

Food & Beverage

LITIGATION UPDATE

Issue 38 • July 9, 2003

Table of Contents

Legislation, Regulations and Standards

- [1] FTC Studies Online Wine Purchases1
- [2] IOM Report Addresses Dietary Dioxin Exposure.....1
- [3] Two New Bills Target Child Nutrition in Public Schools.....2
- [4] EU Parliament Approves New Rules on GM Foods2
- [5] New York City to Restrict Offerings in Public School Vending Machines2

Litigation

- [6] Seattle School Board Receives Liability Warning Related to Pouring Rights Contract3
- [7] *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (RWS) (U.S. District Court, Southern District, New York) (filed February 12, 2003).....3

Other Developments

- [8] U.S. Chamber of Commerce Issues Report on Obesity4
- [9] Kraft to Implement Measures to Address Obesity4

Scientific/Technical Items

- [10] Teenage Use of Alcohol and Tobacco May Enhance Susceptibility to Addiction.....4

Shook,
Hardy &
Bacon L.L.P.

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Studies Online Wine Purchases

According to [a report](#) recently issued by the FTC, online wine purchases can benefit consumers by offering significant savings and increased selection, without compromising concerns about sales to minors. State laws restricting direct shipments from other states are viewed as anticompetitive barriers that are not necessary to control underage access to alcohol. Such access is being effectively controlled, says the FTC, by laws in some states requiring adults to sign for the shipment at the point of delivery.

Meanwhile, recent commentary notes that the alcohol industry has largely escaped the attention of litigators and public health organizations that have been focusing instead on tobacco and obesity. Tobacco-control activist John Banzhaf, who has made obesity his latest cause, reportedly suggested that drinkers could have a more difficult time proving industry liability in court because “The dangers associated with over-consumption of alcohol are arguably far better known.” The article also notes that the industry has been successful in escaping scrutiny by submitting to “responsible self-regulation” and by encouraging distinction between overall alcohol consumption and excessive drinking. *See Financial Times*, July 8, 2003.

Institute of Medicine (IOM)

[2] IOM Report Addresses Dietary Dioxin Exposure

Though the authors of a 294-page document issued by the National Academies’ Institute of Medicine acknowledge that the health risks of dioxins in foods are as yet undetermined, they recommend establishment of a federal interagency group to “develop a risk-management strategy to reduce DLCs [dioxin-like compounds] in the food supply.” Titled [Dioxins and Dioxin-like Compounds in the Food Supply: Strategies to Decrease Exposure](#), the report also recommends (i) “reducing the contamination of animal forage and feed and interrupting the recycling of DLCs that result from the use of animal fat in animal feed,” (ii) “reducing DLC intakes by girls and young women in the years well before pregnancy is likely to occur,” and (iii) increasing research on the health effects of DLCs on fetuses and breastfeeding infants.

Meanwhile, the Food Safety Authority of Ireland (FSAI) has published a [discussion paper](#) which concludes that the levels of dioxin in the Irish food supply are “extremely low and pose no risk to consumers.”

Dioxins and DLCs are compounds that accumulate in the body fat of people and animals. Most human exposure comes from dioxin-contaminated foods such as dairy products, meat, poultry, and fatty fish. High levels of dioxins have purportedly been linked to cancer and endocrine problems. *See FSAI Press Release*, June 27, 2003; *National Academies Press Release*, July 1, 2003.



U.S. Congress

[3] Two New Bills Target Child Nutrition in Public Schools

Two bills introduced in Congress on June 26, 2003, would amend the Richard B. Russell National School Lunch Act to improve the nutrition and health of children. Senator Mitch McConnell (R-Ky.) introduced the [Child Nutrition Improvement Act of 2003 \(S. 1367\)](#) to require that schools participating in the school lunch program offer a variety of flavored and unflavored fluid milk products. The legislation would also provide grants to schools dedicated to establishing a “healthy school environment program” – i.e., a program designed to improve nutrition by offering fruits, vegetables and dairy products as well as enhancing physical activity levels among students. The bill has been referred to the Committee on Agriculture, Nutrition and Forestry.

