

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] Task Force to Discuss Obesity and Nutrition Issues

FDA's Obesity Working Group will hold a [public meeting](#) on October 23, 2003, in Bethesda, Maryland, to discuss obesity and nutrition issues within agency jurisdiction. Chaired by FDA Deputy Commissioner Lester Crawford, the event will reportedly focus on six issues related to reducing the incidence of obesity: (i) the effectiveness of educational campaigns, (ii) priorities for nutrition research regarding children, (iii) behavioral and medical interventions, (iv) food labeling changes "that could result in the development of healthier, lower calorie foods by industry and the selection of healthier, lower calorie foods by consumers," (v) the development of healthier foods, and (iv) "the most important things" FDA could do to affect the nation's obesity epidemic. The agency is accepting requests for oral presentations at the meeting as well as public comments regarding obesity issues generally; the deadline for such comments is November 21. *See Federal Register*, October 8, 2003.

##### [2] Bioterrorism Regulations to Be Topic of Public Meeting

FDA will hold a two-hour [public meeting](#) via satellite downlink on October 28, 2003, to discuss final regulations implementing two sections in Title III of the Public Health Security and Bioterrorism

Preparedness Response Act of 2002. The regulations in question address the registration of food facilities and prior notice of imported food shipments. *See Federal Register*, October 1, 2003.

#### U.S. Department of Agriculture (USDA)

##### [3] Inspector General Finds Problems with ConAgra Beef Recall

An investigation undertaken at the request of a Senate agriculture committee has reported that neither ConAgra nor USDA's Food Safety and Inspection Service (FSIS) operated in accordance with regulatory requirements in responding to the *E. coli* contamination at ConAgra's Greeley, Colorado, plant that resulted in the 2002 recall of 18 million pounds of beef and sickened 46 people in 16 states. USDA's inspector general [report](#) also concludes that the recall was "ineffective and inefficient" and that "the majority of beef was not returned or accounted for." According to the report, FSIS had identified continuing contamination problems at the plant months before the recall was instituted, but failed to take "decisive enforcement action." USDA's inspector general provides a number of recommendations including that FSIS provide clear authority for agency access to plant microbial testing results and reassess its management control process over recall operations.



## State/Local Initiatives

### [4] Stakeholders Submit Comments on Acrylamide in Advance of California Meeting

While activists who are seeking warnings on foods containing acrylamide are urging California's Office of Environmental Health Hazard Assessment (OEHHA) not to exempt certain foods from Proposition 65's health warnings, a coalition of food-related industry organizations is suggesting that the agency make an interim determination that existing levels of acrylamide formed through cooking processes meet the Prop. 65 no-significant-risk level (NSRL) for acrylamide in foods. The recommendations were made in comments responding to OEHHA's proposed acrylamide work plan and have been filed in advance of an October 17, 2003, meeting at which OEHHA's Carcinogen Identification Committee will consider potential actions to handle the controversy.

Those seeking stringent standards and a proliferation of warnings have identified themselves as CLEEN, or the California League for Environmental Enforcement Now. CLEEN, whose members are devoted to Prop. 65 enforcement, is calling for the most sensitive methods of analysis to be used on foods and also recommends that, in setting an NSRL for acrylamide, OEHHA include a "multi-route exposure analysis that considers exposures from cooking, dishwashing, showering, washing clothes, and gardening," because "acrylamide is a volatile chemical found in our municipal water supply." CLEEN further questions the legality of OEHHA setting a higher NSRL for some foods "because of those foods' perceived health benefits unrelated to their carcinogenicity."

Meanwhile, food-industry comments highlight scientific data gaps and parallel actions undertaken

by the Food and Drug Administration, the World Health Organization and others studying the issues. The food interests are urging coordination with those efforts and a delay in any regulatory changes until new studies are completed. See *Inside Cal/EPA*, October 3, 2003.

## Other Developments

### [5] Richard Daynard Warns of Litigation Risks in the United Kingdom

Anti-tobacco crusader Richard Daynard, who has recently taken on the food industry in the United States, has published an article in a British consumer magazine warning that food companies could soon be sued for causing obesity in Britons. In an article appearing in the *Consumer Policy Review*, Daynard reportedly discusses the similarities between cigarette manufacturers and some food companies, contending that massive advertising budgets and dishonest marketing involving "health-enhancing" claims could leave food firms vulnerable to litigation. He apparently cites research suggesting that foods with added sugars and fat could be addictive, and asserts that the food industry could be accused of selling products known to be harmful. See *Foodservice.com* and *The (U.K.) Telegraph*, September 30, 2003.

### [6] Public Health Advocates to Target Obesity-Related Issues at Annual Meeting

Discussions related to food, nutrition and obesity will account for more than 100 sessions during the American Public Health Association's [130th Annual Meeting](#) on November 15-19, 2003, in San Francisco. In a session titled "Is Childhood Obesity the Next Tobacco? The Growing Movement for State and Local Policy Reform," Yale University's Kelly Brownell, Ph.D., is slated to discuss protecting children from



what he deems a “toxic environment” – e.g., advertising aimed at kids and product placements in television programs.

