

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] Tomatoes Linked to Recent *Salmonella* Outbreak

FDA has reportedly identified tomatoes from restaurants as the cause of a recent *Salmonella typhimurium* outbreak. The disease reportedly sickened 183 people in 21 states, although FDA did not issue a consumer warning. FDA attributes the rapid detection of the outbreak to improved reporting systems and technological advances. See *FDA Press Release and Reuters*, November 3, 2006.

#### World Health Organization (WHO)

##### [2] WHO Charter to Take on Marketing to Children

The WHO will reportedly introduce an anti-obesity charter at a November 15, 2006, conference in Istanbul, Turkey. "Special attention needs to be focused on vulnerable groups such as children and adolescents, whose credulity should not be exploited by commercial activities," the draft charter apparently charges. Many public health advocates have apparently asked for restrictions on "junk food" marketing before 9 p.m. See *BBC News*, November 3, 2006.

### Litigation

##### [3] Federal Judge Dismisses Class Complaint Involving Popcorn Bag Coatings

A U.S. district court in California has dismissed claims that ConAgra Foods Inc. misled consumers by failing to warn that the coatings on its microwave popcorn bags contain a carcinogenic chemical that, when heated, dissolves and is absorbed into the popcorn and is then unwittingly consumed. *Nunez v. ConAgra Foods Inc.*, No. 06 CV 1012 WQH (S.D. Calif., filed Oct. 2, 2006).

The complaint sought declaratory relief, injunctive relief and restitution under the state's Unfair Competition Law (UCL) and Consumer Legal Remedies Act. The court determined that the named plaintiff lacked standing under the UCL because he had not alleged any injury in fact and had not lost money or property by ingesting a potentially harmful carcinogen, showings now required since California's Proposition 64 was approved. In this regard, the court concluded, "these allegations which rest solely upon a potential for future illness or injury are not adequate to constitute injury-in-fact as required in section 17204 of the UCL."

The court also ruled that the plaintiff lacked standing under the Consumer Legal Remedies Act because he failed to allege any actual damages, finding "allegations in the Complaint that Plaintiff would not have purchased or consumed Defendant's microwave popcorn if he had known



that the fluorotelomer coating as applied to the bags is not adequate to support the inference that the popcorn was worthless.”

## Bovine Spongiform Encephalopathy (BSE)

### [4] Kansas Beef Producer Continues Fight Against USDA

Creekstone Farms Premium Beef has reportedly filed its reply to the agriculture department’s statement opposing its bid to test its own cattle for BSE. The exchange of pleadings follows Creekstone’s summary judgment motion filed in July 2006; USDA’s reply will be due by December 1. Further details about the motion and the case appear in issues 165 and 177 of this Report. Creekstone apparently argues that USDA has misinterpreted and exceeded its authority by claiming a 100-year-old law related to hog cholera serums applies to BSE testing. In its latest pleading, Creekstone claims it has lost 35 percent of revenues because of BSE concerns in other countries and is “prepared to spend \$6 million per year to perform BSE testing itself to help recover the lost demand.” See *meatingplace.com*, November 7, 2006.

## Other Developments

### [5] Public Health Advocates Target Youth Marketing During Annual Conference in Boston

Youth marketing was the focus of the 2006 Public Health Advocacy Institute (PHAI) conference on legal approaches to the obesity epidemic. Of the approximately 40 individuals attending the November 3-5 event, one-quarter were either representatives of defense-oriented law firms,

industry organizations or the press. Based on observations from previous PHAI conferences, public interest is in steady decline.

Marion Nestle gave the keynote address, and five panels of speakers discussed (i) “Children’s Diets and Public Health,” (ii) “The School Food Environment,” (iii) “The ‘Choice’ Mantra,” (iv) “Industry Marketing: Subverting Children’s Health,” and (v) “Where Do We Go From Here.” Presenters included Michael Jacobson and Steve Gardner of the Center for Science in the Public Interest (CSPI); Frank Hu and Jean Wiesha of the Harvard School of Public Health; Christopher Kimball, the host of “America’s Test Kitchen” and editor of *Cooks Illustrated*; and Michele Simon of the Center for Informed Food Choices. A number of lawyers and law professors served as panelists in discussions of regulatory and legal perspectives.

