

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### National Toxicology Program (NTP)

##### [1] NTP Panel Concludes That Acrylamide Is Unlikely to Pose Reproductive and Developmental Risks

A 14-member expert panel from NTP's Center for the Evaluation of Risks to Human Reproduction (CERHR) has issued its [conclusions](#) about the potential reproductive and/or developmental toxicity associated with exposure to acrylamide. Acrylamide forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. The chemical also has many industrial applications, including use in the production of pulp, paper and permanent press fabrics. "Considering the low level of estimated human exposure to acrylamide derived from a variety of sources, the Expert Panel expressed negligible concern for adverse reproductive and developmental effects for exposures in the general population," according to the panel's interim report. The group "expressed minimal concern for acrylamide-induced heritable effects in the general population," and "some concern for adverse reproductive and developmental effects, including heritable effects, for exposures in occupational settings." Following a public comment period on the expert panel's final report, CERHR will prepare a monograph that contains NTP's opinion on acrylamide as a human reproductive and/or developmental hazard, the expert panel's report and all public comments on the report.

### U.S. Congress

##### [2] Proposed Bipartisan Bill Would Study Effects of Electronic Media on Children's Diets and Consumption Habits

A bipartisan proposal ([S. 2447](#)) co-sponsored by Senators Joe Lieberman (D-Ct.), Sam Brownback (R-Kan.), Hillary Rodham Clinton (D-N.Y.), Rick Santorum (R-Pa.), and Mary Landrieu (D-La.) would (i) authorize funding for establishment of a program within the National Institute of Child Health and Human Development to study the role and impact of electronic media in the development of children and (ii) provide for a report regarding the results of such research to Congress. Among other things, the Children and Media Research Advancement Act would require the director of the institute to collaborate with the National Academy of Science in convening an independent panel of experts to establish research priorities regarding the influence of television, movies, video games, and the Internet on children's cognitive, physical and socio-behavioral development, including any effects on diet and consumption habits. A specific pilot project called for in the proposed bill would evaluate the role of media exposure on "the development of childhood obesity, particularly as a function of media advertising and sedentary lifestyles that may co-occur with heavy media diets." The legislation has been referred to the Committee on Health, Education, Labor, and Pensions.



### [3] **South Dakota Senators Introduce Bill to Restore Original Implementation Date for Country-of-Origin Labeling**

Senators Tom Daschle (D-S.D.) and Tim Johnson (D-S.D.) last Friday introduced legislation ([S. 2451](#)) that would implement country-of-origin labeling for meat products by the original September 30, 2004, deadline. The labeling regulations were mandated in the 2002 farm bill, but delayed until 2006 by a rider contained in the 2003 omnibus appropriations bill.

## Food and Drug Administration (FDA)

### [4] **FDA Announces Public Meetings to Solicit Information About Current Good Manufacturing Practice Regulations**

FDA will hold three public meetings this summer to solicit information about the current state of quality management techniques, quality systems approaches and voluntary industry standards used by food manufacturers and processors to prevent, reduce or control food borne hazards during food production or processing. FDA plans to use the information to revise the agency's current good manufacturing practice regulations. The [meetings](#) will be held June 11, 2004, in College Park, Maryland; July 2 in Monterey, California; and July 21 in Chicago, Illinois. See *Federal Register*, May 21, 2004.

## World Health Organization

### [5] **WHO Member States Endorse Strategy on Diet, Physical Activity and Health**

Delegates from the WHO's 192 member states meeting in Geneva, Switzerland, on May 22, 2004, endorsed an unprecedented [plan](#) to combat the growing burden of noncommunicable diseases related to unhealthy diets and physical inactivity – e.g., type 2 diabetes, cardiovascular ailments,

cancers, and obesity-related conditions. With respect to diet, the nonbinding *Global Strategy on Diet, Physical Activity and Health* recommends that individuals (i) “achieve energy balance and a healthy weight,” (ii) “limit energy intake from total fats and shift fat consumption away from saturated fats to unsaturated fats and towards the elimination of *trans*-fatty acids,” (iii) increase consumption of fruits and vegetables, and legumes, whole grains and nuts,” (iv) “limit the intake of free sugars,” and (v) “limit salt (sodium) consumption from all sources and ensure that salt is iodized.” The strategy notes that success in changing dietary habits and patterns of physical activity will take collaboration among various stakeholders over time and calls on governments to devise national dietary and physical activity guidelines. Recommendations for food manufacturers include (i) practicing “responsible” marketing directed at children, (ii) improving labeling and providing evidence-based health claims to help consumers make informed choices, and (iii) limiting levels of saturated fats, *trans*-fatty acids, free sugars, and salt in existing products. See *WHO News Release*, May 22, 2004.

## State/Local Initiatives

### [6] **Three More States Act on Obesity Litigation Legislation**

Early last week, Colorado Governor Bill Owens (R) signed H.B. 1150, an obesity liability reform bill that prohibits claims against purveyors of food for weight gain or obesity-related illness from the long-term consumption of food. The law does not preclude civil liability for violations of state or federal regulations on food content and labeling.

