

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA Investigates Hepatitis Outbreak; Chi-Chi's Restaurant Chain and Suppliers Face Numerous Lawsuits

The FDA and the Centers for Disease Control and Prevention are inspecting four Mexican onion exporters for possible links to the largest hepatitis A outbreak in U.S. history. Raw green onions (scallions) shipped from Mexico are thought to be responsible for a recent hepatitis A outbreak at a Chi-Chi's restaurant in Pennsylvania that killed three people and sickened more than 600. The Mexican restaurant chain filed for Chapter 11 bankruptcy protection in October 2003, which automatically stayed any claims on the company, although a U.S. bankruptcy court in Delaware has apparently approved a plan in which claimants could receive up to \$20,000 each for medical expenses, lost wages and related costs. Some claimants have dropped their suits against the restaurant chain and instead named growers and suppliers "who had the opportunity to prevent this outbreak before it reached the Chi-Chi's restaurant." See *FDA Press Release*, November 20, 2003; *The Pittsburgh Post-Gazette*, November 22, 2003; *Associated Press*, November 24, 2003; *The New York Times*, December 2, 2003.

##### [2] FDA Issues *Listeria* Risk Management Plan

FDA has issued a [Listeria monocytogenes risk management plan](#) that identifies FDA and Centers for Disease Control and Prevention (CDC) activities aimed at helping achieve the Healthy People 2010 goal of reducing listeriosis contracted from ready-to-eat foods by 50 percent by 2005. The plan targets food categories named in the FDA/Department of Agriculture *L. monocytogenes* risk assessment as those demanding additional measures to reduce contamination or the gathering of additional data. Aspects of the risk management plan include (i) revising guidance for processors that manufacture or prepare ready-to-eat foods and guidance for retail and food service establishments, (ii) providing training and technical assistance for industry and food safety regulatory employees, (iii) enhancing educational efforts to consumers and health care providers, (iv) revising enforcement and regulatory strategies, and (v) enhancing disease surveillance and outbreak response efforts. See *Federal Register*, December 2, 2003.

#### Agency for Healthcare Research and Quality

##### [3] Task Force Recommends Obesity Screening for All U.S. Adults

An independent panel of experts in preventive and primary care medicine has called on physicians to screen all adult patients for obesity and encourage intensive counseling and behavioral interventions to promote sustained weight loss for those deemed obese. The U.S. Preventive Services Task Force defined intensive counseling as two or more



individual or group diet and exercise counseling sessions per month for at least three months. The group's [recommendations](#) were published in the December 2, 2003, issue of the *Annals of Internal Medicine*. Press reports indicate that while task force guidelines are not officially binding, they often become the standard of care for U.S. doctors, and an American Obesity Association representative was quoted as saying the guidelines may prompt health insurers to pay for obesity treatment. The organization estimates that some 300,000 deaths annually can be attributed to problems related to overweight and obesity. See *The Washington Post*, December 1, 2003; *Associated Press*, December 2, 2003.

## U.S. Congress

### [4] Colorado Lawmaker Introduces Bills to Improve Safety of Meat and Poultry Products

Representative Diana DeGette (D-Colo.) has introduced legislation ([H.R. 3546](#)) that would amend the federal Meat Inspection Act and the Poultry Products Inspection Act by "enhancing the ability of the Secretary of Agriculture to retrieve the history, use, and location of a meat or poultry product through a recordkeeping and audit system or registered identification." More specifically, the Meat and Poultry Products Traceability and Safety Act of 2003 would necessitate that the secretary be able to trace "(i) each animal to any premises or other location at which the animal was held at any time before slaughter" and (ii) "each carcass or part of a carcass and meat and meat food product of such animals forward from slaughter through processing and distribution to the ultimate consumer." The bill has been referred to the Committee on Agriculture.

DeGette has also introduced a proposal ([H.R. 3547](#)) that would amend the Meat Inspection Act,

the Poultry Products Inspection Act and the Food, Drug, and Cosmetic Act "to provide for improved public health and food safety through enhanced enforcement." That bill, which deals specifically with notification, nondistribution and recall of adulterated or misbranded articles of food, has been referred to both the Committee on Agriculture and the Committee on Energy and Commerce.

## Germany

### [5] Citing Underage Drinking, German Parliament Likely to Impose Tax on Flavored Malt Beverages

German lawmakers are reportedly poised to pass legislation that would tax flavored malt beverages in an effort to curb underage drinking. "Alcopops' are a dangerous starter drug because they contain so many sweeteners, you can hardly taste the alcohol," Berlin's drug commissioner was quoted as saying. A news report indicates passage of the proposed tax bill is likely in early 2004. See *This Is London*, November 27, 2003.

## Litigation

### Deceptive Trade Practices

### [6] Purported Class Action Accuses Alcohol Makers of Advertising to Minors

A newly filed class-action complaint accuses 20 defendants of engaging in "a long-running, sophisticated, and deceptive scheme ... to market alcoholic beverages to children and other underage consumers." The lawsuit "seeks to disgorge the unlawful profits these companies have made through the illegal sale and use of their products and to stop



the abusive marketing practices that contributed to those illegal sales." *Hakki v. Adolph Coors Co.* Dated November 13, 2003, the complaint is pending in the District of Columbia's Superior Court. A number of reporters have compared the lawsuit to youth-marketing claims made against tobacco companies starting in the 1990s.

