

Food & Beverage

LITIGATION UPDATE

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Shook,
Hardy &
Bacon LLP

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Legislation, Regulations and Standards

Department of Health and Human Services (HHS)

[1] HHS Announces Revised Medicare Obesity Coverage Policy; Trial Attorneys See Opportunity for Future Litigation

Late last week, HHS Secretary Tommy Thompson announced changes to Medicare that will cover obesity treatments, provided scientific and medical evidence demonstrate the treatments' effectiveness in improving health outcomes of the program's senior and/or disabled beneficiaries. The revisions remove language in the *Medicare Coverage Issues Manual* stating that obesity is not an illness, but fall short of classifying the condition as a disease. "From the standpoint of Medicare coverage and the health of our beneficiaries, the question isn't whether obesity is a disease or a risk factor," Mark McClellan, M.D., administrator of HHS' Centers for Medicare & Medicaid Services, was quoted as saying. "What matters is whether there's scientific evidence that an obesity-related medical treatment improves health," he said. Weight-loss treatments the Medicare program expects to evaluate include bariatric surgery, behavioral therapy and diet programs. The American Obesity Association estimates that 18 percent of the Medicare population is obese.

George Washington University law professor John Banzhaf, a longtime foe of tobacco companies and proponent of obesity-related litigation against food manufacturers, was quoted in *The Washington Times* as saying he expects the Medicare policy change to lead to a similar change in coverage under Medicaid, the federal program for low-income families with children. If Medicaid provided coverage for obesity-related treatments, says Banzhaf, state attorneys general could sue food companies to recoup the costs of such treatments to the Medicaid program. "The biggest threat could be the states coming in to sue McDonald's for millions because of their role in the illness called obesity," Banzhaf said. "Now that's far from a slam-dunk, and probably considered far-fetched, but that's exactly what everyone said about tobacco." See *HHS News Release*, July 15, 2004; *The New York Times* and *The Washington Post*, July 16, 2004; *The Washington Times*, July 17, 2004.

[2] Dietary Guidelines Advisory Committee to Convene for Final Meeting

The 13-member federal panel charged with preparing the revised Dietary Guidelines for Americans will gather for its [final meeting](#) on August 11, 2004, in Washington, D.C. Among other things, the panel's findings will affect proposed changes to the agriculture department's Food Guide Pyramid. The meeting is expected to focus on the committee's draft report and its technical review of current scientific and medical knowledge regarding nutritional issues. See *Federal Register*, July 16, 2004.



U.S. Congress

[3] Food Allergen Legislation Now Headed to the President for Signature

The House of Representatives yesterday passed legislation ([S. 741](#)) that includes the Food Allergen Labeling and Consumer Protection Act of 2004 and the Minor Use and Minor Species Animal Health Act of 2004. The measure establishes new rules that require food labels to plainly state whether products contain any of eight major food allergens—milk, eggs, fish, Crustacean shellfish, tree nuts, peanuts, wheat, and soybeans. See *FDA News Release*, July 20, 2004.

Health Resources and Services Administration (HRSA)

[4] American Children and Youth Increasingly Overweight, Says Interagency Annual Report

Mexican-American boys and African-American, non-Hispanic girls are at the greatest risk of being overweight, according to an [annual report](#) compiled by the Interagency Forum on Child and Family Statistics that details the well-being of the nation's children and youth. The report indicates that during the period 1999–2002, 16 percent of youth ages 6 to 18 were overweight, compared to 11 percent from 1988 to 1994 and only 6 percent from 1976–1980. “This increase in overweight jeopardizes our children’s future, making them vulnerable to chronic conditions such as diabetes and hypertension previously associated more with adults than with children,” a Centers for Disease Control and Prevention spokesperson was quoted as saying. Titled *America’s Children in Brief*:

Key National Indicators of Well-Being 2004, the report also discusses economic security, behavior, social environment, and education.

U.S. Department of Agriculture (USDA)

[5] USDA’s Inspector General Critical of Enhanced BSE Surveillance Program

“The problems disclosed during our review, if not corrected, may negatively impact the effectiveness of USDA’s overall BSE surveillance program, impair its ability to perform risk assessments and program evaluations, and reduce the credibility of any assertion regarding the prevalence of BSE in the United States,” according to a [draft audit](#) authored by USDA’s Office of Inspector General and issued in advance of a House Committee on Government Reform hearing last week by Representative Henry Waxman (D-Calif.). The program was initiated after the December 2003 discovery of a cow in Washington state that was infected with bovine spongiform encephalopathy (BSE) and aims to expand testing for BSE to more than 200,000 high-risk cattle by 2005. Among other things, the inspector general’s report found that (i) “critical assumptions in the surveillance plan will result in questionable estimates of BSE prevalence”; (ii) “sampling is not truly random because participation in the program is voluntary”; and (iii) “[a] process for obtaining samples from animals that ‘died on the farm’ has not been developed.”