The [Farm-to-Cafeteria Projects Act of 2003 \(H.R. 2626\)](#) would provide funds for schools to purchase locally produced foods from small and medium-sized farms. Introduced by Representative Fred Upton (R-Mich.), the proposal would also support student participation in farm and agriculture projects. The bill has been referred to the Committee on Education and the Workforce.

European Union (EU)

[4] Parliament Approves New Rules on GM Foods

Rules that would require labeling on any food with more than 0.9 percent genetically modified (GM) ingredients have been approved by the European Parliament. The rules, which also impose traceability requirements, will take effect in early 2004 if approved by the EU’s 15 member states.

The Bush administration and agricultural interests in the United States are reportedly critical of the new legislation, complaining that its requirements will be burdensome and will hinder trade because European consumers are reluctant to buy GM products. EU agricultural ministers were notably absent, according to news sources, from the U.S. Department of Agriculture’s first Ministerial Conference and Expo on Agricultural Science and Technology held in Sacramento, California, in late June 2003.

In other developments, a biotechnology trade group has released [a report](#) which concludes that European farmers could increase their net income by \$1 billion annually if the EU would approve just three GM crops – corn, sugar beets and potatoes. The projected gains are apparently attributable to increased yields and decreased pesticide use. The report was funded by the U.S. Biotechnology Industry Organization, Monsanto and Syngenta. *See The Los Angeles Times*, June 25, 2003; *Associated Press*, June 26, 2003; and *The New York Times*, July 3, 2003.

State/Local Initiatives

[5] New York City to Restrict Offerings in Public School Vending Machines

Citing a desire to combat rising rates of childhood obesity, the New York City Department of Education has established nutritional guidelines that prohibit the sale of soft drinks, chewing gum, hard candy, and doughnuts in school vending machines as of September 2003. “Childhood obesity is at epidemic levels throughout the United States and that can create problems related to school performance,” an education department official was quoted as saying. Cookies, pretzels, and potato chips will evidently still be stocked in the machines.



A recent survey conducted by the Department of Health and Mental Hygiene and Department of Education reportedly indicated that nearly one-half of the city's elementary school children are overweight. Of the nearly 3,000 kindergartners through fifth-graders surveyed, 43 percent of them apparently weighed more than their recommended weights (based on such factors as sex, height and age), while 19 percent were deemed overweight and 24 percent as obese. See *The New York Times*, June 25 and July 9, 2003; *New York Post*, June 25, 2003.

Litigation

Soft Drinks

[6] **Seattle School Board Receives Liability Warning Related to Pouring Rights Contract**

Law professor John Banzhaf has informed Seattle School Board members that, should they renew the district's contract for exclusive vending machine rights with Coca-Cola, they will open themselves to potential liability for breach of fiduciary duties to district students. The contract apparently expires August 31, 2003, and the school board had been scheduled to vote on a five-year renewal in early July. The decision has reportedly been delayed until at least July 17 for the consideration of alternatives, including making the beverages inaccessible during school hours, banning them from middle and high schools altogether or requiring some vending machine slots to be reserved for non-carbonated beverages or water.

Linking the country's "major epidemic in pediatric obesity" to soft drink consumption, Banzhaf claims that school boards owe a duty to students "to protect them from harmful activities," and that the

contract renewal "may create the risk of legal liability." A Seattle attorney with children in the district echoed Banzhaf's warnings in a June 30 letter to the board. School board president Nancy Waldman reportedly noted that the contract brings \$400,000 in revenues to the district, while at least some district parents expressed anger about "some outside lawyer from some outside state coming in and trying to mandate what we have in our schools." See *Seattle Post-Intelligencer*, July 2, 2003.

