

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Initiatives

[1] Congressional Lawmakers Consider Obesity-Related Legislation

Proposed legislation sponsored by Senator William Frist (R-Tenn.) would amend the Public Health Services Act to address obesity-related issues. S. 2821, the Improved Nutrition and Physical Activity Act (IMPACT Act), notes that an estimated 61 percent of U.S. adults and 13 percent of U.S. children are overweight or obese and would therefore establish grants to provide improved nutrition, physical activity and obesity prevention programs. Specific provisions of the proposal include (i) analyzing Department of Agriculture food and nutrition programs to determine how they could better address weight-related issues, (ii) creating a Medicare demonstration project to reduce obesity in older Americans, (iii) providing grants to local health care systems for obesity prevention programs, and (iv) establishing a national campaign that targets children's health behaviors. The bill has been referred to the Senate Committee on Health, Education, Labor and Pensions. A companion bill, H.R. 5412, has been introduced in the House of Representatives by Representative Mary Bono (R-Calif.). A news report indicates that 16 states have passed obesity-related legislation that generally provides for obesity research and health-awareness campaigns. *See Associated Press, September 20, 2002.*

[2] Proposed Legislation Addresses Allergenic Substances in Food

Senator Edward Kennedy (D-Mass.) introduced legislation in May 2002 (S. 2499) that would amend the Food, Drug, and Cosmetic Act by establishing requirements for labels on food to identify known food allergens contained therein. Under the Food Allergen Consumer Protection Act, "known food allergens" would include milk, eggs, fish, Crustacea, tree nuts, wheat, peanuts, soybeans, other grains containing gluten, and any food that the secretary of the Department of Health and Human Services (HHS) determines to cause allergic or adverse reactions which endanger human health. The labeling requirement would also apply to spices, flavorings, colorings, or incidental additives that are or contain a known food allergen. Other provisions of the proposed bill would require the HHS secretary to issue rules addressing the use of good manufacturing processes to minimize the unintentional presence of allergens in food and advisory labeling if such allergens are unintentionally present. The secretary would also be required to publish annually national data on the prevalence of food allergies and the incidence of deaths and injuries. S. 2499 has cleared the Senate Committee on Health, Education, Labor, and Pensions by way of an amendment in the nature of a substitute, S. 3001, and is now headed to the Senate floor. Companion legislation in the House of Representatives (H.R. 4704) was sponsored by Representative Nita Lowey (D-N.Y.).



State/Local Initiatives

[3] Los Angeles School District Imposes Ban on Carbonated Soft Drinks

Citing a desire to combat childhood obesity and attendant health effects, the Los Angeles Unified School District voted unanimously in late August 2002 to extend an existing ban on soft drink sales in elementary schools to the district's approximately 200 middle and high schools. The district reportedly includes some 748,000 students on 677 campuses.

As of January 2004, the only beverages authorized for sale in the district "before, during, and until one half hour after the end of the school day at all sites accessible to students shall be: fruit based drinks that are composed of no less than 50 percent fruit juices and have no added sweeteners; drinking water; milk, including, but not limited to, chocolate milk, soy milk, rice milk, and other similar dairy or non-dairy milk; and electrolyte replacement beverages and vitamin waters that do not contain more than 42 grams of added sweetener per 20 ounce serving."

The soft drink ban was evidently championed by the California Center for Public Health Advocacy, a group that spearheaded passage of the Pupil Nutrition, Health and Achievement Act of 2001, a state law which sets nutritional standards for food sold in elementary, middle and high schools. *See Motion to Promote Healthy Beverage Sales in the LAUSD and Associated Press*, August 27, 2002.

Litigation

Fast Food

[4] Two Class Actions Claim Fast Food Is Responsible for Obesity and Health Problems

New York attorney Samuel Hirsch has filed lawsuits against fast food companies on behalf of two

classes of plaintiffs who are allegedly obese and have developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and other adverse health effects from consuming defendants' products. *Barber v. McDonald's Corp. et al.*, Index # 23145/2002 (Supreme Court, New York) (filed July 24, 2002); *Pelman v. McDonald's Corp.*, Index # 24809/2002 (Supreme Court, New York) (filed August 22, 2002). The cases involve a class of adult plaintiffs and a class of children. The complaints are being brought on theories of (i) unfair and deceptive practices, (ii) failure to warn, and (iii) negligence in selling products high in fat, salt, sugar, and cholesterol, and in marketing to children, in marketing addictive products, and in enticing plaintiffs to consume larger portions in "value meals" and "meal combos."

According to news sources, the named adult plaintiff, Caesar Barber, 56, did not realize that consumption of fast food hamburgers could lead to health risks. Law professor John Banzhaf, a self-proclaimed pioneer in lawsuits against cigarette manufacturers, is advising the plaintiffs and has reportedly indicated that Hirsch will be focusing on the suit involving children to the extent that they cannot be expected to be personally responsible for their health. Critics have been quoted as saying the suits have little legal merit and have more to do with making money for the lawyers who bring them than with meaningfully addressing the nation's obesity problems. *See coxnews.com*, September 19, 2002; *news.findlaw.com*, August 14, 2002.

Food Additives

[5] *Donavin v. Balance Bar Co.*, No. 412039 (Superior Court, San Francisco, California) (filed August 29, 2002)

A plaintiff alleging no harm to himself has filed an unfair competition and business practices lawsuit in California state court, on behalf of the general pub-



lic, against the company that manufactures a protein bar allegedly containing vitamin D3. According to the complaint, excess vitamin D “has the potential for toxicity. The toxicity generally develops over time, and symptoms of Vitamin D overdose include increased frequency of urination, loss of appetite, nausea, vomiting, diarrhea, constipation, fatigue, muscular weakness, dizziness, calcification of the soft tissues of the heart, blood vessels, and lungs, and in severe cases, confusion, high blood pressure, kidney failure, and coma.” The complaint further alleges that federal regulations restrict the use of vitamin D and that the protein snack bars at issue “do not fall into any of the enumerated categories” of foods in which it is permitted.

