

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] Obesity Litigation Reform Now Headed for Vote in the Full House

The House Judiciary Committee passed the Personal Responsibility in Food Consumption Act (H.R. 339) by a vote of 18-9 on January 28, 2004. As amended, the legislation prevents "legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity." A similar bill ([S. 1428](#)) is pending in the Senate Judiciary Committee.

[2] House Lawmakers Introduce Legislation to Repeal Delay in COOL Regulations

A bill ([H.R. 3732](#)) co-sponsored by Representative Dennis Rehberg (R-Mont.) and Collin Peterson (D-Minn.) would amend the Agricultural Marketing Act of 1946 to repeal the recently enacted two-year delay in the implementation of country-of-origin labeling (COOL) on meat, seafood and produce. Senate Minority Leader Tom Daschle (D-S.D.) has vowed that supporters of the labeling rules will amend legislation whenever possible to reinstate their implementation during 2004.

In a related development, Wal-Mart has announced plans to develop its own country-of-origin labeling for fruit and vegetables in its more than 1,800 supercenters, neighborhood markets and Sam's Clubs. As a first step, the company reportedly plans to have a traceability protocol in place by the end of 2004. *See The Packer*, February 2, 2004.

U.S. Department of Agriculture (USDA)

[3] USDA to Revise Biotech Regulations

USDA is requesting public comments on potential issues that could be discussed in a forthcoming environmental impact statement from the Animal and Plant Health Inspection Service (APHIS) regarding the importation, interstate movement and environmental release of certain genetically engineered organisms that might pose a plant pest risk. Among other things, APHIS is considering (i) broadening its scope to regulate genetically engineered organisms that might pose a noxious weed risk and those that might be used as biological control agents and (ii) revising regulations to define specific risk-based categories for field testing. Comments must be received by March 23, 2004. *See Federal Register*, January 23, 2004.

[4] Microbiological Criteria for Foods Committee Schedules Public Meeting

The National Advisory Committee on Microbiological Criteria for Foods will hold a public meeting on February 13, 2004, in Atlanta, Georgia. The committee provides scientific advice to USDA and the Department of Health and Human Services on



public health issues related to the safety of the U.S. food supply, including development of microbiological criteria and evaluation of epidemiological and risk assessment data for assessing microbiological hazards in food. Agenda items at the meeting include (i) microbiological performance standards for broilers and ground chicken, (ii) the scientific basis for establishing safety-based "use by" date labeling for refrigerated ready-to-eat foods, and (iii) scientific criteria for redefining pasteurization. See *Federal Register*, February 2, 2004.

Codex Alimentarius Commission

[5] U.S. Delegates Schedule Public Meeting, Request Comments on Various Food Additive/Contaminant Proposals

The U.S. Department of Agriculture, Food and Drug Administration, and Department of Health and Human Services have scheduled a February 9, 2004, public meeting in College Park, Maryland, to discuss U.S. draft positions to be presented at a March 22-26 meeting of the Codex Committee on Food Additives and Contaminants in Rotterdam, the Netherlands. Issues to be discussed at the February 9 meeting include (i) the endorsement and/or revision of maximum levels for various food additives in Codex standards, (ii) mycotoxins in food and feed, (iii) proposed draft maximum levels for cadmium, (iv) a proposed draft code of practice for ways to reduce dioxin and dioxin-like PCB contamination, and (v) a [discussion paper](#) on acrylamide. See *Federal Register*, February 3, 2004.

United Kingdom (UK)

[6] Groups Petition English Government to Move on Obesity Issue; Department of Health to Issue White Paper

Public health groups spearheaded by the [International Obesity Task Force](#) have presented a strategic proposal to the Parliamentary Select Committee for Health that outlines the U.K. government's possible responses to the obesity epidemic. The proposal's recommendations include (i) appointment of a cabinet minister "to oversee a comprehensive cross-departmental obesity prevention strategy engaging government, civil society and business as part of a new public health program," (ii) establishment of an independent public health agency "directly responsible to Parliament to monitor progress on prevention of obesity, diabetes, cardiovascular disease and cancers, with powers to ensure compliance with prevention policies and to propose regulatory measures," (iii) legislation "to restrict the marketing to children of foods with high energy density or high content of fat/sugar/salt on television and elsewhere," and (iv) introduction of "a simplified food labeling scheme with clear symbols warning of high-energy density or high fat/sugar/salt content, in keeping with World Health Organization and Department of Health nutritional goals. The health committee is expected to submit a report on the obesity issue to the House of Commons later this year. See *International Obesity Task Force Press Statement*, January 29, 2004.

Meanwhile, Department of Health Secretary John Reid has announced that a forthcoming department white paper will target obesity, food labeling, alcoholism, and public smoking bans. See *The Guardian*, February 3, 2004.



Other Developments

[7] Insurance Group Discusses Future of Fast-Food Litigation

Liability insurers should prepare for claims by food companies being sued by obese customers, according to *Obesity, Liability & Insurance*, a new report from the Insurance Information Institute. Reflecting on "the history of litigation arising out of asbestos, environmental, tobacco and other liabilities," the report states that "it would be a mistake to dismiss [obesity-related lawsuits] as far-fetched," even though they are at an early stage of development. Conclusion: "This emerging issue has direct consequences for many industry sectors, including insurance and reinsurance. It will require careful attention in the months ahead."

