

# Food & Beverage

## LITIGATION UPDATE

Issue 71 • March 10, 2004

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Department of Health and Human Services (HHS)

##### [1] **Physical Inactivity, Poor Nutrition Catching Up on Tobacco as Actual Cause of Death; HHS Launches New Campaign Against Obesity**

“Americans need to understand that overweight and obesity are literally killing us.” That was HHS Secretary Tommy Thompson’s message yesterday in a press conference held to announce publication of a Centers for Disease Control and Prevention (CDC) study attributing 400,000 deaths to poor diet and physical inactivity in 2000 as well as the agency’s new obesity prevention initiative. “To know that poor eating habits and inactivity are on the verge of surpassing tobacco use as the leading cause of preventable death in America should motivate all Americans to take action to protect their health. We need to tackle America’s weight issues as aggressively as we are addressing smoking and tobacco,” Thompson said. He also announced that the National Institutes of Health is developing a Strategic Plan for NIH Obesity Research.

Using mortality data from 2000, the CDC study (“Actual Causes of Death in the United States, 2000,” *JAMA* 291: 1238-1245, 2004) indicates that deaths due to poor diet and physical inactivity rose by 33 percent over the past decade; the study attributes 435,000 deaths to tobacco use and 85,000 deaths to alcohol consumption.

The new [Healthy Lifestyles & Disease Prevention](#) campaign encourages people to take small steps to control their weight by following a “healthy” diet, controlling portion sizes, exercising at least five times per week, and avoiding tobacco and illegal drugs “altogether.”

The [Strategic Plan for NIH Obesity Research](#) focuses largely on research topics that prevent and treat obesity through (i) lifestyle modification and (ii) pharmacologic, surgical or other medical approaches. NIH invites public comments on the plan until April 2, 2004. See *HHS News Release, Reuters* and *Associated Press*, March 9, 2004.

##### [2] **ICD-9-CM Committee to Discuss Overweight Issue at First Meeting of 2004**

The National Center for Health Statistics’ ICD-9-CM Coordination and Maintenance Committee will hold its first public meeting of 2004 on April 1-2 in Baltimore, Maryland. Overweight and obesity issues are included on the agenda of the public forum targeting proposed modifications to the *International Classification of Diseases, Ninth Revision, Clinical Modification*. See [Federal Register](#), March 5, 2004.

A November 10, 2003, *Washington Post* article asserted that momentum is building for federal agencies and others to classify obesity as a disease, with questions about insurance coverage and drug access hanging in the balance. For example, in 2002 the Internal Revenue Service apparently declared obesity a disease and now allows taxpayers to deduct the cost of prescribed weight-loss treatments. Advocates of the obesity-as-disease movement evidently believe that more people will seek help if



they consider their weight problem to be a medical condition instead of a personal failing. See [issue 57](#) of this Update, November 12, 2003.

## Litigation

### Negligence

#### [3] Proposed Class Action Accuses Kroger Subsidiary of Failing to Warn of Potentially Tainted Beef; Medical Monitoring Requested

On March 8, 2004, Seattle attorney Steve Berman filed a purported class action in Washington state court against Kroger subsidiary Quality Food Centers (QFC), claiming the chain failed to warn consumers who purchased beef potentially tainted with bovine spongiform encephalopathy (BSE) using their customer loyalty cards, which track all purchases. The complaint alleges that QFC had the ability to notify Advantage Card customers of the beef recall by telephone and by mail but failed to do so, choosing instead to post small signs about the recall four days after notification of the potential hazard. Stated causes of action include negligence, strict liability and failure-to-warn claims. Plaintiffs purport to represent every Washington state consumer who purchased the recalled meat from QFC and seek unspecified damages and establishment of a medical monitoring fund. See *Seattle Post-Intelligencer*, March 5, 2004; *Seattle Post-Intelligencer*, March 8, 2004.

Berman represented the state of Washington in its attorney-general reimbursement action against tobacco companies in the late 1990s. He currently represents plaintiffs in a purported class action filed last month in Los Angeles against Anheuser-Busch and Miller that accuses the companies of targeting underage consumers through product development

and marketing. See issue 67 of this [Update](#), February 11, 2004.

## Legal Literature

#### [4] “Tipping the Scales: Recipe for Reducing American Obesity,” Michael Jacobson, *Legal Times*, March 1, 2004

Obesity-related lawsuits are a “powerful engine for change” should regulatory options for addressing the obesity issue falter, according to Center for Science in the Public Interest Executive Director Michael Jacobson. He urges trial attorneys and state attorneys general to sue (i) food manufacturers “on grounds of false advertising, unfair marketing and tort-fraud theories” for advertising high-sugar products to children that “undermine” their health and (ii) chain restaurants whose menus fail to disclose the high amount of *trans* fats in certain offerings.

#### [5] “Taking the Cake,” Ben Gerson, *Harvard Business Review*, March 2004

The current issue of *Harvard Business Review* features a fictional case study in which the general counsel of a baking company considers whether his client “needs to recast its product lines” in light of potential legal liability. Readers follow the in-house lawyer through a hypothetical week in which he (i) hears a consumer advocate tell a congressional committee that “obesity alone will kill more people than alcohol and tobacco combined”; (ii) learns that snacks “made with honey instead of sugar or corn syrup and with canola or palm oil that hasn’t been hydrogenated” are gaining market share; (iii) watches a 7-year-old boy spit out a prototype of a low-fat version of the company’s “Chizzlewits” during a test-marketing session; and (iv) attends a meeting in which the company’s chief dietician says, “I think it’s irresponsible to use *trans* fats when reasonable alternatives exist.” The story ends with the general



counsel learning that his company has just been sued.

