

Food & Beverage

LITIGATION UPDATE

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Table of Contents

Legislation, Regulations and Standards

- [1] **Bipartisan Proposal Would Shift Responsibility for Nutrition Guidelines from USDA to Institute of Medicine** 1
- [2] **FDA Reopens Comment Period for Bioterrorism Rule and Joint Plan with CBP** 1
- [3] **Labor MP Introduces Children's Food Act of 2004**..... 1
- [4] **European Commission to Approve Sale of Genetically Engineered Corn** 2

Legal Literature

- [5] **"String of Fast-Food Suits Expected by End of Year: Defense Bar Not Taking Suits Lightly," Elaine McArdle, *Lawyers Weekly USA*, May 10, 2004**..... 2

Other Developments

- [6] **CSPI Petitions FDA to Prohibit the Use of Partially Hydrogenated Vegetable Oils in Foods, Launches TransFreeAmerica Campaign** 2
- [7] **ABC News and *Time* Magazine to Host Obesity Summit** 3

Scientific/Technical Items

- [8] **Researchers Associate Carbonated Beverages with Increased Incidence of Esophageal Cancer** 4
- [9] **Non-Alcoholic Beer Might Provide Cardiovascular Benefits** 4

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Legislation, Regulations and Standards

U.S. Congress

[1] **Bipartisan Proposal Would Shift Responsibility for Nutrition Guidelines from USDA to Institute of Medicine**

The agriculture department is fraught with conflicts of interest in its charge of developing and publishing the *Dietary Guidelines for Americans* and the Food Guide Pyramid, according to Senators Peter Fitzgerald (R-Ill.) and Edward Kennedy (D-Mass.), who recently introduced legislation ([S. 2399](#)) that would shift responsibility for the nutrition guidelines to the independent Institute of Medicine (IOM), a branch of the National Academies of Science. “With 64 percent of the people in our country classified as overweight or obese, it is obvious that the Dietary Guidelines and federal nutrition monitoring programs have failed,” Fitzgerald said. “We owe it to the American people to disseminate unbiased, sound, scientific nutrition information. We cannot continue to promote bad choices.” Under the Healthy Lifestyles Act of 2004, the Department of Health and Human Services would be required to contract with IOM every five years to develop and publish the nutrition guidelines. The proposal would also fund grants to promote physical activity in schools, workplaces and communities. See *Press Release from the Office of Peter Fitzgerald*, May 10, 2004.

Food and Drug Administration (FDA)

[2] **FDA Reopens Comment Period for Bioterrorism Rule and Joint Plan with CBP**

In response to a request from the Canadian government, FDA has [reopened](#) for a second time the public comment period on the prior notice interim final rule (IFR) that implements a section of Title III of the Public Health Security and Bioterrorism Preparedness Response Act of 2002. The IFR requires the submission to FDA of prior notice of food, including animal feed, that is imported or offered for import into the United States.

In collaboration with Customs and Border Protection (CBP), FDA is also extending the comment period on the agencies’ *Joint FDA-CBP Plan for Increasing Integration and Assessing the Coordination of Prior Notice Timeframes*. The proposal describes the process by which FDA and CBP could adjust the timeframe requirements in FDA’s prior notice IFR to have the same advanced notice timeframes for arrivals by land or air with those in CBP’s advanced electronic information rule. Comments on the prior notice IFR and the prior notice timeframe plan must be submitted by July 13, 2004. See *Federal Register*, May 18, 2004.

United Kingdom (UK)