Fast Food

[7] ***Pelman v. McDonald's Corp.*, No. 02 Civ. 7821 (RWS) (U.S. District Court, Southern District, New York) (filed February 12, 2003)**

During a recent hearing before U.S. District Judge Robert Sweet, plaintiffs' counsel Samuel Hirsch reportedly indicated that they would be dropping any claim that McDonald's foods are highly processed and as such pose risks of which consumers are unaware. Hirsch was quoted as saying, "I think that's the sensational part of the suit. We don't need that." The concession was apparently made as the parties presented arguments on McDonald's motion to dismiss. Claims remaining in the case challenge the company's (i) advertisements as misleading and (ii) assertions about the availability of nutritional information as unfair and deceptive. McDonald's counsel reportedly defended its advertising campaigns and said plaintiffs' false advertising claims lack sufficient specificity. See *Obesity Policy Report*, June 26, 2003.



Other Developments

[8] U.S. Chamber of Commerce Issues Report on Obesity

According to a new U.S. Chamber of Commerce report, litigation against fast-food companies will not result in reduced rates of obesity. Prepared by economist Todd Buchholz, the report titled [Burger, Fries and Lawyers: The Beef Behind Obesity Lawsuits](#), contends that “fast food restaurants are not a chief explanation for rising obesity levels in the U.S.,” and that “the spread of fast food restaurants has actually helped to push down the cost of protein, a key building block to good physical health.” The report documents how body mass index (BMI) scores have risen steadily for the last 120 years and attributes the increase to more sedentary lifestyles, increases in snacking and a greater availability of all foods at lower prices, whether obtained from supermarkets or fast-food restaurants.

The report concludes by noting that “Lawsuits against fast food firms fail to recognize the fact that people choose what and how they want to eat. While it is unlikely that nutritionists will soon announce that super-sized double-cheeseburgers will make you thin, society should not allow the latest fads or the most lucrative lawsuits to govern what we eat for lunch.” The Center for Science in the Public Interest responded to the report by stating “one would have to be a complete ostrich to believe that fast food marketers have no culpability in the obesity epidemic.” See *CSPI Newsroom*, July 3, 2003.

[9] Kraft Announces Obesity Measures

Kraft Foods has announced an [initiative](#) aimed at countering rising rates of obesity worldwide. “Measures the company plans to implement include (i) capping the portion sizes of single-serve packages, (ii) eliminating all in-school marketing, (iii)

discouraging over-consumption of food or sedentary behavior in advertising and marketing to children, (iv) augmenting nutrition labeling in all markets worldwide, and (v) advocating public policies that target improved fitness and nutrition. An advisory council of various health-related professionals will guide the company in implementing the changes, which are expected to require two to three years to complete. See *Kraft Press Release*, July 1, 2003.

Scientific/Technical Items

Addiction

[10] Teenage Use of Alcohol and Tobacco May Enhance Susceptibility to Addiction

Regions of the brain that govern impulsivity and/or novelty-seeking are not fully developed by adolescence, at least partially explaining teen susceptibility to addiction, say researchers from the Yale School of Medicine. R.A. Chambers, et al., “Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability,” *American Journal of Psychiatry* 160: 1041-1052, 2003. Based on a review of more than 100 scientific papers on neurodevelopment, the Yale team concluded that “addictive” substances like alcohol and tobacco stimulate rapidly changing parts of the brain during adolescence when developmental processes promote a learning drive that aids adaptation to adult roles. According to the researchers, the neurocircuitry involved in the motivation to repeat novel experiences develops at a much faster rate than the neurocircuitry that inhibits urges and impulses. They further opine that alcohol and tobacco use may accelerate these developmental changes, enhancing their progression or permanence, thus making teens particularly vulnerable to the development of “addictive” habits.



Food & Beverage

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 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.

Shook,
Hardy &
Bacon_{L.L.P.}TM

Geneva, Switzerland

Houston, Texas

Irvine, California

Kansas City, Missouri

London, United Kingdom

Miami, Florida

New Orleans, Louisiana

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

