

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

U.S. Congress

[1] House Subcommittee Enters Obesity Lawsuit Fracas

Considering legislation (H.R. 339) that would protect manufacturers, distributors or sellers of food or non-alcoholic beverages from “frivolous lawsuits,” the House Subcommittee on Commercial and Administrative Law conducted a hearing on June 19, 2003, at which Shook, Hardy & Bacon’s Victor Schwartz and law professor John Banzhaf testified. Schwartz addressed the burgeoning phenomenon of regulation through litigation and suggested that legislation which would “solidify existing law” to protect food sellers, manufacturers and distributors would counter any unsound trends that could develop in state courts. Banzhaf, who is actively exploring ways to regulate the food industry through litigation, reportedly claimed that personal responsibility is not to blame for America’s “epidemic of obesity.” He noted that while fast-food companies are “at the top of the list,” “we’re also suing school boards for selling soft drinks.”

Also testifying in support of the bill were a restaurateur speaking on behalf of the National Restaurant Association and the executive director of the Center for Consumer Freedom. The Center for Science in the Public Interest apparently opposes the measure, claiming it “has nothing to do with encouraging

personal responsibility and everything to do with encouraging corporate irresponsibility.”

Meanwhile, legislation (H.B. 518) recently signed by Louisiana’s governor specifically protects from civil liability for personal injury or wrongful death “any manufacturer, distributor, or seller of a food or nonalcoholic beverage intended for human consumption ... where liability is premised upon the individual’s weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage.” See www.cspinet.org, June 19, 2003; *The Washington Times*, June 20, 2003.

[2] House Panel Blocks USDA Implementation of Country-of-Origin Labeling

The House Agriculture Appropriations Subcommittee has reportedly voted to block the U.S. Department of Agriculture (USDA) from implementing a mandatory country-of-origin label rule for meat and poultry products. The vote, part of a \$76 billion fiscal 2004 spending bill, was defended by subcommittee chair Henry Bonilla (R-Texas) as an action that would give lawmakers and the USDA time to “air out” objections to the labels brought by retailers, meatpackers and some livestock producers, according to a news source. Public Citizen criticized the decision, claiming that the rule would benefit American consumers and family farmers and ranchers. An organization that opposes such labeling has established an informational Web site at www.countryoforiginlabel.org. See *The Washington Post*, *Public Citizen Press Release* and *just-food.com*, June 18, 2003.



Litigation

[3] Lawyers and Public Health Activists Ponder Legal Strategies Against the Food Industry at Boston Conference

Plaintiffs' attorneys and public health advocates who claim that food companies should be held liable for obesity and its attendant health effects convened at Boston's Northeastern University School of Law on June 20-22, 2003, for a conference organized largely by longtime antitobacco lawyer Richard Daynard. "We're not doing this to make trial lawyers rich, that's for sure," Daynard was quoted as saying. "What we're facing is an extraordinary epidemic. We have one-third of children in the United States that are going to develop diabetes," he said. Nearly 100 people attended June 21 sessions of the [Public Health Advocacy Institute's](#) First Annual Conference on Legal Approaches to the Obesity Epidemic, while attendance at the June 22 legal strategy workshop was restricted to those willing to sign an affidavit swearing (i) "not to appear as an expert witness or work as a consultant or in any capacity for or in the food industry before December 31, 2006," and (ii) that "I, and any firm/organization for which I am working, am not currently retained by, and hereby commit myself and my firm/organization not to take as a client, any defendant in a food industry case before December 31, 2006."

Noting that lawsuits against tobacco companies were initially deemed frivolous, George Washington University Law Professor John Banzhaf reportedly told participants in the legal strategy workshop to expect four or five food-related lawsuits in the near future. According to news reports, Banzhaf indicated that such lawsuits may target (i) public schools which have "pouring rights" contracts for vending machines with soft drink manufacturers and (ii) fast-food companies for misrepresentation in nutrition

labeling disclosure. "The goal is not to put fast-food companies out of business, but move them to offer healthier alternatives and give consumers important product information," he said. Banzhaf also supports the possibility of suing physicians for not advising patients to lose weight and federal agencies – the Department of Agriculture, Food and Drug Administration, and Federal Trade Commission (FTC) – for not fulfilling specific food-related mandates, e.g., maintaining accuracy in labeling and health claims, devising appropriate serving-size guidelines.

