

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

European Food Safety Authority (EFSA)

[1] EFSA Issues Risk Assessment on *Trans* Fatty Acids

The European Union's independent food safety agency has issued a [risk assessment](#) on *trans* fatty acids (TFAs) which concludes that the effect of TFA consumption on cardiovascular health may be greater than that of saturated fatty acids, but only when consumed at equivalent levels. Both *trans* fatty and saturated fatty acids raise blood levels of LDL ("bad") cholesterol, thereby increasing the risk of heart disease. EFSA's Panel on Dietetic Products, Nutrition and Allergies dismissed as "weak or inconsistent" scientific evidence that associates TFA intake to cancer, type 2 diabetes or allergies. The group advised that it was not possible to compare the health effects of TFAs according to source – i.e., animal fats vs. hydrogenated oils – because no current analytical methods can distinguish between TFAs naturally present in food and those formed during food processing. EFSA initiated the risk assessment in 2003 after Danish health officials said

cardiovascular risks justified regulatory limits on levels of TFAs in oils and other processed foodstuffs, with the exception of naturally occurring TFAs in animal fat. *See EFSA Press Release*, September 1, 2004.

Japan

[2] Japan May Ease Mad Cow Testing Policy

A Japanese Food Safety Commission advisory panel has reportedly recommended that the government relax its policy on bovine spongiform encephalopathy (BSE) testing in a way that would allow resumption of U.S. beef imports. If the Food Safety Commission accepts the group's advice to exclude beef younger than age 20 months from BSE testing, the Labor and Welfare Ministry is expected to review its three-year-old policy of testing all cattle for the brain-wasting disease. Japan stopped importing American beef after the December 2003 discovery of a BSE-infected cow in Washington state, insisting that U.S. products be tested using Japanese protocols. Most U.S. beef is slaughtered before it reaches the age of 20 months. *See Reuters, The Japan Times*, September 7, 2004.



State/Local Initiatives

[3] **Snack Foods, Most Soft Drinks Prohibited Under Seattle School Board's New Nutrition Policies**

"The availability of non-nutritious foods undermines nutrition education efforts, encourages over-consumption of foods high in fat and added sugar, teaches children to associate food with praise and teaches children to eat when they are not hungry. It also increases the potential for development of eating disorders, food-borne illnesses and food-based allergic reactions," according to a comprehensive set of guidelines the Seattle School Board approved late last week.

Under the new rules, foods that are not offered or sold to students as part of the school meals programs must meet particular standards for portion sizes and levels of fat and sugar. In addition, those products must "as much as possible, be fresh, locally grown or produced, certified organic, unprocessed, non-GMO and non-irradiated, and should not contain additives or preservatives." Beverages must meet the same guidelines for fat and contain no more than 15 grams of added sweetener per serving and no caffeine. Effective immediately at elementary and middle schools and as of February 1, 2005, at high schools, the new policies prohibit exclusive "pouring rights" contracts with beverage companies. The school district's current contract with Coca-Cola is expected to be terminated by the beginning of the 2005-2006 school year. *See Seattle Public Schools News Center*; September 3, 2004.

During summer 2003, George Washington University Law Professor John Banzhaf warned Seattle School Board members that renewing the district's contract for exclusive vending machine rights with Coca-Cola would open themselves to potential liability for breach of fiduciary duties to district students. Among other things, Banzhaf linked the nation's "major epidemic in pediatric obesity" to soft drink consumption and said school boards owed a duty to students "to protect them from harmful activities." *See Seattle Post-Intelligencer*; July 2, 2003.

Legal Literature

[4] **"Heavyweight Litigation: Will Public Nuisance Theories Tackle the Food Industry?" Charles Moellenberg, *Washington Legal Foundation Legal Backgrounder*, September 3, 2004**

A partner at the Jones Day law firm presents in this article a defense perspective on the prospect of widespread public-nuisance lawsuits against food companies. "This is not a world of an overactive imagination," Charles Moellenberg writes. "Now is the time to take steps that can blunt attempts to vilify the industry and lay the groundwork for future public nuisance litigation."

Current conditions that could foster such litigation, according to Moellenberg, include the public controversy concerning obesity; the success of the states' lawsuits against tobacco companies; the "vast resources" amassed by plaintiffs' law firms, primarily in campaigns involving tobacco and asbestos; public bodies' chronic need for funds; the overall elasticity of tort law; and the vagueness of nuisance law.



