

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Surgeon General

[1] Carmona Describes Obesity as “the Terror Within”

Late last week, U.S. Surgeon General Dr. Richard Carmona reportedly urged marketing executives attending a meeting of the American Association of Advertising Agencies in Miami to help fight the nation’s obesity epidemic by improving labeling, educating consumers and ending misleading informercials that contain “spurious” information. Carmona said the annual mortality rate from obesity-related diseases (400,000) will soon surpass that of deaths related to smoking-related diseases (450,000). “This is the terror within,” he was quoted as saying. “We lose 400,000 people a year and what are we doing about it?” Carmona also told the marketers that the government hopes to partner with the food industry to affect the obesity problem, rather than impose regulatory mandates. *See Advertising Age*, April 16, 2004.

Office of Management and Budget (OMB)

[2] OMB Issues Revised Peer-Review Guidelines for Scientific Data

The White House Office of Management and Budget has issued [revised proposed guidelines](#) for federal agencies to use with respect to the peer review of and public dissemination of scientific information. “We listened to the scientific community and made revisions designed to make the peer-

review policy more objective and workable,” John Graham, administrator of OMB’s Office of Information and Regulatory Affairs, was quoted as saying. Changes in the new proposed guidelines that could affect food-related issues would allow the Department of Agriculture or Food and Drug Administration, for example, to implement without first getting OMB approval, a recall of tainted food should the agencies have reliable information recommending such action. Other changes contained in the new draft guidelines (i) provide “more discretion to federal agencies in determining what type of peer review mechanism is appropriate for specific information products,” (ii) indicate “that the guidance does not create any new rights for litigation against federal agencies,” and (iii) require “the most rigorous form of peer review only for highly influential scientific assessments.” After a 30-day comment period, OMB expects to finalize the guidelines later in 2004. *See The Washington Post*, April 16, 2004.

Food and Drug Administration

[3] FDA Reopens Comment Period for *Trans* Fat Rulemaking

FDA has reopened for the second time the comment period for a proposed rulemaking related to (i) nutrient content claims about *trans*-fatty acids, (ii) qualifying criteria for *trans* fats in current nutrient claims for saturated fatty acids and cholesterol, (iii) lean and extra lean claims, and (iv) health claims about cholesterol-raising lipids. The agency hopes the extended comment period will allow commenters to consider discussions in a Food Advisory Committee Nutrition Subcommittee meeting



slated for April 27-28, 2004. Among other things, that meeting is expected to focus on whether current scientific evidence supports listing the % DV (daily value) for saturated fat and *trans* fat together or separately on the nutrition facts panel and the recommended maximal daily intake of *trans* fat. Comments are due by June 18, 2004. See [Federal Register](#), April 19, 2004.

European Union (EU)

[4] New GM Food Regulations Take Effect in European Union

EU legislation that took effect April 18, 2004, requires all food and feed products containing at least 0.9 percent of genetically engineered organisms to have labels that state: "This product contains a genetically modified organism." ([EC No. 1829/2003 on Genetically Modified Food and Feed](#) and [EC No. 1830/2003 Concerning the Traceability and Labeling of Genetically Modified Organisms](#)).

Consumer protection and environmentalist groups reportedly believe the new rules represent an important step in giving European consumers a choice in whether to consume products derived from GMOs, while U.S. agribusiness interests mostly object to them. "These new requirements establish a serious trade barrier that will keep many U.S. food products out of the European market," National Food Processors Association President John Cady was quoted as saying. "European consumers will see such labels on food products as 'warning labels.' However, there is no safety or nutrition issue associated with the products of agricultural biotechnology on the market, and there is no scientific basis for requiring the labeling of biotech foods," he said. According to *The Wall Street Journal*, nearly 7 million farmers in 18 countries now plant genetically engineered seeds, and the global market value of GM crops in 2003 was estimated at \$4.75 billion.

See *The Wall Street Journal*, April 16, 2004; *Food Production Daily.com*, April 19, 2004.

Litigation

Alcohol Marketing

[5] Mother of Deceased Teenager Sues Coors Brewing Company

Coors Brewing Co. "sponsors and supports events that are attractive to minors and youthful persons, glorifying a culture of youth, sex, and glamour while hiding the dangers of alcohol and addiction," according to a complaint just filed by the mother of a 19-year-old man who was driving while intoxicated when he was killed in a one-car accident. The complaint is pending in Nevada state court; other defendants include the deceased man's girlfriend, his girlfriend's mother, and persons who were allegedly responsible for or involved in a party the man attended before the accident. *Pisco v. Coors Brewing Co.*, No. CV04-00928 (District Court, Washoe County, Nevada) (filed April 14, 2004) (complaint not available online).

The complaint claims that Coors was negligent in breaching an alleged duty to protect "America's underage youth" from using its products. Coors' actions were "a direct and proximate cause" of Ryan Pisco's death because Coors enticed and unduly influenced "the underage youth of America with their directed advertisement campaigns," according to the complaint. Plaintiff seeks an unspecified amount of actual and punitive damages.

Plaintiff's attorney, Ken McKenna of Reno, Nevada, is not involved in other youth-marketing cases filed in recent months against a variety of beer and spirits manufacturers. The other cases are pending in state or federal court in California, Colorado,



North Carolina, and the District of Columbia.

