

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] Senate Repeals Exemption to Organic Food Standards

Senate lawmakers have reportedly approved bipartisan legislation (S. 457) that repeals a last-minute provision added to the Omnibus Appropriations Bill that would have allowed producers to label dairy and meat products as “organic” even though the products did not meet U.S. Department of Agriculture criteria for such designation. The rider was added to the bill by Representative Nathan Deal (R-Ga.) to benefit Georgia-based Fieldale Farms Corp., which reportedly argued that limited amounts of organic feed made it impossible to raise large flocks of organic chickens.

“We need to send a message to all producers that if you want the economic rewards of selling organic products, you must follow the standards that others are following,” Senator Patrick Leahy (D-Vt.), co-sponsor of the Organic Restoration Act, was quoted as saying. “If a few beef, poultry, pork, and dairy producers are able to label their products organic without using organic feed, which is one of the primary inputs, then what exactly is organic about their products?” Leahy asked. Companion legislation to S. 457 in the House of Representatives reportedly has more than 100 co-sponsors. *See Associated Press*, April 4, 2003; *Greenwire*, April 7, 2003.

State/Local Initiatives

[2] Proposed Connecticut Legislation Would Require Sale of Healthy Foods in Schools

A proposed bill in the Connecticut General Assembly would prohibit the sale of foods with “minimal nutritional value” in all public schools. Under House Bill 6328, the sale of chewing gum, soft drinks, most frozen desserts, candy, any juice products not containing 100 percent fruit juice, and any other foods containing more than 8 grams of fat per serving would be prohibited in cafeterias, school stores and school vending machines. “Given the prevalence of poor nutrition and obesity in children, junk food should not be readily available in school,” the executive director of End Hunger Connecticut Inc. was quoted as saying. A Bridgeport public schools’ spokesperson reportedly predicted that such restrictions would leave schools with few offerings. “Peanut butter would be knocked off our menu. Pizza would be knocked off our menu,” she said. “What would we be left with?” *See Connecticut Post*, March 29, 2003.

Litigation

Obesity

[3] *Pelman v. McDonald’s Corp.*: Court Denies Third Party Motion to Join Litigation

U.S. District Court Judge Robert Sweet has denied a [motion](#) to join the proposed class action initiated



by overweight teenagers and their parents against McDonald's Corp. A 43-year-old woman with breast cancer filed the *pro se* motion, stating in an affidavit that her eating habits, including eating at McDonald's weekly for 22 years, caused the disease. In his April 7, 2003, order, Judge Sweet reports that third party Rivka Robbin Freeman originally sought to get involved in the litigation while defendant's motion to dismiss the first complaint was pending. Offering her services as an "independent nutritionist," Freeman apparently "suggested that the complaint be expanded to allege claims against other defendants, including beef and chicken producers, pesticide manufacturers, producers of *trans* fat products, health care insurers, and the Department of Health and Mental Hygiene." She also recommended that she be appointed "to assist McDonald's in 'balanced meals training' at a base pay of \$500,000 in addition to bonuses and stock options."

Freeman subsequently sought to join as a plaintiff under Rule 19(a) of the Federal Rules of Civil Procedure and requested orders (i) certifying the class, (ii) enjoining McDonald's from selling products containing chemically altered hydrogenated *trans* fat, (iii) requiring that McDonald's find a supplier for salad dressings without chemically altered hydrogenated oil or omega-6 oils, (iv) enjoining McDonald's from cooking fries in chemically altered hydrogenated oil, (v) requiring that McDonald's sell only grilled meat, chicken and fish, and (vi) requiring McDonald's to advertise information on balanced meals, including Freeman's theory of "Zone Guidelines."

Applying rules on joinder and stating that "there are no necessary parties lacking from this controversy," the court acknowledged Freeman's sincere desire to be part of the lawsuit, but stated, "Freeman's desire alone ... is insufficient to establish

that the plaintiffs' lawsuit cannot continue without her." The court also noted the media attention given to the case, observing "It is only natural that this interest will result in others seeking to join the plaintiffs in their fight against 'Big Food,' whether as a cause celebre or, as with Freeman, to pursue their own agenda and concerns with the fast food industry." According to the court, if the newly amended complaint survives "a likely" motion to dismiss and if the class is certified, "a number of minors and their parents will have the opportunity to join this action."

Other Developments

[4] California Physicians Call for Mercury Warning Labels

The California Medical Association (CMA) has reportedly adopted a resolution that (i) calls for warning labels on fresh, packaged and canned fish, such as tuna, that is high in mercury; and (ii) encourages doctors to educate their patients about the purported dangers of mercury in food and advise pregnant women and children to limit consumption of fish with significant mercury levels. The resolution will apparently be referred to the American Medical Association's annual meeting in June 2003. According to a news source, 10 groups, including Physicians for Social Responsibility, have also called on the state's attorney general to add canned tuna to the products that should have warning labels under Proposition 65. Further information about the attorney general's Proposition 65 enforcement action against major grocery chains seeking mercury warnings on fish appears in issue 14 of this Update, January 22, 2003.

