

Food & Beverage

LITIGATION UPDATE

Issue 69 • February 25, 2004

Table of Contents

Legislation, Regulations and Standards

- [1] NTP Invites Comments on Acrylamide Report, Announces Public Meeting 1
- [2] FDA Issues Revised Antimicrobial Residue Guidelines 1
- [3] Britain's Obesity Problem Addressed in Government Discussion Paper 1

Legal Literature

- [4] "Living on the Fat of the Land: How to Have Your Burger and Sue It Too," Jeremy Rogers (Note), 81 *Wash. U. L.Q.* 859 (2003) 2

Other Developments

- [5] Two Reports Implicate Advertising's Role in Childhood Obesity Epidemic 2
- [6] Obesity-Related Disability Claims on the Rise 3
- [7] Traditional Crops Contaminated with Biotech DNA 3

Media Coverage

- [8] Donald McNeil, Jr., "U.S. Scientist Tells of Pressure to Lift Bans on Food Imports," *The New York Times*, February 25, 2004 3
- [9] Paul Kelso, "Fast Food Firms Accused of Using Sport to Attract Children," *The Guardian*, February 21, 2004 4

Scientific/Technical Items

- [10] Moderate-Fat and Low-Fat Diets Have Different Effects on Serum Lipid Profiles 4

Shook,
Hardy &
Bacon L.L.P.™

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

National Toxicology Program (NTP)

[1] NTP Invites Comments on Acrylamide Report, Announces Public Meeting

NTP's Center for the Evaluation of Risks to Human Reproduction is inviting comments on sections 1-4 of its draft expert panel report on acrylamide, which will be posted on the center's [Web site](#) on March 15, 2004. Acrylamide forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. The chemical is also used to produce polyacrylamides, synthetic polymers used in biomedical research and paper production. Comments on the draft document are due by April 29.

The acrylamide expert panel will hold a public meeting in Alexandria, Virginia, on May 17-19. Agenda topics are expected to include the draft report, data gaps and research needs. [See Federal Register](#), February 20, 2004.

Food and Drug Administration (FDA)

[2] FDA Issues Revised Antimicrobial Residue Guidelines

FDA's Center for Veterinary Medicine has issued revised guidance titled [Assessment of the Effects of Antimicrobial Drug Residues from Food of](#)

[Animal Origin on the Human Intestinal Flora.](#)

The center now recommends that regulators and sponsors of new animal drugs use a pathway approach to address the human food safety of anti-microbial drug residues instead of the approach described in the 1996 version of the guidance.

See Federal Register, February 19, 2004.

United Kingdom (UK)

[3] Britain's Obesity Problem Addressed in Government Discussion Paper

Poor diet and sedentary lifestyle are cited as the primary reasons for the increasing number of overweight and obese Britons in a discussion paper authored by members of the Prime Minister's Strategy Unit. Titled [Personal Responsibility and Changing Behavior: The State of Knowledge and Its Implications for Public Policy](#), the paper advocates "a comprehensive approach to the behavioral 'ecology' of obesity" by means that include (i) reforming fast food and confectionary industry marketing practices through government-mandated labeling, (ii) improving "regulated nutritional standards for common processed foods and drinks," and (iii) encouraging more physical activity among all populations.



Legal Literature

- [4] **“Living on the Fat of the Land: How to Have Your Burger and Sue It Too,”**
Jeremy Rogers (Note), 81 *Wash. U. L.Q.* 859 (2003)

“Achieving success with Big Food litigation is not a matter of if, but a matter of when,” according to this article. The author, a third-year student at Washington University School of Law, proposes that “states should sue Big Food to recoup Medicaid costs that were incurred caring for overweight and obese people.” One reason he advocates states as plaintiffs is that they “need not overcome the rule of personal responsibility.”

The note discusses the “obesity epidemic,” the reasons the author believes “Big Food litigation” is viable, litigation activity to date, “the success of Big Tobacco Litigation,” and what the author calls “Big Food’s standard practices.” A copy of the article is available [here](#).

Other Developments

- [5] **Two Reports Implicate Advertising’s Role in Childhood Obesity Epidemic**

New reports from the Kaiser Family Foundation and the American Psychological Association (APA) blame American children’s exposure to thousands of advertisements for candy, soft drinks, sugary cereals, and fast food for contributing to unhealthy eating habits and the nation’s increasing rate of childhood obesity.

The Kaiser report, titled [The Role of Media in Childhood Obesity](#), reviews more than 40 studies on the role that television, video games and the Internet play in childhood obesity, noting that typical kids view some 40,000 television advertisements

for food and beverages annually. The report’s findings include (i) the amount of time children spend watching television is linked to their body weight; (ii) children who spend less time with media lose weight; and (iii) kids’ exposure to food advertising and marketing affects their food choices. While not endorsing any particular policies, the report suggests such options as regulating food advertising that targets children and incorporating healthy-eating messages into television program storylines. Kaiser issued the report on Tuesday during an event featuring a panel discussion with child health experts and representatives of the Grocery Manufacturers of America and Nickelodeon.

Advertising that targets children younger than age 8 should be restricted, according to the [Report of the APA Task Force on Advertising and Children](#). “While older children and adults understand the inherent bias of advertising, younger children do not, and therefore tend to interpret commercial claims and appeals as accurate and truthful information,” Dale Kunkel, Ph.D., a co-author of the report, was quoted as saying. The report is based on a six-member task force’s review of relevant literature pertaining to children and advertising. Task force recommendations include (i) ensuring that advertising disclosures and disclaimers aimed at kids “are conveyed in language clearly comprehensible to the intended audience” and (ii) investigating the effects of Internet advertising on young children and the potential influence of advertising in schools.

