

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

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

##### [1] USDA Solicits Public Comment on Revised Food Guidance System

In concert with the ongoing revision of the *Dietary Guidelines for Americans*, USDA is [requesting public comments](#) on a proposed graphic image (i.e., Food Guide Pyramid) and the motivational and educational messages for its new Food Guidance System. More specifically, the agency seeks input on (i) configuration of the graphic, (ii) ways to increase awareness and motivation for utilizing the information, (iii) ways to help consumers personalize the system, (iv) content of the educational messages, (v) interactive tools to demonstrate the messages, and (vi) communication delivery channels for the messages. A public meeting for interested stakeholders has been scheduled for August 19, 2004, at USDA headquarters in Washington, D.C.; written comments regarding the Food Guidance System must be submitted by August 27. *See Federal Register*, July 13, 2004.

#### United Kingdom (UK)

##### [2] FSA Finalizes Action Plan on Food Promotions and Children's Diets

After lengthy evidence gathering and public consultation, Britain's Food Standards Agency (FSA) has finalized [recommendations](#) that address ways of reducing the nation's incidence of childhood obesity. "This action plan sets clear targets and timetables for the measures that can start to improve the balance of children's diets and their health," FSA Chair Sir John Krebs was quoted as saying. Elements of the action plan include (i) working with industry to reduce levels of fat, sugar and salt in processed foods marketed to kids and revising labeling rules to reflect same, (ii) encouraging industry to use celebrities or cartoon characters in campaigns that promote healthier foods, (iii) encouraging schools to offer healthier foods, and (iv) having the Advertising Standards Authority review current regulations pertaining to food advertising aimed at kids. *See FSA News Release*, July 6, 2004.



## Litigation

### Deceptive Trade Practices

[3] ***Fettke v. McDonald's Corp.*, No. CV04-02754-WHA (U.S. District Court, Northern District, California) (filed July 8, 2004)**

A purported class action lawsuit filed July 8, 2004, in San Francisco alleges McDonald's Corp. failed to switch to a lower-*trans*-fat cooking oil by the end of February 2003, a date stated in a 2002 McDonald's USA press release that, according to the complaint, received extensive news coverage. The complaint also alleges that McDonald's subsequent February 2003 press release stating that the company planned "to extend the timeframe" for introducing a change in its cooking oil was not given effective publicity, that class members were not effectively informed, and that the consequences include increased health problems. The class is defined as all persons who have consumed McDonald's French fries, Chicken McNuggets, Filet-O-Fish, Hash Browns or crispy chicken sandwiches since March 1, 2003, and all persons who consume these products in the future "until McDonald's effectively informs the public that it has not made the announced oil change."

Plaintiffs' attorney, Stephen Joseph, previously sued McDonald's in California state court over the *trans* fat issue on behalf of BanTransFat.com, Inc, an organization he founded. That suit, filed in October 2003, is still pending. He also filed an earlier suit on behalf of BanTransFat.com, Inc. against Kraft Foods over the *trans* fat content of Oreos cookies.

The present complaint enumerates claims for violation of consumer protection statutes, fraud, breach of contract, negligence, breach of warranty, and strict product liability, and seeks disgorgement and restitution, compensatory damages, punitive damages, prejudgment interest, attorney's fees, and costs. Plaintiff Katherine Fettke evidently plans to donate any monetary proceeds from the lawsuit to the Larry King Cardiac Foundation and "encourages and requests all Class Members to agree to contribute any and all monetary proceeds to the Larry King Cardiac Foundation or alternatively to one or more non-profit organizations to be used for the education of children or the public generally about the dangers of *trans* fats." A case management conference has been scheduled for October 14.

## Free Trade

[4] **French Law Prohibiting Indirect Television Advertising of Alcoholic Beverages Justified, Says European Court of Justice**

The Luxembourg-based European Court of Justice ruled yesterday that certain alcohol advertising provisions of France's *loi Evin* are "compatible" with European Union law and "justified by the aim of protecting public health." The provisions at issue ban French television broadcasters from allowing alcohol advertising posted in sports venues from appearing on screen during international sporting events if the broadcasts are aimed specifically at French viewers. The European Commission and spirits manufacturer Bacardi argued that the French law contravened free market principles behind the EU's single market. See *Associated Press*, July 13, 2004.