Moellenberg discusses six “traditional rules” that have, to date, “fortunately stalled” the advance of public-nuisance litigation in many jurisdictions: “A ‘public’ right must be infringed”; “there must be specific proof of individual responsibility”; “the nuisance must result from current activity within the defendant’s control”; “plaintiff must show a direct connection between its harm the defendant’s conduct”; “the remedy must be abatement, not reimbursement for services provided”; and “tort liability must fit with legislative rules.”

Other Developments

[5] Public Health Advocates Target Obesity, Alcohol Issues at Annual Convention

The American Public Health Association will hold its [annual meeting](#) on November 6-8, 2004, at the Washington Convention Center in Washington, D.C. Nutrition-related sessions will include those addressing (i) the obesigenic environment, (ii) alleged strategies the fast-food industry has used to create brand loyalty among certain minority groups, (iii) food marketing and advertising aimed at children, and (iv) the economic causes and consequences of obesity. Alcohol-related sessions will include those discussing youth exposure to malt liquor products and alcohol advertising generally.

Media Coverage

[6] Melissa Healy, “Behind the Organic Label: As the Industry Grows, Skeptics Are Challenging the Health Claims,” *The Los Angeles Times*, September 6, 2004

“Amid scares over mad cow disease, mercury in fish and produce tainted with harmful bacteria, new customers are joining existing ones in embracing organic foods as a sanctuary from harm and a surer route to long life and good health,” according to this article. Food safety and nutrition experts, however, are increasingly questioning evidence for consumers’ belief that organic products are safer than conventional foodstuffs and what some scientists reportedly perceive as “a campaign of scare tactics, innuendo and shoddy science perpetrated by organic food producers and their allies.” A Rutgers University food science professor who presided over a symposium on the alleged health benefits of organic foods at the American Chemical Society’s annual meeting last month is quoted as saying, “There’s certainly not sufficient science to prove that the claims of organic food advocates are true.” Among other things, critics of the organic food industry claim (i) organic farming uses unregulated “natural” herbicides and pesticides that might pose potential health risks, (ii) cumulative health risks from exposure to both synthetic and natural pesticides are not well understood, and (iii) animal manure used to fertilize some organic crops could expose consumers to *E coli*, *salmonella* and *citrobacter* bacteria.



Scientific/Technical Items

PBDEs

[7] Flame Retardants Found in Common Foods

Elevated levels of polybrominated diphenyl ethers (PBDEs), chemicals added to various consumer products to retard flammability, were recently detected in a survey of 30 common foods sold in three major supermarket chains in Dallas, Texas. PBDEs resemble compounds known as PCBs, whose route of intake is almost exclusively through food of animal origin. PBDEs are of particular concern because of their association with endocrine disruption, reproductive and developmental toxicity, and cancer in rodents. Published in *Environmental Science and Technology* (A. Schechter, et al., "Polybrominated Diphenyl Ethers Contamination of United States Food, September 2004), the study sampled food items that were almost exclusively of animal origin — meat, fish and dairy products. Thirty-one of the 32 food samples reportedly contained detectable levels of PBDEs, with the highest concentrations observed in fish, followed by meat and dairy products. Non-fat milk had no detectable PBDEs. "The fattier the foods, the more PBDEs you will get," Linda Birnbaum, a study co-author and director of experimental toxicology

for the U.S. Environmental Protection Agency, was quoted as saying. The Bromine Science and Environmental Forum has criticized the study, asserting the research detected "levels so low that the authors elected to report them on a parts-per-trillion basis." See *MSNBC.com*, September 1, 2004; *Philadelphia Inquirer*, September 2, 2004.

Obesity

[8] Physical Education Class Has Significant Impact on Obesity in Girls

A National Institute for Health Care Management Foundation and RAND Corp. [research brief](#) reports that the addition of as little as one hour per week of physical education for 5- and 6-year-old girls could have a significant effect on the incidence of childhood obesity. The study reported that kindergarteners average only 57 minutes weekly in physical education classes, increasing to an average of only 65 minutes per week in first grade. It concludes that at least five hours of kindergarten PE. instruction per week, which is close to the level recommended by federal guidelines, would produce a 43 percent reduction in the prevalence of overweight in elementary school girls. See *NIHCM Foundation Press Release*, August 27, 2004; *Associated Press*, September 7, 2004.



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