Recurring themes during sessions on June 21 focused on food and beverage company advertising aimed at children, the effect of such advertising on overeating, the behavioral "myth" that individuals are responsible for their personal choices, and the possibility of comparing fatty foods to addictive drugs in litigation. "It's very hard to draw the line on what is healthy because fatty foods are a healthy part of the diet when eaten in moderation," Ross Petty, a professor at Babson College and former FTC attorney was quoted as saying. "They could prove that cigarettes caused cancer that killed you, but making the case with junk food is going to be a lot trickier," Petty said.

In a keynote speech, New York University Professor Marion Nestle asserted that "eating less is bad for business" in describing the effect on the obesity epidemic of pricing strategies which allegedly encourage people to eat or drink more and the roles of supersized portions and youth marketing. Nestle made specific references to Coca-Cola Barbie and counting books that feature Oreo cookies. Author of [Food Politics: How the Food Industry Influences Nutrition and Health](#), Nestle espouses a conspiracy theory by which she claims the food industry satisfies stockholders by convincing consumers "to eat more of their products or to eat their products instead of those of competitors. They do so through

advertising and public relations, of course, but also by working tirelessly to convince government officials, nutrition professionals, and the media that their products promote health – or at least do no harm. Much of this work is a virtually invisible part of contemporary culture that attracts only occasional notice.”

Susan Linn, a psychology instructor at Harvard Medical School and co-founder of [Stop Commercial Exploitation to Children](#), discussed various alleged effects of advertising and marketing to children, claiming that advertisers encourage kids to nag their parents to buy certain products and citing Oscar Mayer’s Lunchables in particular as an example of “extreme exploitation.”

[Center for Science in the Public Interest](#) Director Michael Jacobson championed special taxes to reduce consumption of certain foods and provide funding for “fabulous educational programs.” He claimed, for example, that a 1 cent tax on 12-ounce soft drinks could raise \$1.5 billion annually, while a similar tax for every 1 pound of meat sold could generate some \$475 million. In regard to potential litigation, he suggested as possible targets the manufacturers of food products whose labels fail to disclose additives like acrylamide and beer companies whose product labels fail to disclose calorie content.

Kelly Brownell, director of the Yale Center for Eating and Weight Disorders, opined to conference participants that the food and beverage industry would likely respond to obesity-related litigation by (i) trying to focus public attention on the roles of physical inactivity and personal responsibility, (ii) scolding parents for not monitoring what their children consume, (iii) claiming that advertising affects brand choice only, and (iv) distorting or ignoring the science, i.e., “treading on common sense.” To protect children from what he deems a “toxic environment” that contributes to obesity, Brownell advocates

regulating advertising aimed at kids, ending product placements in television programs, movies and print media, and creating “healthy schools” by rejecting pouring contracts with soft drink companies. See *Associated Press*, *Reuters* and *The Wall Street Journal*, June 20, 2003; *CanWest News Service*, June 21, 2003; *The Financial Times* and *The Washington Times*, June 22, 2003; *The Washington Times*, June 23, 2003.

[4] **Fast-Food Companies Receive Warning Letters from John Banzhaf**

In an opening salvo to the campaign against those alleged to be responsible for the nation’s growing problems with obesity, law professor John Banzhaf has sent letters to fast-food companies in the United States and Great Britain warning them of potential liability for failing to post health warnings and other informational notices about their foods. Distributed during the obesity conference held in Boston June 20-22, 2003, the purported “legal notices” cite research about “possible addictive-like effects of many fast foods.” Banzhaf, who refers to himself as a “legal terrorist” and claims to have led successful assaults against cigarette manufacturers, also suggests that the companies review their policies and practices to ensure that they are doing nothing to “enhance the possible addictive properties” of their foods, such as manipulating the fat content, adding sugar or “secretly adding appetite stimulants.” The letters close by reminding companies that juries might construe such actions negatively. The [American Council on Science and Health](#) characterized Banzhaf’s assertions about addiction and high-fat, high-sugar foods as “ludicrous.” See *American Council on Science and Health Press Release*, June 19, 2003; and *Sunday Times*, June 22, 2003.



