

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] **Canada, United States and Mexico Look to BSE Standards to Protect Trade**

Agriculture officials in the United States, Canada and Mexico have reportedly called on the Organization of International Epizootics (OIE) to update its standards for dealing with bovine spongiform encephalopathy (BSE), or “mad cow disease,” and to use those standards to formulate trade policy. A joint letter to OIE signed by USDA Secretary Ann Veneman and her North American counterparts apparently reports that a single BSE case in Canada cost the beef industry there more than US\$250 million because many countries immediately closed their borders to Canadian beef imports, despite stringent safeguards intended to prevent the spread of the disease. The agriculture officials are seeking the development of practical, science-based guidelines when OIE meets in September 2003 to give countries confidence to continue trading in animals and animal products when isolated disease outbreaks occur. See *CBS MarketWatch*, September 18, 2003; *Agriculture and Agri-Food Canada News Release*, August 25, 2003.

United Kingdom (U.K.)

[2] **British Government Issues Alcohol-Related Reports**

The prime minister’s Strategy Unit has issued an [interim analytical report](#) as part of its Alcohol Harm Reduction Project; a final report is expected later in 2003. Among other things, the report outlines four areas affected by alcohol misuse: (i) crime and disorder, (ii) health, (iii) lost productivity at work, and (iv) family and social networks. Alcohol-related injuries and illnesses are estimated to cost the National Health Service (NHS) some £1.7 billion annually, while the costs of lost productivity in the workplace are estimated at £6.4 billion. “This report gives a full picture of the effects of alcohol consumption on society and on the health of individuals,” Public Health Minister Melanie Johnson was quoted as saying. “While alcohol can have positive effects, the cost to the NHS of 150,000 alcohol-related hospital admissions each year are clear to see,” she said.

Meanwhile, the Home Office has issued a report titled [Alcohol-Related Assault: Findings from the British Crime Survey](#). The document analyzes alcohol-related violence in England and Wales between 1995 and 1999, identifying factors associated with an increased risk of being the victim of such violence.

[3] **Food Standards Agency Warns Against Low-Carb Diets**

The U.K.’s Food Standards Agency (FSA), which is responsible for the government’s nutritional guidance, has released a [statement](#) warning the public



about purported health risks of low-carbohydrate diets. Without actually naming the Atkins diet, which is apparently followed by three million people in Britain, the statement says that excluding any food group from the diet “can be bad for your health because you could be missing out on a range of nutrients.” The statement adds that low-carb diets tend to be high in fat, “and eating a diet that is high in fat could increase your chances of developing coronary heart disease.” According to FSA, carbohydrates should make up one-third of the diet. Reporting on the statement, the press notes that supermarkets have seen an increase in meat, cheese and egg sales and that some sandwich bars are offering “Atkins-friendly” meals to counter a fall in sandwich sales. See *The Observer*, September 21, 2003.

State/Local Initiatives

[4] California Committee to Discuss Acrylamide Work Plan at October Meeting

California’s Carcinogen Identification Committee will discuss the Office of Environmental Health Hazard Assessment’s proposed [acrylamide work plan](#) during a public meeting slated for October 17, 2003, in Sacramento. The proposal targets Safe Drinking Water and Toxic Enforcement Act (Prop. 65) regulatory options for the byproduct of high-temperature cooking processes. Acrylamide is currently listed as a carcinogen “known to the state to cause cancer” under Prop. 65; a No Significant Risk Level (NSRL) of 0.2 micrograms/day was established for the chemical in 1990. [Background materials](#) for the meeting include a compendium of acrylamide studies and summer 2003 correspondence between Food and Drug Administration Deputy Commissioner Lester Crawford and OEHHA Director Joan Denton in which Crawford asserts that “it is premature to set a level for acrylamide in food, and that California’s

current NSRL and future actions may frustrate federal purposes or even directly conflict with federal law.” See *OEHHA Notice*, September 9, 2003.

Litigation

Obesity

[5] Mixed Results Reported in Obesity-Discrimination Suits

While an obese man in Connecticut has settled discrimination claims against McDonald’s Corp. for allegedly rescinding a job offer due to his weight, other overweight plaintiffs have had limited success in challenging obesity-bias in the workplace. According to news sources, overweight individuals often face problems getting hired or promoted and have little legal recourse because most anti-discrimination laws do not protect them. Few jurisdictions apparently have ordinances barring such discrimination and “employment at will” is standard across the United States. With obesity-related claims increasing and more Americans classified as obese or overweight, however, some employers are conducting size-discrimination training. See *The Chicago Tribune* and *The Boston Globe*, September 21, 2003.

Legal Literature

[6] Manhattan Institute, *Trial Lawyers Inc., A Report on the Lawsuit Industry in America 2003*, September 23, 2003

The Manhattan Institute, a conservative think tank based in Washington, D.C., has issued a [report](#) that characterizes the plaintiffs’ bar as an industry “run amok,” where tort litigation costs have grown to exceed \$200 billion annually, comprising more



than 2 percent of America's gross domestic product. A section of the report devoted to litigation against the fast-food industry cautions that early litigation failures "represent nothing more than new product development costs."

