

Food & Beverage

LITIGATION UPDATE

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Table of Contents

Legislation, Regulations and Standards

- [1] Veneman Declares Extraordinary Emergency; Daschle Wants Labeling Rules Implemented1
- [2] FDA Issues Updated Guidance on Food Facility Registration Regulation1
- [3] Dietary Guidelines Advisory Committee to Hold Second Meeting.....1
- [4] California Proposal Would Ban GM Crops in Mendocino County2

Litigation

- [5] Lawyers Developing Model Complaint for Obesity-Related Litigation.....2

Other Developments

- [6] New APHA Policy Targets Food Marketing to Youth.....3
- [7] CASA Report Links Eating Disorders and Substance Abuse.....3

Media Coverage

- [8] "Cut the Fat," *Consumer Reports*, January 2004.....3

Scientific/Technical Items

- [9] Rand Study Blames Obesity for Rising Rates of Disability.....4

Shook,
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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] Veneman Declares Extraordinary Emergency; Daschle Wants Labeling Rules Implemented

USDA Secretary Ann Veneman has issued a "Declaration of Extraordinary Emergency Because of Bovine Spongiform Encephalopathy" that authorizes USDA to aid the state of Washington in taking whatever measures are deemed necessary to quarantine and dispose of animals that might be infected with or exposed to BSE. According to the declaration, "It appears that BSE is spread primarily through the use of ruminant feed containing protein and other products from ruminants infected with BSE."

The agriculture department has also issued a notice confirming that federal inspectors are no longer marking as "inspected and passed" any normal cattle targeted for BSE testing until such cattle test negative for the disease as well as three interim final rules pertaining to the prohibition from the food chain of non-ambulatory animals, specified risk materials and mechanically separated meat and the prohibition of air injection stunning devices during slaughter. USDA's Food Safety and Inspection Service is accepting public comments on the regulations until April 12. *See Federal Register*, January 12, 2004.

The BSE scare has led Senator Tom Daschle (D-N.D.) to call for immediate implementation of a provision in the 2002 Farm Bill requiring labeling of

meat, fish and produce by its country of origin by September 2004. Implementation of the law would likely be delayed if Senate lawmakers fail to approve the necessary appropriations when they reconvene on January 20. *See The New York Times*, January 8, 2004. Meanwhile, the Organic Consumers Association has issued a [report](#) speculating that Creutzfeldt-Jakob disease, a human spongiform encephalopathy, might be linked to consumption of infected beef, pork, lamb, and venison.

Food and Drug Administration

[2] FDA Issues Updated Guidance on Food Facility Registration Regulation

FDA has posted on its Web site revised [guidance](#) regarding an interim final regulation that implemented section 305 of the Bioterrorism Act's by requiring domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States to register their facilities by December 12, 2003. The agency evidently hopes that its continued clarification of the interim rule will expedite prompt registration by covered facilities. *See Federal Register*, January 12, 2004.

Department of Health and Human Services (HHS)

[3] Dietary Guidelines Advisory Committee to Hold Second Meeting

The Dietary Guidelines Advisory Committee will hold its second meeting on January 28-29, 2004, in



Washington, D.C. Requests to present oral testimony must be submitted by January 16; public comments pertinent to the group's review of the guidelines will be accepted throughout its deliberations. The 13-member federal panel is charged with preparing by 2005 the revised Dietary Guidelines for Americans, a report whose findings will affect, among other things, proposed changes to the Food Guide Pyramid. Shortly after HHS Secretary Tommy Thompson announced appointments to the committee in August 2003, the Center for Science in the Public Interest called for the replacement of seven members of the group, claiming the individuals have "tight affiliations" with the food, drug and dietary-supplement industries. See *Federal Register*, December 29, 2003.

State/Local Initiatives

[4] California Proposal Would Ban GM Crops in Mendocino County

A ballot initiative to be put before voters in northern California on March 4, 2004, will ask: "Shall the people of Mendocino County prohibit the propagation, cultivation, raising and growing of genetically modified organisms [GMOs] in Mendocino County?" [Supporters](#) of Measure H claim GMOs are a "huge uncontrolled biological experiment" and that GMO contamination could harm the market value of the county's wine and other agricultural products. Organic vintners supporting the measure include those from the Fetzer and Barra wineries. A news report indicates that during 2001-2002, 158 pieces of biotechnology-related legislation were introduced in 39 states. See *Associated Press*, January 11, 2004.

Litigation

Obesity

[5] Lawyers Developing Model Complaint for Obesity-Related Litigation

George Washington University Law Professor John Banzhaf is working with a group of public health lawyers to draft a model complaint for trial lawyers to use in filing obesity-related lawsuits, according to *The Washington Times*. The group is evidently shaping its arguments based on comments made by U.S. District Judge Robert Sweet in two opinions he issued in dismissing obesity-related complaints against McDonald's. *Pelman v. McDonald's Corp.*, No. 20 Civ. 7821 (RWS) (S.D. N.Y.) (orders dated [1/22/03](#) and [9/3/03](#)). Sweet's September opinion, for example, includes this excerpt: "Plaintiffs should have included sufficient information about themselves to be able to draw a causal connection between the alleged deceptive practices and the plaintiffs' obesity and related diseases. Information about the frequency with which the plaintiffs ate at McDonald's is helpful, but only begins to address the issue of causation. Other pertinent, but unanswered questions include: What else did the plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are alleged to have been caused by McDonald's products?" See *The Washington Times*, January 7, 2004.



