

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] Senate Majority Leader Introduces Legislation Addressing Childhood Obesity

Senate Majority Leader Bill Frist (R-Tenn.) recently introduced two proposals aimed at reducing the escalating rate of obesity among American youth. “Obesity is one of the most debilitating, expensive and preventable health conditions affecting Americans,” Frist said. “By taking concrete action now to improve lifestyle habits and raise public awareness about nutrition and exercise, we can halt the spread of this dangerous and avoidable disease.” The Childhood Obesity Reduction Act ([S. 1324](#)) would encourage schools and school districts to develop and implement programs designed to reduce and prevent obesity, promote physical activity and improve nutritional choices. More specifically, the proposal would establish (i) the Congressional Council on Childhood Obesity, whose eight members would be charged with developing the Congressional Challenge to Reduce and Prevent Childhood Obesity and assisting schools in promoting successful weight-loss strategies; and (ii) the private, nonprofit National Foundation for the Prevention and Reduction of Childhood Obesity, whose duties would include providing grants to

schools and local agencies for obesity education programs.

The Improved Nutrition and Physical Activity Act ([S. 1325](#)) would (i) add obesity, being overweight and eating disorders to the list of priority conditions addressed in health professions Title VII training grants; (ii) provide more authority for the Centers for Disease Control and Prevention to gather data on fitness levels and energy expenditure among children; and (iii) direct the HHS secretary to provide a report on research that addresses obesity treatment and prevention. Both bills have been referred to the Committee on Health, Education, Labor, and Pensions. *See Press Releases of Senator Bill Frist*, June 28, 2005.

Litigation

Deceptive Trade Practices

[2] PCRM Sues Dairy Groups and Food Companies over Weight-Loss Claims

The Physicians Committee for Responsible Medicine (PCRM) has filed two lawsuits in Virginia state court alleging dairy industry trade groups and several food companies “have embarked on a massive, deceptive advertising campaign to convince Virginia consumers specifically, and Americans generally, that increased consumption of dairy products will lead to weight loss.” (*PCRM and Catherine Holmes v. Kraft Foods, Inc.*, et al., No.



CH-05-002179, Va. Cir., Alexandria City) (filed 6/28/05). (*PCRM and Catherine Holmes v. International Dairy Foods Association, et al.*, No. not available, Va. Cir., Alexandria City) (filed 6/28/05). “To stem declining sales and boost their bottom line, the dairy industry is duping overweight Americans into believing that milk and other dairy are the magic bullet to weight control,” Dan Kinburn, PCRM senior legal counsel, was quoted as saying. “We are serving notice with these lawsuits that we will not continue to let these false health claims go unchallenged.”

PCRM filed the two lawsuits on behalf of 46-year-old Catherine Holmes, a Virginia resident who allegedly relied on the dairy industry’s ad campaign advocating increased dairy consumption to facilitate weight loss, but who gained weight instead. The first lawsuit seeks class action status on behalf of Virginia residents affected by the dairy industry’s weight-loss campaign and names as defendants Kraft Foods, Inc., General Mills, Inc., Dannon Co., Inc., McNeil-PPC, Inc., International Dairy Foods Association, Dairy Management, Inc., National Dairy Council, and Lifeway Foods, Inc. The second suit seeks actual damages for Holmes and names as defendants International Dairy Foods Association, Dairy Management, Inc., National Dairy Council, Inc., and Lifeway Foods, Inc.

Among other things, plaintiffs allege that defendants’ weight-loss claims are based on the unreliable findings of the University of Tennessee’s Michael Zemel, a researcher whom both lawsuits describe as a “single industry-funded experimenter, whose studies are small, poorly controlled, reported with only minimal detail and which have yielded inconsistent results.” Plaintiffs seek (i) class action damages for alleged violations of the Virginia Consumer Protection Act and the Virginia False

Advertising Statute; (ii) \$236 in actual damages for Holmes’ dairy product purchases; (iii) a permanent injunction banning continuation of the weight-loss campaign; and (iv) corrective advertising. *See PCRM News Release*, June 28, 2005.

Other Developments

[3] Public Health Advocacy Institute Posts Resources for Safeguarding “Your Rights as a Consumer from the Food Industry”

“Americans have often relied on the court system to right wrongs when they have been injured by products or misled by companies. Today, a traditional legal tool, litigation, has been the subject of a campaign of misinformation and is under assault from the food industry,” charges the introduction to a [new section](#) of the Public Health Advocacy Institute’s (PHAI’s) Web site titled “Protect Your Rights as a Consumer from the Food Industry.” The Web site provides (i) talking points and counter-arguments to oppose proposed state and federal laws offering food manufacturers civil immunity from obesity-related claims; and (ii) sample letters to the editor and op-ed articles that address such laws.

PHAI acknowledges the assistance of California public health attorney Michele Simon in preparing the materials. Simon is founder of the Center for Informed Food Choices and is currently soliciting articles for a special issue of the *Loyola Law Review* that will focus on food advertising to children.

