

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Environmental Protection Agency (EPA)

[1] **Activist Groups Petition EPA to Withdraw Fluoride Pesticide Residue Tolerances for Food**

The environmental organizations, Environmental Working Group and Beyond Pesticides, have reportedly joined with the Fluoride Action Network (FAN) in petitioning EPA to rescind an [agency rule](#) that establishes residue tolerances for the fumigant sulfuryl fluoride on agricultural commodities in food processing facilities. 70 *Federal Register* 40899-40908 (7/15/05). The final rule includes more than 200 fluoride tolerances for different foodstuffs, ranging from 5 parts per million (ppm) for cheese to 900 ppm for powdered eggs. Pesticide manufacturer Dow AgroSciences LLC asked the agency to establish the exposure limits.

The Federal Food and Drug Certification Act requires EPA to possess “a reasonable certainty that no harm will result” and “give special consideration to exposure to infants and children” when setting pesticide residues for food. In their [petition](#), the activist groups allege “EPA cannot possibly claim or demonstrate that ‘there is reasonable certainty that no harm will result’ or that they [EPA] have given ‘special consideration to exposure of infants and

children’ ... In fact, FAN will demonstrate that these tolerances ‘with a reasonable certainty’ are likely to cause acute symptoms for a sizeable portion of the American public, especially infants and children, as well as contribute, in conjunction with many other sources of fluoride, to which the general public is routinely exposed, to exceeding the reference dose of 8 mg per day of millions of Americans.”

Among other things, the groups specifically argue that the maximum residue limit for dried eggs (900 ppm) is “extremely close” to the fluoride limit for toothpaste (1,000 ppm), a level deemed toxic if consumed in greater than pea-sized amounts. “How can the EPA consider 900 ppm in eggs safe, while the Food and Drug Administration directs parents to call poison control centers if their children consume more than a pea-sized portion of toothpaste with fluoride at 1,000 ppm?” FAN’s executive director was quoted as asking. “Unlike toothpaste, eggs are meant to be eaten, not spit out,” he added. *See FAN News Release*, September 21, 2005.

U.S. Department of Agriculture (USDA)

[2] **USDA to Co-host Workshop on European Union Food Regulations**

U.S. and European experts will convene on November 3, 2005, in Washington, D.C. to address issues related to the effect of European Union food policy on global trade. Sessions at the one-day event



will include those targeting (i) cross-border implications of new EU food safety and traceability requirements, (ii) private-sector standards, (iii) the increasing gap between EU's process-based standards and the United States' product-based food regulations, and (iv) the economic impacts of differing food standards on international trade. The workshop will be co-hosted by USDA's Economic Research Service and the Farm Foundation. More information is available [here](#).

Denmark

[3] Denmark Changes Stance on GM Foods

After strongly opposing genetically modified organisms (GMOs) for some eight years, Denmark's Ministry of the Environment recently announced plans to approve the importation of GM corn. "The time has passed when Denmark automatically said 'no' to GMOs, and (the country) now intends to take a more nuanced approach on a case-by-case basis," Environment Minister Connie Hedegaard was quoted as saying. "We cannot allow ourselves to reject this technology just because it is new and incomprehensible to us," she said. Hedegaard added that she wants Danish research on GMOs to emphasize the technology's potential benefit to agriculture in Third World countries. *See EU Business*, September 16, 2005.

Litigation

Youth Marketing Claims

[4] Marketing Class Action Lawsuit Against Brewers and Distillers Dismissed

A Colorado judge has dismissed a purported class action filed by parents against a number of brewers and distillers as well as the Beer Institute. [*Kreft v. Zima Beverage Co., et al., No 04CV1827 \(District Court, Jefferson County, Colorado\) \(order dated 9/16/05\)*](#). The dismissal order includes an award of "reasonable attorney fees and costs" to the defendants.

Plaintiffs Randy and Colleen Kreft alleged that defendants deliberately and recklessly targeted underage consumers. Defendants' motions to dismiss asserted that plaintiffs lacked standing to bring the lawsuit and that their claims were substantially frivolous and groundless.

In the order granting defendants' motions to dismiss, Judge James Zimmerman found that plaintiffs failed to allege that they or their children sustained damages as a result of defendants' alleged actions. "Because the allegations are insufficient to show the Plaintiffs have standing to bring individual claims, they do not have standing to be representatives of the class or classes sought to be represented," he said.

A similar case in California, *Goodwin v. Anheuser-Busch Cos., Inc., and Miller Brewing Co.*, was dismissed by the trial court earlier this year and is now before the California Court of Appeal. Other similar cases are pending in a handful of states and the District of Columbia.



Other Developments

[5] **Lawyers, Public Health Activists Deem School Vending Contracts Potential Vulnerability of Food Industry**

Plaintiffs' attorneys and public health advocates who believe that food and beverage manufacturers should be held liable for obesity and its attendant health effects convened at Boston's Northeastern University School of Law on September 24-25, 2005, for a conference spearheaded by longtime antitobacco attorney Richard Daynard and the Public Health Advocacy Institute (PHAI). Principal themes of the third annual event focusing on legal approaches to the obesity epidemic included the public health implications of childhood obesity and industry marketing campaigns aimed at children.