Plaintiff bases his action on unlawful business practices/unfair competition predicated on violations of the state’s (i) health and safety code due to product adulteration, (ii) the Federal Food, Drug and Cosmetics Act, and (iii) the state’s Consumer Legal Remedies Act due to product misrepresentation. The action is also based on violations of California’s Business and Professions Code for unfair advertising and unfair business practices. The relief sought includes permanently enjoining the defendant manufacturer and “Does” from failing to warn the public and inform past purchasers that their products “contain an unapproved food additive,” failing to disgorge monies acquired by unlawful or unfair business practices, failing to make restitution to the public, and failing to discontinue the practice of adding vitamin D to their products. The plaintiff also seeks fees, costs and other relief.

A case management conference has been set for January 31, 2003.

Proposition 65

[6] Plaintiffs Target Chocolate, Organic Bread and French Fries in Prop. 65 Enforcement Actions

Since May 2002 California plaintiffs have reportedly brought enforcement actions against a number of food manufacturers and fast food restaurants claiming that because carcinogens or reproductive toxicants are contained in their products, they are required to provide public warnings under the Safe Drinking Water and Toxic Enforcement Act. This law, also known as Proposition 65 (Prop.65), was approved by state voters in November 1986. It requires the governor to publish a list of chemicals known to the state to cause cancer, birth defects or other reproductive harms. Companies selling products in California must provide warnings if such substances are contained in their products. Private citizens are empowered under the Act to sue alleged violators to enjoin future violations and obtain civil penalties for past violations.

Plaintiffs in *American Environmental Safety Institute v. Mars, Inc. et al.*, No. BC273433 (Los Angeles Superior Court) (filed May 8, 2002), allege that chocolate contains the toxicants lead and cadmium and thus require Prop. 65 warnings. In July the American Council on Science and Health served a 60-day notice, a precursor to an enforcement action, on Whole Foods Markets, claiming the company’s organic whole wheat bread exposes consumers to acrylamide. This action, taken by a conservative organization, was apparently intended to illustrate the absurdity of the law and is unlikely to proceed further.

Acrylamide is also at issue in *Council for Education and Research on Toxics v. McDonald’s Corp. et al.*, No. BC280980 (Los Angeles Superior Court) (filed September 5, 2002). This complaint alleges violations of Prop. 65 and the Unfair Business Practices Act.

According to the plaintiff, "Defendants' french fries contain approximately 100 times more acrylamide than the maximum level permitted by the World Health Organization for drinking water." The California attorney general has written to the lawyers in the chocolate and french fry cases indicating that the enforcement actions may not be appropriate or in the public interest. See *calprop65.com*, September 15, 2002.

Litigation Trends

State Attorneys General

[7] Symposium to Explore Multi-Government Litigation Issues

State attorneys general, corporate counsel and leading defense and plaintiff's lawyers, involved in lawsuits against tobacco, asbestos, automobile, pharmaceutical, and gun manufacturers, will convene in November 2002 for a national symposium on government actions against business. Titled "Coordinated State Attorneys General Actions Against Business: The Rising Tide," the symposium will be held in Washington, D.C., on November 20-21 at the Renaissance Hotel. Among the topics to be addressed will be (i) "Who's Next on the Hit List?," (ii) "Is the New Strategy Essential to Government Regulation of Business?," and (iii) "Strategies for Improving Industry Relations with State Regulators." Tort reform, crisis management and expectations for international litigation will also be addressed.

Speakers will include products liability expert Victor Schwartz, renowned plaintiff's counsel Richard Scruggs, and attorneys general from Oklahoma, Iowa, Mississippi, Alabama, and New York. The corporate perspective will be represented by counsel for Pfizer, Inc., and former counsel for RJR Nabisco, Inc. The program is co-sponsored by the State Capital Global Law Firm Group and Glasser LegalWorks.

Scientific/Technical Items

Acrylamide

[8] FDA to Tackle Issue of Acrylamide in Food

The Food and Drug Administration (FDA) hosted a public meeting in late September 2002 to outline the agency's action plan to address health risks related to the presence of the chemical acrylamide in food. Acrylamide apparently forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is known to cause cancer in laboratory animals. Foods in which acrylamide develops when cooked at higher than 120 degrees Celsius include potato chips, french fries, processed cereals, and bread. Many scientists reportedly speculate that acrylamide forms when the naturally occurring amino acid, asparagine, is heated with sugars like glucose.

Actions that FDA intends to undertake in the next year include (i) measuring acrylamide levels in various foods to evaluate the dietary exposure of U.S. consumers, (ii) developing new data about the toxicology of acrylamide by collaborating with the Centers for Disease Control and the National Toxicology Program on various research studies, and (iii) encouraging other collaborative research efforts to investigate mechanisms of acrylamide formation and processes for reducing such formation.

During December, FDA reportedly intends to convene another public meeting at which agency officials will present a revised draft action plan that reflects comment from the September meeting as well as preliminary data on acrylamide levels in foods. The levels of acrylamide in McDonald's french fries are currently the focus of a California lawsuit that alleges violations of the state's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). See *FDA Draft Action Plan for Acrylamide in Food*, September 20, 2002; *New York Times*, October 1, 2002.

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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. We also welcome any leads on new developments in this emerging area of litigation.

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