[4] International Health Officials Devise Strategy to Battle Avian Influenza

Animal and human health experts from around the world convened in Kuala Lumpur, Malaysia, last week to discuss ways of averting a flu pandemic



by reducing the risk of poultry transmitting the H5N1 avian flu virus to humans. "It's an international crisis," the U.N. Food and Agriculture Organization's (FAO's) chief veterinary official was quoted as saying. "It has to be an international vision for awareness, surveillance and early response," he said. The plan calls for spending \$102 million over the next three years to fund (i) more research on the H5N1 virus, (ii) improved animal surveillance programs, (iii) openness in the way governments and poultry producers report information about the virus, and (iv) expanded vaccination and diagnostic programs. News sources indicate that increased virus prevention efforts will immediately target Southeast Asia, East Asia and South Asia, while such activities in Africa, Europe and the United States will begin in October. Organizers of the Kuala Lumpur conference included the FAO, the World Organization for Animal Health and the World Health Organization.

Meanwhile, the Trust for America's Health has issued a [report](#) claiming that a flu pandemic in the United States would likely result in more than half a million deaths and 2 million hospitalizations. See *CQ Healthbeat News*, June 24, 2005; *CIDRAP News*, July 5, 2005; and *FAO News Release*, July 6, 2005.

[5] National Academy of Sciences Publishes Article Describing Deliberate Contamination of U.S. Milk Supply

Despite the national security concerns of various government agencies, the National Academy of Sciences (NAS) this week published a contentious [research article](#) whose authors speculate about the ease with which bioterrorists could poison the U.S. milk supply with botulinum toxin. (Lawrence Wein and Yifan Liu, "Analyzing a Bioterror Attack on the Food Supply: The Case of Botulinum Toxin in Milk,"

Proceedings of the National Academy of Sciences 102: 9984-9989, July 12, 2005). Wein, a member of the business school faculty at Stanford University, and Liu, a Stanford graduate student, provide a mathematical model for the milk contamination scenario and make specific recommendations for avoiding such an attack.

In an accompanying editorial explaining the *PNAS* Editorial Board's reasons for deciding to publish the article, outgoing NAS President Bruce Alberts emphasizes the importance of allowing "free scientific debate in areas that can provide valuable information for improving our ability to defend against terrorism." He also contends the article contains no information not already available on the World Wide Web and points out that authors Weinstein and Liu likely underestimated the impact of recently improved pasteurization techniques on inactivating any deliberately introduced toxins in milk.

[6] Alcohol Marketing Group Advocates Stricter Standard to Reduce Youth Exposure to Alcohol Advertising

Georgetown University's Center on Alcohol Marketing and Youth (CAMY) has issued a [white paper](#) calling for revisions to industry's 70 percent adult demographic for alcohol advertising placements. "The needed reform is for the alcohol industry to place its ads where the percentage of youth ages 12 to 20 in the audience is 15 percent or less," CAMY's executive director said. CAMY contends that replacing the current 30 percent standard with a 15 percent cap would substantially reduce youth exposure to alcohol ads while permitting manufacturers to reach consumers of legal drinking age. The group also supports establishment of an independent entity to monitor industry



compliance with advertising reforms. See *CAMY News Release*, July 5, 2005.

Media Coverage

- [7] **“The Food Industry Empire Strikes Back,”**
Melanie Warner, *The New York Times*, July
7, 2005

Passage of “commonsense consumption” laws by some 20 states “reveals how an organized and impassioned lobbying effort, combined with a receptive legislative climate, can quickly alter the legal framework on a major public health issue like obesity,” according to this article describing state and federal legislative proposals designed to protect food manufacturers from civil liability for claims arising out of obesity-related health conditions. The new laws have reportedly caused trial lawyers to shift their interest from obesity-related claims to those that allege deceptive trade practices. “Rather than seeking personal injury damages for the consequences of obesity, there will be lawsuits based on consumer protection laws,” Richard Daynard, founder of the Public Health Advocacy Institute at Northeastern University in Boston, was quoted as saying. “There’s a lot of deception in the marketplace, and a lot of it is relevant to the obesity epidemic. But here we don’t have to prove anyone got fat. ... People changed their minds when documents started to come out about how tobacco companies misled customers about the alleged health benefits of light and low-tar cigarettes. Similarly, people will start to realize that Ronald McDonald is not their friend.”

Scientific/Technical Items

Colorectal Cancer

- [8] **Western Diets Purportedly Linked to Increased Risk of Colon Cancer in Women**

A study of dietary patterns and the risk of colorectal cancer in Japan suggests that “Western” patterns of eating and diets rich in traditional Japanese foods increase the risk of colon cancer in women. (M. Kim, et al., “Dietary Patterns and Subsequent Colorectal Cancer Risk by Subsite: A Prospective Cohort Study,” *The International Journal of Cancer* 115(5): 790-798, 2005).

Investigators examined the dietary habits of 42,000 adult women over a 10-year period and identified three different patterns: (i) the Western dietary pattern characterized by high intake of meat, poultry, cheese, bread, and butter; (ii) the “traditional” Japanese dietary pattern typified by consumption of rice, miso soup, salted fish, and pickled vegetables; and (iii) the “healthy” pattern characterized by high intake of fruit, vegetables, soy foods, beans, and dairy products. Women whose diets were “the most Western” reportedly exhibited more than double the risk of developing colon cancer compared to women with the least Westernized diets. A similar positive association was identified for colon cancer among women who ate the most traditional Japanese foods compared to those who consumed the fewest. No association with colon cancer was observed in women in the “healthy” eating category, and no association with any of the diets was reported for men.



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