

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] House Committee Approves Workplace Exposure Standard to Address “Popcorn Lung”

The House Education and Labor Committee has reportedly approved a bill ([H.R. 2693](#)) that would require the Occupational Safety and Health Administration to establish a workplace exposure standard for diacetyl, a flavoring ingredient used to give microwave popcorn a buttery taste and linked by some studies to *bronchiolitis obliterans*, a condition that can cause severe lung damage. Committee Chair George Miller (D-Calif.), who observed that the National Institute for Occupational Safety and Health had confirmed an association between diacetyl and “popcorn lung” in 2003, reportedly said, “It is stunning that OSHA has failed to issue a standard protecting American workers from exposure to diacetyl.” Committee Republicans suggested that there is insufficient research to single out the chemical; nevertheless, the proposal was passed by voice vote. See *CQ Weekly – Weekly Report Employment & Labor*, June 25, 2007.

Meanwhile, the Grocery Manufacturers Association, Food Products Association (merged as GMA/FPA) and the Flavor and Extract Manufacturers

Association (FEMA) are sponsoring a September 20, 2007, Chicago program to address respiratory health and safety issues in food and flavor manufacturing. According to available information, “the program will cover the most recent information and recommendations on respiratory health and safety and will also include a training component.” FEMA, a trade association for the U.S. flavor industry, supports H.R. 2693. See *FEMA Press Release*, June 13, 2007.

#### [2] House Subcommittee Hearing Addresses Food Marketing to Children

The House Committee on Energy and Commerce recently held a subcommittee hearing titled “Images Kids See on the Screen” to address food and beverage marketing aimed at children. The Subcommittee on Telecommunications and the Internet heard testimony by consumer advocates, medical professionals and food industry representatives, the latter of whom reportedly contended that many companies have already implemented new advertising practices. “The food and beverage industry has responded to the challenge and we remain committed. There is too much at stake for us to fail,” a Grocery Manufacturers Association spokesperson said, also describing an industry-sponsored ad campaign promoting health, nutrition and physical activity. U.S. Representative Baron Hill (D-Ind.), however, apparently likened such public service announcements to “an umbrella during the London blitz” and called for restrictions on marketing high-calorie foods to children younger than age 8. In addition, Subcommittee Chair



Edward Markey (D-Mass.) urged the Federal Communications Commission (FCC) to implement stricter regulations on youth advertising. “The FCC will fulfill the mandate of the law,” he said. *See Food Navigator USA.com* and *Media Post*, June 25, 2007.

Meanwhile, several companies have reportedly revised nutritional standards and advertising guidelines for popular snack items. “There’s a committed effort to provide products that can contribute to healthier lifestyles,” a PepsiCo, Inc. spokesperson said about a “Smart Spot” designation appearing on nearly 300 products that meet specific nutritional requirements. Critics, however, have argued that these types of programs seek to influence a July 18 public Federal Trade Commission hearing in which industry representatives are scheduled to report on efforts to reduce the incidence of childhood obesity. “They are trying to take enough steps so that Congress won’t pass laws and they won’t get sued,” a Center for Science in the Public Interest spokesperson was quoted as saying. *See Associated Press*, June 20, 2007.

### **[3] House Committee Opens Investigation into Meat Treated with Carbon Monoxide**

U.S. Representatives John Dingell (D-Mich.) and Bart Stupak (D-Mich.) this week sent letters to Safeway Inc., Tyson Foods, Inc., Pactiv Corp., and Precept Foods, LLC that question “the companies’ practice of packing fresh meat in carbon monoxide, which artificially colors the product and disguises spoilage.” Dingell, chair of the House Committee on Energy and Commerce, and Stupak, chair of the Subcommittee on Oversight and Investigations, take issue with the Generally Recognized as Safe (GRAS) status of carbon monoxide, which Food and Drug Administration standards deem “sufficiently safe.” The Committee also announced plans to open an

investigation into FDA’s GRAS approval process. “We refuse to let the FDA continue stonewalling consumers and Congress about this dangerous deception. We are particularly concerned about the FDA’s decision in light of our discovery of carbon monoxide treated fish from China and other Asian countries that are regularly rejected for spoilage. The American people deserve to know whether FDA was aware of the apparent masking of spoiled fish with carbon monoxide when it determined that its use was ‘Generally Recognized as Safe,’” opined Stupak. *See Committee on Energy and Commerce Press Release*, June 26, 2007.