Nestle’s primary message was that no one should be allowed to market products to children younger than age 8. She observed, nevertheless, that even a well-meaning company under a capitalist system may have little room to change practices that allegedly result from agricultural policies which produce more calories than every man, woman and child in the nation can use without gaining weight, in addition to shareholder demands for increasing returns and short-term profits. Conference presenters and participants did not discuss the American Council on Science and Health’s recent report on *trans* fats nor did they discuss recent news that prices for corn and other major food ingredients are increasing dramatically. See *FoodUSANavigator.com*, November 6, 2006. It was their contention that exceptionally low prices for corn and soy products are driving the industry to produce foods with little nutritional value.



Presenters generally congratulated themselves for bringing about change merely with the threat of litigation. They view litigation as a tool that should be used as a last resort and discussed the benefits of bringing only selective litigation designed to have the greatest public relations impact, i.e., generally those causes of action involving children. They concede that obesity causation issues are complex and that existing scientific literature may not yet provide the support they need to prove causation in personal injury lawsuits. Hence, they have been focusing recent efforts on unfair and deceptive advertising.

Public health advocates are seeing greater successes at the local and state levels (e.g., NYC proposal to ban the sale of foods prepared with *trans* fats in restaurants) and may be channeling future energies in that direction unless they believe that congressional changes effected by the November 7 elections will significantly alter the regulatory and legislative climate at the federal level. They believe that this strategy was effective in the tobacco-control context. Regarding *trans* fats, participants are unwilling to acknowledge that changing ingredients in some products may render them unacceptable to consumers. As recently noted by spokespersons for McDonald's, changing a product like french fries that are particularly linked to the brand can create a consumer "push back," while not changing ingredients brings criticism from public health advocates. See *Advertising Age*, November 6, 2006.

*Pelman v. McDonald's Corp.* is being tracked with great interest as it enters the discovery phase. According to PHAI's Richard Daynard, just as tobacco documents turned public opinion against an industry, food industry documents may have the same effect.

The public health community is exploring how to bring effective messages to the public about the "Toxic Food Environment" and how that environment overwhelms personal choice. They recognize that personal choice resonates with Americans because of the "rugged individualist" foundation of U.S. culture. They are considering framing the issue as one of shared responsibility where food producers are consciously manipulating consumer preferences to maximize profits with no concern for health and welfare outcomes, and the public does not know the extent to which it is being manipulated. Key themes thus would be deception, exploitation and shared responsibility.

Another arena of concern involves personalized digital marketing. According to one presenter, Jeff Chester, who is publishing a work titled *Digital Destiny* in January 2007, the ad industry is already mining digital data to create personalized marketing messages to youth through their cell phones, computers and televisions. Public health advocates are considering how to address this issue in the food and beverage context and devise effective intervention strategies.

Public health participants labeled industry calls for public education a "dead end"; they contend that efforts to address the "obesity epidemic" must be comprehensive and involve extensive industry and advertising regulation. They also complain that industry "health" initiatives are window dressing and never go as far as needed to be effective. They contend that healthier food alternatives are not widely advertised and that the food industry turns every labeling requirement to its advantage. CSPI, which is "pushing for legislation to require table-service chain restaurants to list calories, saturated plus *trans* fat, sodium, and carbohydrates on their menus, and fast-food restaurants to list calories on



their menu boards,” has developed a new online [quiz](#) to teach consumers about the calorie content of common fast-food items like a large chocolate milk shake (1,160 calories) or a sesame bagel with cream cheese (570 calories). See *CSPI Press Release*, November 6, 2006.

Among the actions public health advocates are considering: (i) file motions to intervene if it looks like Judge Robert Sweet is asked to issue protective orders with respect to the documents uncovered during discovery in *Pelman*; (ii) bring corporate shareholder proposals, linked to a return on shareholder investment, requiring food companies to prepare reports on youth marketing and personalized digital marketing; and (iii) prepare annotated model “pouring” contracts that school districts can use to ensure food companies will vend only nutritious beverages and snacks in their schools.

In a related development, marketing groups are reportedly indicating that should the U.S. Senate switch to a Democratic majority, issues like children’s food advertising will go under the microscope, particularly given ongoing interest in the matter by Senator Tom Harkin (D-Iowa), who would be expected to assume the chairmanship of the Senate Agriculture Committee. See *Advertising Age*, November 8, 2006.

