

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] “Cheeseburger Bills” Introduced to Shield Food Industry from Obesity Lawsuits

Titled the “Commonsense Consumption Act of 2007,” a [bill](#) (H.R. 2183, S. 1323) that would forbid the filing of any action in federal or state court brought against any entity in the food industry seeking relief for a person’s weight gain, obesity or obesity-related health condition has been introduced in the House by Representative Dan Boren (D-Okla.) and in the Senate by Senator Mitch McConnell (R-Ky.). The legislation would also require the dismissal of any pending actions of this nature. Excluded from the bill are lawsuits based on (i) warranty breaches unrelated to weight gain or obesity, (ii) knowing violations of marketing, advertising or labeling leading to weight gain, obesity or obesity-related health conditions, and (iii) violations of the Federal Trade Commission Act or the Federal Food, Drug, and Cosmetic Act. The bills have been referred to each chamber’s judiciary committees.

The Virginia Journal of Social Policy and Law has just published a student-authored article critical of congressional efforts to prohibit obesity-related “fast-food lawsuits.” The article contends that such

legislation is unnecessary, “relies on a flawed view of the causes of obesity, and would actually be counterproductive.” Referring to the “cheeseburger bills” introduced in previous congressional sessions, the author claims that “elected representatives are hampering the fight against obesity while providing protection to corporations that may be partly responsible for the problem.” He points out that fast-food lawsuits are infrequent and that 23 states already have similar laws giving the industry immunity. He also takes issue with any effort to frame obesity as a matter of personal responsibility; rather, he states, “obesity is an epidemic health problem with complex and systemic causes that must be addressed on a nationwide level.” The article calls for Congress to adopt policies and laws that would “improve Americans’ food supply, lifestyle habits, and education about the health risks of obesity.”

Federal Trade Commission (FTC)

[2] Advocacy Groups Submit Report on Digital Youth Marketing to FTC

Consumer and health groups, including the Center for Science in the Public Interest and the Public Health Advocacy Institute, are asking the FTC to expand its investigation into the food and beverage industry’s youth marketing practices to include the full range of digital media technologies the companies use to market to children and adolescents. The groups released a [report](#),



“Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age,” during a May 17, 2007, briefing at the National Press Club.

Co-written by Jeff Chester, the founder and executive director of the Center for Digital Democracy, a nonprofit dedicated to “promoting a democratic media system in the digital age,” the report describes the ways that “major food, soft drink and fast food brands are deploying a panoply of new techniques – including cell phones, instant messaging, video games, user-generated video, and three-dimensional virtual worlds – to target children and adolescents, often under the radar of parents.”

Chester, who describes himself as a media policy specialist, was formerly a psychiatric social worker. He published a book in January 2007, *Digital Destiny: New Media and the Future of Democracy*, which is critical of the ways advertisers mine electronic data about consumers and then target personalized advertising to them. The report his group and others submitted to the FTC covers the same ground but focuses on food and beverage marketing to youth. In a letter to the FTC commissioner, they suggest that the industry be required to answer questions such as (i) “What kinds of research are food and beverage companies, as well as their marketing companies, conducting in order to develop and implement their interactive campaigns targeting children and adolescents?”; (ii) “To what extent and in what ways are food and beverage companies, and their media and marketing partners, designing digital content and services in order to facilitate ongoing interaction between young people and brands?”; and (iii) “In what ways are companies engaging in behavioral profiling of children and adolescents?”

Among the types of commercial media campaigns the report addresses are aggressive participation in social networks such as MySpace® and FaceBook®, peer-to-peer marketing that involves hidden messages and coded information to “lure youth into an elaborate series of games and other activities across different media,” and the creation of “brand-saturated” environments where children engage in colorful, interactive online playgrounds to play with food advertising icons like Tony the Tiger and Ronald McDonald.

The Center for Digital Democracy released statements from a number of individuals when it launched the report. Senator Tom Harkin (D-Iowa) noted that “junk food marketing to children has spread far beyond television. Unlike Saturday-morning television, these new media are not even on parents’ radar screens.” According to nutrition activist Marion Nestle, the report “reveals that children are being targeted to eat poorly in even more insidious ways than most of us could possibly have imagined. . . . Congress and the FTC need to act on this new information about digital food marketing and start putting some restrictions on direct marketing of junk foods to children.” And Yale psychology professor Kelly Brownell said the report shows that “the marketing of unhealthy foods extends across a growing array of digital platforms that are becoming ubiquitous in the lives of our youth. Food companies are targeting children with unprecedented intimacy, encouraging them to engage with products that, by and large, are not good for their health.”