## **Food and Drug Administration (FDA)**

### **[4] CSPI Seeks Action to Halt Egg Producers’ Omega-3 Claims**

The Center for Science in the Public Interest (CSPI) has filed a [complaint](#) with the FDA asking it to take enforcement action against seven egg producers that allegedly imply that their eggs, fortified with omega-3 fatty acids, can reduce the risk of heart disease.

The nutrition and food safety advocacy group claims that such products are misbranded and requests that the agency issue warning letters to Land O Lakes, Safeway, Gold Circle Farms, Egglands Best, The Country Hen, Giving Nature, and Full Spectrum Farms.

The eggs these companies sell include label claims such as “Omega 3 All-Natural Eggs contain 350 mg of Omega 3 fatty acids per serving – an essential nutrient that may lessen the risk of heart disease,” “Not Just Any Omega-3, Cage Free DHA OMEGA -3, DHA is vital for a healthy heart and for brain and eye development and function,” and



“Our certified organic, vegetarian, whole grain feed formula creates a 225 mg level of Omega-3 and a 75 mg level of DHA per one large egg. DHA Omega-3 in our diets is necessary for optimum development and function of human tissues such as the brain, eyes and heart throughout life, including pregnancy.”

According to CSPI, “eggs contain too much saturated fat and cholesterol to bear the qualified health claim for omega-3s.” Executive Director Michael Jacobson contends that egg producers are using “the omega-3 buzz word to bilk health-conscious consumers.” Such eggs apparently cost twice as much as regular eggs and do not contain the types of omega-3 for which health claims are allowed. A CSPI senior staff attorney was quoted as saying, “The most beneficial omega-3 fatty acids come from fish, fish oil, and algae.” CSPI claims that even eggs with the most beneficial forms of omega-3 contain no more of them than the amount in 1.5 teaspoons of salmon, which is among the richest sources. See *CSPI Press Release*, June 21, 2007.

#### **[5] Consumer Group Urges FDA to Review Aspartame’s Link to Cancer**

The Center for Science in the Public Interest (CSPI) has called on FDA to review aspartame’s safety after an Italian study reportedly linked the artificial sweetener to leukemia, lymphoma and breast cancer in rats. The Ramazzini Foundation of Oncology and Environmental Sciences has claimed that rats fed high doses of aspartame are more likely to develop cancer than those on low doses. Published in *Environmental Health Perspectives*, the study also alleges that the cancer risk increased in rats first exposed to aspartame *in vitro* or at a young age. The results “call for urgent reconsideration of regulations governing the use of aspartame

as an artificial sweetener,” the lead author said. “This is not just an opinion, but in the United States, it is also the law.”

Meanwhile, CSPI has downgraded aspartame in its “Chemical Cuisine” directory from a rating of “use caution” to one that “everyone should avoid.” The consumer group has also urged FDA to revoke aspartame’s Generally Recognized as Safe status. “But consumers, particularly parents, should not wait for the FDA to act. People shouldn’t panic, but they should stop buying beverages and foods containing aspartame,” CSPI said. FDA, however, has announced that it has no plans to alter its prior ruling on aspartame. “[T]he conclusions from this second European Ramazzini Foundation study are not consistent with those from the larger number of studies on aspartame that have been evaluated by FDA, including five previously conducted carcinogenicity studies,” an FDA spokesperson said. See *Milwaukee Journal Sentinel*, June 19, 2007; *Reuters* and *CSPI Press Release*, June 25, 2007; *Food Navigator USA.com*, June 26, 2007.

#### **[6] FDA to Tighten Dietary Supplement Regulations**

FDA this week issued a [final rule](#) establishing current good manufacturing practices (CGMP) for dietary supplements. The rule, which sets forth “the minimum CGMPs necessary for activities related to manufacturing, packaging, labeling, or holding dietary supplements to ensure [their] quality,” also requires manufacturers to verify all ingredients used in production. This “100 percent identity testing of dietary ingredients” applies to manufacturers who purchase ingredients from suppliers and those who produce their own ingredients. Companies must also retain consumer complaint records for FDA inspection. In addition, FDA has published an



[interim final rule](#) describing the process for requesting an exemption from the testing requirement and arranging an alternative procedure. Both rules become effective August 24, 2007, with a general compliance date set for June 25, 2008. The compliance date for businesses employing fewer than 500, but 20 or more full-time equivalent employees, is June 25, 2009, and June 25, 2010, for businesses employing fewer than 20 full-time equivalent employees.

