

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration

[1] Produce Safety Action Plan Topic of Upcoming FDA Meeting

FDA is holding a [public meeting](#) on June 29, 2004, in College Park, Maryland, to solicit feedback from key stakeholders regarding elements of the agency's forthcoming produce safety action plan titled *Produce Safety from Production to Consumption: An Action Plan to Minimize Foodborne Illness Associated with Fresh Produce*. The draft plan covers fresh fruits and vegetables that have not been processed to reduce or eliminate pathogens. Issues the agency intends to address at the meeting include (i) intervention strategies to prevent contamination of fresh produce, (ii) the role of federal, state and local agencies in implementing different parts of the action plan, and (iii) food safety systems or standards the agency should include in the action plan. *See Federal Register*, June 15, 2004.

Litigation

Alcohol Youth-Marketing Allegations

[2] Ohio Parents File Sixth Purported Class Action Against Alcohol Companies

A class-action [complaint](#) filed last week in state court in Cleveland, Ohio, alleges that manufacturers of spirits,

beer and flavored malt beverages have engaged in “a long-running, sophisticated, and deceptive scheme...to market alcoholic beverages to children and other underage consumers.” *Tully v. Anheuser-Busch, Inc.*, No. CV 04 532269 (Court of Common Pleas, Cuyahoga County, Ohio) (complaint filed June 8, 2004).

Tully is the second purported class action against alcohol companies filed in Cuyahoga County this year. The first case, *Eisenberg v. Anheuser-Busch, Inc.*, has been pending since late April. Defendants removed Eisenberg to the U.S. District Court for the Northern District of Ohio on June 7. Cleveland attorney John Chapman represents plaintiffs in both *Eisenberg* and *Tully*. Plaintiffs in each case have other counsel, too, but Chapman is the only plaintiffs' counsel whose name appears on both complaints.

Plaintiffs Michael and Sue Tully allege that they are “parents of children who have been subject to and are being subjected to defendants' unlawful and unjust marketing campaign.” Plaintiffs purport to represent two classes: a guardian class “consisting of all persons who were or are parents or guardians of children whose funds were used to purchase alcoholic beverages marketed by defendants which were consumed without their prior knowledge by their children under the age of 21 during the period 1982 to the present”; and an injunctive class consisting of the parents and guardians of all children currently younger than age 21.

Plaintiffs identify two statutory theories of recovery: (1) corrupt activity under the state's Pattern of Corrupt Activity Law and (2) unfair and deceptive trade practices



under Ohio's Consumer Sales Practices Act. In addition, plaintiffs seek recovery under the common-law theories of unjust enrichment, negligence and civil conspiracy.

Eisenberg is the sixth purported class action filed against alcoholic-beverage manufacturers since November 2003. The other five cases are pending in the District of Columbia, Colorado, North Carolina, California, and Ohio.

An individual lawsuit containing youth-advertising allegations against alcohol companies is pending in Oregon. What was a second individual lawsuit, *Pisco v. Coors Brewing Co.*, filed in state court in Nevada, has been [dismissed](#) with prejudice.

Atkins Diet

[3] Florida Man Sues Atkins Company and Estate, Claims Heart Damage

A 53-year-old man who claims that the food he ate on the Atkins diet damaged his heart has filed a consumer-deception lawsuit in Florida state court against Atkins Nutritionals, Inc., and the estate of Dr. Robert C. Atkins. *Gorran v. Atkins Nutritionals, Inc.*, Case No. Unknown (County Court for Palm Beach County, Florida) (filed May 27, 2004). Plaintiff Jody Gorran is receiving legal counsel and assistance from the Physicians Committee for Responsible Medicine, which maintains an [online registry](#) for health complaints that dieters attribute to the Atkins regimen. The registry has logged "more than 560 complaints of illnesses and fatalities," according to the committee.

Gorran's [complaint](#) alleges that he followed the Atkins diet from May 2001 through October 2003, all the while relying on defendants' assurances and representations, including "the promise" that "you can eat all you want, lose weight and stay healthy, so long as you restrict carbohydrates."

Gorran further claims that after just two months on the Atkins diet, his total cholesterol had risen from a safe level "to the danger range, well over 200 mg/dl." Eventually, he alleges, he developed severe chest pain and required angioplasty and a stent.

Gorran seeks damages "of less than \$15,000" under Florida's Deceptive and Unfair Trade Practices Act as well as common-law claims of negligent misrepresentation and product liability. He also requests "a permanent injunction preventing [defendants] from promoting and marketing their diet and products unless each such product and all marketing materials used have warnings deemed adequate by the Court to advise consumers of the risks of the Atkins diet."

Negligence

[4] Claiming Severe Respiratory Damage, Iowa Popcorn Plant Worker Files Suit Against Flavoring Manufacturers

A worker in a Sioux City, Iowa, popcorn factory has sued four flavoring companies, claiming exposure to butter flavoring used in the manufacture of Jolly Time microwave popcorn has caused "sustained, severe, permanent and progressive damage to the lungs, severe damage to the respiratory system, and impairment of the ability to function." Filed in Woodbury County District Court, Kevin Remmes' lawsuit reportedly accuses New York-based International Flavors and Fragrances Inc., Carol Stream, Illinois-based Flavors of North America Inc., Cincinnati-based Givaudan Inc., and Indianapolis-based Sensient Flavors Inc., of failing to warn workers about the dangers associated with the product or provide adequate safety instructions. The National Institute of Occupational Safety and Health has linked inhalation of vapors emitted by diacetyl, a chemical constituent of the



butter flavoring, to the development of bronchiolitis obliterans. Remmes' employer, American Popcorn Co., is not a named defendant in the lawsuit. *See Associated Press*, June 9, 2004.

