

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

U.S. Congress

[1] DeLauro Introduces Bill Requiring Nutrition Disclosure by Restaurants

Representative Rosa DeLauro (D-Ct.) has introduced legislation ([H.R. 3444](#)) that would amend the federal Food, Drug and Cosmetic Act by requiring chain restaurants with 20 or more locations nationwide to provide information about the nutritional content of their foods and beverages. More specifically, the Menu Education and Labeling Act would require restaurants to post on menu boards or print in menus next to each item information about (i) calorie content, (ii) saturated and *trans*-fat content and (iii) sodium content. The bill has been referred to the Committee on Energy and Commerce. Senator Tom Harkin (D-Iowa) is expected to introduce similar legislation in the Senate. *See Reuters*, November 5, 2003.

Federal Trade Commission (FTC)

[2] CSPI Cries Foul; Agency Asked to Enjoin KFC Ads

Responding to new KFC advertisements that tout fried chicken as “better” eating, the Center for Science in the Public Interest (CSPI) has [petitioned](#) the FTC to enjoin the ads as misleading and deceptive. In a November 6, 2003, letter to the FTC, CSPI Director Michael Jacobson focuses on television ads in which the company’s chicken is linked to “eating

better” and one man’s “fantastic” appearance. While Jacobson acknowledges the ads’ “virtually illegible disclaimers,” he states “KFC’s ads are so outrageous that an experienced observer of the advertising industry, has characterized them as ‘naked non-sense.’ A November 3 *Advertising Age* column by Bob Garfield says KFC has resorted to ‘desperate and sleazy tactics ... Fried chicken is not, never has been and never will be health food ... the overriding message about healthful chicken is dangerous baloney.’”

Jacobson’s letter focuses on the high levels of saturated and *trans* fat, cholesterol and sodium in a typical KFC meal. KFC apparently compares its products to a Burger King Whopper, about which Jacobson says, “Practically anything looks good compared to a Whopper.” A KFC spokesperson was quoted as saying, “Our ads simply set the record straight by providing consumers the absolute facts about KFC’s original recipe fried chicken, which can be part of a balanced, healthy diet.” *See Associated Press*, November 8, 2003.

Food and Drug Administration (FDA)

[3] Agency Finds Cookie Labels Inaccurate

During testing conducted in June 2003, the FDA reportedly found that Baker’s Breakfast Cookie samples contained more calories, fat and carbohydrates than information provided on product labels. The discrepancies apparently ranged from 35 to 48 percent, well beyond the 20 percent margin of error that FDA allows for nutritional information. A news source indicates that FDA sent its results to the Seattle-based company on October 31 and will await



the company's response before deciding whether to take further action. Since June, the company has reportedly changed its labels to reflect calorie counts about 15 to 20 percent higher than previous totals. The cookies at issue, which contain some 300 calories each, are apparently popular with those on the Weight Watchers diet. *See The Seattle Times*, November 7, 2003.

[4] FDA Announces *Listeria* Risk Assessment Meeting

The FDA will conduct a public meeting on December 4, 2003, to present its *Quantitative Assessment of the Relative Risk to Public Health from Foodborne Listeria monocytogenes Among Selected Categories of Ready-to-Eat Foods*. According to FDA's notice, "This public meeting is intended to provide clarification about the results of the risk assessment and information as to how the risk assessment may be utilized. Stakeholders will have an opportunity to ask questions about the risk assessment and the risk management plan." The [risk assessment](#) was made available to the public in the *Federal Register* on October 24. *See Federal Register*, November 7, 2003.

United Kingdom

[5] Food Agency Considers Options for Improving Children's Diets

Characterizing childhood obesity as "a health time bomb," the U.K.'s Food Standards Agency has issued the [options](#) it is currently considering to address the increasing levels of obesity among British children. Among the options are proposals to (i) "restrict advertising of less healthy foods during programs aimed at pre-school children," (ii) use celebrity endorsements to promote healthier foods to children, (iii) encourage children to purchase healthier foods by means of prize promotions or voucher

collections that would be exchanged for gifts, (iv) provide health warnings on foods high in salt, sugar and fat, and (v) remove vending machines from schools or mandate the stocking of healthier options. The agency is seeking public input on its proposals and is planning a public meeting for January 2004 after which it will make its recommendations to government. The agency's chair, citing statistics on childhood obesity, has stated "Doing nothing is not an option."

Meanwhile, the Consumers' Association is reportedly calling for European Union-wide legislation to address food labeling issues. The association apparently commissioned an analysis of foods and drink targeted to children, finding such products contain more sugar than similar adult foods and are marketed with misleading images that suggest they contain more of the primary ingredient than is actually the case. An association spokesperson was quoted as saying, "The conclusion of the dietician's analysis is shocking. To follow such a diet on a regular basis would be damaging to a child's health." A food industry trade group reportedly responded by claiming "It is absolutely untrue to suggest that children's products are damaging to health. The industry works with food regulators and parents to ensure that its products are safe, wholesome and can be enjoyed as part of a healthy diet." *See BBC News*, November 5, 2003.

European Union (EU)

[6] EU Committee Fails to Vote on Allowing Sale of GM Corn

A European Union regulatory committee has reportedly delayed approval of a proposal allowing the sale of imported canned corn grown from genetically modified seeds (BT-11) in the EU's 15 member states. BT-11 sweet corn is produced by Syngenta



and grown primarily in the United States and Canada. An EU spokesperson was quoted as saying committee members needed more time to study the proposal and would likely make a decision during a meeting in December 2003. If approved, the decision to allow importation of the GM corn will mark the end of a five-year ban the EU has maintained against GM foods. See *EUObserver* and *The Wall Street Journal*, November 10, 2003.