The rulemaking is just “one of many actions related to dietary supplements that we are taking to promote and protect the public health,” according to FDA. Recent studies have reportedly found that some dietary supplements contain illegal or adulterated ingredients, or have mislabeled ingredient amounts. Consumer advocates have also urged the agency to tighten rules governing dietary supplements, which are considered food supplements rather than pharmaceuticals. “This is a small, small step in the right direction,” a Consumers Union spokesperson was quoted as saying. *See The Los Angeles Times*, June 23, 2007.

## China

### [7] Chinese Regulators Close 180 Food Plants for Safety Violations

China has reportedly closed 180 food plants and discovered more than 23,000 food-safety violations in a nationwide crackdown on counterfeit and adulterated products. The General Administration of Quality Supervision, Inspection and Quarantine this week released a statement admitting that illegal food manufacturers are a widespread problem affecting everything from bottled water and soy sauce to seafood, candy and biscuits. Administration

officials apparently found that many small, privately owned food operations, which make up 75 percent of China’s 1-million food-processing plants, were adding industrial chemicals, dyes and other prohibited ingredients to their products. In addition to toxic chemicals like paraffin wax, formaldehyde and malachite green, inspectors uncovered sodium hydroxide and hydrochloric acid in processed versions of shark fin and ox tendon. Another regulatory agency, the State Administration for Industry and Commerce, also said it had shut down 152,000 unlicensed food manufacturers last year. “These are not isolated cases,” a Chinese official was quoted as saying. *See The New York Times* and *Associated Press*, June 27, 2007.

## Litigation

### [8] Promotional Games and Menus on Court Dockets

The Eleventh Circuit Court of Appeals has dismissed a false-advertising claim filed by a Burger King franchisee against McDonald’s Corp., finding that the franchisee lacked prudential standing under the Lanham Act to bring the claim. [Phoenix of Broward, Inc. v McDonald’s Corp., No. 06-00394 \(9th Cir., decided June 22, 2007\)](#). The franchisee owns and operates a Burger King facility in Fort Lauderdale, Florida; it contended that McDonald’s misrepresented that each player in its promotional games, which were purportedly rigged from 1995 to 2001, had a fair and equal chance of winning high-value prizes and misrepresented the odds of winning such prizes. According to the complaint, McDonald’s knowingly and deliberately continued to advertise the games in this manner even after learning the games had been compromised by a criminal ring that was embezzling the winning,





high-value game pieces. Such misrepresentations lured customers away from Burger King, the franchisee claimed. The district court dismissed the complaint on prudential standing grounds, and the franchisee appealed.

Noting that the franchisee had constitutional standing to bring the claim, the court nonetheless affirmed the dismissal, determining that (i) the prudential standing doctrine applies to the Lanham Act; (ii) the prudential standing test articulated by the Third Circuit provides the appropriate means for addressing standing for a false advertising claim brought under the Lanham Act; and (iii) the causal chain linking McDonald's alleged misrepresentations about one aspect of its promotional games to a decrease in Burger King sales is tenuous, the franchisee's damages are speculative because McDonald's customers still had a fair and equal opportunity to win the numerous low- and mid-value prizes, and if the franchisee had prudential standing to bring its claim, every other fast-food competitor would have similar standing, raising the risk of duplicative damages.

And in a federal courtroom in New York City, a West Village chef has reportedly filed suit against a former sous chef, claiming that when he opened his own seafood restaurant in SoHo, he copied every element of her establishment from the white marble bar and gray wainscoting to the Caesar salad dressing. Rebecca Charles, who owns the Pearl Oyster Bar, contends that Ed McFarland stole her intellectual property when he opened Ed's Lobster Bar in March 2007. McFarland apparently acknowledges that his restaurant is similar, but he claims that he uses his own recipes and that his place is "a lot neater, a lot cleaner and a lot nicer looking." According to a news source, chefs have been taking their intellectual property rights seriously in recent

years, with some even applying for patents on their culinary inventions and requiring cooks to sign nondisclosure agreements. Others reportedly believe it is impossible to protect recipes or ambience. See *The New York Times*, June 27, 2007.

