

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA to Investigate Canned Tuna for Mercury Contamination

In response to *Chicago Tribune* scrutiny of federal inspection polices, FDA will reportedly investigate the possibility that some cans of “light tuna” contain elevated levels of mercury. “We will definitely look at it through our office of seafood and determine whether there is something that requires further pursuit,” FDA Chief Medical Officer David Acheson said. *See The Chicago Tribune*, December 31, 2005.

In a three-part series published December 11-13, 2005, *Tribune* writers asserted that their investigation into the levels of mercury present in seafood revealed “a decades-long pattern of the U.S. government knowingly allowing millions of Americans to eat seafood with unsafe levels of mercury. Regulators have repeatedly downplayed the hazards, failed to take basic steps to protect public health and misled consumers about the true dangers ... The government does not seize high-mercury fish that violate U.S. limits. Regulators do not even inspect seafood for mercury – not in ports, processing plants or supermarkets.”

National Toxicology Program (NTP)

[2] National Toxicology Program to Evaluate Potential Toxicity of Food Packaging Additive

NTP’s Center for the Evaluation of Risks to Human Reproduction is [soliciting nominations](#) for experts to serve on a 12-member panel charged with evaluating the scientific evidence regarding the potential reproductive and developmental toxicities of bisphenol A, a chemical used to manufacture plastic food and beverage containers. Well-publicized studies last year claimed the hormonally active compound can leach into foods and water when plastic containers are heated, washed or exposed to acidic foods. The studies further claimed that low doses of the chemical in experimental animals can affect growth rates and sexual maturation, hormone levels in the blood, reproductive organ function, fertility, immune function, enzyme activity, brain structure, brain chemistry, and behavior. Nominations for membership on the expert panel or general comments about bisphenol A must be submitted by February 6, 2006. *See Federal Register*, December 21, 2005.



State/Local Initiatives

[3] New Mexico Board Delays Taking Action on Aspartame

The New Mexico Environmental Improvement Board has reportedly decided to postpone a July 2006 hearing on the purported health effects of aspartame pending a forthcoming opinion from Attorney General Patricia Madrid on whether the board has the authority to ban or require warning labels on products that contain the artificial sweetener. The campaign against the Food and Drug Administration-approved sweetener is being spearheaded by Santa Fe gallery owner Stephen Fox, who says he fears “for the 70 percent of adults and 40 percent of children who consume this product, not knowing it turns to formaldehyde and other toxins.” The environmental board’s hearing is currently slated for January 2007. *See The Santa Fe New Mexican*, January 4, 2006.

Litigation

Obesity

[4] *Pelman* Plaintiffs File Second Amended Complaint Against McDonald’s

As ordered by a federal district judge in New York, plaintiffs in a teenage-obesity lawsuit against McDonald’s have filed their second amended complaint, which consists of 166 pages of allegations plus 197 pages of exhibits. *Pelman v. McDonald’s Corp.*, 02 Civ. 7821 (RWS) (S.D. N.Y.) (second amended complaint filed 12/15/05). The requirements of this newest complaint, as set out in Judge Robert Sweet’s October 2005 are to: 1) identify the McDonald’s advertisements about which

they are complaining; (2) explain briefly why they allege that the ads are materially deceptive to an objective consumer; (3) explain briefly how the plaintiffs were aware of the acts alleged to be misleading; and (4) describe briefly “the injuries suffered by each plaintiff by reason of defendant’s conducts.”

In their three-count complaint, plaintiffs specifically describe 25 McDonald’s marketing campaigns that they claim were “objectively deceptive and misleading to a reasonable consumer.” The specific products about which plaintiffs complain include French fries, hash browns, Chicken McNuggets, fish products, and chicken products. Plaintiffs cite to and quote Dr. Neal Bernard, M.D. [sic – read Barnard] in support of their allegations that consumption of McDonald’s products is linked to heart disease, cancer, obesity, and other health problems. They allege that [Barnard](#), president of the Physicians Committee for Responsible Medicine, reviewed the food-consumption history and medical records of plaintiff Gregory Rhymes and determined that his continued consumption of McDonald’s food “significantly contributed to the development of his obesity and pediatric diabetes.”

The named teenage plaintiffs are children under age 18 who allegedly exceed the Body Mass Index for clinical obesity and are “Heavy Users” (at least once per week) or “Super Heavy Users” (at least four times per week) of McDonald’s products. They further allege that they would not have purchased McDonald’s products but for the company’s deceptive marketing. They claim to have “sustained significant or substantial increased factors in the development of diabetes, coronary heart disease, high blood pressure, obesity, elevated levels of Low-Density Lipoprotein, . . . and/or other detrimental and adverse health effects and/or diseases as



medically determined to have been causally connected to the prolonged use of Defendant's certain products." The requested relief includes disgorgement of "all unjust profits from sales of its misrepresented products to a charitable not-for-profit health organization"; funding of an educational program to inform children and adults about the "dangers of eating certain foods containing high levels of fat, salt, sugar and cholesterol"; cost of the goods purchased; and an order that McDonald's cease targeting "minors and children," "Heavy Users" and "Super Heavy Users" with its advertising.

Plaintiffs purport to represent a class of consumers under the New York Consumer Protection Act. They filed their original complaint in August 2002. The district court dismissed that complaint in January 2003 but granted plaintiffs leave to amend, which they did in February 2003. The district court dismissed the amended complaint in September 2003 on the grounds that plaintiffs

failed to establish a connection between their alleged injuries and their consumption of McDonald's food. The Second Circuit reversed the dismissal in January 2005, remanding the case to the district court.

Scientific/Technical Items

Soft Drinks

[5] **New Study Casts Doubt on Purported Link Between Soft Drink Consumption and Esophageal Cancer**

Contrary to recent studies associating carbonated soft drink consumption with increased risks of developing gastroesophageal reflux and esophageal cancer, a Yale University study now suggests that regular consumers of soft drinks may be less likely to develop esophageal cancer. S. Mayne, et al., "Carbonated Soft Drink Consumption and Risk of Esophageal Adenocarcinoma," *Journal of the National Cancer Institute* 98(1): 72-5, 2006. "We found that contrary to the hypothesis put forth by other researchers, carbonated soft drink consumption was inversely associated with esophageal adenocarcinoma risk, mainly attributable to diet soda, and that high intake did not increase risk of any esophageal or gastric cancer subtype in men or women," co-author Susan Mayne was quoted as saying. See *Medical News Today*, January 5, 2006.



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