A *BusinessWeek* article discussing the report opens with a profile of a 10-year-old girl who takes care of a virtual pet by logging onto Neopets.com to



feed the creature ice cream, omelets, smoothies, jellies, and baked goods. “For Gabrielle, the Web site is about fun. Some marketers, however, see such online kids communities as an opportunity to associate ‘fun’ with snack foods.” Company spokespersons quoted in the article note that their sites often promote healthy foods and encourage children to go offline and do something active. Nevertheless, the digital youth marketing report details how low-nutrient foods saturate the digital market, generating hundreds of thousands of hits; the authors “suggest that a rise in such marketing on sites where kids are spending larger chunks of time is contributing to childhood obesity and diet-related health problems by encouraging kids to make poor food choices.” See *BusinessWeek.com*, May 17, 2007.

Department of Agriculture (USDA)

[3] USDA Withdraws Promotions Linking Dairy Products to Weight Loss

USDA and two national dairy boards have reportedly withdrawn advertisements suggesting that milk and dairy consumption may lead to weight loss in some individuals. USDA, the National Fluid Milk Processor Promotion Board, and the National Dairy Promotion and Research Board agreed to end the “Milk Your Diet: Lose Weight” and “3-A-Day. Burn More Fat, Lose Weight” campaigns, which some consumer watchdogs criticized for relying on industry-sponsored research. “Milk and cheese are more likely to pack on pounds than help people slim down,” opined a spokesperson for the vegan-advocacy group Physicians Committee for Responsible Medicine, which in 2005 filed a petition with the Federal Trade Commission. “This case calls into question other advertising claims made by the

industry, especially the notion that milk builds strong bones,” he said. See *PCRM Press Release and Associated Press*, May 11, 2007.

Meanwhile, New York University’s Marion Nestle has apparently called the agreement “ground-breaking.” “Those ads were ridiculously misleading,” she was quoted as saying, although she backed milk’s nutritional value in general. In 2005, federal dietary guidelines increased the recommended amount to three cups of low- or non-fat dairy per day. “I think there’s a minority of people out there that just have very loud voices,” a National Dairy Council spokesperson said. “This is a vegan group that doesn’t want anyone to eat dairy.” See *The New York Times*, May 11, 2007.

[4] AMS Proposes Amendments to the National List of Allowed and Prohibited Substances

USDA’s Agricultural Marketing Services has issued a [proposed rule](#) that would amend the National List of Allowed and Prohibited Substances (National List) to reflect the recommendations of the National Organic Standards Board. The proposal would add 38 substances to the National List, which describes the synthetic ingredients (exemptions) permitted in organic food production and prohibited non-synthetics. The proposed exemptions would apply when an organic alternative is commercially unavailable and include: (i) coloring agents such as annatto, beta-carotene and turmeric extracts; (ii) meat casings made from processed intestines; and (iii) food additives and ingredients such as gelatin, hops, rice starch, and wheat protein concentrate. AMS also notes that because the sunset review for these substances ends on June 9, public comments must be received by May 22, 2007. See *Federal Register*, May 15, 2007.



Food and Drug Administration (FDA)

[5] FDA to Test Protein Ingredients for Melamine and Related Compounds

FDA this week issued a [letter](#) reminding food and feed ingredient manufacturers “of their legal responsibility to ensure that every ingredient used in their products is safe for its intended use, whether the product is meant to be used to feed animals intended for human consumption or non-food animals such as pets.” Earlier this month, the agency also announced a protein surveillance assignment to inspect facilities and test protein ingredients for melamine and melamine-related compounds. In addition to domestic feed ingredients, FDA will sample imported wheat gluten, corn gluten, corn meal, soy protein, and rice protein concentrate at point of entry. Laboratories in the Food Emergency Response Network will analyze the samples, although the FDA letter stresses that manufacturers “should also verify that their suppliers have such procedures in place” to ensure ingredient safety. See *Food Navigator USA.com*, May 15, 1007.

Meanwhile, the Department of Agriculture (USDA) has [released](#) approximately 56,000 swine previously quarantined for suspected melamine contamination. Hog farms in California, North Carolina, South Carolina, New York, Kansas, Utah, and Illinois had been salvaging pet food as animal feed before FDA issued the initial recall. A government risk assessment, however, has since found that “a person weighing 132 pounds would have to eat more than 800 pounds per day of pork” to surpass the safety threshold for melamine exposure. USDA and FDA are also continuing to monitor poultry and

fish exposed to the melamine-tainted ingredients, all of which were imported from China. See *Associated Press* and *The Washington Post*, May 16, 2007.