Other Developments

[6] New APHA Policy Targets Food Marketing to Youth

A [policy](#) adopted by the American Public Health Association's Governing Council during the group's recent annual meeting takes aim at food industry marketing and advertising to the nation's youth. According to the policy, "Children and adolescents are currently being exposed to an increasing and unprecedented amount of food advertising and marketing through a wide range of venues," e.g., television and in-school marketing. Among other things, the policy links commercial influences to the prevalence of childhood obesity and attendant health problems in advocating such measures as (i) designating schools as "food advertising-free zones," (ii) prohibiting soft drink and snack food sales in schools to promote a "healthful eating environment," (iii) passing legislation to prohibit television advertising for unhealthy food that targets young children, and (iv) having the Office of the Surgeon General develop recommendations to address the issue. See *APHA Press Release*, January 12, 2004.

[7] CASA Report Links Eating Disorders and Substance Abuse

"Individuals with eating disorders are up to five times likelier to abuse alcohol or illicit drugs and those who abuse alcohol or illicit drugs are up to 11 times likelier to have eating disorders," according to a new National Center on Addiction and Substance Abuse (CASA) report titled [Food for Thought: Substance Abuse and Eating Disorders](#). "This lethal link between substance abuse and eating disorders sends a signal to parents, teachers and health professionals – where you see the smoke of eating disorders, look for the fire of substance abuse and vice versa," CASA president and former Secretary of Health, Education

and Welfare, Joseph Califano, said upon release of the report.

The 73-page report identifies shared characteristics and shared risk factors for substance abuse and eating disorders, noting that few, if any, programs currently exist that treat both of these co-occurring conditions that primarily affect young women. It also (i) provides treatment and prevention information, (ii) encourages magazines with high numbers of young female readers to reject alcohol and tobacco advertisements (iii) discourages television program and film writers from "making positive associations between thinness and smoking, drinking and using drugs," (iv) discourages tobacco and alcohol companies from "linking smoking and drinking to unrealistically thin images of women," and (v) asks policymakers to increase public awareness about the connection between substance abuse and eating disorders.

Media Coverage

[8] "Cut the Fat," *Consumer Reports*, January 2004

"The ready availability and skillful marketing of cheap, tasty, high-calorie products has made it difficult, if not impossible, for many people to achieve the 'balance' that food and restaurant companies so confidently prescribe" when they promote the role of consumers' personal responsibility, this article asserts. "We've uncovered and distilled what you need to know to keep the innocent act of feeding yourself and your family from becoming a threat to your health and well-being."

The article claims that "adequate, accurate [nutrition] information is hard to come by" for three reasons: First, food labels allegedly "disguise added sugar under confounding pseudonyms," such as



corn syrup, fruit-juice concentrates, dextrose, and glucose. Second, “restaurant menus don’t always give you the information you need to choose meals that contain a reasonable number of calories.” And third, “the government’s official nutritional advice has steadily retreated from forthrightly stating that people should consume” less high-fat, high-calorie foods.

The article also previews a number of “not-yet-published” items, including (i) a “15-year study from Harvard Medical School of more than 3,700 adults from across the country,” which reportedly found that “eating fast food more than twice a week increased the risk of obesity by about 50 percent for whites (though not, surprisingly, for blacks);” and (ii) a Penn State study in which Tanja Kral “invited 39 women to eat breakfast, lunch, and dinner in her lab once a week for six weeks.... On days they drew the higher-calorie, larger-portion lunch, the women ate an average of 56 percent more calories than when they got the lower-calorie, smaller-portion version.”

Scientific/Technical Items

Obesity

[9] Rand Study Blames Obesity for Rising Rates of Disability

The obesity epidemic has caused disability rates to rise sharply over the last two decades among Americans in the prime of their working lives, according to a new study from the nonprofit think tank Rand Corp. D.N. Lakdawalla, et al., “Are The Young Becoming More Disabled?” *Health Affairs* 23(1): 168-176, 2004. The study found that the number of people ages 30 to 49 who were unable to care for themselves or perform routine tasks increased by more than 50 percent from 1984 to 2000. Among those ages 30 to 39, the number reporting disability rose from 118 per 10,000 people to 182 per 10,000 people during the 16-year period. For those ages 40 to 49, the number rose from 212 per 10,000 to 278 per 10,000. The researchers attribute some portion of the rise in disability among these populations to disability insurance incentives and advancing medical technology that saves the lives of those who might previously have died. They identify obesity, however, as the primary factor for the increased incidence of disability. “Obesity is the only trend that is commensurate in size with what we found happening with disability,” Darius Lakdawalla, Rand economist and lead author of the study, was quoted as saying. The researchers also note the relatively large increases in disability attributed to muscular or skeletal pain, mental illness and diabetes, all conditions that disproportionately affect those who are obese.

Food & Beverage

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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 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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