Four professionals then offer their distinctly different perspectives on the hypothetical. Ken McClain, a Missouri-based plaintiffs' lawyer, writes that he "can readily see the basis for a defective-product claim .... [The hypothetical company's] decision to place partially hydrogenated oils in its products to produce 'flavor intensity and mouth sensation' is a design choice that puts sales ahead of health." Laurian Unnevehr, an agricultural economist, says the company's executives "need to stop fighting the food-culture wars within the company and move forward with a strategy that integrates product development and marketing." Pam Murtaugh, a management consultant, suggests that the company should "investigate acquiring a food company that understands the very different kind of marketing and product development demanded by a food line preaching health." And Richard Berman, executive director of the [Center for Consumer Freedom](#), asserts that new products won't diminish the company's legal exposure because "an overzealous plaintiffs' bar ... has already concocted enough causes of action to render most countermeasures meaningless." Berman advocates "an industrywide effort to push back against" advocacy groups that he believes "couple junk science with media theatrics to foster a litigation-friendly environment."

## Other Developments

### [6] Advocacy Group Criticizes Alcohol Companies' Web Sites

In a report released Tuesday, the Center on Alcohol Marketing and Youth (CAMY) alleges that alcohol-company Web sites offer "almost no effective mechanisms to keep underage youth from accessing them despite the various steps – reminders

of the legal drinking age on the Web site or asking for a birth date, in essence self-policing by the Internet surfer – taken by the industry and called for by the [Federal Trade Commission]." [Clicking with Kids: Alcohol Marketing and Youth on the Internet](#) (3/9/04). The organization further asserts that video games and downloadable music on some sites make them "a virtual cyber playground with no adult supervision." Internet users younger than 21 made "nearly 700,000 in-depth visits" to alcohol-company sites in the last half of 2003, according to CAMY. See *CAMY Press Release*, March 9, 2004.

Located at Georgetown University, CAMY says its mission is to monitor "the marketing practices of the alcohol industry to focus attention and action on industry practices that jeopardize the health and safety of America's youth." *Clicking with Kids* is the group's [ninth report](#) criticizing alcohol-company activities since September 2002.

### [7] British Medical Group Calls for Action Against Excessive Drinking

Britain "has reached a point where it is necessary and urgent to call time on runaway alcohol consumption," according to a new Academy of Medical Sciences [report](#). Among other things, the 42-page report advocates (i) raising alcohol taxes, (ii) increasing restrictions on the amount of alcohol British citizens can bring in from abroad, (iii) raising the legal drinking age, and (iv) reviewing the advertising practices of alcohol manufacturers. See *Academy of Medical Sciences Press Release*, March 4, 2004.



## Scientific/Technical Items

### Obesity

#### [8] RAND Study Links Increasing Health Care Costs to Obesity

A new RAND Corp. study (“Increasing Obesity Rates and Disability Trends,” *Health Affairs* 23(2): 199-205, 2004) predicts that if population weight and obesity continue to increase at current rates, 20 percent of the health care dollar spent on people ages 50-69 by the year 2020 could be directed to obesity-related medical problems. The figure represents a 50 percent increase over expenditures from 2000. The study also predicts that if population weight continues to increase at today’s trends, improvements in health achieved by middle-aged Americans as a result of medical advances would largely be erased over the next two decades. The number of people ages 50-69 with obesity-related disabilities is expected to increase by roughly 20 percent between 2000 and 2020. The study was based on data from two national surveys on obesity, health care costs and health-related problems.

#### [9] Debate over the Role of Sugar-Sweetened Drinks and Childhood Obesity Continues

In a commentary titled “Sugar High: The Marketing of Soft Drinks to America’s Schoolchildren,” (*Archives of Pediatric and Adolescent Medicine*, 158: 209-210, 2004) author Sarah Wiehe suggests that access to soft drinks in vending machines in America’s middle and high schools is part of the “complex cultural fabric” involved in the nation’s “epidemic of obesity.” Citing the increased per-capita consumption of soft drinks and a recent study reporting that sugar-sweetened beverages are associated with increases in body mass index and the risk of obesity, Wiehe urges parents and members of the pediatric health community to re-examine school policies promoting access to soft drink vending machines and to “support bans or limits on sales of soda and nutrient-poor foods in schools.”

Meanwhile, in the same journal’s “Pediatric Forum,” researchers David Ludwig and colleagues question a recent finding in a study indicating that both diet and sugar-sweetened soft drinks are positively associated with obesity in children. The authors note that their own research suggests that sugar-sweetened drinks are positively associated with obesity in children while diet drinks are not. Authors of the original study, David Pettitt, et al., reply that their study had concluded that “increased levels of television viewing and soda intake are associated with a higher prevalence of overweight and obesity among sixth-and seventh-grade school children.” They note that they had only speculated that it “might not have been the calories in the beverages alone but the caloric intake associated with a child’s general snacking behavior that could have led to obesity.”

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## LITIGATION UPDATE

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](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto: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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