

Food & Beverage

LITIGATION UPDATE

Issue 9 • December 4, 2002

Table of Contents

Legislation, Regulations and Standards

- [1] Activists Want More Authority for USDA in Meat Recalls; FSIS to Discuss Recall Process in Public Meeting.....1
- [2] FDA Amends Rule to Permit Health Claims About Sugar Substitute1
- [3] European Union Ministers Reach Agreement on GM Food Labeling2
- [4] California Committee Considers Removing Saccharin from Prop. 65 List of Chemicals2
- [5] Fast-Food Outlets in Taipei, Taiwan, Begin Posting Nutrition Information2

Other Developments

- [6] Nutritionist Wants More Defendants in Obesity Lawsuits; Analysts Warn of Risks to Food Revenues.....3

Media Coverage

- [7] Denise Grady, "Why We Eat (and Eat and Eat)," *The New York Times*, November 26, 2002.....3
- [8] Jeffrey Spivak and Alan Bavley, "Expanding Suburbs, Expanding Waistlines? Some Researchers See a Connection," *The Kansas City Star*, December 1, 2002.....4

Scientific/Technical Items

- [9] Diet Rich in Nuts or Peanut Butter Cuts Diabetes Risk4
- [10] NIH Funds Studies to Encourage Healthier Lifestyle for Youths; McDonald's Funds Product Placement in Cyberspace4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] **Activists Want More Authority for USDA in Meat Recalls; FSIS to Discuss Recall Process in Public Meeting**

Citing the number of large-scale meat recalls during 2002, consumer activists recently called on the Bush Administration to ask Congress to grant USDA mandatory recall authority when meat is suspected of contamination. "The fact the government doesn't have mandatory recall authority is a gaping hole," former Department of Agriculture Secretary Dan Glickman was quoted as saying. According to a news source, many consumer activists contend that meat manufacturers "drag their heels" in ordering recalls. At present, USDA only recommends product recalls after federal meat inspectors suspect food-safety problems. The American Meat Institute reportedly opposes any additional authority for USDA, claiming that most companies recall their products if the agency requests them to do so. USDA officials apparently assert that mandatory recalls could result in delays in product withdrawals from the market due to the more rigorous testing by meat inspectors that such authority would require.

USDA's Food Safety and Inspection Service (FSIS) has scheduled a public meeting to discuss the recall process for meat, poultry and egg products on December 12, 2002, at the Washington Plaza Hotel in Washington, D.C.

Meanwhile, a *Wall Street Journal* article profiling new FSIS Administrator Garry McKee says "If the meat industry expected the Bush administration to pick a business-friendly regulator, it was wrong." McKee was quoted as stating that recent meat product recalls "repeatedly underscore the need to focus on prevention" and that recalls are "a failure in the system, not a cure or solution." See *FSIS News Release* and *Reuters*, November 25, 2002; *Wall Street Journal*, December 3, 2002.

Food and Drug Administration (FDA)

[2] **FDA Amends Rule to Permit Health Claims About Sugar Substitute**

FDA has amended its rule on health claims regarding noncariogenic carbohydrate sweeteners and dental caries (21 C.F.R. § 101.80) to take into account research showing that D-tagatose, a new food ingredient, does not promote, or may reduce the risk of, tooth decay. The action was taken on the petition of Arla Foods Ingredients amba, which also asked that D-tagatose be removed from the definition of "sugars." Because FDA found that the substance is a sugar, the agency decided instead to exempt foods containing D-tagatose from the requirement that foods bearing a health claim about the non-promotion of dental caries be sugar free. D-tagatose is a reduced-calorie bulk sweetener found in some dairy products. It apparently has the potential to be used in other products, such as chocolate, caramel, chewing gum, soft drinks, and cereals. See *Federal Register*, December 2, 2002.