[3] **Labor MP Introduces Children’s Food Act of 2004**

Labor MP Debra Shipley yesterday introduced a [proposal](#) aimed at improving children’s health



by preventing childhood obesity and other conditions “linked to children’s junk food diets.” Among other things, the proposed law would require the Food Standards Agency to (i) determine the criteria for “healthy” and “unhealthy” foods and beverages by taking into account the presence of “additives” and “contaminants,” (ii) prohibit the marketing to kids of those foods and beverages that are deemed unhealthy, and (iii) publish an Annual Food Promotion Plan whose educational campaigns encourage children to eat fruits and vegetables. “As huge profits are at stake, calls for the junk food industry to act voluntarily are simply naïve,” a spokesperson for Sustain, the food and farming lobbying organization that developed the proposed legislation, was quoted as saying. The proposal would also limit the types of foods and drinks served to children in public schools and restrict the snack items available in school shops and vending machines. A Food and Drink Federation representative responded to the proposal by saying that classifying foods as healthy or unhealthy is “simplistic and out of date. All foods can play a part in a healthy balanced diet and demonizing individual foods is pointless.” More than 100 organizations, including the British Dental Association, Cancer Research UK and the Royal College of Physicians, reportedly support the legislation. *See The Guardian* and *just-food.com*, May 18, 2004.

European Union (EU)

[4] European Commission to Approve Sale of Genetically Engineered Corn

Meeting today in Brussels, the European Commission was expected to approve a contentious proposal allowing the sale of imported canned corn grown from genetically modified seeds (BT-11) in the EU’s 15 member states. BT-11 corn, which has been genetically modified to produce its own insecticide, is produced by the Swiss biotech com-

pany Syngenta and is grown primarily in the United States and Canada. The commission’s action ends the EU’s six-year *de facto* moratorium on approving agricultural biotech products, although a U.S. official speaking on condition of anonymity was quoted as saying the U.S. trade representative plans to continue its enforcement action against the EU with the World Trade Organization. *See Associated Press*, May 14, 2004.

Legal Literature

[5] “String of Fast-Food Suits Expected by End of Year: Defense Bar Not Taking Suits Lightly,” Elaine McArdle, *Lawyers Weekly USA*, May 10, 2004

This article plows little new ground, though it does say that tobacco class-action veteran John Coale is now leading a core group of about 20 plaintiffs’ attorneys who are talking with potential witnesses and gathering evidence against fast-food companies. Coale, who is based in Washington, D.C., reportedly predicts that favorable state laws make Maryland, Oregon and Washington the likely venues for “the first class-action suits.” When interviewed for the article, Coale apparently focused on fast-food companies’ strategies to market to children. “The documents will be there,” Coale is quoted as saying. “I’ve talked to some whistleblowers.”

Other Developments

[6] CSPI Petitions FDA to Prohibit the Use of Partially Hydrogenated Vegetable Oils in Foods, Launches TransFreeAmerica Campaign

Claiming that partially hydrogenated vegetable oils “cause thousands of heart-attack deaths each year,” the Washington, D.C.-based health advocacy group Center for Science in the Public Interest has

petitioned the Food and Drug Administration (FDA) to ban the use of such oils as a food ingredient and launched a consumer awareness campaign to encourage food manufacturers and restaurants to reformulate their products. “Unlike fats that occur in nature, partially hydrogenated vegetable oil is totally artificial and absolutely unnecessary in the food supply,” CSPI Executive Director Michael Jacobson was quoted as saying. “Food-processing companies should worry less about the shelf life of their products and more about the shelf life of their customers. Getting rid of partially hydrogenated vegetable oil is probably the single easiest, fastest, cheapest way to save tens of thousands of lives each year,” he said.

In its 39-page [petition](#) to FDA, the health watchdog requests an immediate rulemaking to “(1) revoke all the ‘generally recognized as safe’ statuses of partially hydrogenated oils in foods – including shortening, soybean oil, menhaden oil, and partially hydrogenated low erucic acid rapeseed oil (canola oil) – so that they would be legally classified as food additives. Absent a regulation ‘prescribing the conditions under which such additive may be safely used,’ it would then be illegal to continue using those food additives; (2) revoke the current ‘safe conditions’ for those partially hydrogenated vegetable oils that the FDA has approved as food additives; and (3) prohibit the use of any partially hydrogenated vegetable oil which is not classified as a food additive because the FDA sanctioned or approved its use prior to September 6, 1958.” The petition also asks FDA to develop a program that encourages food manufacturers and restaurants to replace the oils with the most healthful ingredients possible.

