

# Food & Beverage

## LITIGATION UPDATE

Issue 159 • February 8, 2006

### Table of Contents

#### Legislation, Regulations and Standards

- [1] **USDA Inspector General Criticizes Expanded BSE Surveillance Program** .....1
- [2] **Connecticut Poised to Prohibit Soft Drink Sales in Schools** .....1

#### Litigation

- [3] **WTO Concludes That European Union Restrictions on Genetically Modified Organisms Breach Trade Regulations** .....2

#### Media Coverage

- [4] **“Taking Cola to Court: If You’re Fat, Blame Coke and Pepsi,”** Walter K. Olson, *City Journal*, Winter 2006 . . . .2

#### Scientific/Technical Items

- [5] **IARC Researchers Assert Causal Link Between Excessive Alcohol Consumption and Various Cancers** . .2

Shook,  
Hardy &  
Bacon LLP

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] USDA Inspector General Criticizes Expanded BSE Surveillance Program

An Office of Inspector General [audit](#) of USDA's expanded program to detect and stop the spread of bovine spongiform encephalopathy (BSE) in U.S. cattle has concluded that various shortcomings threaten the program's ability to achieve its objectives. USDA amplified its BSE surveillance efforts in June 2004 in response to the discovery of a BSE-positive cow in Washington state during December 2003.

Among other things, the audit recommends that USDA determine whether the Food Safety and Inspection Service and/or the Animal and Plant Health Inspection Service (APHIS) should be given additional authority to perform inspection and sampling activities in pre-screening areas adjacent to slaughter facilities. Specific recommendations with respect to APHIS include (i) ensuring the transparency of published information so that stakeholders are fully informed of conclusions reached as a result of the monitoring program, (ii) reevaluating testing protocols on a regular basis, and (iii) ensuring that laboratory staff understand

the procedures for submitting samples and following up with labs that fail to submit a sufficient number of samples.

USDA officials responded to the audit by saying the agency is committed to maintaining "an aggressive, well-managed BSE surveillance program" and vowed to address each of the audit's 22 recommendations. *See The Wall Street Journal*, February 2, 2006; *Herd on the Hill*, February 6, 2006.

#### State/Local Initiatives

##### [2] Connecticut Poised to Prohibit Soft Drink Sales in Schools

A Connecticut state senator will reportedly introduce legislation this week that would ban the sale of all soft drinks, sports drinks and juices that contain less than 100 percent fruit in elementary, middle and high schools. "This landmark legislation represents the state's commitment to providing our students with healthy choices that will best position students to succeed in school and in society," Senate President Pro Tem Donald Williams (D-Brooklyn) said in announcing his proposal. Republican Governor M. Jodi Rell has reportedly endorsed the legislation because its provisions do not mandate recess for elementary schools or require schools to meet state-imposed nutritional guidelines. The proposal would allow schools to continue to sell chips and candy, though school districts opting to sell "healthy" snacks only would be eligible for a 10-



cent increase in school lunch subsidies. *See The Connecticut Post, The Hartford Courant and The New York Times*, February 2, 2006.

## Litigation

### International Trade

#### [3] **WTO Concludes That European Union Restrictions on Genetically Modified Organisms Breach Trade Regulations**

In a 1,000-page preliminary ruling issued yesterday, the World Trade Organization (WTO) reportedly found no scientific basis for European Union restrictions on imports of biotech crops and foods. The United States, Argentina and Canada initiated the case in 2003 hoping that a favorable ruling would quell the “chilling effect” of the de facto EU moratorium on the adoption of biotechnology in other parts of the world. The WTO decision also found that separate biotech bans in Austria, France, Germany, Greece, Italy, and Luxembourg violated WTO rules.

Industry groups reportedly hailed the WTO ruling, while biotechnology opponents labeled it an “inappropriate intrusion into decisions about what food people eat.” The Friends of the Earth spokesperson added that he considered the WTO “unfit to decide what we eat or what farmers grow. It is an undemocratic and secretive institution that has no particular competence in environmental or health and safety matters. This WTO decision will only increase the determination of citizens in Europe and around the world to reject these poorly tested foods.” *See The Financial Times*, February 7, 2006; *The Wall Street Journal* and *The New York Times*, February 8, 2006.

## Media Coverage

#### [4] **“Taking Cola to Court: If You’re Fat, Blame Coke and Pepsi,”** Walter K. Olson, *City Journal*, Winter 2006

“Get ready for the next mass-tort crusade: protecting our kids from the ravages of Big Cola,” cautions Walter Olson, a senior fellow at The Manhattan Institute for Legal Policy and the editor of the Web site Overlawyered.com. Focusing on the purported class action that consumer advocacy groups reportedly intend to file in Massachusetts state court over the presence of soft drinks in schools, Olson suggests that the public might accept such lawsuits given the popularity of initiatives to restrict the availability of soft drinks in schools across the country. According to Olson, “The real leverage that this kind of litigation affords ... lies in the threat of obtaining, under court order, reams of internal documents from the opponents’ files. The next step is for the lawyers to pluck selected bits out of context and feed them to a cooperative press, which then casts them in the worst possible light.” The article is available [here](#).

## Scientific/Technical Items

### Alcoholic Beverages

#### [5] **IARC Researchers Assert Causal Link Between Excessive Alcohol Consumption and Various Cancers**

Researchers from the International Agency for Research on Cancer (IARC) last week claimed that “a causal association has been established” between excessive alcohol consumption and cancers of the oral cavity, pharynx, larynx, esophagus, liver, colon,



and rectum. They also attribute too much drinking to an increased risk of breast cancer in women and suspect an association between alcohol consumption and cancers of the pancreas and lung. (P. Boffetta and M. Hashibe, "Alcohol and Cancer," *Lancet Oncology* 7: 149-156, February 2006). "Alcohol is underestimated as a cause of cancer in many parts of the world," said authors Paolo Boffetta and Mia Hashibe. "Given the linear dose-response relationship between alcohol intake and risk of cancer, control of heavy drinking remains the main target for cancer control." They do not however, advocate abstaining from alcohol in light of the significant evidence indicating that moderate consumption (2 drinks daily for men, 1 for women) provides protective benefits against cardiovascular disease. See *Reuters*, January 30, 2006.



---

# Food & Beverage

## 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.

Shook,  
Hardy &  
Bacon<sup>LLP</sup>

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

