

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Congress

[1] Internet Wine Sales Debated in House Subcommittee Hearing

A subcommittee of the House Energy and Commerce Committee held a hearing on October 30, 2003, to consider testimony and a recent Federal Trade Commission (FTC) [report](#) on state laws that restrict e-commerce relating to out-of-state wine sales and direct shipment to consumers. While the FTC staff report concludes, on the basis of surveys, empirical data and public comment, that “consumers could reap significant benefits if they had the option of purchasing wine online from out-of-state sources and having it shipped directly to them,” a representative of the Wine and Spirits Wholesalers of America, Inc. characterized the study as a “triumph of rhetoric over reason” that is “intellectually dishonest and scientifically specious.” Wholesaler interests claim that state laws restricting online sales protect minors and advance public policy goals of excise-tax collection. Witness statements, a hearing Webcast and related documents can be accessed [here](#).

U.S. Department of Agriculture (USDA)

[2] USDA Secretary Solicits Nominations for Biotechnology Committee

Secretary of Agriculture Ann Veneman is accepting nominations for membership on her Advisory

Committee on Biotechnology and 21st Century Agriculture. As many as 11 new members will be chosen for a 2-year term to commence in early 2004. Nominations must be in writing and postmarked by November 24, 2003. Complete submission directions are at [68 Fed. Reg. 60633 \(10/23/03\)](#). The committee was formed earlier this year to advise the Secretary on key issues related to biotechnology in agriculture while examining the long-term effects of biotechnology on the United States’ food and agriculture system. The committee is currently made up of [18 members](#) from 14 states, the District of Columbia and Mexico. Nominees to the committee should have recognized expertise in a relevant discipline such as recombinant-DNA research, food science, fisheries science, ecology, veterinary medicine, and biodiversity.

[3] Risk-Analysis Meeting Scheduled for November 13, 2003

The USDA’s Food Safety and Inspection Service will host a one-day public symposium on risk analysis November 13, 2003, in Washington, D.C. See [68 Fed. Reg. 61183 \(10/27/03\)](#). Representatives of government, academia, industry, and consumer organizations will discuss current thinking and activities relating to the three components of risk analysis: risk assessment, risk management and risk communication. Included on the symposium’s [agenda](#) is a discussion of the [current draft](#) of standard operating procedures that the service intends to follow when evaluating suspected hazards such as salmonella, E-coli and listeria in meat, poultry and eggs. The deadline for written comments on the draft operating procedures is December 26, 2003.



[4] **USDA Publishes Proposed COOL Implementation Rule**

Amidst complaints that USDA's country-of-origin labeling (COOL) regulations may ultimately cost consumers billions more for meats, fish, perishable commodities, and peanuts, the agency published its [proposed rule](#) on October 30, 2003, indicating that it is available for public comment until December 29, 2003. USDA's proposal implements the Farm Security and Rural Investment Act of 2002, which requires retailers to notify their customers of the country of origin of covered commodities beginning September 30, 2004. The rule contains definitions, consumer-notification and product-marking requirements, and the recordkeeping responsibilities of both retailers and suppliers. *See Congress Daily*, October 27 and 31, 2003.

State/Local Initiatives

[5] **State Lawmakers Introduce Bills to Prevent Food Industry Liability from Obesity Lawsuits**

Citing a need to stop "frivolous" obesity-related lawsuits against fast-food chains, Representative John Fritchey (D-Chicago) is reportedly poised to introduce the Illinois Commonsense Consumption Act in January 2004. "This is a call for personal responsibility," Fritchey said. Wisconsin legislators introduced similar proposals during October 2003. S.B. 289 and A.B. 595 would provide "a civil liability exemption for food manufacturers, marketers, packers, advertisers, distributors, and sellers for claims resulting from a person's weight gain or obesity or health condition related to weight gain or obesity caused by the consumption of food." To date, Louisiana is the only state to have adopted such a law. *See Chicago Sun-Times* and *Chicago Business*, October 30, 2003.

Congress is currently considering the Personal Responsibility in Food Consumption Act (H.R. 339) and the Commonsense Consumption Act (S. 1428).

Great Britain

[6] **Proposed Bill Prohibits TV Advertising for Junk Food to Pre-School Children**

Legislation proposed by MP Debra Shipley would reportedly prohibit advertising for food and beverage products high in fat, sugar and salt during television programs whose target audiences are younger than age 5. "Irresponsible food and drink manufacturers ruthlessly target children through television advertising and clever marketing strategies," Shipley said. "No mention is made of the fact that high-fat, high-sugar and high-salt food and drink can cause obesity and diabetes." Recent research conducted by a U.K. consumer group reportedly found that 89 percent of advertising for cereal during young children's television viewing time was for products very high in sugar. *See BBC News*, November 4, 2003.

