

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] USDA Releases Directive to Increase Testing for *Listeria* in Meat and Poultry Plants

During a one-day summit on *Listeria monocytogenes*, the Food Safety and Inspection Service (FSIS) unveiled its revised directive, "Microbial Sampling of Ready-to-Eat (RTE) Products for the FSIS Verification Testing Program." According to the FSIS Web site, comments on the directive will be received until December 2, 2002, and it will be finalized December 9. The November 18 summit was designed to provide a forum for stakeholders and government to share research data and discuss actions to best address a spate of recent contamination outbreaks.

The directive will create three levels of focused testing for establishments producing RTE meat and poultry products, i.e., intensified, targeted and non-targeted verifications. The intensified inspections will take place in "high or medium risk operations that do not have either a provision in the HACCP [Hazard Analysis and Critical Control Point] plans or a scientifically-based and validated program in the SSOPs [Sanitation Standard Operating Procedures] or prerequisite programs for the control of *L. monocytogenes*, or who refuse to share test results." The draft directive is available from the FSIS Web site at www.fsis.usda.gov. The National Food Processors Association, while committed to testing requirements,

has reportedly responded to the directive release by expressing concern that such requirements be "more effective, not less." See biz.yahoo.com/prnews, November 18, 2002.

[2] FSIS Announces Upcoming Codex Meeting and Comment Deadlines

The Food Safety and Inspection Service (FSIS), which is responsible for keeping the public informed of international standard-setting activities, has announced that the Office of the Under Secretary for Food Safety and the Food and Drug Administration will sponsor a public meeting January 7, 2003, to prepare for the London meeting of the Codex Committee on Fats and Oils to be held in February. Proposed amendments to relevant standards will be addressed during these meetings, and comments are being solicited. The documents can be accessed electronically from www.codexalimentarius.net.

Comments are also being sought by the U.S. delegate to the Codex Committee on Food Hygiene regarding its *Proposed Draft Guidelines for the Control of Listeria monocytogenes in Foods*. Due November 27, 2002, the comments will be considered for inclusion in those the United States submits. The draft *Listeria* guidelines are at step 3 of an eight-step Codex process. The revised document has been modified structurally and includes a clarified scope, risk assessment results, and chapters on (i) risk management options, (ii) guidelines for managing *Listeria* in food production, and (iii) information from deleted appendices. The draft guidelines can be obtained from the FSIS Web site at www.fsis.usda.gov. A December 1 deadline has been set for comments on



three food labeling items that are currently at step 6. Those items are (i) a draft amendment to the *Guideline for the Production, Processing, Labelling and Marketing of Organically Produced Foods*, Section 5. Criteria; (ii) a draft amendment to the *Guidelines on Nutrition Labelling*; and (iii) draft guidelines for the use of health and nutrition claims. Further information about these proposed changes can also be obtained from the FSIS Web site.

U.S. Food and Drug Administration (FDA)

[3] FDA Schedules Next Meeting on Acrylamide

FDA's Contaminants and Natural Toxicants Subcommittee of the Food Advisory Committee has scheduled a December 4-5, 2002, meeting in Adelphi, Maryland, to discuss the agency's action plan for addressing acrylamide in food. An agenda will reportedly be posted before the meeting at www.cfsan.fda.gov. See *Federal Register*, November 15, 2002.

State Initiatives

[4] Soft Drink Manufacturers Persuade Maine to Modify Public Awareness Campaign

A meeting between soft drink manufacturers and Governor Angus King (I) has reportedly led to a reworking of the Maine Bureau of Health's "Enough is Enough" campaign, an initiative encouraging state residents to decrease soda consumption because of its purported role in the rising rates of obesity among children and adolescents. A soft drink industry spokesperson was quoted as saying the campaign made claims "unsupported by fact. We're not saying obesity is not a problem, [but] we were mystified as to why soda was being singled out." A news report indicates that the revised initiative will

also target other sweetened beverages. See *Atlanta Journal-Constitution*, November 19, 2002.

Litigation

Acrylamide

[5] *Council for Education and Research on Toxics v. McDonald's Corp.*, No. BC 280980 (Superior Court, Los Angeles County, California) (filed September 5, 2002)

Defendants McDonald's Corp. and Burger King Corp. have filed motions to stay and dismiss this Proposition 65 enforcement action, which seeks penalties for defendants' alleged failure to warn that their french fries contain acrylamide, a substance known to the state of California to be a carcinogen. According to the motion to stay, the state's Office of Environmental Health Hazard Assessment (OEHHA) has informed defendants that it is studying the issue of acrylamide in food and plans to take initial regulatory action in early 2003. Relying on the primary jurisdiction doctrine, McDonald's suggests that a stay pending regulatory action would (i) "advance uniform interpretation and application of Proposition 65" in light of its presence in many foods in addition to french fries, and (ii) "enhance judicial efficiency and decision-making."

In its motion to dismiss, Burger King asserts that the court lacks subject matter jurisdiction because plaintiff's notice is not adequate, and the attorney general deemed the certificate of merit insufficient. Defendant also claims that the litigation is not in the public interest given the preliminary nature of the scientific findings to date. According to OEHHA's October 15, 2002, letter to counsel for Burger King, the agency is considering its options regarding acrylamide in food and may be applying Proposition 65's



“alternative risk level,” which permits the establishment of higher allowable ingestion levels where the substance at issue exists due to a beneficial cooking process or “naturally.” See *Inside Cal/EPA*, November 15, 2002.

