive populations. EPA further states “the corresponding estimate of the chronic exposure level of 1,3-butadiene resulting in extra cancer risk of 10^{-6} (i.e., 1 in a million) is 0.01 ppb.” Acknowledging that no human data are available, EPA also reports that the substance causes a variety of reproductive and developmental effects in mice.

Regarding indoor exposures, EPA states that the release of 1,3-butadiene associated with cooking oil “probably occurs primarily by volatilization, but

could also involve formation due to low levels of combustion.” Apparently, emissions are “22-fold higher from unrefined Chinese rapeseed oil than from heated peanut oil. The report is available electronically at www.epa.gov/ncea.

[2] USDA Approves Irradiated Meat for National School Lunch Program

The U.S. Department of Agriculture (USDA) has reportedly approved a new policy that will allow schools to serve meat sterilized through irradiation, a process that uses gamma rays or electrons to kill bacteria and parasites such as E. coli and salmonella. Some 25 million U.S. children reportedly participate in the school lunch program; 50 school-related outbreaks of food poisoning were reported nationwide in 1999, with 2,900 illnesses. Advocacy groups such as Public Citizen reportedly contend that irradiation destroys nutrients and can lead to the development of chemicals linked to birth defects and cancer. See *CNN*, October 26, 2002; *The New York Times*, October 27, 2002.

State/Local Initiatives

[3] Voters in November 5 Elections Reject GM Food Labeling Proposal in Oregon and Coffee Ordinance in Berkeley, California

An estimated 73 percent of Oregon voters rejected a ballot proposal that would have required genetically modified (GM) foods sold or distributed in or from the state to be labeled as such. Opponents of Measure 27 claimed that such labeling would have stigmatized their products and created logistical



nightmares for farmers, retailers and food manufacturers. Voters in Berkeley, California, reportedly rejected Measure O, a proposal requiring that all brewed coffee sold in the city be derived from beans which are shade-grown, organic, purchased at "Fair-Trade" prices, i.e., \$1.26 pound, or a combination thereof. *See Reuters*, November 6, 2002.

Litigation

Acrylamide

[4] New LawsUIT Filed in California Seeks Warnings on French Fries and Snacks

Kentucky Fried Chicken, Wendy's and Frito-Lay have been sued by Environmental World Watch (EWW) in Los Angeles Superior Court for "knowingly and intentionally" exposing consumers to acrylamide in their food products without warning. EWW, which has been characterized as a "law-firm front group," filed the Proposition 65 enforcement action on October 30, 2002, claiming that acrylamide has been listed as a carcinogen by California since 1990 and that the defendants' french fries and chips contain more than 100 times the maximum level the Environmental Protection Agency permits in water. Plaintiff seeks a restraining order to stop the sale of such products without warnings. A July 9, 2002, letter from California's attorney general notes that an EWW notice of intent to sue, that may or may not be associated with this case, "did not include a certificate of merit or supporting factual information." Thus, at that time, EWW was precluded from suing under Proposition 65. *See City News Service*, October 30, 2002; *consumerfreedom.com*, July 17, 2002.

Food Additives

[5] Court Approves Settlement in French Fry Lawsuit

A Cook County, Illinois, judge has reportedly approved a settlement reached by McDonald's Corp. and vegetarian plaintiffs who alleged the fast-food company deliberately concealed the use of beef extract in its french fries. The agreement, which apparently applies to lawsuits in five states, requires McDonald's to pay \$10 million to organizations that support vegetarianism, issue a public apology and form an advisory board on vegetarian dietary issues. Under the agreement, McDonald's did not admit to any wrongdoing, said a news source. *See Chicago Tribune*, October 31, 2002.

Listeria

[6] Meat Packers Sued for Contaminated Turkey and Chicken Products

A nationwide class action lawsuit has apparently been filed against Pilgrim's Pride Corp., alleging that its fresh and frozen ready-to-eat turkey and chicken products caused deaths and serious injuries from listeria contamination. One of the named plaintiffs, Frank Niemtow, is reportedly a 98-year-old retired obstetrician who was allegedly hospitalized for two months with listeriosis. The defendant recalled nearly 30 million pounds of its products in October 2002, after federal and state inspectors identified a specific strain of listeria in its plant and linked it to a number of deaths, miscarriages, stillbirths, and other injuries in eight states. Press reports have indicated that the affected meat processing plant had been warned of numerous sanitation violations months before the deadly listeria outbreak occurred. According to U.S. Department of Agriculture

records, despite 40 citations in 2002, “corrective actions were either not implemented or ineffective.” See *biz.yahoo.com*, November 1, 2002; *Associated Press*, November 4, 2002.