[5] **Class Action Suit Filed Against Nestle for Claims About Bottled Water**

A class action lawsuit has reportedly been filed against Nestle in Connecticut state court claiming that the company has misrepresented the quality of its bottled water. According to the attorney who filed the complaint, "Consumers purchase Poland Spring thinking they are getting a higher-quality natural spring water, but our suit will show that Poland Spring is neither natural nor spring water, and in fact comes from sources of a lesser quality than some tap water." Those sources are allegedly surrounded by asphalt parking lots or potentially dangerous contamination. Plaintiffs apparently seek restitution to the general public and a ban on advertisements or promotions that are not scientifically accurate. A company spokesperson responded by stating "The truth will come to light. We will certainly defend our good name against these false charges." *See Reuters*, June 18, 2003.

Legal Literature

[6] **Anthony Robbins, Wendy Parmet and Richard Daynard, "Race, Poverty, and New Strategies to Control the Obesity Epidemic," *Poverty & Race Research Action Council*, May/June 2003**

Written by three principals in the Public Health Advocacy Institute, this article attributes bad eating habits among the poor to aggressive marketing by food producers. According to the authors, "Limits of time and money, and habits learned at an early age, condemn many poor Americans to an excessively generous diet of processed and fast food. Perhaps 'comfort food' is not misnamed. The distribution of obesity by income is similar to the distribution of tobacco use in the population – greater prevalence with lower income, as well as racial disparities." The

authors allege that discovery in litigation will allow "lawyers to learn what the food marketers knew about causing obesity and when they knew it just as that process led to finding clear evidence in the tobacco litigation." The goal of such litigation, say the authors, will be to change corporate behavior.

Other Developments

[7] **Fast-Food Giant Notifies Meat Suppliers About Policy on Antibiotic Use**

Working with a coalition of stakeholders, McDonald's Corp. has reportedly adopted a policy requiring its meat suppliers to stop using growth promoters closely related to antibiotics in human medicine by the end of 2004. Suppliers will be required to keep records and submit to regular audits, said a news source. The initiative has been praised by a Food and Drug Administration official and environmental advocates concerned about the overuse of antibiotics in animal feed and the potential for antibiotic resistance in animals and the bacteria that cause diseases in humans. McDonald's reportedly uses more than 2.5 billion pounds of chicken, beef and pork annually.

The policy is not, however, without its critics; an official with the Animal Health Institute apparently claims it has no scientific basis. He was quoted as saying that "Europe, as a result of a non-science based policy, has removed the use of antibiotics as growth promoters, and as a result has sparked a dramatic increase in animal disease and the use of antibiotics to treat that disease." *See Reuters* and *The Washington Post*, June 19, 2003; *The New York Times*, June 20, 2003.



[8] Genetically Modified Crops Continue to Generate Controversy

Based on data collected through Freedom of Information Act requests to the federal government, the Center for Science in the Public Interest (CSPI) has issued [a study](#) purportedly showing that more farmers are failing to comply with standards regulating the planting of genetically modified (GM) corn than the industry has claimed. CSPI found that 19 percent of farmers do not plant at least 20 percent of their acreage with corn other than the GM variety to serve as a refuge for insects killed by a toxin in the GM corn and thus mitigate the potential for insect resistance. According to CSPI, discrepancies in industry data can be explained by industry's reliance on surveys of large farms. Smaller farms apparently have a higher rate of noncompliance. Another GM-crop-related report, also released June 18, 2003, says that the U.S. Department of Agriculture rarely turns down applications to test GM crops. *See The New York Times*, June 19, 2003.

Meanwhile, the advocacy group Environment California Research & Policy Center has added its criticism of the government's purported failure to properly oversee the thousands of open-air, gene-splicing crop tests conducted by such companies as Coors Brewing Co., Frito-Lay, Monsanto, and H.J. Heinz. The group claims that such experiments could result in the "genetic contamination" of the nation's food supply. The Bush administration is reportedly showing signs of withdrawing support for a requirement that companies notify the Food and Drug Administration before putting a new GM crop on the market. Such consultation is currently voluntary, but the agency had proposed in the waning days of the Clinton administration to make notification mandatory. *See MSNBC.com*, June 18, 2003.

