

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Initiatives

#### [1] FTC Report Correlates Regulatory Policies with Changes in Nutrition and Health Claims

The Federal Trade Commission (FTC) has released a report that analyzes changes in magazine advertising for food products from 1977 to 1997. Health and nutrition claims have apparently varied over time as FTC policies and regulations changed, according to the report authored by two economists on the basis of data collected by FTC staff. Available from the FTC Web site at [www.ftc.gov/opa/2002/10/foodads.htm](http://www.ftc.gov/opa/2002/10/foodads.htm), the report concludes that “nutrition-related claims have become a major feature of food advertising and an important focus of competition” at a time when science has been showing “the importance of nutrition in disease risks.” The report also notes that “the ultimate question of which regulatory and legal policies best serve consumer interests requires that we relate the advertising changes observed here to consumers’ food choices. Until that work is done, this evidence provides us with an important part of that evaluation: objective and detailed information on the content of food advertising under the different policies examined here.”

#### [2] Consumer Health Group Calls for ATF Action on “Alcopop” Beverages

Citing survey statistics purportedly showing that children and adults are confused about the content of products bearing hard liquor names, but containing what is claimed by manufacturers to be fermented malt and flavorings, the Center for Science in the Public Interest (CSPI) is asking the Bureau of Alcohol, Tobacco and Firearms to test “alcopop” beverages to determine their source of alcohol and regulate them appropriately. According to CSPI, beverages such as Smirnoff Ice, Bacardi Silver and Absolut Platinum are perceived by the public to be more like liquor than beer and should be regulated as such. Presently, alcopops are reportedly sold in grocery and convenience stores like beer and wine, at a lower tax rate than liquor, and they are being advertised on television. A CSPI spokesperson has apparently claimed that liquor manufacturers are intentionally designing these beverages to appeal to young and underage drinkers by masking their taste with sweet flavorings. A spokesperson for a distilled spirits trade group has reportedly responded by noting that the Federal Trade Commission has rejected such claims. See *The Washington Post* and [cspinet.org](http://cspinet.org), November 5, 2002.

#### [3] Canadian Government to Impose Food Labeling Regulations

Health Canada, the nation’s federal health department, is expected to publish in December 2002 final regulations mandating nutrition information on the labels of most prepackaged foods; manufacturers will reportedly have two years to comply with the



new directive. Under the regulations, labels must provide caloric content as well as information about the amount of 13 specific nutrients. Diet-related health claims will be allowed on labels provided the food in question meets certain criteria – e.g., a food making a health claim about cardiovascular disease would have to be low in saturated fat and *trans* fat.

See *Ottawa Citizen*, November 9, 2002;

<http://www.hc-sc.gc.ca>.

## State/Local Initiatives

### [4] **New York City Council to Consider Banning Junk Food and Soda from Public Schools**

Two New York City Council members have reportedly introduced a bill that would require public schools to remove “minimally nutritious” junk foods, sodas and candy from school vending machines. Apparently concerned about a doubling of childhood obesity over the last 20 years, Councilman David Yassky (D-Brooklyn) was quoted as saying, “We should not be in the business of pushing soda and candy 24 hours a day. That just does not make sense.” State law already reportedly mandates that vending machines only be used after the lunch hour, but spot checks have revealed that city high schools still sell soda and sweets during lunch periods. The city council’s health committee chair has apparently indicated that the proposal represents “an important pro-public health step that actually won’t cost us any money.” See *NYPPost.com*, November 11, 2002.

In August 2002, the Los Angeles Unified School District voted unanimously to extend an existing ban on soft drink sales in elementary schools to the district’s middle and high schools.

## Legal Literature

### [5] **Robert Cochran, Jr., “Hedonic Product Liability: Will Alcohol Follow the Tobacco Road?,” *The Brief*, Fall 2002**

This article sets forth a list of reasons why alcohol manufacturers may face the same liabilities as those faced by cigarette manufacturers in recent years. Among such reasons are that alcohol-related diseases and injuries cost taxpayers more than those purportedly linked to tobacco use and that alcohol kills more innocent bystanders than secondhand smoke. The article also includes reasons why alcohol manufacturers may not be held liable for disease and injury allegedly related to alcohol consumption, i.e., a lack of evidence that manufacturers have deceived the public about alcohol risks, intervening tortfeasors, and the fact that “the policymaking classes,” such as judges and lawyers, are more likely to drink than to smoke. The article concludes by noting that the similarities between tobacco and alcohol “suggest that manufacturers of alcohol will be subject to hedonic product liability under one or more of the theories discussed herein.”

## Other Developments

### [6] **Medical Student JAMA Targets Obesity Issues; Daynard Calls for Litigation to Regulate Food Industry**

A number of articles in the current issue of *MSJAMA* discuss the rising rates of obesity in the United States and recommend public health and other strategies to address the problem. Nutritionists, medical professionals and government officials writing in the November 2002 issue consider (i) the growing political movement against soft drinks in public schools, (ii) the role public schools can

play in preventing childhood obesity through food programs, physical activity and health education, (iii) the public health interventions that will be required to decrease obesity prevalence, and (iv) the consequences of physicians underrecognizing and undertreating obesity in their practices, a problem blamed, in part, on “the poor efficacy of current treatments for obesity.”