In response to this incident, China recently shut down the two companies believed responsible for spiking wheat flour, which was later labeled as wheat gluten, with melamine to boost protein counts above acceptable levels. The Chinese government has reportedly detained officers from the Xuzhou Anying Biologic Technology Development Co. and Binzhou Futian Biology Technology Co., although local sources have claimed that the practice is widespread. “Our clients who buy melamine scrap to make animal feed are mainly from the Shandong Province,” the manager of a chemical plant told reporters. “They use melamine scrap to produce fish, chicken and other animal feed.”

Chinese authorities, however, have apparently denied these allegations, asking the United States not to punish all Chinese exporters on the basis of “special individual cases.” “We hope the American side will accurately and objectively deal with problems among individual companies and not take stringent measures against other Chinese companies producing the same type of products,” a government statement reportedly read. China has also issued an edict promising “to crack down on the illegal production, sale and use” of banned pesticides, fertilizers, veterinary medicines, and feed additives, according to *The Wall Street Journal*. China’s regulatory system currently faces increasing criticism over tainted products, such as antibiotic-laced catfish sold in the United States, as well as corruption charges against its top officials. See *The Wall Street Journal*, May 10, 2007; *The New York Times*, May 16, 2007.



In a related development, FDA has also come under scrutiny for its failure to detect the melamine contamination and to prevent other incidences of foodborne illness, including a 2006 *E. coli* outbreak linked to fresh produce. FDA last week introduced new regulations on the handling of fresh produce, but the proposal reportedly received little support from the Department of Health and Human Services (HHS). Backed by industry groups such as the United Fresh Produce Association and the Grocery Manufacturers Association, the plan called for \$76 million in agency funds to monitor produce safety and enforce rules governing growers and processors. Although one former FDA official apparently suggested that the administration “has been reluctant to make something mandatory,” current FDA Commissioner Andrew von Eschenbach has cautioned against potentially “cumbersome” regulation. “We believe in the importance of a strong, science-based regulatory process and take our responsibility to ensure the safety of foods, drugs and other items FDA regulates very seriously,” an HHS spokesperson was quoted as saying. See *The Wall Street Journal* and *The New York Times*, May 16, 2007.

Litigation

[6] CSPI Sues Burger King over *Trans* Fats in Foods and Frying Oils

The Center for Science in the Public Interest (CSPI) has filed a [complaint](#) against the Burger King Corp. in a Washington, D.C. court, alleging that the company’s continuing use of *trans* fats in its French fries, baked goods and other foods violates D.C. consumer protection laws. *CSPI v. Burger King Corp.*, No. 3363-07 (D.C. Super. Ct., filed May 17, 2007). The nutrition advocacy group

seeks an order enjoining the company’s sale of foods prepared with *trans*-fat oils and foods containing significant levels of *trans* fats or, alternatively, requiring the company to inform consumers that its products are prepared with *trans* fats. CSPI also seeks an order “finding and declaring that Burger King’s acts and practices as challenged herein are unlawful and deceptive.”

On its Web site, CSPI notes that other fast-food chains have switched to *trans*-fat free oils and that Burger King will be complying with laws in New York City and Philadelphia that will be phasing in a ban on *trans* fats in restaurants over the next 18 months. According to CSPI lead litigation attorney Stephen Gardner, “Virtually every major restaurant chain in the country is working overtime to replace artificial *trans* fats with healthier oils, but Burger King can’t be bothered. Litigation has proven to be an effective means at accelerating the pace with which restaurant chains are getting rid of *trans* fat, and we hope the court brings Burger King to his senses in this case.” CSPI contends that Burger King offerings contain “three, four or five times as much *trans* fat as is safe to consume in an entire day.” It claims that a Burger King sausage biscuit with a large order of hash browns has 18 grams of *trans* fat, or more than a person should consume in nine days.

According to the complaint, CSPI has been meeting with Burger King representatives since the beginning of 2007, but the company has “refused to make any commitments regarding the elimination of *trans* fats other than vaguely representing that it would start doing so at the end of 2008.” The complaint specifically alleges that the company violates D.C. consumer protection act provisions relating to deception and misrepresentation by failing to disclose the presence of *trans* fats in its



foods or that foods prepared with *trans* fats increase the risk of heart disease and are generally harmful to health. CSPI also contends that the company is breaching the law's implied warranty of merchantability by selling food not fit for human consumption. A company spokesperson was quoted as saying that Burger King was "disappointed that CSPI elected to bring this baseless lawsuit," and that it was "committed to eliminating *trans* fats from its products." The company claims to be testing a variety of alternative oils in hundreds of restaurants in five U.S. markets. See *CSPI Press Release* and *Reuters*, May 16, 2007.

