

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Food and Drug Administration (FDA)

[1] FDA Creates Task Force to Address Health Claims in Foods

FDA Commissioner Mark McClellan, M.D., has reportedly announced formation of an internal group whose mission will focus on developing standards for qualified health claims in food and dietary supplements. An FDA press release indicates that the 13-member FDA Task Force on Consumer Health Information for Better Nutrition will (i) determine how the agency should apply the “weight of the evidence” standard established under the consumer health information initiative for qualified health claims on conventional foods, (ii) develop regulations to give those principles the force and effect of the law, (iii) identify ways to implement the initiative and provide timely review of health claim petitions, and (iv) develop a research agenda aimed at presenting scientific information to consumers “in a truthful and non-misleading way.” The group will reportedly begin holding monthly meetings in February 2003. See *FDA News Release*, January 16, 2003.

Codex Alimentarius Commission

[2] Public Meetings Scheduled to Prepare for Codex Sessions on Food Contaminants

According to the Food Safety and Inspection Service (FSIS), a public meeting will be held January 30, 2003, in College Park, Maryland to prepare

for the March meeting in Tanzania of the Codex Committee on Food Additives and Contaminants. Attendees will be able to pose questions and submit comments on issues ranging from maximum food additive and contaminant standards, principles for exposure assessment, and lead levels in fish to dioxins and mycotoxins in food. The U.S. delegate to the Codex Committee on Veterinary Drugs in Foods has announced a February 18 public meeting in Washington, D.C., to prepare for that committee’s 14th session which will take place in March. Pre-registration for both public meetings is recommended. More details and relevant documents can be obtained electronically from www.fsis.usda.gov and www.codexalimentarius.net. See *Federal Register*, January 14, 2003.

State/Local Initiatives

[3] Nebraska Lawmaker Introduces Legislation to Tax Junk Food

Asserting that obesity is “the No. 1 problem in the country today,” Senator Dennis Byars (R-Beatrice) has introduced legislation (L.B. 57) that would tax baked goods (e.g., pastries, cookies, pies), candy, snack foods (e.g., chips, popcorn, pretzels), and soft drinks. Groceries are not currently taxed in Nebraska. “Junk food is one thing that no one in the state of Nebraska needs,” Byars said. A news source indicates that state legislatures in California, Washington, Kentucky, Tennessee, and Vermont have considered similar proposals in recent years, but none of the legislation has passed. See *Omaha World-Herald*, January 16, 2003.



Litigation

Fast Food

- [4] *Pelman v. McDonald's Corp.*, No. 20 Civ. 7821 (RWS) (U.S. District Court, Southern District, New York) (decided January 22, 2003)

A U.S. district court has dismissed the complaint filed on behalf of overweight and obese children in New York who alleged that eating at McDonald's caused significant health problems such as diabetes, coronary heart disease and high blood pressure. In granting McDonald's motion to dismiss, however, the court, in a 65-page opinion, also grants leave to plaintiffs to amend the complaint and discusses in some detail what will be required for plaintiffs to plead a number of the claims with greater specificity. In an introduction, Judge Robert Sweet recognizes the intense public interest in this litigation and sets forth as a guiding principle "that legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food." To that end, claims involving the alleged addictive nature of the products and the significant alteration that is made to chicken and french fries, "a McFrankenstein creation of various elements not utilized by the home cook," are dismissed with leave to amend, the court finding that such issues may not involve common knowledge. The court also finds proximate cause allegations defective, observing "the Complaint does not specify how often the plaintiffs ate at McDonalds," and that, as McDonalds has pointed out, the scientific literature points to obesity as a "complex multifactorial chronic disease developing from interactive influences of numerous factors – social behavioral, physiological, metabolic, cellular, and molecular' in addition to cultural and genetic factors."

Warnings

- [5] *California v. Safeway, Inc.* (Superior Court, San Francisco County, California) (filed January 17, 2003)

California's attorney general has filed a Proposition 65 (Prop. 65) enforcement action against major grocery chains and Does one through 100, seeking to force the companies to warn consumers about the purported health risk of mercury in fresh or frozen tuna, swordfish and shark. The state is also seeking civil penalties under the Unfair Competition Act of up to \$2,500 per day for each violation. Defendants are Safeway, Inc.; the Kroger Co.; Albertson's Inc.; Trader Joe's Co.; Whole Foods Market, Inc.; and Whole Foods Market California, Inc. Prop. 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, requires warnings to the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity." The complaint alleges that defendants have known since July 1, 1988, that the fish they sell contains methyl mercury and that defendants have sold their fish without a reasonable warning. Attorney General Bill Lockyer was quoted as saying "Consumers deserve to know when they are being exposed to chemicals that can cause birth defects and reproductive harm. Public health agencies have advised pregnant women not to eat swordfish and shark because those fish contain relatively high levels of mercury." See *azcentral.com*, January 17, 2003.

Food Labeling

- [6] **EU Court Orders Spain and Italy to Drop Chocolate-Labeling Regulations**

According to news sources, the European Union's (EU's) Court of Justice has ruled that Spain and Italy have wrongly been requiring that candies made with



fats other than cocoa butter be labeled as a “chocolate substitute.” EU ministers reportedly decided in 2000 to permit products containing up to 5 percent vegetable fats to be labeled “chocolate,” but Spain and Italy continued to prohibit the import of such products. European chocolate makers Nestle SA and Cadbury Schweppes PLC were apparently pleased with the January 16, 2003, ruling, which followed the recommendation of the European court’s advocate general. According to Advocate General Siegbert Alber, the chocolate laws hampered the growth of Europe’s single market and were unnecessary to protect consumers who could “first read the list of ingredients” if they are concerned about cocoa content. *See Dow Jones Business News*, January 15, 2003; *The Atlanta Journal-Constitution*, January 16, 2003.

