

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

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

##### [1] Agriculture Secretary Announces Details of Animal I.D. System

Early last week, Agriculture Secretary Ann Veneman announced funding of \$18.8 million for a three-phase program designed to help contain animal disease outbreaks by establishing a National Animal Identification System (NAIS). “While many livestock species in the United States can be identified through a variety of systems, a verifiable system of national animal identification will enhance our efforts to respond to intentionally or unintentionally introduced animal disease outbreaks more quickly and effectively,” Veneman said.

In Phase I of the program, USDA plans to evaluate existing pilot animal identification systems to determine which one should be used in a national system. The agency will also talk to stakeholders about ways of operating the national system and develop any regulations and legislation needed to support it. Phase II will involve implementing the selected identification system at a regional level for one or more species, while Phase III will expand the system to the national level. *See USDA Press Release*, April 27, 2004.

##### [2] FSIS Proposes Uniform Compliance Date for Food Labeling Rules

The agriculture department’s Food Safety and Inspection Service (FSIS) has proposed

January 1, 2008, as the [\*uniform compliance date for new food labeling regulations\*](#) issued between January 1, 2005, and December 31, 2006. By coordinating the effective dates of labeling changes with those of the Food and Drug Administration, FSIS hopes to minimize the economic impact of such changes for the meat and poultry industries. Comments on the proposal are due by July 6, 2004. *See Federal Register*, May 4, 2004.

#### Food and Drug Administration (FDA)

##### [3] FDA Reopens Comment Period on Food Labeling Regulations

FDA has [\*reopened\*](#) for 60 days the comment period on a 1995 proposed rule titled “Food Labeling: Nutrient Content Claims, General Principles; Health Claims, General Requirements and Other Specific Requirements for Individual Health Claims.” More specifically, the agency now seeks public comment on the “proposed amendments to permit unqualified health claims on certain foods that do not contain 10 percent or more of one of certain required nutrients, the proposed amendments to provide criteria that FDA would consider in determining whether to grant an exemption from disqualifying nutrient levels related to unqualified health claims of certain nutrients, and the proposed amendments to retain the word ‘may’ or ‘might’ in unqualified health claims.” The agency also seeks information on the use of unlisted synonyms – i.e., terms not defined by regulation – and abbreviated health claims. Comments are due by July 6, 2004. *See Federal Register*, May 4, 2004.



#### [4] CFSAN Issues Program Priorities for 2004

FDA's Center for Food Safety and Applied Nutrition (CFSAN) has issued [program priorities](#) for the current fiscal year 2004 (October 1, 2003, through September 30, 2004). Priorities related to ensuring food safety and security include (i) issuing final rules to implement various mandates under the Bioterrorism Act of 2002, (ii) continuing to analyze selected food samples for acrylamide, (iii) reducing exposure to dioxin-like compounds, (iv) completing the development of an analytical tool to detect perchlorate (rocket fuel that has contaminated various drinking and irrigation water sources), and (v) developing bovine spongiform encephalopathy regulations that parallel those of the agriculture department. CFSAN priorities related to improving nutrition include implementing various labeling reforms to enable consumers to make more informed choices and regulating qualified health claims.

### State/Local Initiatives

#### [5] Colorado Governor Signs into Law Legislation Restricting Vending Machine Offerings in Schools

A bill signed into law (S.B. 103) in late April 2004 by Colorado Governor Bill Owens (R) requires 50 percent of all items in school vending machines to meet "acceptable nutritional standards" by the 2006-2007 school year. Under the new law, those foods and beverages meeting the acceptable standards include (i) unflavored noncarbonated water, (ii) milk, (iii) soy and rice beverages, (iv) fruit-based drinks composed of no less than 50 percent juice without additional sweeteners, (v) electrolyte beverages that contain fewer than 42 grams of sweeteners per 20-ounce serving, and (vi) any other food items containing not more than 35 percent of total

calories from fat and not more than 10 percent of those calories from saturated fat.

#### [6] Vermont to Require Labeling of GM Seeds

Years of lobbying efforts by advocacy and environmental groups have reportedly resulted in enactment of a Vermont law that requires seed manufacturers to label genetically modified or engineered seeds after October 1, 2004. Seed companies must also report annual sales of GM seeds in the state to the state department of agriculture. According to a news source, Vermont environmentalists plan to continue their campaign for a moratorium on sale of GM seeds. *See Associated Press*, April 28, 2004.

## Litigation

### Negligence

#### [7] Confidential Settlement Announced in Popcorn Flavoring Personal Injury Case

Shortly before the jury was to return a verdict, plaintiff and defendants announced a confidential settlement in a southwest Missouri trial in which a worker at a popcorn factory claimed lung injury from exposure to a butter flavoring. The worker, Linda Redman, alleged that New York-based International Flavors & Fragrances and its subsidiary Bushe Boake Allen Inc. knew the flavoring was hazardous but failed to warn their customers. *See CNN.com*, May 1, 2004.