Estimating that underage drinkers consume 15 to 20 percent of alcoholic beverages sold in the United States, the complaint lists 18 asserted "unfair and deceptive acts and practices" that allegedly range from advertising extensively in youth-oriented media to sponsoring Web sites that encourage drinking games and are not sufficiently closed to underage visitors, and from using "cartoon and other promotional characters designed to appeal to underage consumers" to using "code-words to conceal and disguise research and marketing efforts directed at children and underage drinkers."

Defendants have not yet responded formally to the complaint. Those who have commented to the news media vigorously deny the claims. See *Just-Drinks.com* and *Advertising Age*, November 24, 2003; *The Wall Street Journal*, November 28, 2003.

The sole named plaintiff is Ayman Hakki, a plastic surgeon and parent in Washington, D.C. The first-named plaintiffs' counsel is David Boies III, son of the attorney who represented the U.S. Justice Department in the Microsoft antitrust case and Al Gore in his court quest involving the 2000 presidential election. The senior Boies's firm also represents plaintiff. Defendants include the Beer Institute and makers of Coors, Heineken, Zima, Mike's Hard Lemonade, and Bacardi. Not named in the lawsuit, however, are the two largest domestic beer producers, Anheuser-Busch and Miller Brewing Co., along with the trade association for spirits makers, the Distilled Spirits Council of the United States.

Plaintiff seeks to certify two purported classes: "a Guardian Class consisting of all persons who were or are parents or guardians of children whose funds were used to purchase alcoholic beverages marketed by defendants which were consumed without their prior knowledge by their children under the age of 21 during the period 1982 to the present"; and "an Injunctive Class consisting of the parents and guardians of all children currently under the age of 21." The titles of plaintiff's alleged causes of action are unfair and deceptive trade practices, unjust enrichment, negligence, rescission, and fraudulent concealment.

## Other Developments

### [7] Ohio State University to Drop Alcohol Advertising

Beginning in 2004, Ohio State University (OSU) will prohibit alcohol advertisements during local television and radio broadcasts of the school's sporting events and in any school publications. "We can be accused of hypocrisy if we're sending one message at one level and doing something else at another," OSU's athletic director said. According to a press source, the new policy came at the suggestion of the Washington, D.C.-based [Center for Science in the Public Interest](#) (CSPI). "We believe it's a conflict of interest for (colleges) to be telling underage students not to drink and at the same time be in bed with the beer industry," a CSPI spokesperson was quoted as saying. CSPI evidently wants all colleges to prohibit alcohol advertising in local sports programming as well as during conference-level events and bowl games. See *The Cincinnati Post*, November 22, 2003.



### [8] KFC Pulls Ads Amidst Controversy over Health Claims

Citing “brand protection reasons,” KFC has reportedly discontinued two controversial television advertisements that touted fried chicken as “better” eating. The action follows a complaint to the Federal Trade Commission (FTC) urging the agency “to protect the public health by taking prompt enforcement action against these two KFC advertisements that clearly violate the FTC Act’s ban on deceptive food advertising.” In a November 6, 2003, letter to the FTC, Center for Science in the Public Interest Director Michael Jacobson characterized as “outrageous” with “virtually illegible disclaimers” ads in which the company’s chicken was linked to “eating better” and one man’s “fantastic” appearance. The FTC has apparently served the restaurant chain with a civil subpoena requesting that KFC “explain and justify the health claims in the ads.” It is unclear whether the agency will pursue legal action against KFC. See *Advertising Age*, November 18, 2003; *The Wall Street Journal*, November 19, 2003.

## Media Coverage

### [9] Clare Wilson, “Food Kills: Remember How Tobacco Executives Used to Question the Link Between Smoking and Lung Cancer? It’s Happening All over Again with Junk Food,” *New Scientist*, November 29, 2003

This editorial in the London-based science and technology magazine *New Scientist* discusses arguments regarding the complexity of the obesity issue -- e.g., the role of sedentary lifestyles, the disputed impact of food advertising on consumption -- and compares recent House of Commons Health Select Committee hearings on the food industry’s role in the childhood obesity epidemic to those held by the U.S. Congress “in which tobacco industry executives

denied that nicotine was addictive and asked how we could really be sure that smoking caused lung cancer. If the analogy between Big Tobacco and Big Food seems harsh, consider the arguments the food industry is deploying to persuade us that it should be allowed to carry on promoting and advertising its products to children.”

## Scientific/Technical Items

### Obesity

#### [10] Consumption of Caloric Sweeteners Increases Worldwide

The use of caloric sweeteners, including sugar and high-fructose corn syrup, has increased considerably in countries throughout the world over the past 40 years. B.M. Popkin and S.J. Nielsen, “The Sweetening of the World’s Diet,” *Obesity Research* 11: 1325-1332, 2003. By combining data from more than 100 countries, University of North Carolina at Chapel Hill researchers calculated that from 1962 to 2000, average dietary intake of sweeteners increased by nearly 75 calories per day per individual, a 32 percent increase. Using U.S.-specific data, they also calculated that sweetener intake increased by 83 calories per day in the United States during roughly the same period, with some 80 percent of that increase coming from the consumption of soft drinks and fruit beverages. The researchers assert that their findings are of particular concern because increases in caloric sweetener intake are generally accompanied by either increases in overall caloric intake or decreases in consumption of high-fiber, nutrient-rich foods.



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## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Mark Cowing 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 [mcowing@shb.com](mailto:mcowing@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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