Legal Literature

[6] Products Liability Expert Focuses on Regulation Through Litigation

Two recent articles by products liability expert and SHB partner Victor Schwartz discuss the growing trend of litigators seeking regulatory controls of entire industries by filing lawsuits. He suggests that the food and beverage industries could be the next targets and proposes an “iron triangle defense” to counter the newest strategies employed by plaintiffs’ lawyers. That defense consists of public relations, government relations and skilled litigation. Schwartz warns that “by the time the lawsuit is filed, the plaintiff’s lawyers are already on third base,” having prepared the way to huge verdicts or settlements by vilifying the industry of choice through the media and government hearings intended to “educate” the jury pool and by influencing analysts in the institutional investor community who lower their evaluation of common stocks. The latter tactic is apparently employed to force settlements. While Schwartz acknowledges that personal injury lawyers may be reluctant to litigate against the makers of products they consume, he cautions “if public opinion shifts, whether through the force of personal injury lawyers and their allies or through industry missteps, potentially substantial liability could move into areas that are now considered ordinary and welcome pleasures of our society.” See *ALEC Policy Forum, Summer/Fall 2002*; and *The Metropolitan Corporate Counsel*, November 2002.

Other Developments

[7] APHA Issues Policy on Sodium Intake; Targets Fast Food, Soda During Annual Meeting

The American Public Health Association (APHA) reportedly issued a policy resolution encouraging food manufacturers and restaurants to reduce the amount of sodium in their foods during the health group’s annual meeting held November 9-13, 2002, in Philadelphia. “Americans are consuming an ever-increasing amount of processed foods high in sodium at home, at work, at school, and in restaurants,” Stephen Havas, M.D., co-author of the policy, was quoted as saying. “The excess sodium in these foods is unnecessary and leads to a large, preventable toll of hypertension, premature death and disability,” he said. APHA evidently claims that if food manufacturers and restaurants decreased by 50 percent the amount of sodium added to foods over the next 10 years, nearly 150,000 deaths attributable to cardiovascular diseases linked to high blood pressure could be prevented.

During the APHA meeting, President Faye Wong reportedly moderated a session titled “The Obesity Crisis: Challenging the Fast Food Culture.” Speakers during the session included public health activist Marion Nestle and Occidental College’s Robert Gottlieb, who reportedly helped spearhead the successful effort to ban soft drinks in the Los Angeles Unified School District. See *Reuters.com*, November 12, 2002; *consumerfreedom.com*, November 13, 2002.



Media Coverage

- [8] **Shari Roan, "The Sugar Habit,"** *Los Angeles Times*, November 11, 2002; **Jim Auchmutey, "America's Craving for All Things Sweet,"** *Atlanta Journal-Constitution*, November 17, 2002

According to Roan's article, researchers are beginning to take seriously popular beliefs about the addictiveness of sugar. A study presented at the Society for Neuroscience meeting in November 2002 apparently demonstrated that rats will eat sugar excessively, experience withdrawal when sugar is denied and continue to crave it for weeks. Some are downplaying the significance of such research, claiming human research does not show behavior changes or ill effects on dietary regimes that manipulate sugar consumption.

Auchmutey's article reports that Americans consume nearly 150 pounds of sweeteners annually per person. Soft drinks reportedly account for the largest single source of sweeteners, while other sources include baked goods, fruit drinks, candy, cereals, salad dressings, ketchup, sauces, and french fries.

- [9] **Food Activists Call for Wide-Ranging Policies to Fix Obesity Problem**

Marion Nestle, Ellen Ruppel Shell and Kelly Brownell, who are calling for U.S. public health policies that address the "raging obesity epidemic," have recently been the focus of media attention. Nestle has apparently been lecturing nationwide to promote her book, *Food Politics*, and blaming food-industry marketing for current obesity statistics. Shell, author of *The Hungry Gene*, appeared on National Public Radio's "Talk of the Nation/Science Friday," November 15, 2002, to discuss her theory that genetic predisposition and cultural influence are responsible for obesity. She has also studied Micronesian islanders who are dying from obesity-related

diseases since the introduction of Western diets and sedentary lifestyles. Brownell, of Yale University's Center for Eating and Weight Disorders, has apparently been calling for snack food taxes since at least 1994 and has nearly finished a book on cleaning up "the toxic food environment." See *Associated Press*, November 4, 2002; *seattletimes.com* and *The Wall Street Journal*, November 6, 2002; and *Talk of the Nation/Science Friday*, November 15, 2002.

Scientific/Technical Items

Mercury

- [10] **California Physician Warns of Mercury Threat in Oceangoing Fish**

According to study results recently published online in *Environmental Health Perspectives*, individuals with a diet high in large, oceangoing fish may have dangerous levels of mercury in their blood. Based on either diet or symptoms, Dr. Jane Hightower evaluated certain of her San Francisco Bay Area patients to determine blood-mercury levels. Of the 89 patients studied, 89 percent had mercury levels exceeding the 5 parts per billion recognized as safe by the U.S. Environmental Protection Agency and the National Academy of Sciences. Hightower identified individuals with blood-mercury levels as much as 10 times higher than recommended levels. Ill and high-mercury patients were instructed to give up fish or eat fish that do not accumulate mercury for six months. Abstinence resulted in significant decreases in blood-mercury levels; although, in some cases, it took as long as 21 weeks to see reductions. Hightower warns that while many people think they are "doing the right thing by eating swordfish, sea bass, halibut and ahi tuna steaks," these fish have the "highest content of mercury sold in restaurants and grocery stores."



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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.

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