

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] “Cheeseburger Bill” Passes the House in Historic Vote

The U.S. House of Representatives passed the “Personal Responsibility in Food Consumption Act” ([H.R. 554](#)) on October 19, 2005. Sponsored by Representative Ric Keller (R-Fla.), the bill would prevent frivolous obesity-related lawsuits that hold food companies liable for an individual's obesity or obesity-related health claims. The vote of 306-120 represents a high-water mark for industry-specific liability bills over the last few years.

The bill has gained significant importance since the Second Circuit Court of Appeals reinstated *Pelman v. McDonald's Corp.* earlier this year. The appellate court held that under applicable New York law, the plaintiff did not need to specify in the pleadings that he relied on a specific advertisement or how the defendant's alleged wrongful conduct caused his injury. H.R. 554 requires the plaintiff to prove reliance and also have specific allegations of causation in order to proceed with claims seeking damages for weight gain, obesity or health conditions associated with one's weight gain or obesity.

Organizations behind the bill, which include the National Restaurant Association, have indicated that

two other factors have helped with the bill's popularity. First, 21 states have enacted similar laws over the past several years. Second, a recent Gallup Poll indicated that nearly 9 in 10 Americans (89%) oppose holding the fast-food industry legally responsible for the diet-related health problems of people who eat that kind of food on a regular basis. The Senate's companion bill is S. 1428, which was introduced by Senator Mitch McConnell (R-Ky.) and co-sponsored by Senator David Pryor (D-Ark.).

[2] Bipartisan Senate Legislation Targets Effects of Electronic Media on Children's Diets and Consumption Habits

A bipartisan proposal ([S. 1902](#)) reintroduced by Senators Joe Lieberman (D-Ct.), Sam Brownback (R-Kan.), Hillary Rodham Clinton (D-N.Y.), Rick Santorum (R-Pa.), and Richard Durbin (D-Ill.) would (i) authorize funding for establishment of a program within the National Institute of Child Health and Human Development to study the role and impact of electronic media in the development of children and (ii) provide Congress with a report describing the results of such research. Among other things, the Children and Media Research Advancement (CAMRA) Act would require the institute's director to collaborate with the National Academy of Science in convening an independent panel of experts to set research priorities regarding the influence of TV, movies, video games, and the Internet on children's cognitive, physical and socio-behavioral development. The proposed bill calls for a pilot project that



would evaluate the role of media exposure on the “development of childhood obesity, particularly as a function of media advertising and sedentary lifestyles that may co-occur with heavy media diets.” Representative Edward Markey (D-Mass.) has reintroduced similar legislation (H.R. 4124) in the House.

Other Developments

[3] **Anti-Industry Activists Gather in Los Angeles to Discuss Legal Strategies for Challenging Food Ads Aimed at Kids**

Loyola of Los Angeles Law School and The Center for Informed Food Choices hosted a symposium titled “Food Marketing to Children and the Law” last Friday in response to the Federal Trade Commission’s (FTC’s) July 2005 workshop on industry self-regulation, an event Loyola organizer Michele Simon described as “a PR opportunity for industry representatives.”

In a keynote address, Susan Linn, author and co-founder of Campaign for a Commercial-Free Childhood, expressed concern about ads on the Internet and now available on cell phones, which she claims parents use like rattles to entertain their young children. She was critical of Internet marketing designed for children and specifically singled out the Neopets Web site, now owned by Nickelodeon. She and others were particularly critical of Coca Cola’s branded toys and its sponsorship of “American Idol”; SpongeBob SquarePants, featured in a number of children’s products; and Kraft’s Sensible Solutions program.