## Legal Literature

[9] Note, "Lawsuits in the Fast-Food Nation: Will Fast-Food Suits Succeed as Obesity Becomes an American Tradition?," *Wayne Law Review*, Fall 2006

Recently referenced by legal periodical indices, this student-authored article suggests that current perceptions about obesity as a personal responsibility issue could change and open the courthouse door for fast-food plaintiffs. The article reviews the *Pelman v. McDonald's Corp.* litigation pending in a New York court as well as the statutes that are limiting the liability of fast-food restaurants for obesity-related injury. The author explores the evolution of lawsuits filed against cigarette manufacturers and suggests that if food addictions can be proved and if obesity is viewed as a disease, obesity lawsuits can succeed. Just as with tobacco suits, the author concludes, "A key to successful fast-food suits will be lawyers' ability to find 'good' plaintiffs. . . . Fast-food suits will have much greater success when they become class action suits or when blameless plaintiffs are found. These will likely be children, already the focus of claims against McDonald's for irresponsible marketing, who have no personal responsibility issues since they were fed McDonald's by their parents."



## Other Developments

### [10] Environmentalists Go After Dairy Emissions Under Clean Air Act

According to a news source, environmental groups have filed notices of intent to sue dairies in Washington, Idaho, California, and Nevada, alleging that the operations failed to obtain maximum achievable technology (MACT) permits for hazardous air pollutants under section 112 of the Clean Air Act. Industry sources have reportedly suggested that the activists are doing so to find a way around agreements the U.S. Environmental Protection Agency has reached with the dairies and concentrated animal feeding operations (CAFOs). The agreements apparently exempt dairies and participating CAFOs from Clean Air Act enforcement while requiring them to conduct monitoring to determine emission levels.

Filed in May 2007, the notices reportedly contend that toxic methanol emissions from dairy cows must comply with MACT requirements, which apply to facilities emitting 10 tons of a single air toxic annually, and that the targeted dairies failed to obtain a MACT compliance determination from the EPA or state regulators when they were built or expanded. The notices also reportedly allege violations of the Comprehensive Response, Compensation & Liability Act and the Emergency Planning & Community Right-to-Know Act. Commentators contend that such legal action is premature, because industry air monitoring has just begun and emission levels are currently unknown. EPA's administrator recently announced the launch of such research at dairy, poultry and swine feedlots. See *Inside EPA*, June 22, 2007.

## Media Coverage

### [11] Martin Fackler, "Waiter, There's Deer in My Sushi," *The New York Times*, June 25, 2007

"It's like America running out of steak," Tadashi Yamagata, vice chair of Japan's national union of sushi chefs, told *Times* writer Martin Fackler in this article about a worldwide tuna shortage. Fackler examines the nation's fears that increasing demand and declining fisheries will drive the price of tuna beyond reach for many Japanese consumers, for whom sushi without tuna is "something as unthinkable here as baseball without hot dogs or Texas without barbecue." Recent limits on annual tuna catches have compounded the strain of a growing global market, which now competes with Japan to dominate the tuna supply. "Fish that would have gone to Tokyo are now ending up in New York or Shanghai," said Sasha Issenberg, author of *The Sushi Economy*. "This has been devastating to Japan's national esteem."

As a result, many chefs have reportedly started experimenting with alternatives in their sushi rolls. Some mid-range restaurants have started using smoked deer meat and raw horse, considered a delicacy in some parts of Japan. While some high-end establishments can continue to afford premium, locally caught bluefin, others have branched out into unusual substitutes like smoked duck or daikon with sea urchin sushi. "We can learn from American sushi chefs," Yamagata concluded. "Sushi has to evolve to keep up with the times."



## Scientific/Technical Items

### [12] Canadian Researchers Allegedly Link Toddler Weight Gain to Sugar-Sweetened Beverages

Studying nearly 2,000 children born in 1998 in Quebec, researchers have reportedly concluded that preschoolers who regularly drink sugar-sweetened beverages between meals are more than twice as likely to be overweight at age 4 ½ as children who do not consume such products. Lisa Dubois, et al., “Regular Sugar-Sweetened Beverage Consumption Between Meals Increases Risk of Overweight Among Preschool-Aged Children,” *Journal of the American Dietetic Association*, June 2007. Dubois was quoted as saying, “These children are not old enough to buy their own beverages, so, in this case, the products are in the house, and the parents are giving these drinks to their children.” Among the beverages consumed were non-diet carbonated drinks and fruit-flavored drinks that were not pure fruit juices. While almost 7 percent of the children who did not consume these beverages were overweight at age 4 ½, slightly more than 15 percent of those children who drank sugary beverages four to six times or more each week were overweight. The study also found that socioeconomic factors, such as mother’s age, education and income levels, play a role in the consumption of sugary drinks. Experts are reportedly encouraging parents to give their children mostly water and other unsweetened beverages. See *Forbes.com*, June 25, 2007.





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