#### [6] **British Supermarkets Announce Plan to Trim the *Trans* Fat**

In the wake of Sainbury’s decision to remove *trans* fat from its brands, other British supermarkets have reportedly announced similar plans. “This cut off date underlines our commitment to improving the nutritional profile of our products,” said a spokesperson for Waitrose, which will join Asda, Tesco, and Marks and Spencer in offering *trans* fat-free brands by early 2007. See *Food Production Daily*, November 1, 2006.

Meanwhile, an editorial in *The Washington Post* supports New York City’s proposed ban on *trans* fat. “As with lead added to paint, *trans* fats are unnecessary additives to consumer products that can cause significant harm – and many Americans don’t even know they are in the restaurant food they are eating,” charges the editorial, which also asks FDA to revoke the “generally regarded as safe” status of *trans* fat. See *The Washington Post*, November 6, 2006.

#### [7] **Marketing Professor Studies Tendency to Overeat**

“So much of the answer lies not in counting calories, not in legislating, but in the middle range of what we can do changing some of our own habits,” says Brian Wansink, marketing professor and author of *Mindless Eating: Why We Eat More than We Think We Eat*. Wansink studied people’s subconscious decisions about what, and how much, they eat. Described by one behavioral scientist as “ingenious,” Wansink’s experiments included one with a self-filling soup bowl, which evidently showed that without the visual cue of an empty bowl, some test subjects consumed more than one quart of soup before stopping. Wansink also questioned how consumers read nutritional information, concluding that some labels “can lull people into a false sense of security.” See *MSNBC*, November 5, 2006.

## Media Coverage

#### [8] **Andrew Martin, “The Package May Say Healthy, but This Grocer Begg to Differ,” *The New York Times*, November 6, 2006**

In an article about a nutritional scale developed by the Hannaford Brother’s grocery chain, *Times* reporter Andrew Martin questions whether



the FDA's standards are too lenient, or Hannaford's "too prissy or draconian." Hannaford's three-star ranking system leaves many "healthy" foods earning no stars because of fat, salt or sugar content. Martin reports that whole milk, some Healthy Choice frozen meals, yogurt with fruit, and V8 juice earned no stars under Hannaford's system.

Industry representatives reportedly emphasized that they follow FDA guidelines when making health claims. Hannaford, which hopes to patent its "food-rating algorithm," apparently sets no threshold values for salt, fat or sugar, but weighs them against ingredients like whole grains or dietary fiber. Nevertheless, as one trend analyst told Martin, "Nothing is healthy if you get right down to it, except mother's milk, and that's probably got too much fat."

## Scientific/Technical Items

### Obesity

#### [9] Researchers Question Link Between Urban Sprawl and Obesity

In an [article](#) titled "Fat City: Questioning the Relationship Between Urban Sprawl and Obesity," scholars from Canada, England and Spain have concluded that there is no evidence to support the proposition that "neighborhood characteristics have any causal effect on weight." Previous studies have suggested that suburban dwellers tend to be obese at higher rates than their more urban counterparts and have blamed urban sprawl, where driving is the primary means of getting around, as a causal factor in the obesity epidemic. The authors of this article, however, postulate that it is the obese who tend to choose such built environments and that "individuals who have a lower propensity to being obese

will choose to avoid those kinds of neighborhoods." Thus, they contend "recent calls to redesign cities in order to combat the rise in obesity is misguided. Our results do not provide a basis for thinking that such redesigns will have the desired effect, and therefore suggest that resources devoted to this cause will be wasted."

#### [10] Abdominal Obesity in Children Allegedly Increasing

Abdominal obesity, which may indicate cardiovascular disease and type 2 diabetes, has increased in prevalence among U.S. children and adolescents sampled between 1988-1994 and 1999-2004. Chaoyung Li, et al., "Recent Trends in Waist Circumference and Waist-Height Ratio Among US Children and Adolescents," *Pediatrics*, November 2006. The study recommends that future research focus on standardizing waist circumference and waist-height ratio, as opposed to BMI, for "identifying children at risk of abdominal obesity in relation to clustering of metabolic and cardiovascular risk factors or obese-related diseases, such as type 2 diabetes."

In a related development, a study published in the *American Journal of Clinical Nutrition* claims that overweight children who binge eat can consume 400 to 600 calories more than their peers in a single sitting. Researchers hypothesized that binge-eaters may be responding more to "external 'cues' – like the sight and smell of food – than to physiological hunger signals." See *Reuters*, November 6, 2006.



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