In Georgia, Governor Sonny Perdue (R) recently signed H.B. 1519, obesity liability reform legislation that prohibits lawsuits for damages against

manufacturers, distributors, sellers, or advertisers of food by plaintiffs who claim weight gain or obesity caused by long-term consumption of food, unless the alleged weight gain results from a material violation of state or federal regulations on food content and labeling.

And in Missouri, similar legislation awaits Governor Bob Holden's (D) signature. H.B. 1115 limits lawsuits for damages against purveyors of food for obesity or obesity-related illnesses.

At the federal level, 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.

## Legal Literature

- [7] **"Take That Tobacco Settlement and Super-Size It! The Deep-Frying of the Fast Food Industry?" Jonathan Goldman (law student), 13 *Temp. Pol. & Civ. Rts. L. Rev.* 113 (2003)**

This law-student comment begins with the increasingly popular presumption that fast-food companies are about to be sued by a number of overweight plaintiffs, then purports to examine "the very real health hazards and policy predicaments that precipitated these lawsuits" as well as "the prior legal actions against the tobacco industry which are the current lawsuits' historical precedent." The author's prediction: "while the plaintiffs in these cases may lose some legal battles along the way, the American public as a whole will ultimately win the war against the fast food industry."

The article's first section "squarely places these lawsuits against the fast food industry in the arena of political and civil rights and in the context of contemporary policy and politics. The second

section examines how the tobacco litigation created both the novel tort theories and the legal and societal precedent that made the ground fertile for these lawsuits. The third section [evaluates] the validity of the plaintiffs' claims and their potential for success. The conclusion summarizes specific comparisons between the tobacco claims and the claims against the fast food industry in terms of likelihood of success and offers predictions and recommendations for the future." To receive a copy of this article, please click [here](#).

## Other Developments

- [8] **New Treatment Guidelines Implicate Obesity in Rising Blood Pressure Levels of U.S. Youth**

Blood pressure screening for children should begin at age 3, according to revised federal hypertension treatment guidelines unveiled last week by the National High Blood Pressure Education Working Group. "The strong association of high blood pressure with obesity and the marked increase in the prevalence of childhood obesity indicate that both hypertension and prehypertension are becoming a significant health issue in the young," the chair of the working group was quoted as saying. The revised guidelines are scheduled to be published in the July 2004 of *Pediatrics* and recommend dietary modification and regular physical activity to help prevent hypertension in youth. See *Associated Press* and *American Society of Hypertension News Release*, May 20, 2004.

## Media Coverage

- [9] **Katy McLaughlin and Jane Spencer, "Take Two Grass-Fed Steaks and Call Me in the Morning," *The Wall St. Journal*, May 25, 2004**

This article discusses the fast-growing \$13.6 billion "functional" food and beverage business



– those products that promise health benefits – and food manufacturers’ technique of marketing them directly to physicians in the hope that doctors will recommend specific brands to their patients. “When patients get samples from their doctors, it’s a more authoritative referral, whether it’s a prescription drug, or a food product,” an Alberto-Culver executive is quoted as saying. Examples of functional foods include sugar and butter substitutes, baked snacks and juice beverages. According to the article, consumer activists claim such marketing strategies, which might include food company gifts or grants to physicians or medical groups, raise ethical concerns similar to those faced by the pharmaceutical industry in the marketing of its products to the medical community.

## Scientific/Technical Items

### Obesity

#### [10] Two New Studies Endorse Low-Carbohydrate Diets

Two studies published in the May 18, 2004, issue of the *Annals of Internal Medicine* concluded that individuals on low-carbohydrate diets can effectively lose weight and improve blood levels of both HDL (“good”) cholesterol and triglycerides. In the first study, researchers assigned 132 severely overweight adults to either a low-carbohydrate diet or a

conventional low-fat weight loss diet and followed the individuals for one year. (L. Stern, et al., “The Effects of Low-Carbohydrate Versus Conventional Weight Loss Diets in Severely Obese Adults: One-Year Follow-Up of a Randomized Trial,” *Annals of Internal Medicine* 140: 778-785, 2004.) Initially, individuals on the low-carbohydrate diet lost weight faster than those on the low-fat diet. Patients in the low-carbohydrate group also had more favorable levels of triglycerides and high-density lipoprotein cholesterol than patients on the low-fat diet. At the end of one year, however, weight loss and other metabolic factors were similar in the two diet groups.

A second study published in the journal reported similar results. (W. Yancy, et al., “A Low-Carbohydrate, Ketogenic Diet Versus a Low-Fat Diet to Treat Obesity and Hyperlipidemia,” *Annals of Internal Medicine* 140: 769-777, 2004). This study involved 120 overweight people who were followed for six months. Individuals assigned to the low-carbohydrate diet group lost an average of 26 pounds compared to a loss of 14 pounds by individuals on the low-fat diet. Blood triglyceride levels and HDL cholesterol levels in the low-carbohydrate group were significantly improved over levels found in individuals in the low-fat diet group. Changes in LDL or “bad” cholesterol levels were not significantly different for either the low-carbohydrate group or the low-fat group at 6-month follow-up. Both studies were funded by the Robert C. Atkins Foundation.

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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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