New York University Professor Marion Nestle will take aim at the sugar industry by discussing its lobbying activities against World Health Organization (WHO) proposals to curb sugar consumption in a session titled “Politics of Food: Big Sugar vs. Public Health.” Public health lawyers from California plan to extrapolate their experience in tobacco control to ways of improving community nutrition in a session titled “Applying Tobacco-Control Tools to the Problems of Hunger and Obesity.” In that session, Edward Bolen, J.D., et al. will advocate generating revenue for anti-obesity programs through the use of licensing and land-use laws to regulate fast-food and junk-food retailers.

“Independent consultant” Norbert Hirschhorn, M.D., will discuss his unpublished June 2002 report to WHO detailing ways the “tobacco industry and its food company allies” covertly influenced WHO’s food and nutrition policies by (i) “‘positioning’ experts on various FAO/WHO committees,” (ii) “using the entry afforded by formal NGO relationships of industry-dominated organizations with FAO and WHO,” (iii) using the food companies as funding conduits to research and policy groups sympathetic to the industry,” and (iv) “sponsoring libertarian ‘think tanks’ and writers that promote anti-regulation ideology to the public.” Hirschhorn’s report evidently focused on the International Life Sciences Institute, a non-governmental organization that had “official relations” with WHO and was supposedly funded by Coca-Cola, PepsiCo, General Foods, Kraft, and Procter & Gamble.

Other sessions at the APHA meeting will attribute obesity to the increasing size of food portions and urban sprawl.

## [7] New Book Analyzes Appeal of Food Products

A British marketing consultant, who has apparently spent years studying what makes foods palatable, has published a book that explains what food characteristics “make people want to eat or drink more.” Distilling 20 years of research involving more than 2,000 products from Europe, North America and Asia, author Thornton Mustard reportedly contends in *The Taste Signature* that food companies are generally unaware of the precise way they have used appearance, aroma and taste to purportedly manipulate consumers’ taste buds. Among the “tricks of the trade” he discusses are aftertaste, texture and ingredients that dry the mouth to cause salivation and a desire to consume more of the product. Mustard reportedly asserts that responses to tastes are learned rather than instinctual and that people will learn to like the tastes of more fashionable foods that will not contribute to weight gain.

See *Financial Times*, October 3, 2004.

## Media Coverage

### [8] Jonathan Rauch, “Will Frankenfood Save the Planet?,” *The Atlantic Monthly*, October 2003

With the world’s population expected to reach nearly 9 billion by 2050 and agricultural needs keeping pace, genetically modified (GM) crops are seen by this author as a means to increase crop yields without creating undue pressures on soil or watersheds. GM crops can apparently be grown without tilling or using artificial fertilizers, thus decreasing soil erosion and damaging run-off. Yet, environmentalists remain opposed to the technology, citing concerns about “severe ecological disruptions” such as “gene flow” and “enhanced invasiveness.”



Nevertheless, the article contends that “in ten years or less, most American environmentalists will regard genetic modification as one of their most powerful tools,” given its ability to bring poor soils back into production and provide resistance to damaging infestations without pesticides. The article does not address consumer concerns about the safety of GM foods.

[9] **Jeannine Stein, “His Obesity Theory: Fast Food Has Us Surrounded,”** *Los Angeles Times*, October 6, 2003

“If you picked up the American food environment with its fast-food restaurants, the kinds of foods served in schools, food advertising, and the lost cost of snack foods, and transplanted it to a country where there is very little obesity, you’d have an obesity problem,” says Kelly Brownell, Ph.D., director of Yale University’s Center for Eating and Weight Disorders. Brownell is currently touring the United States to promote a newly published book he co-authored titled [\*Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It\*](#). Among other things, Brownell advocates adopting junk food taxes to fund anti-obesity efforts, regulating advertising aimed at children, ending product placements in various media, and creating “healthy schools” by rejecting pouring rights contracts with soft drink companies.

## Scientific/Technical Items

### Weight Control

[10] **Harvard Study Examines Effects of Dieting on Youth**

Children and adolescents who diet may be more likely to gain weight in the long term, according to new research in the journal *Pediatrics*. A.E. Field, et al., “Relation Between Dieting and Weight Change Among Preadolescents and Adolescents,” *Pediatrics* 112(4): 900-906, 2003. Clinical investigators at Harvard Medical School and related hospitals followed nearly 15,000 boys and girls ages 9 to 14 from 1996 to 1998. They found that approximately 30 percent of the girls and 16 percent of the boys dieted, some infrequently and others more frequently. Despite reporting that they ingest fewer calories and exercise more, dieters gained more weight than non-dieters during the three-year follow-up. The investigators note that binge eating was also more common among the dieters, suggesting that repeated cycles of overeating between restrictive diets may be partially responsible for the weight gains observed. They conclude that while medically supervised weight control may be beneficial for overweight youths, their data indicate that for many individuals, diets may prove counterproductive. The investigators suggest that severely overweight youths and adults be encouraged to adopt “a modest and therefore sustainable weight-control strategy that includes physical activity and does not require severe restriction of total calories.”



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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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