The TransFreeAmerica campaign [Web site](#) includes lists of foods with and without *trans* fats as well as a letter for site visitors to send to McDonald’s requesting that the company “help protect both kids’ and adults’

health by switching from partially hydrogenated vegetable oil to *trans*-fat-free liquid vegetable oil” to deep fry their products. Future letters will evidently target other fast-food chains, processed food manufacturers, supermarket chains, and various government officials. *See CSPI Newsroom*, May 18, 2004.

[7] **ABC News and *Time* Magazine to Host Obesity Summit**

ABC News and *Time* Magazine have collaborated in bringing together a diverse group of stakeholders for a three-day [Summit on Obesity](#), June 2-4, 2004, in Williamsburg, Virginia. Primary funding for the event comes from the Robert Wood Johnson Foundation. Billed as a “springboard for creating a successful action plan to end obesity,” conference speakers will include Senator Tom Harkin (D-Iowa); U.S. Surgeon General Richard Carmona, M.D.; senior executives from Kraft, Coca-Cola, Nestle, Pepsi, and Nickelodeon; Dean Ornish, M.D.; Andrew Weil, M.D.; New York University’s Marion Nestle; and Yale University’s Kelly Brownell. Conference sessions will include those targeting public/private partnerships, marketing to children, nutrition policies in schools, and the role of the food industry.

In a recent [editorial](#), Cato Institute commentator Radley Balko opined that the obesity summit “promises to be a pep rally for media, nutrition activists, and policy makers – all agitating for a panoply of government anti-obesity initiatives, including prohibiting junk food in school vending machines, federal funding for new bike trails and sidewalks, more demanding labels on foodstuffs, restrictive food marketing to children, and prodding the food industry into more ‘responsible’ behavior. In other words, bringing government between you and your waistline.” *See Tech Central Station.com*, May 17, 2004.

In December 2003, Peter Jennings hosted an ABC



News program titled “Who’s to Blame? Obesity in America: How to Get Fat Without Really Trying.” That program ostensibly explored various aspects of the U.S. obesity epidemic, asking “Is it bad eating habits or poorly executed exercise regimes? Could the government and the food industry also be to blame?”

Scientific/Technical Items

Soft Drinks

[8] Researchers Associate Carbonated Beverages with Increased Incidence of Esophageal Cancer

Study data presented this past Monday at a recent meeting of cancer and gastrointestinal experts in New Orleans reportedly indicated a strong correlation between the consumption of soft drinks and esophageal cancer in the United States. Conducted by Dr. Mohandas Mallath, head of the digestive diseases department at India’s Tata Memorial Hospital, the research compared trends in the per capita consumption of carbonated soft drinks and incidence rates of esophageal cancer over the past 25 years. The number of esophageal cancer cases purportedly followed the rise in carbonated soft drink intake, according to the researchers, and similar trends were reported worldwide. In countries like Japan and China, however, where soft drink consumption is relatively low, the researchers reported no similar increase in cancers of the esophagus. Mallath and

colleagues suggested that gastric reflux initiated or exacerbated by the consumption of carbonated drinks might be a plausible biological explanation for the association with esophageal cancer, noting that other research has indicated that soft drinks can lower the pH of the esophagus. *See Reuters and New Scientist.com*, May 18, 2004.

Alcohol

[9] Non-Alcoholic Beer Might Provide Cardiovascular Benefits

Recent research suggests that drinking non-alcoholic beer might have a beneficial effect on processes believed to be involved in the development of heart disease. The study, conducted by Steffen Bassus and colleagues in Germany and published in the May issue of *Alcoholism: Clinical and Experimental Research*, found that drinking non-alcoholic beer over a three-hour period inhibited the formation of thrombin, a factor in blood clotting. Consumption of non-alcoholic beer was compared with consumption of normal beer and alcohol mixed with water among healthy men ages 19 to 36. While non-alcoholic beer appeared to inhibit the formation of thrombin, normal beer and the alcohol/water mixture seemed to promote clotting. The researchers admitted that the study’s findings are limited because they only examined the short-term effects of drinking non-alcoholic beer. The German beer maker Bitburger funded the study. *See Reuters*, May 13, 2004.



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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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