About six weeks ago, a similar trial against the same defendants resulted in a \$20 million plaintiff's verdict. The worker in the earlier trial was Eric Peoples. *See* issues 72 and 73 of this Update, March 17 and 24, 2004. Approximately 28 popcorn-flavoring lawsuits remain pending.

## Media Coverage

### [8] “Junk-Food Games,” Joseph Pereira, *The Wall Street Journal*, May 3, 2004

This article reviews food marketers’ use of online video games to promote products. “Brand-laden diversions, sometimes called ‘advergames,’ are emerging as a powerful and inexpensive new ad medium, cropping up on dozens of sites from marketers of cookies, candy, cereal, chips and soda,” according to the article. “Game creators say their users include both children and adults; the typical player spends a half-hour on a game site, often replaying a single game 15 times or more.”

In February 2004, the total number of visits to two sites, Nabiscoworld and Candystand, apparently totaled 4.2 million, a 45 percent increase from the year before, according to Nielsen Net Ratings, which began tracking usage of these sites in August 2002.

### [9] “Demonizing Fat in the War on Weight,” Dinitia Smith, *The New York Times*, May 1, 2004

According to this *New York Times* writer, an increasing number of historians and social critics believe America’s preoccupation with weight “is based less on science than on morality. Insidious attitudes about politics, sex, race or class are at the heart of the frenzy over obesity, these scholars say, a frenzy they see as comparable to the Salem witch trials, McCarthyism and even the eugenics movement.” The author interviews several academicians who believe the campaign against obesity is “primarily a cultural and political issue” intended to stigmatize particular groups of people. “All of the discourse about fatness is about pathologizing the individual,” Kathleen LeBesco, an associate professor of communication arts at Marymount Manhattan College and author of *Revolting Bodies*, is quoted as saying.

George Stearns, a George Mason University professor of history, concludes that the nation’s obsession with dieting is a type of Puritanism that deems gaining weight an indication of laziness and lack of self-control.

## Scientific/Technical Items

### Diabetes

#### [10] New Study Linking Refined Carbohydrates and Type-2 Diabetes Sparks Debate

Debate over the role of the consumption of refined carbohydrates in the form of process grains and sugars, and particularly the role of high-fructose corn syrup, was renewed this week with the publication of a study in the *American Journal of Clinical Nutrition*. (L. Gross, “Increased Consumption of Refined Carbohydrates and the Epidemic of Type-2 Diabetes in the United States: An Ecologic Assessment,” *American Journal of Clinical Nutrition* 79(5): 774-779, May 2004.) Examining the correlation between the consumption of refined carbohydrates and the prevalence of type-2 diabetes in the United States, researchers found that over the past century, people have eaten essentially the same number of carbohydrates per day on average, but that individuals now consume more carbohydrates in the form of processed grains and sugars, including corn syrup, instead of whole grains and vegetables. The dietary shift to refined carbohydrates has increased general caloric uptake by at least 500 calories daily. The research team asserts that 20 percent of carbohydrates, 10 percent of an individual’s total daily calorie intake, are derived from corn syrup. The researchers conclude that as diets have shifted to greater refined carbohydrate consumption, the prevalence of type-2 diabetes has increased by 47 percent and the prevalence of obesity by 80 percent.



The director of nutrition policy for the National Food Processors Association disputed the study's claims, suggesting that "it is incorrect and even misleading to suggest the consumption of a specific food or food ingredient is the cause of obesity and the rising rate of type-2 diabetes in this country." He added that excess calories "from any source" can lead to weight gain "in the absence of physical activity." The president of the Corn Refiners Association was quoted as saying that "diabetes rates are rising in many countries around the world that use little or no high fructose corn syrup in foods and beverages. This supports findings by the Center for Disease Control and the American Diabetes Association which states 'the primary causes of diabetes are obesity, advancing age and heredity.'"

## Soft Drinks

### [11] British Program Aims to Curb Carbonated Drink Consumption Among School Children

Researchers from the United Kingdom report in a recent issue of the *British Medical Journal* on a school-based educational program aimed at reducing the consumption of carbonated soft drinks to prevent excessive weight gain in children. (J. James, et al., "Preventing Childhood Obesity by Reducing Consumption of Carbonated Drinks: Cluster Randomized Controlled Trial," *BMJ*, doi: 10.1136/bmj.38077.458438.EE (published April 27, 2004)). A total of 644 children ages 7 to 11 were divided into intervention and control groups, with the intervention group receiving a focused educational program on nutrition over the course of the school year. The emphasis for the intervention "was to discourage the consumption of 'fizzy' drinks (sweetened and unsweetened) with positive affirmation of a balanced healthy diet." At the end of the study, the researchers report that consumption of carbonated drinks decreased by 0.6 glasses over

three-day periods in the intervention group, and increased slightly in the control group. The percentage of overweight and obese children increased in the control group by 7.5 percent compared with a slight (0.2%) decrease in the intervention group. The authors conclude that the education program "produced a modest reduction in the number of carbonated drinks consumed, which was associated with a reduction in the number of overweight and obese children."



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## 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.

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