Issued in late January 2004, the report summarizes relevant litigation activity in 2003, including the class-action lawsuit against McDonald's and the short-lived Oreo lawsuit against Kraft Foods. It also lists 11 theories of liability that plaintiffs might employ: products liability, personal injury, negligence, strict liability, failure to warn, breach of warranty, misrepresentation, negligent/reckless marketing or distribution, vicarious liability, advertising liability, and governmental subrogation.

"Similar to earlier lawsuits targeting 'Big Tobacco,' and more recent suits against the alcohol industry, the obesity-related cases are another example of a trend toward attempting to attach liability for broad social and health concerns to private sector defendants," the report states. "Even though insurers have never paid any tobacco settlements or defense costs, there are concerns that the legal cases against the food industry could leave insurers exposed to potential claims under certain general liability and product liability coverages."

One of the report's more unique observations involves the relationship between states' obesity rates and reputation for litigiousness. "For example," the report states, "the U.S. Chamber of Commerce 2003 States Liability Systems Ranking Study ranks Mississippi last among 50 states in terms of its liability system. Mississippi also has the worst obesity rate in the nation, according to the CDC, with an obesity prevalence of 25.9 percent in 2001. Similarly, West Virginia, Alabama, Louisiana, and Texas, which complete the bottom five ranked state liability systems in 2003 all had an obesity prevalence of over 23 percent in 2001."

Included in the report are 24 tables and a list of additional resources. It also discusses the potential impact of rising obesity rates on health insurance, life insurance, disability insurers, and workers' compensation.

[8] Most Britons Believe Parents Are Responsible for Children's Diets, Support Curbs on Food Marketing to Kids

Eighty-eight percent of consumers believe parents have the most responsibility for improving children's diets, according to a poll commissioned by Britain's Food Standards Agency (FSA). Forty-three percent of the 2,000 Britons surveyed reportedly indicated that schools are the second most responsible, followed by food manufacturers (30 percent) and broadcasters (26 percent). Some 85 percent of consumers advocate greater controls over the way fast food is promoted to children, while 82 percent believe celebrity endorsements have considerable influence on children's food choices. "The British public recognize the role that parents must play in improving the diets and health of their children," FSA Chair Sir John Krebs was quoted as saying. "But it is also clear from our poll that they can't do



it on their own — they need support from schools, industry, broadcasters and government if they are to make a difference.” See *FSA Press Release* and *The Guardian*, January 27, 2004.

Media Coverage

- [9] “United States Wins More Time to Lobby Against WHO Diet Plan, Owen Dyer, *British Medical Journal*, January 31, 2004; “Who Pays in the Obesity War?,” *The Lancet*, January 31, 2004; “The Fat of the Land,” *The New York Times*, February 2, 2004

These opinion pieces all criticize the United States’ recent allegations that the World Health Organization’s (WHO’s) *Draft Global Strategy on Diet, Physical Activity and Health* is based on faulty science. *The Lancet* editorial blames “intense lobbying from the U.S. food industry” for the WHO Executive Board’s decision to allow further comment on the strategy until February 29, 2004, while *The New York Times* editorial asserts that “[Bush] administration should be throwing its weight behind the anti-obesity strategy instead of fighting it. Its current stance has nothing to do with health and everything to do with the political power of Big Food – and especially Big Sugar.”

Scientific/Technical Items

Obesity

- [10] Cost of Energy-Dense Foods Purportedly Linked to Rising Obesity Rates

Researchers have concluded that the poor, particularly those who have to worry about missing meals, choose inexpensive calorie-packed foods like pasta and bread because such foods are more affordable and energy-dense than health-conscious

selections like fresh fruits and vegetables. They further suggest that energy-dense diets may be responsible in part for previously identified associations between poverty and obesity. A. Drewnowski and S.E. Specter, “Poverty and Obesity: The Role of Energy Density and Energy Costs,” *The American Journal of Clinical Nutrition* 79(1): 6-16, 2004. “It’s a question of money,” Adam Drewnowski was quoted as saying. “The reason healthier diets are beyond the reach of many people is that such diets cost more. On a per calorie basis, diets composed of whole grains, fish, and fresh vegetables and fruit are far more expensive than refined grains, added sugars and added fats. It’s not a question of being sensible or silly when it comes to food choices, it’s about being limited to those foods that you can afford,” he said.

The research team based its conclusions on a review of the published evidence linking obesity to dietary costs and quality. In that review, they found support for four basic points: (i) obesity rates are highest among those living in poverty with the least education; (ii) an inverse relationship exists between high-energy foods and energy cost, such that dense foods composed of refined grains, added sugars or fats may be the least expensive; (iii) the energy density and palatability of sweets and fats are associated with higher intake; and (iv) poverty and food insecurity are associated with lower food expenditures and lower quality diets.



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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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