European Union (EU)

[3] European Union Ministers Reach Agreement on GM Food Labeling

The EU's Agriculture Council has reportedly agreed that (i) food containing more than 0.9 percent genetically modified (GM) material will have to be labeled as containing GM organisms, (ii) current legislation on the labeling of GM material in food should be extended to foods produced from GM crops; and (iii) animal feed containing GM material must also be labeled. The agreement, which represents a compromise between countries seeking a 0.5 percent threshold and those seeking a 1 percent threshold, will now apparently go before the EU Parliament before any new legislation can implement the changes.

In a related development, U.S. farmers are calling on the government to challenge the EU's moratorium on the import of GM foods and animal feed before the World Trade Organization (WTO). U.S. trade officials are apparently considering such a move, although the costs of a trade dispute will have to be weighed against the need for cooperation with the war on terrorism. One trade specialist was quoted as saying, nonetheless, "The U.S. has strong technical and legal points on their side in a WTO case." See *The Wall Street Journal*, November 25, 2002; and *just-food.com*, November 29, 2002.

State/Local Initiatives

[4] California Board's Cancer Identification Committee Considers Removing Sodium Saccharin from Prop. 65 List of Chemicals

The Carcinogen Identification Committee (CIC) of the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) will hold a public meeting on December

17, 2002, in Sacramento to decide if sodium saccharin should remain on the Proposition 65 (Prop. 65) list of chemicals known to the state to cause cancer or reproductive toxicity. Products containing sodium saccharin include diet beverages, table-top sweeteners, processed fruits, chewing gum and confections, gelatin desserts, jams and toppings, sauces and dressings, and animal feed. Sodium saccharin was added to the Prop. 65 list in 1988, but decisions since then by the International Agency on Cancer and the National Toxicology Program to declassify sodium saccharin as carcinogenic to humans led CIC to reevaluate its listing of the chemical as "clearly shown through scientifically valid testing according to generally accepted principles to cause cancer." CIC is accepting written comments on a draft report titled *Evidence on the Carcinogenicity of Sodium Saccharin* until December 10; members of the public are also invited to make oral comments on the document during the December 17 meeting. See *OEHHA Notice to Interested Parties*, November 1, 2002.

[5] Fast-Food Outlets in Taipei, Taiwan, Begin Posting Nutrition Information

According to a news source, rules introduced by Taipei's city health director now require fast-food restaurants to provide information about the nutritional value of the foods they serve. Vendors such as McDonald's, Burger King and Kentucky Fried Chicken have reportedly begun to either post such information on their walls or on receipts. The notices, which are part of Taipei's plan to encourage its 2.5 million residents to lose a combined 100 tons of weight in the next year, apparently include information about calories, protein, fat, and sugar content. See *just-food.com*, November 27, 2002.

Other Developments

[6] Nutritionist Wants More Defendants in Obesity Lawsuits; Financial Analysts Warn of Long-Term Risks to Food and Beverage Revenues

Responding to news about obesity lawsuits filed against McDonald's Corp., a nutrition expert has reportedly called for lawsuits against "all hamburger chains and fast-food outlets, including those that sell donuts, pasta, pizza, muffins, cookies, and pastries. Sue sugar, white flour and snack-food manufacturers. These products are high in carbohydrates, which the body readily turns into fat. The government should be on the 'sue' list, too, for promoting the consumption of carbohydrates as the foundation of healthy eating and the base of the food pyramid." While he admits that consumers have some responsibility for educating themselves about food choices and their health consequences, Udo Erasmus, Ph.D., apparently believes that obesity litigation will help bring national attention to the link between nutrition and health.

Meanwhile, analysts at UBS Warburg have apparently released a report outlining financial risks to the food and beverage industry due, in part, to the new focus on obesity by public interest lawyers and health organizations. A Guardian Group of Funds spokesperson reportedly said, "Everything's aligning for this to be a serious problem going forward. Undoubtedly, what you'll get is a situation like you have with tobacco in which the stocks trade at a lower price to earnings multiple." See *PR Newswire*, November 26, 2002; *Dow Jones Business News*, November 27, 2002; *National Post*, November 28, 2002; and *Sunday Telegraph* (London), December 1, 2002.