An article by attorney and law professor Richard Daynard, who has long battled cigarette manufacturers with a litigation strategy, suggests that litigation could be effective at curtailing food industry practices that may be leading to eating habits which result in obesity. Daynard believes that state lawsuits to recover Medicaid expenses paid for treating obesity may be successful “as it might not be necessary to show that a particular food industry action caused obesity and consequent disease.” He also supports lawsuits targeting food marketing practices and school district “pouring rights” contracts with soft drink manufacturers. His article concludes by stating “Food industry documents analyzed during such lawsuits will likely reveal whether these marketing techniques were intended to deceive or manipulate consumers. This information will play a major role in determining the outcome of food litigation.”  
*See MSJAMA*, November 6, 2002.

**[7] U.K. Agency Champions Nutritive and Food Additives Disclosure in Restaurants; Australia Expected to Announce Anti-Obesity Measures**

The United Kingdom’s (U.K.’s) Food Standards Agency reportedly supports efforts to require restaurants to provide nutritive and food additives disclosure on menus as a means of allowing consumers to make better informed choices and thereby affect the nation’s rising rate of obesity. “The Food Standards Agency is committed to improving food labeling in the U.K. and is actively engaged in this

process in Europe [the European Union],” an agency spokesperson was quoted as saying. The U.K.’s Restaurant Association reportedly opposes any such plan, claiming “the prospect of reading a menu that dissects each dish is hardly appealing for the diner and for a restaurateur would be a logistical nightmare. The majority of the dining-out public know what they should eat to maintain a healthy lifestyle.”  
*See BBC News*, November 4, 2002.

Meanwhile in Australia, federal Health Minister Kay Patterson is expected to announce a national strategy for combating obesity by December 1. A news report indicates that potential elements of the plan might include (i) restricting television food advertising aimed at children, (ii) pressuring fast-food restaurants to discontinue super-sized meals and explore alternative cooking methods to deep frying, and (iii) requiring housing developers to include bicycle and foot trails in new subdivisions. Weight-related disorders – e.g., cardiovascular disease, diabetes – reportedly cost Australia’s health system some AUS\$2 billion annually. *See Sidney Morning Herald*, October 13, 2002.

## Scientific/Technical Items

### Cardiovascular Disease

**[8] U.K. Committee Issues Report on Salt Intake and Blood Pressure**

The United Kingdom’s Scientific Advisory Committee on Nutrition (SACN) has issued a draft report concluding that strong evidence indicates an association between salt intake and blood pressure. According to SACN, adults consume approximately 9,000 mg. of salt per day. The commission recommends that adults lower their consumption to no more than 6,000 mg. of salt per day and that children



consume even lower amounts. SACN suggests that “lowering the average population salt intake would proportionally lower population average blood pressure levels and confer significant public health benefits by contributing to a reduction in the burden of cardiovascular disease.”

SACN recommends that optimal levels of salt intake are best achieved by adopting a healthy balanced diet low in fat, salt and sugars and rich in fruit, vegetables and complex carbohydrates. It notes, however, that individual actions must be supplemented by food industry efforts to reduce the amount of salt used in processed foods because such foods account for up to 75 percent of salt intake. Press reports indicate that the Food Standards Agency and the Department of Health are already in discussions with food manufacturers and retailers on ways to limit salt during processing and preparation.

## Herbicides

### [9] “Feminization of Male Frogs in the Wild,” T. Hayes, et al., *Nature* 419: 895-896, 2002

Atrazine, a herbicide widely used by U.S. farmers to shield corn and other crops from weeds, feminizes frogs, according to field research recently published in *Nature* and *Environmental Health Perspectives*. Tyrone Hayes and colleagues from the University of California, Berkeley, examined frogs at eight sites from Iowa to Utah, finding that 10 to 92 percent of males had underdeveloped testes and that in certain instances the frogs’ testes produced eggs. Hayes notes these changes appear to stem from atrazine’s stimulation of aromatase, an enzyme that converts testosterone to estrogen. He speculates that, even at low concentrations, atrazine stimulates the testes to make enough estrogen to feminize. Hayes further opines that “atrazine is potentially destroying biodiversity,” presenting an “unacceptable risk.”

## Upcoming Meetings

### [10] NFPA’s Annual Meeting to Address Food Security Issues

Topics of discussion at the National Food Processors Association’s (NFPA’s) annual meeting will reportedly include food security, food recalls and regulatory perspectives on food packaging. The event is slated for November 19-21, 2002, at the Grand Hyatt Washington. More details are available at <http://www.nfpa-food.org>.

### [11] DHHS Region VIII Organizes Obesity Conference

Region VIII of the Department of Health and Human Services (DHHS) is sponsoring a conference titled “Addressing the Obesity Epidemic: Our Region Takes Action,” on November 20-21, 2002, in Denver, Colorado. Topics will reportedly include the federal response to the “obesity epidemic,” targeting obesity in specific populations and obesity research. Invited speakers include U.S. Surgeon General Richard Carmona, M.D., and representatives of the Centers for Disease Control and Prevention, and the National Institutes of Health. The conference brochure can be downloaded at <http://healthlinks.washington.edu/nwcphp>.



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## LITIGATION UPDATE

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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