

# Food & Beverage

## LITIGATION UPDATE

Issue 68 • February 18, 2004

### Table of Contents

#### Legislation, Regulations and Standards

- [1] IOM Report Encourages Americans to Consume Less Sodium, More Potassium ..... 1
- [2] Ninth Circuit Just Says 'No' to DEA ..... 1
- [3] New Senate Bills Target Animal Feed Supply, Animal Identification Plan ..... 1
- [4] Biotechnology Committee to Discuss Traceability Rules .... 2
- [5] Scottish Agency to Debate Youth Marketing Issues ..... 2
- [6] European Food Agencies Approve Dietary Health Action Plan ..... 2

#### State/Local Initiatives

- [7] Obesity Task Force in Florida Delivers Recommendations to Governor ..... 2

#### Litigation

- [8] Appellate Court Upholds New York State Law on Out-of State Wine Shipments ..... 3

#### Other Developments

- [9] British Physicians Say Immediate Action Is Needed to Avert Obesity Crisis ..... 3
- [10] Canadian Health Group Issues Calls on Food Industry to Take Action Against Obesity ..... 3

#### Scientific/Technical Items

- [11] High-Seafood Diets in Mothers Linked to Possible Brain Impairment in Children ..... 4
- [12] High Consumption of Whole-Grain Foods Decreases Risk of Developing Insulin Resistance and Metabolic Syndrome ... 4

Shook,  
Hardy&  
Bacon L.L.P.™

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Institute of Medicine (IOM)

##### [1] IOM Report Encourages Americans to Consume Less Sodium, More Potassium

Citing studies that indicate the average American consumes more than 4,000 milligrams of sodium daily, nearly 75 percent of which comes from restaurant meals and processed foods, a new report from the National Academies' Institute of Medicine urges healthy Americans younger than age 50 to limit their daily consumption of sodium to 1,500 mg. "We don't have our heads in the sand on this one," Johns Hopkins University Professor Lawrence Appel, chair of the panel that authored the report, was quoted as saying. "We realize where we are is quite a distance from where we should be ... and there are commercial interests that don't want this [the recommendations] to happen," Appel said. Titled [Dietary Reference Intakes: Water, Potassium, Sodium, Chloride and Sulfate](#), the report also urges most adults to (i) increase their daily consumption of potassium to 4,700 mg. to help prevent high blood pressure and (ii) maintain "adequate" hydration by consuming 91 ounces of water daily (for women) and 125 ounces daily (for men). The recommended daily water intake need not be derived solely from drinking water, that derived from other beverages and fruits and vegetables counts as well. *See Associated Press*, February 11, 2004, *The New York Times*, February 17, 2004.

### Drug Enforcement Agency (DEA)

##### [2] Ninth Circuit Just Says 'No' to DEA

The Ninth Circuit Court of Appeals has sided with the challengers to government efforts to ban the sale of food and cosmetic products containing hemp, a non-psychoactive plant species related to marijuana. [Hemp Industries Association v. Drug Enforcement Administration, No. 03-71366 \(9th Cir. 2/6/04\)](#). DEA first issued the challenged regulations and interpretive rules in 2001. The Ninth Circuit held that while DEA may certainly regulate marijuana and synthetic forms of the drug *cannabis*, the DEA's authority does not currently extend to trace amounts of *cannabis*-related constituents that occur naturally.

### U.S. Congress

##### [3] New Senate Bills Target Animal Feed Supply, Animal Identification Plan

A proposal ([S. 2051](#)) introduced by Senator Maria Cantwell (D-Wash.) aims to promote food safety and protect the animal feed supply from bovine spongiform encephalopathy. The Animal Feed Protection Act of 2004 would prohibit the inclusion of specified risk material (e.g., brain, spinal cord, dorsal root ganglia) from ruminants in animal feed, nutritional supplements and medicines.