USDA officials defended the BSE surveillance program in a telephone news conference on July 13, 2004, asserting that the agency is “implementing many recommendations made in this report.” See *The New York Times*, July 14, 2004.



Other Developments

[6] U.K. Media Regulator Proposes Changes in Alcohol Advertising

Ofcom, the regulator of the U.K. communications industries, has issued [new draft rules](#) for alcoholic beverage advertising on television. Proposed revisions to the TV advertising code would prohibit ads that appeal specifically to underage drinkers and appear to condone antisocial or self-destructive behavior resulting from excess consumption, or ads that appear to link drinking to maturity, sexual success or attractiveness. Other proposed changes to the code would (i) allow children to appear in commercials that depict drinking “as a part of a normal family life rather than always as a separate, perhaps exciting, adult mystery,” provided that anyone who appears to be younger than age 18 is not drinking alcohol, and (ii) allow ads that show drinking in the workplace. Comments on the draft rules are due by September 24, 2004. See *Ofcom News Release*, July 19, 2004.

Media Coverage

[7] “Seals and Deals: As Health Groups Join Forces with Food Manufacturers, Credibility Concerns Rise,” Sarah Ellison and Mary Kissel; “Nestle Aims at Diabetes Niche,” Deborah Ball, *The Wall Street Journal*, July 20, 2004

These two articles discuss the potential conflicts inherent in the endorsement and sponsorship arrangements that health organizations make with food companies. The first article primarily targets the American Heart Association (AHA), pointing out that the group’s criterion for selling its seal of approval only for use on products that are low in fat

and cholesterol does not prevent the AHA seal from appearing on “hundreds of sugary snack foods” because researchers have not established a direct link between sugar and cardiovascular disease. Among other things, critics claim that such endorsements can mislead consumers into thinking that consuming large amounts of certain products is healthy.

The second article discusses a new sponsorship agreement between the American Diabetes Association (ADA) and Nestle, under which the ADA will distribute information about certain Nestle products. According to the article, the targeting to diabetics of the “Carb Select” Nestle Crunch bar, a product with no sugar and fewer calories but 22 percent more saturated fat and 42 percent more sodium than its regular counterpart, “puts Nestle on a collision course with anti-obesity advocates. Some health-care professionals worry that products that are low in carbs but high in saturated fat and sodium may encourage people, particularly the growing number of juvenile diabetics, to overeat.”

Scientific/Technical Items

High-Fructose Corn Syrup (HFCS)

[8] High-Fructose Corn Syrup Unfairly Maligned, Says Virginia Tech Report

“There is simply no credible evidence that high-fructose corn syrup is the cause of rising overweight/obesity rates,” according to a [report](#) issued last week by the Virginia Tech Center for Food and Nutrition Policy. Generated as the result of a May 2004 workshop co-sponsored by Virginia Tech and the Joint Institute for Food Safety and Applied Nutrition, the report contends that the composition of HFCS, sucrose, honey, and invert sugar is similar



and that the body appears to absorb and metabolize each of the sweeteners in the same way. “Recently published commentaries and studies on high-fructose corn syrup have only confused the issue and misinformed the public with regard to a key public health problem,” a Virginia Tech spokesperson was quoted as saying. The report asserts that findings from expert sensory panels have demonstrated that sucrose and HFCS are “equally sweet,” refuting the argument that an increase in the “sweetness level” of soft drinks can be used to explain over-consumption of beverages sweetened with HFCS.

Cancer

[9] AICR Survey Concludes That Americans Eat Too Much Meat, Too Few Vegetables

A recent American Institute of Cancer Research (AICR) survey found that 72 percent of Americans eat meals containing high proportions of meat, poultry, fish, and dairy foods and not enough

vegetables, fruits, whole grains, and beans. The survey asked 1,000 adults to describe what they had eaten for dinner the night before and to estimate the proportion of foods from both animal and plant sources. The data indicated that many respondents, about 70 percent, eat a “traditional” dinner that combines some form of animal protein with vegetables, pasta or other foods derived from plant sources. Most of those traditional meals, however, contain what AICR deems unhealthy proportions high in meat content and low in plant foods. Fifteen percent of respondents made a meal out of either a sandwich or a burger with disproportionate amounts of meat. AICR recommends meals composed of a wide variety of fruits, vegetables, whole grains, and beans that take up at least two-thirds of the dinner plate, with meat products taking up one-third of the plate or less. The institute contends that following such diets lowers the risk of cancer, heart disease, stroke, diabetes, obesity, and other diseases. *See AICR Press Release, July 15, 2004.*



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Mark Cowing and Mary Boyd in the Kansas City office of SHB.
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