[7] Aggrieved Owners Continue to File Tainted Pet-Food Cases

New cases alleging death or injury from tainted pet food have been filed in state court in Hawaii and in federal district courts in Colorado and Missouri. The two Hawaii lawsuits reportedly allege that pet-food manufacturer Menu Foods failed to monitor the tainted ingredients in their products. One case is a putative consumer class action seeking recovery of the costs of buying the tainted pet food and the costs of veterinary exams for any pet that ate the food; the other is a personal injury lawsuit seeking unspecified damages for pain and suffering. In both cases, animal-law attorney Emily Gardner is representing the plaintiffs. See *The Honolulu Advertiser*, May 12, 2007; *AP State & Local Wire*, May 13, 2007.

In Colorado, some 100 plaintiffs have joined a putative class action against Menu Foods, seeking damages of \$5 million. Such an unprecedented award can only be achieved, according to a news source, if the court agrees that people are pet "guardians," rather than owners, so they can recover for pain and suffering. This case, along with many

others currently pending in federal court, are on hold while the Judicial Panel on Multidistrict Litigation considers whether and where to centralize them for pre-trial proceedings. A [hearing](#) on motions to centralize in district courts from California to Florida and Washington will be heard May 31, 2007, in Las Vegas. *In re Pet Food Products Liab. Litig.*, No. MDL-1850 (J.P.M.L.). See *The Denver Post*, May 14, 2007.

The Missouri proceeding is also styled as a class action; the named plaintiff alleges that his dog "suffered extreme illness" and ultimately had to be put to sleep after eating contaminated food produced and marketed by Menu Foods. Plaintiff is claiming negligence; strict liability – defective in design or manufacture; and strict liability – failure to warn.

And in a related development, a U.S. district magistrate judge in Wisconsin has reportedly refused, without prejudice, to issue an order to preserve evidence against pet-food defendants sued in that court, finding the pet owner did not establish an actual need for one. *Johnson v. Proctor & Gamble Co.*, No. 07-C-0159-C (W.D. Wis., decided April 25, 2007). See *Andrews Product Liability Litigation Reporter*, May 10, 2007.

[8] Artificial Sweetener Giants Settle Marketing Dispute; French Court Bans Splenda® Ad Slogans

Before the federal jury empaneled in the marketing dispute between rival makers of artificial sweeteners could reach their verdict, Merisant Co. and McNeil Nutritionals settled the case. Further details about the lawsuit appear in issues 209 and 210 of this Report. According to a May 11, 2007, joint statement, settlement details will remain confidential and neither party will comment on



the terms reached. McNeil, which markets the sweetener at issue in the case, is no longer using the claims “made from sugar” and “tastes like sugar” on its Web site in connection with Splenda,[®] which is made from sucralose. McNeil is reportedly defending similar advertising claims in a separate lawsuit filed by U.S. sugar manufacturers in California. See *The Legal Intelligencer*, *philly.com*, May 11, 2007; *The New York Times*, May 12, 2007; and *Food Navigator USA.com*, May 14, 2007.

In other news, litigation between the two companies in Paris ended in a May 10 ruling which found that Splenda[®] advertising slogans violated French consumer protection laws. The Commercial Court awarded Merisant US\$54,000 in damages and ordered McNeil to cease using the advertising claims “Because it comes from sugar, sucralose tastes like sugar” and “With sucralose: Comes from sugar and tastes like sugar.” The court gave McNeil 30 days to change its product packaging and prohibited any further distribution of products with unchanged packaging after four months. According to a news source, McNeil indicated that it intends to appeal the ruling. See *Food Navigator USA.com*, May 11, 2007.

Other Developments

[9] Anheuser-Busch to Cease Production of Spykes Malt Beverage

Amidst ongoing controversy that its colorful 2-ounce malt beverage appealed to minors, Anheuser-Busch Cos. yesterday announced that the company will no longer manufacture Spykes. Consumer watchdogs and state attorneys general have been highly critical of the product, which contains caffeine, ginseng, guarana, and 12 percent

alcohol by volume. “This move by Anheuser-Busch, ceasing sales of Spykes after attorneys general raised significant concerns, is a significant victory in the fight against underage drinking,” Connecticut Attorney General Richard Blumenthal was quoted as saying. See *The New York Times*, May 18, 2007.