Legislation ([S. 2070](#)) sponsored by Senator Chuck Hagel (R-Neb.) would direct the agriculture secretary to implement the U.S. Animal Identification Plan and the Food and Drug Administration



commissioner to evaluate the effectiveness of the ban on animal proteins in ruminant feed. Both proposals have been referred to the Committee on Agriculture, Nutrition and Forestry.

## U.S. Department of Agriculture (USDA)

### [4] Biotechnology Committee to Discuss Traceability Regulations

USDA's Advisory Committee on Biotechnology and 21<sup>st</sup> Century Agriculture will hold a public meeting on March 8-9, 2004, in Washington, D.C. The meeting's agenda includes discussion of public and private biotechnology research and a draft report on the implications of traceability and mandatory labeling regulations for biotech products in other countries.

Established in 2003, the 18-member group is charged with evaluating the long-term impacts of biotechnology on the U.S. food and agriculture system. Members include representatives of the biotechnology and food industries, farming interests, and environmental organizations. *See Federal Register*, February 17, 2004.

## United Kingdom (U.K.)

### [5] Scottish Agency to Hold Debate on Youth Marketing Issues

Scotland's Foods Standards Agency (FSA) has scheduled a public debate on the promotion of foods to children for February 26, 2004, in Edinburgh. Panelists will reportedly include Professor Gerard Hastings, author of an FSA-commissioned study on food marketing to youth, and representatives of the Scottish Consumer Council, Advertising Association, and Scottish Youth Parliament. Topics are expected to include celebrity endorsements, labeling, in-store promotions, branded toys, food

company sponsorship of educational materials, food product Web sites, and television and radio advertising. *See FSA Press Release*, February 9, 2004.

## European Union (EU)

### [6] European Food Agencies Approve Dietary Health Action Plan

Food safety agencies in Norway and in EU member states have reportedly approved a joint action plan to improve dietary health throughout Europe. The various agencies have agreed to (i) collaborate on efforts to combat obesity generally, (ii) examine ways of influencing consumption patterns and work with food manufacturers to address the obesity epidemic in children, (iii) raise consumer awareness and enlist food industry cooperation in reducing the salt content of processed foods, (iv) promote harmonization of European salt labeling rules, and (v) raise consumer awareness of benefits related to increased amounts of folic acid in the diet. *See Food Standards Agency Press Release*, February 10, 2004.

## State/Local Initiatives

### [7] Obesity Task Force in Florida Delivers Recommendations to Governor

A 16-member task force charged with addressing Florida's rising rates of overweight and obesity delivered [22 recommendations](#) for action to Governor Jeb Bush (R) on February 13, 2004. The recommendations address the collaborative roles of the family, community, health care providers, public health officials, schools, and employers in promoting lifelong physical activity and healthful nutrition. Specific recommendations include (i) encouraging the health insurance industry to offer incentives to those with healthier lifestyles, (ii) requiring school districts to maintain independent nutrition advi-



sory groups, and (iii) encouraging school districts to seek alternative funding for programs previously funded with resources provided by vending machine sales. *See St. Petersburg Times*, February 14, 2004.

## Litigation Interstate Commerce

### [8] Appellate Court Upholds New York State Law on Out-of-State Wine Shipments

Concluding that “the challenged regulatory scheme is within the ambit of the powers granted to states by the Twenty-first Amendment,” the Second Circuit Court of Appeals has upheld a New York law barring out-of-state wineries from shipping wine directly to New York consumers.

**Swedenburg v. Kelly, Nos. 02-9511, 03-7089 (2d Cir. 2/12/04)**. Two out-of-state wineries and three New York consumers brought the lawsuit, which also challenged advertising disparities involving the Internet. The Institute for Justice, a Washington, D.C.-based public interest law firm, has reportedly vowed to appeal the ruling to the U.S. Supreme Court. *See The Wall Street Journal*, February 12, 2004.

In 2003, the fifth and sixth circuits struck down similar laws in Texas and Michigan, finding the statutes discriminatory and unconstitutional. A July 2003 Federal Trade Commission [report](#) targeting online wine sales concluded that such purchases benefit consumers by offering significant savings and increased selection, without compromising concerns about sales to minors.