Other Developments

[7] Food and Beverage Companies Establish Fitness Council

Food and beverage manufacturers have reportedly collaborated with trade associations and related groups in establishing a nonprofit organization to advocate “comprehensive, long-term strategies and constructive public policies for improving health and wellness of all Americans, particularly youth, by promoting science- and behavior-based solutions focusing on the critical balance between fitness and nutrition.” American Council for Fitness and Nutrition members include Coca-Cola, the Grocery Manufacturers of America, Kraft Foods, Sara Lee, and McDonald’s. *See* www.acfn.org.

[8] Genetically Modified Crops Increase Worldwide in 2002

An agriculture organization that supports the growth and development of genetically modified (GM) crops has reportedly released its annual global

review which shows that 16 countries are raising such crops on some 145 million acres, a 12 percent increase since 2001. The United States, Argentina, Canada, and China apparently grow 99 percent of the world’s GM crop with a focus on corn, cotton, canola, and soybeans. The report of the International Service for the Acquisition of Agri-Biotech Applications (ISAA) claims that GM crops contribute to a reduction in pesticide usage and decrease the time farmers must spend in the field. Critics apparently fault the report for focusing on a limited number of crops; they believe GM expansion is “stagnant at best” in the United States and that “the technology has hit a brick wall.”

In a related development, a European Union (EU) official has reportedly accused the U.S. trade representative of spreading lies about the EU’s position on GM foods in relation to the rejection of U.S. food aid by some African nations. When he announced that litigation before the World Court was being considered to challenge the EU’s ban on GM imports, trade representative Robert Zoellick apparently said that the EU had threatened to withdraw aid from poor countries accepting GM crop aid from the United States, fearing the grain would be used as seed and affect future exports from those nations. European Development Commissioner Paul Nielson reportedly said Zoellick had gone too far and that “if the Americans would stop lying about us, we would stop telling the truth about them.” *See Reuters*, January 16 and 20, 2003; *Greenwire*, January 21, 2003; and www.isaaa.org, January 2003.

Media Coverage

[9] Geoffrey Cowley, “A Better Way to Eat,” *Newsweek*, January 20, 2003

This article attributes America’s obesity problem in large part to the U.S. Department of Agriculture’s



(USDA's) Food Pyramid, a 1992 guide to eating that encourages a low-fat diet based on daily consumption of six to 11 servings of high-carbohydrate foods like bread, cereal, rice, and pasta. "Instead of directing people to the best fats, the most wholesome carbohydrates and the most nutritious sources of protein, the USDA pyramid implies that all fats are dangerous and most carbs are safe. And if the past decade has taught us anything, it's that carbs can be as deadly as fats," Cowley writes. He champions an alternative to the USDA model designed by the Harvard School of Public Health's Walter Willett and colleagues. Their Healthy Eating Pyramid apparently emphasizes "liberal amounts" of saturated fats, a "virtual prohibition" on white rice and potatoes, and few, if any, dairy products. See <http://www.msnbc.com/news/857556.asp?0cl=cR>.

[10] Roger Parloff, "Is Fat the Next Tobacco? For Big Food, the Supersizing of America is Becoming a Big Headache," *Fortune*, January 21, 2003

This article discusses obesity-related litigation that has been instituted since the U.S. surgeon general declared in December 2001 that obesity and overweight are responsible for some 300,000 deaths annually. Tobacco-control activists John Banzhaf and Richard Daynard, who are quoted in the article, apparently did not think much of such litigation when the idea first surfaced. They now expect, however, that media attention will give rise to increasing attorney interest and the filing of other cases. Plaintiffs' lawyer John Coale, described as "a veteran of tobacco and gun litigation," evidently believes that the food industry's Achilles' heel is the targeting of children through Saturday morning television commercials, contracts to serve fast food and soft drinks in schools, and promotional initiatives involving toys. Tort-reform advocate and SHB attorney Victor Schwartz reportedly predicts that it will take about

five years of discovery in obesity-related litigation for plaintiffs' lawyers to find "documents that, if held up in isolation, make it look like the industry had something to hide." While the article notes that individual food and beverage companies are not commenting about future litigation trends, a Grocery Manufacturers of America spokesperson was quoted as saying "finger-pointing, reckless accusations and lawsuits ... won't make anyone any thinner."

Scientific/Technical Items

Caffeine

[11] Researchers Attribute Sleep Disorders in Teenagers to Caffeine

Caffeine consumption may disrupt sleep patterns in teenagers, according to Ohio State University researchers ("Caffeine Consumption and Weekly Sleep Patterns in US Seventh-, Eighth-, and Ninth-Graders," Pollak, et al., *Pediatrics* 111(1): 42-46, 2003). Charles Pollak, M.D., and colleagues examined survey data from 191 seventh, eighth and ninth graders, focusing on recorded sleep patterns and daily intake of caffeinated beverages and food. They found that those subjects who consumed more caffeine were more likely to wake during the night, sleep less during the night and sleep more during the day. The researchers concede that there was no way to tell if caffeine caused the teenagers to lose sleep or if the youngsters consumed caffeine to counteract the effects of sleep loss. They further assert that the substance has a detectable pharmacologic effect and therefore suggest that the availability of caffeine to teenagers be limited. Because 70 percent of the caffeine consumed by the teenage cohort came from soft drinks, they question whether soft drinks should be sold in schools and suggest that manufacturers reduce caffeine levels in such drinks and stop marketing the products to youth.



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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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