The U.S. Tuna Foundation has countered CMA's action by declaring that "canned tuna continues



to be a safe, convenient, affordable, and delicious source for consumers to get the valuable protein, vitamins and nutrients found in fish." According to the foundation, all fish contains some methylmercury "and the trace amounts in canned tuna are well within all safety levels established by the U.S. federal government and international health agencies." Meanwhile, responding to some press reports that it had changed its policy about what constituted a safe level of mercury in food, the U.S. Food and Drug Administration has reiterated that it stands by its action level of 1 part per million of methylmercury in fish. *See San Francisco Chronicle*, April 2, 2003; and *BNA Daily Environment Report*, April 8, 2003.

[5] **Childhood Obesity Prevention Campaign Targets Junk Food Marketing in Schools**

A non-profit organization based in Portland, Oregon, has launched an anti-obesity initiative to prohibit the marketing, distribution and sale of junk food in public schools. Claiming that "purveyors of junk food increasingly are able to use public schools as a platform for their marketing campaigns," [Commercial Alert](#) reportedly sent its childhood obesity prevention agenda to state legislators and health and education officials nationwide urging them to end exclusive marketing deals between snack-food and beverage manufacturers and school districts. According to [Commercial Alert](#), such contracts allow the in-school television program Channel One to broadcast "two minutes of ads each school day to 5.7 million children in 12,000 schools, including ads for Hostess Twinkies, Pepsi, Mountain Dew, M&Ms, and Snicker's bars."

The group's efforts have been endorsed by many public health organizations and individuals, including the Center for Science in the Public Interest, Harvard School of Public Health Professor Walter Willett and *Fat Land* author Greg Critser. A spokesperson for

the Washington, D.C.,-based Center for Consumer Freedom was quoted as saying the campaign is "misguided" in seeking to "demonize particular foods" and "force our decisions" about what to eat or drink. *See The New York Times*, April 4, 2003.

[6] **Health Officials Criticize Chocolate Maker's School Promotion**

According to a press report, concerns have been raised about Cadbury's efforts to bring "free" sports equipment to schools in the United Kingdom by having children collect and redeem product vouchers. Critics have criticized the initiative as an effort to mislead children into associating chocolate with fitness and believing that obesity is linked to exercise but not to diet. Such marketing schemes are expected to succeed given the shortage of funds for non-core activities such as sports.

Meanwhile, Nestle is reportedly planning to capitalize on health-related concerns by offering bite-sized versions of its candies. The launch of Kit Kat Kubes is expected in October 2003 to take advantage of consumer-calorie consciousness. A news source reports that the strong sales performance of such products, however, may suggest that consumers may be deceiving themselves by actually eating and spending more. In Europe, only 1 percent of those who attempted to diet in 2002 achieved permanent weight loss, due apparently to sporadic diet attempts and the difficulty of the endeavor. *See datamonitor.com*, March 27 and April 1, 2003.

[7] **McDonald's Announces Healthy Lifestyles Initiative**

McDonald's Corp. has announced that it will be taking steps to promote healthy lifestyles, physical fitness and better nutrition awareness worldwide. The company is apparently working with the U.S. Department of Health and the World Health Orga-



nization “to help educate consumers about the role nutrition and fitness play in maintaining healthy lifestyles.” Part of the initiative involves offering packaged children’s meals that include fresh fruits and vegetables, yogurt and non-carbonated beverages. The company will also target new demographic groups by changing its décor and menu offerings. Many restaurants will be equipped with wireless Internet connections, for example.

Meanwhile, other food and beverage companies are also reportedly looking to rid themselves of the “junk food” tag by offering alternatives to soft drinks, chips and burgers, such as fruit juices and non-fattening snacks. According to a news source, such changes have likely been prompted by litigation and the concerns of health activists, although McDonald’s denies such claims. See *Dow Jones Business News*, March 26, 2003; *Food Ingredients First*, March 31, 2003; and *The New York Times*, April 8, 2003.

Scientific/Technical Items

Obesity

[8] IARC Report Attributes Variety of Health Conditions to Poor Diet

A new International Agency for Research on Cancer (IARC) report claims that a Western lifestyle “characterized by a highly caloric diet, rich in fat, refined carbohydrates and animal protein, combined with low physical activity” is associated with “a multitude of disease conditions, including obesity, diabetes, cardiovascular disease, arterial hypertension, and cancer.” Titled *The World Cancer Report*, the 351-page document asserts that obesity is an independent predictor of increased risks of uterine endometrium, kidney and gall bladder cancers. IARC is an agency of the World Health Organiza-

tion. See *World Health Organization Press Release*, April 3, 2003.

[9] Obese Kids Rank Quality of Life as Low; JAMA Devotes Entire Issue to Obesity Studies

Severely obese children and adolescents report health-related quality of life scores as low as those of young cancer patients, according to a study published this week in the *Journal of the American Medical Association (JAMA)*. “Health-Related Quality of Life of Severely Obese Children and Adolescents,” J.B. Schwimmer, et al., *JAMA* 289(14): 1813-1819, 2003. Researchers determined that in addition to reporting obesity-related ailments (i.e., fatty liver disease, obstructive sleep apnea, diabetes, and orthopedic problems), overweight youngsters noted significant emotional impairment. Emotional impacts were reported absent any physical conditions; teasing at school, difficulties playing sports and fatigue all influence general well-being. These study results come amid growing concern over the nation’s obesity epidemic and recent data suggesting that 15 percent of children in the United States are overweight or obese. The April 9 edition of *JAMA* is devoted entirely to obesity studies, the majority of which purport to investigate improvements in physical and emotional health as a result of weight-loss intervention.



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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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