Beta-Casein A1

[7] New Zealand Lawsuit Seeks Warnings About Milk Protein

A multinational dairy company in New Zealand has reportedly been sued for failing to provide warnings that its products contain a milk protein allegedly linked to diabetes, heart disease, schizophrenia, and autism. The suit was apparently brought by a company formed in 2000 to pursue commercial opportunities opened by purported scientific findings that beta-casein A1 is a health risk. This company, A2 Corp., is reportedly hoping to convert New Zealand’s dairy herd to cows that carry beta-casein A2 protein. According to press reports, defendant Fonterra Cooperative Group Ltd. is strenuously denying that beta-casein A1 in its milk, yogurt, ice cream, and milk powder is harmful. See *biz.yahoo.com*, November 1, 2002.

Legal Literature

[8] John Villafranco and Khalil Saliba, “The Regulation of Fast Food Under the FTC’s Unfairness Authority,” *New York Law Journal*, October 21, 2002

This article considers whether the Federal Trade Commission (FTC) has the authority to prohibit fast-food advertising practices or require package labeling in an effort to solve the growing obesity problem in the United States. The issue is considered in the context of changes the FTC made in its approach toward its burden of proving “unfair or deceptive

acts or practices” during proceedings involving the Joe Camel cigarette advertising campaign. In taking on Joe Camel, the FTC apparently contended that it only needed to show that “the campaign was a substantial contributing factor” in the decisions of youths to smoke. The article contends that the evidence did not even meet this relaxed standard and suggests that application of such a standard to fast-food advertisements could run afoul of the U.S. Supreme Court’s commercial speech cases. According to the article, “if the ad campaign did not cause a discernible increase in the harmful activity (here, health effects from obesity), banning the campaign could not directly, materially, and significantly advance the government’s asserted interest (decreasing obesity among youth and thereby improving their health).” The article concludes by stating “A showing that fast-food advertising more probably than not causes obesity would be quite a reach. For this reason, activity in this area is not likely to come out of the FTC.”

Other Developments

[9] Advocacy Group Targets Coca-Cola’s Sponsorship of *Harry Potter* Film

Nutrition advocacy group Center for Science in the Public Interest (CSPI) has launched a Web site, www.saveharry.com, to oppose the Coca-Cola Company’s reported \$150 million marketing campaign tied to the November 15, 2002, Warner Brothers’ release of “*Harry Potter and the Chamber of Secrets*.” The Web site contains voluminous information about the purported dangers of “liquid candy,” links to organizations endorsing CSPI’s efforts, and a letter that Harry Potter fans can immediately direct to author J.K. Rowling, Coca-Cola, Warner Brothers, and Scholastic Books. Among other assertions, the letter claims “Coke and other sodas are filled with



empty calories that are making kids fatter than ever before. That puts kids at risk of serious diseases, not to mention dental cavities. And, because they put addictive caffeine in Coke, kids just want to drink more and more!" CSPI evidently wants Rowling to donate any royalties from her marketing agreement to nutrition programs and halt any future sponsorship deals with Coca-Cola. See www.saveharry.com.

Media Coverage

[10] Libby Copeland, "Snack Attack; After Taking on Big Tobacco, Social Reformer Jabs at a New Target: Big Fat," *The Washington Post*, November 3, 2002

This article profiles attorney John Banzhaf who has made a career of generating publicity for litigation with long odds. His latest crusades apparently involve lawsuits against school boards and fast-food companies whose practices he blames for the epidemic of obesity in the United States. The article compares suits against cigarette manufacturers, which Banzhaf has instigated, with suits against fast-food companies and concludes that they are quite different. Banzhaf is calling for clear nutritional information at fast-food counters and signs on doors warning that "Eating out frequently can lead to obesity." McDonald's spokespersons, however, are aggressively defending themselves, according to the article, with one claiming he eats at the restaurant chain every day and, at 5 feet 11, he weighs only 153 pounds.

[11] Marion Burros, "McDonald's France Puts Its Mouth Where Its Money Is," *The New York Times*, October 30, 2002

This article discusses recent French magazine "advertorials" in which a nutritionist reportedly speaking on behalf on McDonald's France said

"there is no reason to eat excessive amounts of junk food, nor go more than once a week to McDonald's." George Washington University's John Banzhaf was quoted as saying that the advertorials show "that health warnings about the dangers of eating out often at fast-food restaurants are not only appropriate but may be necessary to avoid liability if children become obese as a result of overindulgence."

Scientific/Technical Items

Food Additives

[12] "A High Dietary Intake of Sodium Glutamate as Flavoring (Ajinomoto) Causes Gross Changes in Retinal Morphology and Function," H. Ohguro, et al., *Experimental Eye Research* 75(3): 307-315, 2002

Researchers from Hirosaki University in Japan claim to be the first to show that eye damage can be caused by eating food containing monosodium glutamate (MSG). In their study, rats were divided into one of three diet groups, containing high, moderate or no MSG. Rats fed a high-MSG diet exhibited a loss in vision and a thinning of the retinal nerve layers. Those rats in the moderate group also sustained damage but to a lesser extent.

MSG comprised 20 percent of the diet of the rats given the highest amount. In press coverage, lead researcher Hiroshi Ohguro suggested that lesser amounts should be safe but that the "precise borderline amount is still unknown." He and his fellow researchers further assert that over a period of several decades, lower dietary intakes may damage the eye.

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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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