Litigation

Acrylamide

[7] **Consumer Group Seeks Lift of Stay in Acrylamide Action Against Fast-Food Chains**

Claiming that the trial court lacked authority to exercise "primary jurisdiction" and issue a stay in a Proposition 65 (Prop. 65) enforcement action against two fast-food companies, a consumer group has filed a petition in the California Court of Appeal seeking to set aside the stay and have its motion for summary judgment heard. Plaintiff Council for Education and Research on Toxics (CERT) seeks warnings that the fast-food chains' fries contain acrylamide, a



substance known to the state to cause cancer. News sources have indicated that while counsel for Burger King Corp. and McDonald's Corp. will be filing response briefs soon, it is likely that the petition will not be granted and that continued deference will be given to the Office of Environmental Health Hazard Assessment's (OEHHA) work plan to address acrylamide exposure and health issues. By imposing an indefinite stay to await the results of OEHHA's work plan, the court "thwarts the will of the People and the function of the Attorney General," says CERT's petition. *See Inside EPA*, October 31, 2003.

Other Developments

[8] Public Health Group Promises Legal Action Absent Food-Industry Initiatives to Address Obesity

The Boston-based [Public Health Advocacy Institute](#) (PHAI) has reportedly launched a project whose aim is tracking and publicizing "the progress made by food producers and distributors that have voluntarily agreed to improve their practices and products so as to counteract the obesity epidemic." PHAI has evidently sent letters to various companies (e.g., Kraft, McDonald's, Pizza Hut) asking (i) what specific health-promoting measures they are implementing to reduce obesity, (ii) on what scientific or other basis those measures will achieve that goal, and (iii) how the companies plan to "monitor the consumption and purchasing practices of customers to determine whether and how the steps have affected buying and consumption of fat, total calories and other contributors to obesity." PHAI Executive Director Ben Kelley was quoted as saying that industry failure to implement voluntary measures to address the obesity issue "will prompt demands for remedial legal actions such as regulation, legislation and litigation." *See Ascribe Newswire*, October 29, 2003.

[9] Complaints Raised About Beer Tie-in to PG-13 Miramax Movie

A [California organization](#) dedicated to reducing alcohol problems has launched a letter-writing campaign to Coors CEO, Peter Coors, with complaints about the company's involvement in Miramax's *Scary Movie 3*, which was released under a PG-13 rating. The Coors' twins, attractive women who are used in the company's beer promotions and ads, apparently appear in the movie; the company spent between \$3 million and \$8 million on TV ads and in-store displays to promote their role, said a news source. According to the Marin Institute, Coors' actions violate an agreement recently reached by alcohol marketers to advertise only in media that reach an audience consisting of at least 70 percent adults. A Coors' spokesperson reportedly indicated that the PG-13 rating came as a surprise to the company, which anticipated that the Disney-owned movie would have an R rating like its two prequels. *See Ad Age*, November 3, 2003.

In a related development, the Alcohol Policies Project of the Center for Science in the Public Interest (CSPI) has launched an [action alert](#) to stop the National Air and Space Museum from displaying a Bud Light aerobatic plane when it opens a new annex in December 2003. According to CSPI, "Alcohol advertising provides an implicit endorsement of alcohol use. The display of the Bud Light plane, covered in gratuitous and blatant beer advertising, sends misleading and dangerous messages to the millions of children and youth who frequent this premier public museum." CSPI claims that four House members share its concerns and are circulating a letter that will go to Smithsonian Secretary Lawrence Small protesting the plane's placement and asking that it be restored to "its historically accurate original color scheme."



Scientific/Technical Items

Obesity

[10] Researchers Find Gene Linked to Overeating

Researchers in France purport to have identified a gene, *GAD2*, that may stimulate the urge to overeat, increasing the risk for obesity. P. Boutin, et al., "GAD2 on Chromosome 10p12 Is a Candidate Gene for Human Obesity," *PLoS Biology* 1(3): 1-11, 2003. In their comparison of the morbidly obese versus those of normal weight, the team responsible for this discovery identified two forms of the *GAD2* gene. One form protected against obesity, while the other was associated with overeating. As might be expected, obese subjects were more likely to carry that form of the gene linked to increases in appetite. Further investigation showed that this variant of the *GAD2* gene might activate production of a chemical in the brain called GABA, gamma-amino butyric acid. GABA acts as a messenger, spurring an increase in appetite and possibly disinhibiting natural limits on food intake. While the researchers caution that obesity is unlikely to be explained by any one factor, they speculate that identification of this gene might lead to screening to identify those most vulnerable and, thus, early intervention.

Breast Cancer

[11] Meta-Analysis Shows Increased Cancer Risk Associated With Fat or Meat Consumption

New study results indicate an increased risk for breast cancer among those who eat relatively large amounts of saturated fat or red meat. N.F. Boyd, et al., "Dietary Fat and Breast Cancer Risk Revisited: A Meta-Analysis of the Published Literature," *British Journal of Cancer* 89: 1672-1685, 2003. Previous studies on the role of dietary fat in breast cancer have yielded conflicting results. In an effort to clarify this relationship, researchers at the Ontario Cancer Institute combined results from 45 different studies, involving more than a half million women. Overall, those women who ate large amounts of fat were at a higher risk for developing breast cancer than those who ate small amounts. The risk, however, was even stronger in those who ate more saturated fats or meats. On average, those who consumed diets high in saturated fat were 20 percent more likely to be diagnosed with breast cancer than those who did not. Meat intake increased risk by 17 percent. The researchers suggest that these effects were independent of any risk that might be associated with obesity more generally.

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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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