

Food & Beverage

LITIGATION UPDATE

Issue 97 • September 29, 2004

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Legislation, Regulations and Standards

Drug Enforcement Administration (DEA)

[1] DEA Ends Fight over Foods That Contain Hemp

The U.S. Department of Justice has reportedly declined to challenge a Ninth Circuit ruling that overturned a ban of food products (e.g., waffles, energy bars, veggie burgers) that contain hemp, a non-psychoactive plant species related to marijuana. [*Hemp Industries Association v. Drug Enforcement Administration*, No. 03-71366 \(9th Cir. 2/6/04\)](#). A San Francisco attorney representing the Hemp Industries Association was quoted as saying the government had notified his legal team that DEA would let expire the September 27, 2004, deadline for appealing the Ninth Circuit decision to the Supreme Court. “I think they’re choosing their battles,” Patrick Goggin said. “They don’t see this as a battle they can win.” DEA first issued the challenged regulations and interpretive rules in 2001. The Ninth Circuit held that while DEA could regulate marijuana and synthetic forms of the drug *cannibis*, the DEA’s authority did not extend to regulating trace amounts of *cannibis*-related constituents that occur naturally. *See Associated Press*, September 28, 2004.

Food and Drug Administration (FDA)

[2] FDA Advisory Group to Discuss TSE Issues at Public Meeting

FDA’s Transmissible Spongiform Encephalopathies Advisory Committee will convene a [public meeting](#) to discuss TSE regulatory issues on October 14, 2004, in Silver Spring, Md. Topics on the meeting’s agenda include (i) agriculture department-licensed tests for diagnosing bovine spongiform encephalopathy (BSE), (ii) the BSE situation worldwide, (iii) the agency’s BSE-food safety rules, (iv) labeling claims for TSE clearance studies for plasma derivative products, and (v) FDA-recommended safeguards regarding presumptive transfusion transmissions of variant Creutzfeldt Jakob Disease. *See Federal Register*, September 22, 2004.

[3] Foodborne Illness Risk Factors in Institutional and Retail Settings Target of FDA Meeting

A document titled [FDA Report on the Occurrence of Foodborne Illness Risk Factors Within Selected Institutional Foodservice, Restaurant and Retail Food Store Facility Types \(2004\)](#) will be the subject of an FDA satellite down-link meeting on October 13, 2004. Risk factors contributing to foodborne illness that the report identifies include (i) “food from unsafe sources,” (ii) improper cooking methods, (iii) improper



holding temperatures, (iv) contaminated equipment, and (v) poor employee hygiene. Details about the meeting's broadcast are available [here](#). See *Federal Register*, September 22, 2004.

State/Local Initiatives

[4] Obesity Litigation Reform Legislation Awaits Action by Michigan Governor

By a vote of 34 to 4, the Michigan Senate last week passed legislation ([H.B. 5809](#)) that would amend the state's Revised Judicature Act by providing immunity to food manufacturers, packers, distributors, carriers, holders, sellers, marketers, promoters, advertisers, or associations from civil liability for personal injury or death resulting from weight gain, obesity or related health conditions. The bill would not preclude civil liability in complaints that involve adulteration, misbranding or willful violations of state or federal laws. The Michigan Restaurant Association has urged all interested parties to encourage Governor Jennifer Granholm (D) to sign the measure into law. See *MRA News*, September 22, 2004.

Obesity litigation reform has been enacted in 12 states – Washington, Idaho, Utah, Arizona, Colorado, South Dakota, Missouri, Tennessee, Louisiana, Georgia, Florida, and Illinois – and is pending in five others. The Personal Responsibility in Food Consumption Act (H.R. 339) has passed the U.S. House of Representatives, while the Commonsense Consumption Act (S. 1428) is pending in the U.S. Senate.

[5] New Jersey Governor Proposes Major Changes to School Food Offerings to Address Childhood Obesity Epidemic

Citing statistics indicating that 20 percent of New Jersey's children are obese and 18 percent are overweight, Governor James McGreevy (D) has proposed changes to the state agriculture department's Child Nutrition Program Rule that will restrict sales of certain foods and beverages in schools based on the products' portion size, fat and sugar content. "Over the years, soda and junk food have become all too readily accessible in our schools where parents have little control over what their kids eat," McGreevy said. "I know school districts rely in part on vending machine sales to balance budgets and fund extracurricular activities. These new rules do not outright ban vending machines, they simply require schools to stock the machines with healthier choices," he said.

Under McGreevy's proposal, (i) no soft drinks could be sold or served at any time during the school day; (ii) no candy or snack items listing sugar as the first ingredient could be sold or served at any time during the school day; (iii) no available snack foods could contain more than 8 grams of fat and 2 grams of saturated fat per serving; and (iv) beverages could not be larger than 12 ounces, except water or milk that contains 2 percent or less fat. A 60-day public comment period is expected to follow publication of the proposal in the *New Jersey Register* sometime in November 2004. See *Press Release of the NJ Office of the Governor*, September 23, 2004.