Keynote speaker David Ludwig, M.D., director of the obesity program at Children's Hospital in Boston and a member of the Harvard medical faculty, blamed the rise in childhood obesity on (i) an "invasion" of soft drinks, fast food and high-calorie snacks; (ii) less physical activity among youth; and (iii) stress in families that results in reliance on unhealthy "convenience" foods. In championing a "common sense approach" to tackling the childhood obesity issue, Ludwig recommended (i) marketing restrictions, (ii) taxes on fast food and soft drinks, (iii) banning fast food and soft drinks in schools, (iv) regulating political contributions from the food industry, and (v) insurance reimbursement for obesity treatment.

Yale University's Kelly Brownell, who enthusiastically attacked the food industry at PHAI's 2004 obesity litigation conference, this year criticized the federal government's revised *Dietary Guidelines for Americans* for lacking substance and directed audience members to mobilize "key parties" to achieve a

more coordinated campaign against food industry practices.

Former Kraft executive Michael Mudd echoed Brownell by suggesting the advocacy community could enjoy more success if it reached a consensus on what changes it would like food companies to make with respect to marketing practices and product reformulations.

Susan Linn, a psychology instructor at Harvard Medical School and author of *Consuming Kids: The Hostile Takeover of Childhood*, discussed various alleged effects of advertising and marketing to children. She gave particular emphasis to what she deems McDonald's "all-out assault on schools" and the growth of cell phone marketing to youth, aka "celling to kids."

Conference speakers who provided the most specific target for possible litigation included Steve Gardner, litigation director for the Center for Science in the Public Interest (CSPI), Andrew Rainer of the law firm McRoberts, Roberts and Rainer, and lawyer Tim Howard, who teaches at Boston University. In a session devoted to school vending contracts, the three suggested potential lawsuits against soft drink companies using public nuisance theories and state consumer protection statutes. "We may sue them [soft drink companies], we should sue them," Gardner said.

PHAI was established in 2003 with a core grant from the Washington, D.C.-based Bauman Foundation, which has provided significant grants since 1994 to such entities as the Institute for Agriculture and Trade Policy and the Center for Science in the Public Interest.



Media Coverage

- [6] **“A Sports Drink for Children Is Jangling Some Nerves,”** Duff Wilson, *The New York Times*, September 25, 2005

This article discusses children’s health experts’ concerns about a line of energy drinks that Texas-based manufacturer Advocare International markets to athletic youth as young as age 4. Containing 60 milligrams of caffeine and other stimulants, KickStart Spark is recommended for kids ages 4 to 11, while Advocare Spark contains 120 mg. of caffeine and is recommended for athletes ages 12 and older. “It’s not just a caffeine delivery system; it has many more nutritional properties,” an Advocare spokesperson said.

According to the author, pediatricians discourage kids’ use of performance-enhancing products and suggest limiting children’s caffeine consumption to avoid adverse behavioral effects. Drug-free sports activists reportedly worry that such energy drinks could serve as “gateway” products to other performance-enhancing supplements. “What are we coming to? What kind of society are we spawning here where everybody has to be artificially stimulated?” a Consumers Union policy analyst said.

- [7] **“Lawyer Who Took on Oreos and McDonald’s Fights on in Food War,”** Molly Sevin, *The Los Angeles Times*, September 25, 2005

“Business controls Capitol Hill” so that courts offer the only “level landscape for ordinary people to get justice,” says California lawyer Stephen Joseph. Joseph recently settled two *trans* fat-related lawsuits against McDonald’s Corp. and sued Kraft Foods in 2003 over the *trans* fat content of Oreo cookies, an action Joseph dropped after Kraft decided to reformulate the product. Joseph’s

campaign against *trans* fat has lately resulted in convincing restaurant owners in Tiburon, California, to switch to non-hydrogenated oils. He reportedly declined to comment on his role in the New York City Health Department’s new campaign against the use of partially hydrogenated vegetable oils, margarines and vegetable shortenings in the city’s eateries.

Scientific/Technical Items

Obesity

- [8] **Excess Weight Linked to Less Elastic Blood Vessels in Teens**

Excess fat in teenagers has been strongly linked to stiffer blood vessels in a British study evaluating the effect of heart disease risk factors such as body fat, blood pressure and cholesterol levels on arterial elasticity. (P. Whincup, et al., “Arterial Distensibility in Adolescents: The Influence of Adiposity, the Metabolic Syndrome, and Classic Risk Factors,” *Circulation* 112: 1789-1797, 2005). “The message about this is that it’s yet another reason to be concerned about the rise in overweight and obesity among young people,” lead author Peter Whincup was quoted as saying. Using a noninvasive ultrasound technique, the researchers measured artery distensibility and found that all measures of body fat and insulin resistance were associated with artery distensibility in teenagers ages 13 to 15. The changes were observed in teens whose body mass index levels were considered to be well below those considered to represent obesity. Although arterial distensibility is a marker of early arterial disease, the researchers noted that losing weight and increasing exercise can often reverse obesity-related vascular problems. See *Associated Press*, September 21, 2005.



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