The APA report also discusses commercials that target adults, but “pose risks” to kids. Kunkel claims, for example, that beer ads broadcast during sporting events create “both brand familiarity and more positive attitudes toward drinking in children as young as 9-10 years of age.” See [APA Press Release](#), February 23, 2004; [Kaiser Family Foundation Press Release](#), February 24, 2004.



[6] Obesity-Related Disability Claims on the Rise

“Employers lose more than \$12 billion per year due to the consequences of obesity, including increased health care utilization, lower productivity, increased absenteeism, and elevated health and disability claims,” according to a new report from UnumProvident Corp., the United States’ largest provider of disability insurance. Noting that short-term disability claims attributed to obesity have increased tenfold over the past decade, the report indicates that obesity-related disabilities cost employers an average of \$8,720 per employee annually. Direct medical costs combined with co-morbid medical costs where obesity is a contributing factor, are estimated to result in total annual health care costs of \$51,023 per claimant. *See UnumProvident Press Release*, February 17, 2004.

[7] Traditional Crops Contaminated with Biotech DNA

Low levels of bioengineered DNA in conventional crops threaten the future of U.S. agriculture, says a [report](#) the Union of Concerned Scientists (UCS) issued early this week. “Until we know otherwise, it is prudent to assume that engineered sequences originating in any crop, whether it was approved and planted commercially or just field tested, could potentially contaminate the seed supply,” Jane Rissler, Ph.D., co-author of the report, was quoted as saying. “Among the potential contaminants are genes from crops engineered to produce drugs, plastics and vaccines,” she said. The study is apparently the first to analyze whether common biotech crops have contaminated the seed supply for crops presumed not to contain genetically engineered elements. UCS tests involved six varieties of corn, soybean and canola seeds from dealers in Virginia, Montana and Illinois. Analyses conducted by two

commercial labs reportedly revealed biotech characteristics in one-half of the corn and soybean samples and all six of the canola varieties.

UCS recommendations for addressing contamination of the seed supply include a Department of Agriculture (USDA) investigation into the causes and extent of seed contamination, a USDA reservoir of non-engineered seeds for various crops, and collaboration among federal agencies to amend regulations to better protect conventional crops from transgenic pharmaceutical and industrial crop contamination. UCS is a Boston-based nonprofit environmental advocacy group. *See UCS Press Release*, February 23, 2004.

Media Coverage

[8] Donald McNeil, Jr., “U.S. Scientist Tells of Pressure to Lift Bans on Food Imports,” *The New York Times*, February 25, 2004

This article focuses on a senior agriculture department scientist’s allegations that USDA Secretary Ann Veneman and other high-ranking department officials often pressure scientific experts to approve various products before the scientists have determined the products’ safety. Speaking on condition of anonymity, the scientist claimed the motivation for contacting *The New York Times* was that such pressure under the Bush administration surpasses similar pressure under previous administrations. Among other things, the scientist alleges that department experts are currently under pressure to lift restrictions on Mexican cattle imported into Texas, many of which are evidently at risk of having tuberculosis and are therefore required to be individually tested and tagged. Other allegations involve the lifting of bans on a particular type of Chinese pear known to have fungus problems and boneless meat from Canadian cattle, sheep and goats. Various

USDA officials denied all of the scientist's claims, and one administrator was quoted as saying, "If you ignore the science, you could bring in a pest or disease. No one in their right mind would do that."

[9] Paul Kelso, "Fast Food Firms Accused of Using Sport to Attract Children," *The Guardian*, February 21, 2004

Fast food, confectionary and soft drink companies spent more than £40 million sponsoring British sporting events in 2003, according to this article targeting consumer groups' assertion that such sponsorship exploits youth and contributes to the childhood obesity epidemic. An advisor to a parliamentary select committee on obesity is quoted as saying, "It is very convenient for fast food and soft drinks people to sponsor sport because by doing so, they place all the emphasis on activity as the means of avoiding obesity rather than both activity and diet." Tim Lang further claimed that food companies are using similar strategies as tobacco companies in that "both have used sport as a means of reaching young people and both began by denying evidence that their products are harmful to health."

Scientific/Technical Items

Cardiovascular Disease

[10] Moderate-Fat and Low-Fat Diets Have Different Effects on Serum Lipid Profiles

Researchers from the State University of New York at Buffalo and Penn State University have reported that dieters following moderate-fat diets have more favorable changes in blood lipids and lipoproteins than those following low-fat diets. (Pelkman, et al., *American Journal of Clinical Nutrition* 79(2): 204-212, 2004). Dieters in both groups experienced weight loss, and both groups of dieters experienced a drop in LDL, or so-called "bad" cholesterol. The low-fat diet group, however, also experienced a decrease in concentrations of HDL, known as "good" cholesterol, after losing weight. HDL levels did not decrease in dieters who consumed a moderate-fat diet. Moderate-fat dieters also experienced other improvements in cardiovascular disease markers, such as a decrease in triglycerides. The moderate-fat diet recommends that about 33 percent of daily calories come from fat (compared to the low-fat diet that recommends only about 18 percent of total calories from fat), with an emphasis on consumption of the monounsaturated fats found in avocados, olives, nuts, seeds, and peanut and olive oils.



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 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.

Shook,
Hardy &
Bacon L.L.P.™

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.