According to the report, "in tobacco litigation, lawyers fought unsuccessfully in court for years before finally working out the kinks that stood in the way of big-fee verdicts. Such early defeats are merely up-front investments, much like research-and-development expenses for other industries." Discussing recent cases brought against food companies involving claims of deceptive advertising and labeling, the report notes that "Trial Lawyers, Inc. is banking on a growing din from public health advocacy groups gradually to swing public opinion against the food companies," and specifically refers to Ralph Nader and the Center for Science in the Public Interest as contributors to that effort.

"The eventual goal for Trial Lawyers, Inc.," says the report, "is to force food suppliers to foot the bill for a portion of the social cost of diseases related to severe obesity – including type-two diabetes, sclerotic arteries, heart attacks, and strokes – while taking the lion's share of the payout themselves. Under the typical contingency-fee arrangements, the lawsuit industry could again pocket tens of billions" as they did in the cases brought by private law firms on behalf of the state attorneys general against cigarette manufacturers.

The report also discusses (i) PAC and judicial campaign contributions made by the plaintiffs' bar, (ii) those lawyers who "constitute the 'leadership team' for Trial Lawyers, Inc.," (iii) "magnet courts" or favorable forums where plaintiffs bring nationwide class action suits before friendly judges, (iv) other emerging litigation trends, and (v) federal tort-reform initiatives. It graphically compares what lawyers earn from mass tort suits to the "crumbs"

left to their "customers." "For the lawsuit industry as a whole, less than half of all dollars actually go to plaintiffs, and less than a quarter of all dollars actually go to compensate plaintiffs' economic damages.... in capturing 19% of a \$200 billion pie, Trial Lawyers, Inc. does handsomely indeed."

Other Developments

[7] ASU Report Targets Commercialism in Schools

A new [report](#) from Arizona State University's Commercialism in Education Research Unit concludes that "while the health of schoolchildren continues to decline, corporations are targeting schools to advertise and sell products that are the most profitable but not necessarily the most healthful." According to the report, candy and snack food companies, soft drink bottlers, and fast-food chains market their products through such means as (i) sponsorship of programs in exchange for associating their products with the programs, (ii) pouring rights contracts, (iii) incentive programs (e.g., collecting product labels in exchange for funding of particular events or programs), and (iv) electronic programming in exchange for the right to advertise to students and parents. The report notes that "the consumption of foods of little or no nutritional value" in schools is a public policy issue and suggests that absent federal, state or local legislation addressing the issue, "It is possible that businesses harmed by their competitors' exclusive access to schools as well as parents will increasingly turn to the courts for relief."

[8] "Portion Distortion" Blamed for Obesity at U.K. Conference

During a recent conference in the United King-



dom, obesity and cancer experts reportedly blamed oversized food portions for Britain's obesity epidemic. Pointing to hamburgers that have increased in size by 112 percent in the past 20 years, 480 percent larger pasta servings and 700 percent larger cookies, researchers are calling for the food industry to take some responsibility for excess weight gain, which has purportedly been linked to a range of cancers and other health problems. Health experts also apparently urged consumers to select smaller portions and to consider ordering appetizers instead of entrees at restaurants. Speakers, including the chair of the International Obesity Taskforce, asserted that food advertisers target children and called children's diets "atrocious." They have apparently concluded that simply advising people about diet and physical activity is no longer enough to address the problem. See *Reuters*, September 17, 2003; *The Independent* and *The Guardian*, September 18, 2003.

Scientific/Technical Items

Nutrition

[9] Mayo Researchers Propose Link Between Nutrition and Increasing Rate of Fractures

Inadequate nutrition might be contributing to recent increases in forearm fractures among children and adolescents, say researchers from the Mayo Clinic. S. Khosla, et al., "Incidence of Childhood Distal Forearm Fractures Over 30 Years: A Population-Based Study," *The Journal of the American Medical Association* 290(11): 1417, 2003. Their analysis of medical records from the Rochester, Minnesota, area indicated that from 1969 to 2001, the rate of forearm fractures rose 32 percent for boys and 56 percent for girls. The largest increases of as much as 60 percent were seen in children approaching puberty, when growth spurts and the resulting redistribution

of calcium make them particularly vulnerable to fractures. While the researchers acknowledge they intended to track fracture frequency not cause, they suggest both changing patterns of physical activity and poor calcium intake likely contribute to the increasing incidence of fractures. Co-author Sundeeep Khosla notes recent studies showing 30 to 90 percent of children and teens not consuming the recommended four or more servings of dairy or calcium-rich food per day. He further notes at least one recent study demonstrating that as teen consumption of soft drinks has increased, consumption of milk has declined.

[10] Fewer Calories Linked to Longer Life

Scientists have long demonstrated that dietary restrictions can prolong life in a variety of organisms, from yeast cells to mammals. W. Mair, et al., "Demography of Dietary Restriction and Death in *Drosophila*," *Science* 301(5640): 1731-1733, 2003. Now, however, researchers at University College in London have purportedly shown that even individuals who begin a low-calorie diet in middle age might enjoy these life-prolonging effects. In a detailed analysis of mortality among fruit flies fed either heavy or lean diets, the research team found that the protective effect of a lean diet begins almost immediately, no matter when the restriction begins. They found little difference in the life expectancy of those flies fed a lean diet from birth and those switched from a heavy to lean diet at middle age; both groups converted within two days to a longer-life pattern, living almost twice as long as those flies fed a heavier diet. The researchers speculate that similar patterns might be found in mammals, even humans, and suggest their results support the idea that it is never too late to improve health by reducing caloric intake.



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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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