Litigation

Disability Benefits

[6] **Obese Individuals Entitled to State Benefits, Italian Court Rules**

Italy's highest appellate court has ruled that individuals whose extreme obesity prevents them from working can be granted state pensions on a case-by-case basis. According to a news source, the Court of Cassation said that decisions on individual cases will be determined based on the individual's "corporeal mass," a figure ascertained by dividing the person's weight in kilograms by his or her height in meters squared. Sums between 35 and 40 will evidently be considered normal parameters for disability benefits. Italian newspapers reportedly deemed the court's decision "a revolution," while the former president of the Italian Society Against Obesity called it "a very important judgment. To be extremely fat is not the same as having the sin of gluttony or laziness, as many today still think." See *The Independent*, September 16, 2004.

Other Developments

[7] **U.K. Industry Group Publishes Food and Health Manifesto**

The United Kingdom's Food and Drink Federation (FDF) this week issued a [manifesto](#) in which federation members vow to collaborate with government and other stakeholders to help find solutions to the obesity epidemic. Among other things, FDF members intend to (i) provide clearer nutritional information under revised European Union provisions, (ii) reduce levels of salt, sugar and fat in products when possible,

(iii) "explore new approaches for individual portion sizes," (iv) remove vending machines from primary schools unless a school specifically requests them, (v) remove branding from vending machines in primary and secondary schools if requested, (vi) expand choices in vending machines, and (vii) work with the government and media regulators on issues relating to advertising to children. See *FDF Press Notice*, September 27, 2004.

[8] **SHB to Co-Host National E-Discovery Forum**

Recipients of this Update are cordially invited to a National Forum on E-Discovery and Corporate Compliance on November 1, 2004, in Kansas City, Missouri. Shook, Hardy & Bacon is co-sponsoring the event with the University of Missouri-Kansas City School of Law.

The forum's featured speaker will be the Honorable Shira Scheindlin, U.S. district judge for the Southern District of New York. Judge Scheindlin, probably the nation's most prominent judicial author on e-discovery matters, wrote the well-publicized *Zubulake* decisions that address the key issues of cost-sharing, document-retention obligations and sanctions. Judge Scheindlin is also a member of the Civil Rules Advisory Committee, now engaged in amending the Federal Rules of Civil Procedure relating to e-discovery, and she participates as an observer in the Sedona Conference Working Group that just published a public comment draft of *Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, the working group's second major e-discovery publication.

The all-star lineup of speakers also features: two federal appeals-court judges, the Honorable Rosemary Barkett of the 11th Circuit, and the Honorable Deanell Reece Tacha, chief judge of



the 10th Circuit; corporate counsel from DuPont, Foot Locker, Ford, Miller Brewing Co., Sprint, and Tyco International; and law school deans and national practitioners.

The forum will consist of a full day of presentations and discussions, starting at 9 a.m. CST. Topics will include current legal issues, proposed changes to the Federal Rules, views from the bench, e-discovery's appropriate scope and practical impact, plus best practices and proactive solutions. We anticipate that most jurisdictions will approve six to seven hours of CLE credit.

Lodging is available at the conference site, Kansas City's Westin Hotel, which is located in Hallmark's Crown Center complex and a five-minute walk from Shook Hardy & Bacon's Kansas City offices. Call the Westin at (816) 474-4400 and ask for the "SHB rate."

The program is complimentary to invited guests of Shook, Hardy & Bacon. To RSVP, please contact Tamy Brown at (816) 474-6550, ext. 20572, or tbrown@shb.com. For more information, contact Shook Hardy partners Bill Martucci at (816) 559-2196, wmartucci@shb.com; Jim Daley (816) 559-2104, mjdaley@shb.com; or John Barkett (305) 960-6931, jbarkett@shb.com; or any firm attorney.

Scientific/Technical Items

Cardiovascular Disease

[9] **Obese Children Show Early Signs of Coronary Artery Disease**

An Italian study of 100 overweight children ages 6 to 14 reports that ultrasound scans of obese kids as young as 7 indicated signs of early carotid artery thickness and stiffness, a precursor to arterial narrowing and [a predictor of] clinical coronary artery disease. Published in the October issue of *Diabetes Care*, the research also showed that the obese kids displayed higher insulin resistance, a measure of tendency toward development of diabetes, higher blood pressure and higher cholesterol levels than children of normal weight. A. Iannuzzi, et al., "Increased Carotid Intima-Media Thickness and Stiffness in Obese Children," *Diabetes Care* 27(10): 2506-2508, October 2004.



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Food & Beverage Litigation Update is distributed by
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We welcome any leads on new developments in this emerging area of litigation.

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