

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] New Bills Focus on Child Nutrition in Schools; Medicaid Coverage for Obesity Drugs

Senator Patrick Leahy (D-Vt.) has introduced legislation that would offer “a sensible way to resist influences that are undermining [the] source of good nutrition in schools.” The “Child Nutrition Initiatives Act of 2003” (S. 995) focuses on increasing fluid milk, fruit and vegetable consumption in schools; providing grants for farm-to-cafeteria projects; supporting nutritional education activities for children; and fully funding the Women, Infants and Children supplemental food program. The “Better Nutrition for School Children Act of 2003” (S. 1007) would expand the Child Nutrition Act of 1966 by limiting children’s access to soft drinks and “junk food” throughout the entire school, and not just in the cafeteria, until the end of the lunch period.

Meanwhile, Senator Herb Kohl (D-Wis.) has introduced a package of bills (S. 1020, 1021 and 1022) that would expand existing School Breakfast, Summer Food Service and Child and Adult Care Feeding Programs. The Leahy and Kohl bills have been referred to the Committee on Agriculture, Nutrition, and Forestry.

In other legislative action, Representative Edolphus Towns (D-N.Y.) has introduced a bill that

would require states that provide Medicaid prescription drug coverage to cover drugs that are medically necessary to treat obesity. The “Medicaid Obesity Treatment Act of 2003,” (H.R. 2024), which has been referred to the Committee on Energy and Commerce, contains proposed legislative findings about obesity in the United States including “Overweight and obesity are public health problems because they substantially increase the risk of illnesses, including breast cancer, colon cancer, ovarian cancer, prostate cancer, cardiovascular disease, high blood pressure, high cholesterol, type 2 diabetes, heart disease, stroke, gallbladder disease, arthritis, sleep disturbances, and respiratory problems.”

In a related development, the U.S. General Accounting Office has released a report, requested by Congress, on school lunch nutrition, concluding that schools need to do more to limit calories from fat. According to GAO, “many schools are sending a mixed message when they provide nutritious meals and encourage healthy choices, but at the same time rely on the sales of foods of limited nutritious value to fund school and student activities.”

#### U.S. Air Force

##### [2] Government Drops Ball on Studying Perchlorate in Crops

With concerns mounting about levels of a rocket-fuel constituent (perchlorate) appearing in crops irrigated with polluted water, Freedom of Information Act requests have revealed that the U.S. Air Force failed to spend funds appropriated in 1999 desig-



nated for related research. Instead, the Air Force apparently spent its \$500,000 grant to study perchlorate in cactus mice, mosquito fish, Bermuda grass, and other wildlife found in areas near contaminated defense facilities. Environmental Protection Agency officials reportedly prodded the Air Force repeatedly to conduct the crop research; the costs of cleanup nationwide could cost the military millions. Further details about an Environmental Working Group study on perchlorate in lettuce appears in issue 29 of this Update, April 30, 2003. See *The [Riverside] Press-Enterprise*, May 11, 2003.

Two congressional Democrats have requested that the General Accounting Office (GAO) investigate perchlorate cleanup at some Department of Defense (DOD) facilities. In a May 13 letter, Representatives John Dingell (D-Mich.) and Hilda Solis (D-Calif.) asked GAO to find out whether DOD has investigated the existence of perchlorate in groundwater at these locations.

## Litigation

### Trans Fats

[3] *BanTransFats.com, Inc. v. Kraft Foods North America Inc. (Marin County Superior Court, California) (filed May 1, 2003)*

Citing evidence that *trans* fat consumption is associated with high cholesterol, heart disease and diabetes, a newly created non-profit corporation has sued Kraft Foods North America Inc. seeking to stop the marketing and sale of Nabisco Oreo cookies to California children. According to news sources, the case is the first in the nation to target a product that contains *trans* fats. Stephen Joseph, a British-born public-interest lawyer who created the non-profit and filed the lawsuit, is apparently relying on a state products liability law that permits suits against product manufacturers if the products are “not

known to be unsafe” by ordinary consumers. He is also claiming that the company engages in “fraudulent and deceptive advertising.”

Joseph contends many are unaware that *trans* fats, which are contained in partially hydrogenated oils and are commonly found in cookies, crackers and margarine, are unsafe and unfit for human consumption. He evidently believes that consumption of foods with *trans* fats caused his father’s coronary disease and death. In 2002 the Institute of Medicine concluded that there is no safe level of *trans* fat in the diet, and the Food and Drug Administration is currently considering a controversial proposal requiring manufacturers to disclose the amount of *trans* fatty acids in the Nutrition Facts panel of a food product’s label.

The lawsuit reportedly focuses on games that have been created to market Oreos online and in schools; one program encourages school children to stack Oreos as high as possible without toppling the tower, claiming this is “a FUN way to teach your students math, measurement, working as a team and more.”

Media coverage has included references to the pending obesity-related litigation against McDonald’s Corp. and the upcoming obesity conference sponsored by the Public Health Advocacy Institute in Boston. Critics of such litigation argue that courtrooms are the wrong battleground and that nutrition issues should be left to health professionals and regulatory agencies. Better food labeling has been called for by many health professionals. The executive director of the Center for Science in the Public Interest, however, was quoted as saying “The strategy of using the courts is a very valuable one.” See *bantransfats.com Press Release*, May 1, 2003; *SFGate.com* and *The Los Angeles Times*, May 12, 2003; *news.independent.co.uk*, May 13, 2003.