The Pisco case is the subject of a [recent Find-Law commentary](#) in which a law professor discusses whether the lawsuit has a valid legal basis. “Like the ‘Big Fat’ lawsuit against [fast-food companies], ... Pisco’s lawsuit is interesting from both a legal and a social point of view,” writes Anthony Sebok. “In the end, it may turn out to be frivolous. Yet it’s possible that even ‘frivolous’ lawsuits serve a useful purpose in the messy world of American tort law.”

Warnings

[6] German Woman Loses Licorice Lawsuit Against Candy Maker

A presiding judge in Bonn, Germany, has reportedly rejected a claim against the German candy manufacturer Haribo for allegedly failing to warn of the potentially negative effects of eating large amounts of licorice. The suit was brought by a 48-year-old woman who apparently developed heart problems after consuming nearly 1 pound (400 grams) of licorice daily for four months. The court ruled that no warnings on the candy were warranted because the licorice at issue did not contain more than 0.2 percent of glycyrrhizin, the active compound in licorice root. Germany’s Federal Institute for Risk Assessment has said that products containing more than 0.2 percent of glycyrrhizin “can induce side effects in people who eat more than 50 grams of them per day.” See *Deutsche Welle*, April 16, 2004; *Fox News.com*, April 20, 2004.

Other Developments

[7] Marketing Watchdog Issues New Findings About Youth Exposure to Alcohol Advertising

Youth exposure to alcohol advertising on television grew substantially from 2001 to 2002 and new industry marketing codes adopted in 2003 will still allow for youth overexposure to alcohol ads, according to a study issued today by Georgetown University’s [Center on Alcohol Marketing and Youth](#). “This dramatic increase in alcohol ads seen by our children in 2002 suggests the problem got worse,” the center’s executive director was quoted as saying. “While a step in the right direction, the industry’s new marketing codes lag far behind its aggressive marketing practices,” he said. Among other things, the study found that 15 television programs popular with 12- to 17-year-olds were accompanied by alcohol ads. During 2002, alcohol manufacturers purported placed 5,085 ads on programs like “Survivor,” “Fear Factor” and “That ’70s Show,” at an estimated cost of nearly \$53 million. The study also concluded that the new industry standard that sets the maximum permissible youth audience composition for alcohol advertising at 30 percent is inadequate, advocating instead the Institute of Medicine’s recommended threshold of 15 percent youth audience composition. See *Center on Alcohol Advertising Marketing and Youth Press Release*, April 21, 2004.

[8] Procter & Gamble Pulls Potato Chip Ads from Children’s Shows

Procter & Gamble Co. has reportedly agreed to withdraw an advertisement for its Pringles potato chip brand from children’s television programming in response to a request from the Children’s Advertising Review Unit. The ad industry’s self-regulatory group asked the company to pull the ad claiming its content “raised concerns” about whether the product was being promoted for consumption at

reasonable levels because one six-serving can of Original Pringles would be adequate for four people to share, while the music video-type ad featured four kids eating from multiple containers of the potato chips. Procter & Gamble evidently maintained that the ad (i) was meant to show the youths creating music with the Pringles cans and (ii) did not focus on consumption because the total number of chips consumed by each youth during the ad was less than one serving size. *See Advertising Age*, April 15, 2004.

[9] McDonald's to Launch Balanced Lifestyle Initiative

In an effort "to help address obesity in America and improve the nation's overall physical well-being," McDonald's is launching a balanced lifestyle program for children and adults that focuses on three major areas: (i) new food choices and order options; (ii) education and easily accessible nutrition information on tray liners, in brochures and posted on the company's Web site; and (iii) promotion of physical activity. New food choices for adults will include Happy Meals containing salad, bottled water and pedometers; children will now be able to substitute apple slices and juice or milk in place of fries and soft drinks in Happy Meals.

Center for Science in the Public Interest Executive Director Michael Jacobson responded to McDonald's new initiative by saying the company's announcement "advances public relations more than it does public health," adding that if "McDonald's were sincere about promoting healthy eating, it would put calorie counts right on menu boards." *See Associated Press, McDonald's Press Release and CSPI Newsroom*, April 15, 2004.

Scientific/Technical Items

Alcohol

[10] Harvard Study Finds Link Between Alcohol Consumption and Gout in Men

Research findings from Harvard University purportedly link moderate to heavy alcohol consumption among men and an increased risk of gout, a common form of inflammatory arthritis. (H. Choi, et al., "Alcohol Intake and Risk of Incident Gout in Men: A Prospective Study," *The Lancet* 363: 1277-81, 2004). The researchers followed 51,000 male health professionals for 12 years to investigate the relation between alcoholic consumption and the risk of incident gout. Risk of gout was dose-related for the consumption of alcohol compared with men who did not drink; the risk was 30 percent higher for the lowest level of alcohol consumption and 150 percent greater for men with the highest level of alcohol consumption. According to the research team, beer consumption showed the strongest independent association with risk of gout (a 50 percent increased risk). Consumption of hard liquor increased the risk of gout by 15 percent, while wine consumption was not associated with any increased risk.

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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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