## Warnings

### [5] Claiming Lead Contamination, California AG Files Lawsuit Against Candy Manufacturers and Importers

Late last week, California Attorney General Bill Lockyer filed suit under the state's antitoxics law against 33 Mexican candy manufacturers and importers for their failure to warn consumers that certain candies contain what the state's Department of Health Services deems "potentially harmful levels of lead." Proposition 65 (Prop. 65), the Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses to warn the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity"; the law does not apply to chemicals that occur naturally in food.

Filed July 9, 2004, in Los Angeles Superior Court against major Mexican candy makers and two subsidiaries of the U.S.-based Mars Inc., the lawsuit seeks to prohibit the sale of particular chili- and tamarind-flavored Mexican candy products that do not provide warnings of the potential adverse health effects related to lead exposure. According to an April 2004 Food and Drug Administration advisory, chili powder can be contaminated with lead during its manufacturing process, while tamarind-flavored candies can be contaminated by ceramic packaging whose glaze may leach lead into the candy. A spokesperson for the National Confectioners Association was quoted as saying that the candies at issue are safe and comply with all U.S. and Mexican food safety laws, including Prop. 65, which "doesn't require warnings for trace amounts of naturally occurring substances in foods." See *Confectionary Industry Statement Regarding Mexican Candy*, July 9, 2004; *Associated Press*, July 12, 2004.

## Hepatitis A

### [6] Bankruptcy Court Approves Additional Chi-Chi's Settlements

A U.S. bankruptcy court in Delaware has reportedly approved the distribution of \$2.18 million to 60 people sickened in the nation's largest hepatitis A outbreak. Raw green onions shipped from Mexico are thought to be responsible for the fall 2003 outbreak that killed four people and sickened more than 600 patrons of a Chi-Chi's restaurant in suburban Pittsburgh. According to a news source, the restaurant chain plans to seek assistance in paying the claims from the Mexican growers and the Kentucky supplier of the green onions. See *Associated Press* and *The Pittsburgh Tribune-Review*, June 30, 2004.

## Other Developments

### [7] British Physicians Call for Government to Ban Alcohol Advertising and Mandate Effective Food Product Labeling

Noting that the U.K. government "cannot simply proclaim 'choice' as a euphemism for individual responsibility and as an excuse to abdicate its own," the British Medical Association (BMA) has issued a series of [recommendations](#) in response to the Department of Health's request for input regarding possible strategies to improve public health. Health officials are expected to incorporate suggestions received during the "Choosing Health?" consultation in a forthcoming white paper later in 2004. Among other things, BMA's recommendations address smoking, nutrition, exercise, alcohol, and sexual health. With respect to alcohol, BMA calls for (i) a government prohibition on alcohol product



advertising, (ii) more explicit labels that caution consumers of alcohol's possible health effects and (iii) a tax policy wherein products with lower alcohol content are less expensive than those with higher alcohol content. Food-related recommendations include those advocating government-mandated nutrition labeling that is clear and consistent, and government monitoring of the efficacy of "fat taxes" in other countries. See *BMA Press Release*, July 9, 2004.

## Scientific/Technical Items

### Cardiovascular Disease

#### [8] New Government Guidelines Urge More Aggressive Cholesterol-Lowering Therapies

New guidelines endorsed by the National Heart, Lung and Blood Institute, the American College of Cardiology and the American Heart Association, recommend aggressive reductions in low-density lipoprotein cholesterol (LDL-C) levels in patients who have a high or moderate risk for coronary heart disease. (S. Grundy, et al., "Implications of Recent

Clinical Trials for the National Cholesterol Education Program Adult Treatment Panel III Guidelines," *Circulation* 110: 227-239, 2004.) The guidelines acknowledge that therapeutic lifestyle changes remain essential to clinical management of risks for heart disease, while also emphasizing the benefits of cholesterol-lowering drug therapies that have been confirmed by recent clinical trials. The guidelines establish a new treatment goal for lowering low-density lipoprotein cholesterol to less than 100 mg/dL, 30 milligrams below the former recommended goal. When risk is very high, the guidelines suggest an LDL-C goal of less than 70 milligrams as a therapeutic target. The new guidelines also recommend extending LDL-lowering therapy to both patients with diabetes and the elderly. For individuals with high triglyceride or low high-density lipoprotein cholesterol (HDL-C) levels, the guidelines urge combining a fibrate or nicotinic acid medication with an LDL-lowering statin drug. The goal of LDL-lowering drug therapy in high- or moderately high-risk individuals should be sufficient to achieve at least a 30 to 40 percent reduction in LDL-C levels, according to the new guidelines.



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## LITIGATION UPDATE

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