Scientific/Technical Items

Acrylamide

[9] California Researchers Assert That Acrylamide May Induce Genetic Damage

New research published in the *Journal of the National Cancer Institute* reportedly adds toxicologic evidence that acrylamide, a by-product of high-temperature cooking processes, may have the potential to induce genetic damage. A. Besaratinia and G.P. Pfeifer, "Weak Yet Distinct Mutagenicity of Acrylamide in Mammalian Cells," *Journal of the National Cancer Institute* 95(12): 889-896, 2003. Investigators from California's Beckman Research Institute purportedly demonstrated genetic mutations in mice embryonic cells exposed to acrylamide, speculating that such mutations may be caused by direct damage to the DNA.

Significant mutations were only found at relatively high acrylamide doses. Editorial comment on the study notes, however, that high concentrations of acrylamide can be found in frequently consumed foods (e.g., potato chips, fries) and that the total acrylamide burden is rather large. F. Granath and M. Tornqvist, "Who Knows Whether Acrylamide in Food Is Hazardous to Humans?" *Journal of the National Cancer Institute* 95(12): 842-843, 2003. The commentary further opines that acrylamide could contribute significantly to the large fraction of all cancers attributed to dietary factors generally.

Alcohol Advertising

[10] CAMY Report Concludes That African-American Youth Are Consistently Exposed to Alcohol Ads

The Center on Alcohol Marketing and Youth (CAMY) at Georgetown University has released [a report](#) which concludes that African-American youth are overexposed to alcohol advertisements in a variety of media, including radio, television and magazines. Virtual Media Resources, commissioned by CAMY to audit such advertising exposures for the report, tallied the ads aired or printed in 2002 in the media most popular with African-American teens. These data were compared with data relating to non-African-American youth. According to CAMY, the results show that African-American teenagers were exposed to more alcohol advertising in magazines and on radio than were non-African-American teens, with a greater emphasis on distilled spirits and “low-alcohol refreshers,” such as Smirnoff Ice and Mike’s Hard Lemonade. In addition, alcohol ads, costing some \$11.7 million in 2002, were placed on 15 television programs most popular with African-American youth.

According to CAMY, while African-American youth have a lower incidence of drinking when compared with their non-African-American counterparts, there is evidence that “as they age, African-Americans suffer more from alcohol-related diseases than the rest of the population. Alcohol use plays a substantial role in the three leading causes of death among African-American youth – unintentional injuries (including motor vehicle fatalities and drownings), suicides and homicides.” CAMY also reports that “Alcohol is the drug most widely used by African-American youth” and that alcohol products and imagery abound in the music and videos

appealing to this market. Because African-American teenagers are “increasingly viewed by marketers as trendsetters for the entire youth population,” CAMY suggests that targeting this “relatively small group of teens may open the door to the larger, more affluent, white, suburban market.”

A Jack Daniels spokesperson responded to the report by stating, “We’ll gag at a gnat and swallow a camel before we advertise in anything that’s major thrust is under-drinking-age people.”

In related developments, the American Medical Association (AMA) reportedly decided on June 19, 2003, that it would not change its policy against liquor advertising. Former AMA chair and current adviser to the Distilled Spirits Council Dr. Raymond Scalettar had apparently tried to make the industry’s case during the association’s annual meeting, citing a growing body of medical evidence about health benefits of light-to-moderate drinking.

Meanwhile, several advocacy organizations are apparently calling for changes in beer advertising practices, alleging that brewers target young drinkers with racy, over-the-top commercials which depict “essentially drunken, riotous behavior by young people.” The Federal Trade Commission is reportedly investigating such practices as part of a larger study of alcohol marketing requested by Congress; the results should be available in August along with the results of a joint National Research Council and Institute of Medicine report on ways of reducing and preventing underage drinking. See *The New York Times* and *The Chicago Tribune*, June 19, 2003; *The Wall Street Journal*, June 23, 2003.

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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 or 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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