In March 2004, a jury in Jasper County, Missouri, awarded \$20 million to a former popcorn plant worker and his wife on their claims that exposure to the butter flavoring used to make microwave popcorn caused irreparable harm to his lungs.

Other Developments

[5] Public Interest Group Urges FTC to Investigate Interactive Food Marketing Aimed at Kids, "Tweens" and Teens

A Washington, D.C.-based public interest group "devoted to ensuring that the digital media fulfill its democratic potential" has asked the Federal Trade Commission (FTC) to evaluate the interactive marketing and branding techniques advertisers use to target American youth. In a June 8, 2004, [letter](#) to FTC Chair Timothy Muris, the Center for Digital Democracy (CDD) claims the "immersive, relational, and ubiquitous nature [of interactive marketing] raises serious questions about the ability of existing safeguards and rules to protect our nation's children and young people." More specifically, the group asks FTC to "use its subpoena power, if necessary, to obtain from the advertising and marketing industries all relevant documents that provide information on the exact nature of the techniques used; any relevant research done within these industries or through private contract to university or independent research centers; any relevant documents/case studies

that might reveal the range of psychosocial impact on the child/youth population, including cognitive processes, emotional development, and identity formation. The Commission should also focus on the techniques and research related to food consumption, examining the intended impact of digital marketing techniques on children's health, especially relating to obesity concerns. The scope of the review should include Web sites targeted to children/youth, videogames, and new digital TV technologies." CDD recommends that FTC impose a moratorium "on any marketing techniques that – in the absence of independent research suggesting otherwise – could potentially harm or negatively affect children and youth."

A spokesperson for the Association of National Advertisers was quoted as saying that CDD's letter is a "classic example of verdict first, trial later" that misrepresents "all interactive advertising as though it is an illicit activity." Organizations supporting the CDD campaign include the American Psychological Association, the American Academy of Pediatrics and Children Now. *See Ad Age* and *CDD News Release*, June 8, 2004.

[6] Regulatory Issues to Highlight European Food Law Conference

European Commission Public Health Minister David Byrne will address the issues of food labeling and health claims in a keynote [speech](#) during a June 29-30, 2004, conference titled "European Food Law 2004" in Brussels, Belgium. Other speakers at the event will address junk food taxes as a potential tool to combat obesity, bioterrorism in relation to food safety, acrylamide, food industry advertising practices, and genetically modified food products.



Scientific/Technical Items

Obesity

[7] Fructose May Affect the Hormones Involved in Appetite Regulation

A recent study in *The Journal of Clinical Endocrinology and Metabolism* (K. Teff, et al. "Dietary Fructose Reduces Circulating Insulin and Leptin, Attenuates Postprandial Suppression of Ghrelin, and Increases Triglycerides in Women," 89(6): 2963-2972, 2004) reports that consumption of fructose, a form of sugar found in corn syrup, honey and fruit, may alter the levels of hormones involved in appetite regulation and may lead to overeating. Following a meal, study subjects consumed a drink flavored with approximately the same amount of fructose found in two cans of soft drinks. The individuals showed relatively low levels of insulin and leptin, hormones that help people know when they have eaten enough, and high levels of ghrelin, a hormone that stimulates eating. Consumption of the fructose drink was also associated with a spike in triglyceride levels, a blood fat that has been associated with an increased risk for cardiovascular disease. The researchers found that consumption of fructose-containing drinks tended to depress levels of insulin and leptin to a greater extent than did drinks flavored with glucose, another form of sugar. Glucose, but not fructose, stimulates insulin secretion and regulates leptin production, which may explain why glucose-sweetened beverages may not encourage

overeating as much as fructose drinks. When glucose triggers insulin release from the pancreas, it signals people that they are no longer hungry. See *Reuters*, June 9, 2004.

[8] "Empty" Calorie Food Consumption in the American Diet on the Rise

Sweets and desserts, soft drinks and alcoholic beverages constitute nearly one-third of all calories that Americans consume, according to a study in the June issue of the *Journal of Food Composition and Analysis*. The research compared food consumption among adults from two U.S. National Health and Nutrition Examination Surveys (NHANES), 1999-2000 and 1988-1994. The data indicate that soft drinks and pastries are among the top 10 foods contributing the most calories to the American diet. Soft drinks contribute 7.1 percent of the total calories consumed in the adult population, up slightly from 6 percent of total calories consumed during the 1988-1994 time period. Hamburgers, pizza and potato chips round out the top five food-item categories, while fruits and vegetables make up only 10 percent of total caloric intake. Lead author Gladys Block of the University of California at Berkeley was quoted as saying the data suggest "a large proportion of Americans are undernourished in terms of vitamins and minerals. You can actually be obese and still be undernourished with regard to important nutrients. We shouldn't be telling people to eat less, we should be telling people to eat differently." See *Reuters* and *Health Talk.com*, June 2, 2004.



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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 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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