Panel presentations focused on “Public and Private Responses to Junk Food Marketing to Children” and “First Amendment Implications of

Restricting Food Marketing to Children.” Presenters on the first panel argued that industry self-regulation is ineffective. Tracy Westen, a former FTC deputy director of consumer protection, talked about FTC efforts in the late 1970s to regulate advertising to children, particularly the Kid-Vid rule-making, which was instituted in 1977 and “shut down for political reasons” in 1981. According to Westen, one conclusion FTC reached at that time was that young children are unable to distinguish advertisements from actual programming. He explained that FTC prohibits advertising that is deceptive, either overtly or by omission, and that the agency has prohibited subliminal advertising because it is deceptive if viewers do not realize they are being exposed to advertising. Putting all that together, Westen concluded that advertising to young children is inherently deceptive because, as with subliminal advertising to adults, children do not know they are watching advertising. He urged symposium participants to mine the 60,000 pages of expert testimony from the Kid-Vid rulemaking for additional ammunition to use against the food industry.

Stephen Gardner, director of litigation for the Center for Science in the Public Interest, began his presentation by stating, “I’m the guy who gets to sue the bad guys. ... God bless Web sites because lawyers don’t review them, and marketers put them up.” According to Gardner, actions against food companies that market to children can be brought under state laws such as California’s deceptive trade practices act, which allows private enforcement actions to fill the vacuum created by the FTC’s and the FDA’s alleged lack of action against the industry.



He added that the California law provides for disgorgement of profits, which can be paid to a charitable group if no actual plaintiffs can be identified.

Presenters on the second panel focused on how to “nibble around the edges of the First Amendment.” Jason Smith, managing attorney at Boston’s Public Health Advocacy Institute and adjunct professor at Northeastern University School of Law, compared anti-advertising activities to protests against the Vietnam War and argued that regulation of commercial speech to protect public health is within the states’ police power. Other presenters urged the group to follow the tobacco model to get advertisements to children banned from radio and television and offered their ideas about why such bans would withstand First Amendment challenges. A forthcoming issue of the *Loyola Law Review* will feature articles authored by symposium faculty.

Media Coverage

[4] “Plot Line: Drink Pepsi,” John Furia, Jr., *Los Angeles Times*, October 23, 2005

“Television, particularly reality TV, is erasing the line between content and advertising by clumsily grafting sponsors’ car brands, soft drinks and other products into story lines,” according to this indictment of product placement practices. The author, a former president of the Writers Guild of America (WGA) West, claims “unfettered product integration is in no one’s best interest” and encourages writers, directors and actors to resist network pressure to incorporate products into programming. He also calls on the Federal Communications

Commission to mandate clear product disclosures and prohibit “hidden advertising in children’s programming.”

WGA West has become increasingly vocal in its opposition to product placement of late. In September, a group of guild members reportedly disrupted a New York event sponsored by *Advertising Age* that convened high-level media, marketing and entertainment executives to debate the future of branded entertainment. Protesters outside the event passed out fliers detailing their concerns about product integration, while others heckled participants in the debate.

A recent *Wall Street Journal* article reports that the value of product placement deals is expected to reach some \$4.24 billion in 2005 and attributes the marketing technique’s popularity to “a perception that the power of traditional ads has declined” and technology that allows TV viewers to skip over commercials. See *The Wall Street Journal*, September 27, 2005; *Advertising Age*, September 27 and 28, 2005.

Scientific/Technical Items

Obesity

[5] **Industry-Funded Study Refutes Soft Drinks’ Role in Teen Weight Problems**

Restricting the availability of non-diet carbonated soft drinks in schools has a negligible impact on adolescent weight issues, say University of Maryland and researchers in a new study funded by the American Beverage Association. (R. Forshee, et al., “A Risk Analysis Model of the Relationship Between Beverage Consumption from School Vending Machines and Risk of Adolescent Overweight,”



Risk Analysis, October 2005). “We’re not saying that there’s no kid that has a problem with consumption of sweetened beverages,” lead author Richard Forshee was quoted as saying. “We’re wondering what kind of public policy interventions are going to be effective at dealing with public health issues. Restricting sales of soft drinks in schools does come with some costs. It restricts choices, and it is a source of revenue for schools,” he said.

The researchers assessed data on carbonated soft drink consumption in schools in relation to body mass index (BMI) in adolescents. Their analysis suggested that overall consumption of soft drinks from school vending machines was low, with estimates ranging from .5 ounce to 2 ounces daily per student; soft drink consumption at home, however, was found to be five times greater. *See HealthDay News*, October 21, 2005.



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