## Other Developments

### [9] British Physicians Say Immediate Action Is Needed to Avert Obesity Crisis

More than one-half of Britons are either overweight or obese, according to a joint report issued last week by a working party of the Royal College of Physicians, Royal College of Pediatrics and Child Health, and the Faculty of Public Health Medicine. “This report highlights the terrifying health consequences of the obesity epidemic that will particularly impact on our children unless effective and coherent preventive measures are taken,” Professor Peter Kopelman, chair of the working party, was quoted as saying. Among other things, [Storing Up Problems: The Medical Case for a Slimmer Nation](#) calls for (i) a government task force to develop a national obesity strategy and implement a public awareness campaign to educate consumers about the benefits of healthy diets and active lifestyles, (ii) collaboration between the Food Standards Agency and industry in the setting of standards for labeling, nutritional content and marketing of food, and (iii) more research regarding the roles of various societal and cultural factors in the obesity issue. *See Reuters* and *BBC News*, February 11, 2004.

### [10] Canadian Health Group Issues Calls on Food Industry to Take Action Against Obesity

Claiming that the prevalence of overweight and obesity “is almost exactly what we faced with tobacco use 30 years ago,” Canada’s Heart and Stroke Foundation has urged food and beverage manufacturers to work with government leaders in addressing the obesity issue. More specifically, the health organization advocates that industry (i) reduce saturated and *trans* fats in processed foods, (ii) restrict the advertising of “junk” foods to children, (iii)



reduce portion sizes, and (iv) improve nutritional information in fast-food restaurants. *See Heart and Stroke Foundation Press Release*, February 10, 2004.

## Scientific/Technical Items

### Mercury Exposure

#### [11] High-Seafood Diets in Mothers Linked to Increased Levels of Mercury and Possible Brain Impairment in Children

Studies published in the February issue of *The Journal of Pediatrics* 144(2) suggest that mercury passed from a mother to a child *in utero* produces irreversible impairments to specific brain functions in children. The studies followed children from the Faroe Islands over a period of 14 years. Mercury concentrations were measured in both mothers and in children at birth, at seven years, and again at 14 years into the study. In the first study, Grandjean, et al., report significantly higher latencies in the transmission of signals to the brain from the acoustic nerve among children who experienced high intrauterine exposure to mercury. The authors reported a similar finding in children at both seven and 14 years into the study, suggesting that the effect was lasting. A second study by Murata and colleagues reported that neurological changes linked to high methyl mercury concentrations are also associated with decreased nervous system control of heart function, such as heart rate variability.

### Obesity

#### [12] High Consumption of Whole-Grain Foods Decreases Risk of Developing Insulin Resistance and Metabolic Syndrome

Recent data from the ongoing Framingham Offspring Cohort study, reported in the journal *Diabetes Care* 27:538-546, 2004, (McKeown, et al.), indicate that individuals who consume diets rich in cereal fibers, fruit fibers and whole grains are least likely to develop insulin resistance, a precursor to type 2 diabetes. In addition, the study data suggest that the prevalence of the "metabolic syndrome" is significantly lower among individuals with the highest intake of cereal fibers and whole-grain foods. The so-called metabolic syndrome increases the risk of diabetes and heart disease, and is characterized as a cluster of risk factors such as abdominal obesity, high levels of triglycerides, low levels of the so-called "good" cholesterol, HDL, high blood pressure, and high blood sugar. Results related to the consumption of whole-grain foods were observed in individuals who consumed three or more servings of whole-grain foods daily.



# Food & Beverage

## 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.



**Geneva, Switzerland**

**Houston, Texas**

**Kansas City, Missouri**

**London, United Kingdom**

**Miami, Florida**

**New Orleans, Louisiana**

**Orange County, California**

**Overland Park, Kansas**

**San Francisco, California**

**Tampa, Florida**

**Washington, D.C.**