Media Coverage

[7] Denise Grady, "Why We Eat (and Eat and Eat)," *The New York Times*, November 26, 2002

According to this article, most scientists studying obesity believe that the biologic drive to eat that "served us well historically in terms of survival," particularly during famines, has become a liability given the abundance of rich foods readily available today. Researchers seeking ways to address the appetite are apparently studying hormones such as leptin, ghrelin and a gut hormone known as PYY. Some observers opine that different classes of drugs developed from the study of hormones may be needed to help people manage obesity.

Meanwhile, other major media outlets are also covering the obesity issue, with current issues of *Time* and *People* magazines highlighting the class action lawsuit recently filed against McDonald's Corp. Further details about the case appear in issue 8 of this Update, November 27, 2002. *Time* also targets school lunches, addressing issues ranging from food poisoning and meat irradiation to nutritional issues. While the article notes that schools can reap significant profits by selling fast-food products, it concludes by reporting that some school districts have found creative ways to convince children to change their diets. Some are substituting lower fat ingredients in popular products such as burgers and pizza; others find that simply offering unlimited trips to the salad bar will foster improved eating habits. See *Time*, December 2, 2002; and *People*, December 9, 2002.



[8] Jeffrey Spivak and Alan Bavley, "Expanding Suburbs, Expanding Waistlines? Some Researchers See a Connection," *The Kansas City Star*, December 1, 2002

Researchers working with the Centers for Disease Control and Prevention are reportedly finalizing studies showing a correlation between obesity and suburban sprawl. Georgia Tech professor Lawrence Frank, who led a transportation-related study in Atlanta was quoted as saying, "I'm 99 percent sure there's a relationship between how communities are designed and people's weight. People who live in lower-density, suburban environments, all else being equal, have a tendency to be slightly heavier." The article notes that Rutgers University researcher Reid Ewing will be publishing a study in 2003 that supports this relationship by pairing data on weight-related health problems with suburban counties.

Scientific/Technical Items

Diabetes

[9] Diet Rich in Nuts or Peanut Butter Cuts Diabetes Risk

According to research results recently published in the *Journal of the American Medical Association*, a half serving of peanut butter or a full serving of nuts eaten daily significantly cuts the risk of type 2 diabetes. Harvard School of Public Health researchers followed more than 83,000 women for 16 years, monitoring both diet and the development of diabetes. They were able to demonstrate that women who eat 1 tablespoon of peanut butter or 1 ounce of nuts five or more times per week can reduce their risk of type 2 diabetes by 20 to 30 percent. Further, they were able to demonstrate that this relationship is linear, higher consumption imparted greater protective effect. The authors concede that women

who eat nuts lead a slightly healthier life but note that after adjusting for lifestyle factors like physical activity and energy intake, the decreased risk associated with nut consumption remained. Frank Hu, a contributing investigator, suggests that "given the observed inverse association between nuts and risk of coronary heart disease as well as type 2 diabetes, it is advisable to recommend regular peanut butter and nut consumption as a replacement for refined grain products or red or processed meat, which would avoid increasing caloric intake."

Obesity

[10] NIH Funds Studies to Encourage Healthier Lifestyle for Youths; McDonald's Funds Product Placement in Cyberspace

According to a press report, 16 studies, financed by the National Institutes of Health (NIH), are currently exploring ways to change environments to help young people achieve a healthier lifestyle. The director of an NIH obesity and eating disorders program was quoted as saying, "There is a panoply of forces that are all conspiring to get us to eat more and exercise less." Recognizing that youths have become more sedentary, spending more hours in front of the television or computer, and have readier access to sugary drinks and high-calorie foods, the research apparently addresses issues ranging from day care and after-school activities to educating children about food.

Meanwhile, McDonald's Corp. has reportedly contracted with a game publisher to place its logo inside an Internet video game. Sims Online, which will debut December 17, 2002, is apparently an Internet version of a popular PC game that simulates everyday life. Players will reportedly be able to make a virtual stop at McDonald's to purchase burgers and fries while playing the game. See *The New York Times*, November 28 and 29, 2002.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Dale Walker 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 dwalker@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

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