Meanwhile, the Center for Science in the Public Interest (CSPI) reports that it will maintain “[an updated list](#)” of U.S. representatives sponsoring the “beer tax rollback bill,” “along with a tally of the contributions each has received in the 2005-2006 election cycle from the two biggest beer-industry donors, the National Beer Wholesalers Association (NBWA) and Anheuser-Busch (AB).” CSPI alleges that industry interests contributed more than \$10 million to 2005-2006 federal candidates, with 57 percent of Congress having accepted a total of \$2,472,250 in NBWA contributions. See *CSPI Press Release*, May 8, 2007.

[10] CSL/JIFSAN Symposium to Focus on Nanotechnology

The Central Science Laboratory (CSL) and the Joint Institute for Food Safety and Applied Nutrition have announced the 8th Annual CSL/JIFSAN Joint Symposium on Food Safety and Nutrition, which will focus on “Nanotechnology in Foods and Cosmetics.” Slated for June 26-28, 2007, in Greenbelt, Md., conference sessions will cover (i) international regulatory issues relating to product development; (ii) international research approaches to product development; (iii) characterization and detection methods for physical and chemical nano-materials; (iv) routes of exposure and toxicology; and (v) approaches to risk assessment. Interested parties can register for the conference [here](#).



Media Coverage

[11] C. Ford Runge and Benjamin Senauer, "How Biofuels Could Starve the Poor," *Foreign Affairs*, May/June 2007

"The enormous volume of corn required by the ethanol industry is sending shock waves through the food system," argue C. Ford Runge and Benjamin Senauer in this article describing the potential impact of corn- and soybean-based ethanol production on the price of staple food grains and related commodities, from livestock feed to pork, milk and eggs. Runge and Senauer predict that as oil prices rise and biofuels become increasingly competitive, "ethanol producers could afford to pay well over \$5 per bushel for corn," which in 2006 rose from \$2.80 to \$4.20 per bushel. They also expect other ethanol crops, such as soybeans and oilseeds, to increase by 26 percent by 2010 and 76 percent by 2020. "If oil prices remain high – which is likely – the people most vulnerable to the price hikes brought on by the biofuel boom will be those in countries that both suffer food deficits and import petroleum," the authors conclude, instead advocating research into cellulose as an abundant, clean-burning alternative.

In a related development, a recent *Wall Street Journal* article also follows the rising price of milk due to an "ethanol-fueled rally and strong global demand for corn," according to writer Anjali Cordeiro. Hershey Co., Dean Foods Co. and Kraft Foods Inc. are reportedly among those companies considering price hikes to offset raw milk and energy costs. In addition, a reduction in artificial bovine growth hormone usage, coupled with increased demand for dairy, further "crimps" the

milk supply, a National Milk Producers Federation spokesperson was quoted as saying. See *The Wall Street Journal*, May 15, 2007.

Scientific/Technical Items

[12] **Researchers Link Food Additives to Children's Behavioral Problems**

A study conducted by University of Southampton researchers on behalf of the U.K.'s Food Standards Agency has reportedly shown that common colorings and other additives in the foods children eat may be responsible for behavioral problems such as temper tantrums, poor concentration, hyperactivity, and allergic reactions. While the research has not yet been published, experts are apparently calling on parents to limit their children's consumption of sweets, processed foods and soft drinks, which typically contain the additives, including the preservative sodium benzoate. While all of the additives studied are approved for use in the European Union, products including such ingredients must be clearly labeled. According to a news source, the research shows that petroleum-based food dyes, when eaten, cause essential minerals, such as zinc, to be excreted; zinc deficiencies have allegedly been linked to violent behavior.

In a related development, two of Britain's largest food retailers have announced that they will phase out artificial colors and flavorings and replace them with natural ingredients. ASDA, the U.K.'s third biggest supermarket, reportedly expects to spend £30 million to remove the artificial ingredients from its "own-brand" products by the end of 2007; Marks & Spencer has apparently promised to make 4,455



food products and soft drinks free of artificial colors and flavorings by the end of the year. *See BBC News, Telegraph, and FSA Science, Safety and Health Blog, May 8, 2007; The Sunday Times, May 13, 2007; The Independent, May 16, 2007.*

Meanwhile, *The Wall Street Journal* has reported that Asian food manufacturers and street vendors commonly add substances such as formaldehyde to their products to keep them fresh. An Indonesian tofu maker was quoted as saying, "Formaldehyde is magic. There is no comparison." Industrial dyes are also apparently used to make beverages, eggs and other foods more attractive. Borates, including boric acid, prohibited in most countries for use in foods, were found in 20 percent of rice noodles tested in Malaysia in 2006 and in minced pork and meatballs in Thailand. High levels of such chemicals are known to be dangerous when consumed. *See The Wall Street Journal, May 9, 2007.*



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LITIGATION UPDATE

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