## Other Developments

### [4] Bush Administration to Move Forward with WTO Litigation on GM Foods

According to news sources, pressure from members of Congress who have been complaining about the European Union's (EU) moratorium on the import of genetically modified (GM) foods has led the Bush administration to bring a challenge before the World Trade Organization. Key House and Senate members met with the U.S. trade representative and agriculture secretary to discuss details about the litigation on May 13, 2003; it was announced that the U.S., Argentina, Canada, and Egypt would be bringing the challenge, with Australia, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Peru, and Uruguay supporting it as third parties.

An EU representative responded to news that the suit was being considered by claiming that the timing is "eccentric," given the EU's progress toward ending the moratorium with legislation on labeling and tracing. U.S. farmers, who have lost millions annually in sales of GM corn and soybeans to the moratorium, are reportedly complaining that the proposed EU rules will be difficult and costly to implement. Politics was expected to play a role in the timing of the lawsuit; administration officials had reportedly been concerned about whether it should be filed before the president travels to Europe to attend a June meeting of the industrial nations in France and before the United Nations debate over Iraq is resolved. See *Reuters* and *The Wall Street Journal*, May 12, 2003; *Associated Press* and *USDA News Releases*, May 13, 2003.

Meanwhile, Britain's leading scientific institution, the Royal Society, has apparently completed a major review of GM research and concluded that no credible study has found evidence that GM foods harm human health. See *Times Online*, May 8, 2003.

### [5] Activists Promise Lawsuits During National Food Policy Conference

During a food policy conference held in Washington, D.C., May 8-9, 2003, law professor and tobacco-control activist John Banzhaf delivered [a letter](#) to the National Restaurant Association to ensure that the industry is aware of recent scientific literature indicating that some fast foods "can act on the brain the same way as nicotine and heroin." Banzhaf suggests that restaurateurs consider "warnings or informational notices about the possible addictive properties of fast foods." The letter further suggests, "it may also be prudent for fast food companies to review their policies to be sure that nothing they are doing could be construed by a jury as seeking to take advantage of and/or enhance the possibly addictive properties of their foods." He suggests that some food preparation practices, "might well seem to jurors like the activities of cigarette manufacturers to increase ('spike') the addictive effects of their products." According to Banzhaf, the letter "would be a precursor to a legal action or suit."

U.S. Health and Human Services Secretary Tommy Thompson also addressed conference participants and said public pressure may be more effective than lawsuits and legislation at curbing the proliferation of junk food that is costing government \$117 billion annually in obesity-related health care costs. Thompson reportedly said he would "start giving out awards [to food manufacturers] and singling out ones that are doing good and ones that aren't." The president of the National Restaurant Association reportedly argued that the sedentary American lifestyle is to blame for obesity problems and that Banzhaf and his ilk should consider suing "couch manufacturers." See *money.telegraph.co.uk*, May 5, 2003; *Reuters*, May 7 and 8, 2003; *banzhaf.net*, *FindLaw* and *United Press International*, May 8, 2003.



## [6] WHO Urges Food Companies to Encourage Healthier Diets

World Health Organization (WHO) officials reportedly met with food industry representatives on May 9, 2003, in Geneva, Switzerland, to discuss a global strategy against chronic diseases through healthier diets and increased physical activity. "We would like food companies in some countries to promote smaller portions," WHO Director-General Gro Harlem Brundtland was quoted as saying. "We would like to see real moves to cut the amount of fat, sugars and salt in foods. We think consumers have a basic right to know what they are eating and the effects it can have on them. That means clear, informative, accurate and scientifically proven labeling of food products' benefits or potential harmful effects," she said. Industry officials who attended the meeting reportedly included those from Unilever, Coca-Cola, Nestle, the Kellogg Co., Cadbury Schweppes, and McDonald's. *See Reuters*, May 9, 2003; *Food Ingredients First*, May 12, 2003.

## Media Coverage

### [7] "Force Fed Nation: Our Diets Are Being Subtly Manipulated," *The [London] Guardian*, May 10, 2003.

This series of articles is reportedly the first of a three-part investigation into the way "corporate actions and ministerial inactions have quietly shaped the way we eat." Individual articles include those targeting (i) public attitudes about food safety, (ii) socioeconomic aspects of food shopping, (iii) health effects of poor diets, (iv) pork production, (v) pesticide residues in fruit and vegetables, and (vi) food and beverage advertising aimed at children.

## Scientific/Technical Items

### Obesity

#### [8] Portion Sizes May Have "Obesigenic" Effect on Young Children

Preschoolers take larger bites and consume more when faced with larger portions. J. O. Fisher, et al., "Children's Bite Size and Intake of an Entrée Are Greater with Large Portions Than with Age-Appropriate or Self-Selected Portions," *The American Journal of Clinical Nutrition* 77(5): 1164-1170, 2003. Baylor College of Medicine researchers evaluated 30 preschool-age children over two series of lunches in which the children were either served an age-appropriate entrée portion or a double portion. Doubling the entrée portion increased entrée and total lunch consumption by 25 percent and 15 percent, respectively. Researchers attribute these changes to increases in average entrée bite size without corresponding decreases in overall intake. They note that those children who were most responsive to portion size had the highest levels of overeating. The researchers conclude that "large entrée portions may constitute an 'obesigenic' environmental influence for preschool-aged children by producing excessive intake at meals."



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## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Dale Walker and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at [dwalker@shb.com](mailto:dwalker@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com). You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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