Other Developments

[7] CSPI Report Links Food Marketing to Increasing Rate of Childhood Obesity

Claiming that food manufacturers and fast-food chains “use aggressive and sophisticated marketing techniques to get into children’s heads, attract their attention, manipulate their food choices, and prompt them to pester their parents to purchase products,” the Center for Science in the Public Interest (CSPI) has published a [report](#) urging Congress to authorize Federal Trade Commission implementation of nutrition standards for foods that can be marketed to children and restrict advertising and marketing for foods that fail to meet such standards. “No amount of eye-rolling can capture how hypocritical it is for food company flacks to talk about ‘moderation, balance and exercise,’” CSPI Executive Director Michael Jacobson was quoted as saying. “Anyone who looks at these marketing techniques can see that they encourage excess, not moderation,” he said.

Examples of advertising the report cites as encouraging children to overconsume include a section of the [Pepsi World Web site](#) in which New York Yankees first baseman Jason Giambi says that Pepsi “goes great with my favorite pre-game meal. I usually have several Pepsis each day – it really lifts me up.”

Advertising and food industry groups responded to CSPI’s report by saying an advertising ban would be unconstitutional and that the childhood obesity issue is attributable to more than the advertising and marketing of certain foods. The CSPI report also advocates (i) federal and state media campaigns to promote healthy dietary habits for youth, (ii) federally funded research on the impact of food marketing on children’s health, (iii) a ban on soft drinks and low-nutrition foods in public schools, (iv) industry agreements not to market low-nutrition foods to kids, and (v) involvement by state attorneys general and trial lawyers “to protect children from junk-food marketing.” See *Ad Age*, *Grocery Manufacturers Association Press Release* and *The Wall Street Journal*, November 10, 2003.

[8] Debate over Classification of Obesity Intensifies

According to a news source, momentum is building for federal agencies and others to classify obesity as a disease, with questions about insurance coverage and drug access hanging in the balance. For example, in 2002 the Internal Revenue Service apparently declared obesity a disease and now allows taxpayers to deduct the cost of prescribed weight-loss treatments. The agency that administers the Medicare and Medicaid programs is reportedly expected to issue its decision on the matter in the near future, and the Food and Drug Administration is considering revising guidelines for testing diet drugs, which could result in new medications getting on the market more quickly. Advocates of the obesity-as-disease movement apparently believe that more people will seek help if they consider their weight problem to be a medical condition instead of a personal failing. Opponents claim that the condition can have benefits such as a decreased incidence of osteoporosis in older people who are overweight. The efficacy of particular treatments will have to be



evaluated if health insurance benefits are extended to cover weight-control therapies. *See The Washington Post*, November 10, 2003.

[9] **FDLI Conference to Tackle Complexities of Obesity Epidemic**

Scientific, legal and policy aspects of the overweight and obesity issue will be the focus of a January 15-16, 2004, [conference](#) sponsored by the Food and Drug Law Institute. Speakers at the Washington, D.C., event will include Food and Drug Administration Deputy Commissioner Lester Crawford, Center for Science in the Public Interest Director Michael Jacobson, and representatives of the National Restaurant Association and International Food Information Council.

Scientific/Technical Items

High-Fructose Corn Syrup

[10] **Researchers Suspect HFCS Link to Irritable Bowel Syndrome**

An Iowa gastroenterologist concerned about increasing numbers of patients with abdominal pain, bloating, gas, and diarrhea, has conducted breath tests showing that many with such symptoms do not completely digest high-fructose corn syrup (HFCS). Dr. Satish Rao has reportedly concluded that most people cannot adequately digest more than 25 grams of fructose daily. And with a typical cola containing 16 grams of HFCS and a glass of orange juice containing 15 grams of fructose, he believes it is likely that consuming such products within a few hours can overwhelm a person's ability to handle fructose. When Rao advises his patients to cut back on such products as soft drinks, sweetened juices and processed foods, their irritable bowel syndrome

symptoms apparently improve. According to a news source, a dietetics and nutrition professor in Kansas has also found, using breath tests, that the vast majority of those tested do not completely digest HFCS. *See The Kansas City Star*, November 11, 2003.

Cardiovascular Disease

[11] **NYC Researchers Deem Exercise Crucial to Prevention of Heart Disease**

Exercise, not diet, may be the best defense against heart disease. J. Fang, et al., "Exercise, Body Mass Index, Caloric Intake, and Cardiovascular Mortality," *American Journal of Preventive Medicine* 25(4): 283-289, 2003. Researchers at the Albert Einstein College of Medicine followed nearly 10,000 adults for 17 years, assessing the impact of caloric intake, body mass index (BMI) and physical activity on cardiovascular disease mortality. After taking other relevant factors into account, they found physical activity and obesity were independently associated with an increased risk of death attributed to cardiovascular disease. They found no such association between high caloric intake and mortality. Jing Fang, lead investigator in the study, notes "subjects with the lowest caloric intake, least physical activity, and who were overweight or obese had significantly higher cardiovascular mortality rates than those with high caloric intake, most physical activity, and normal weight." She suggests these results indicate a focus on increased energy expenditure rather than reduced caloric intake may be the most productive behavioral strategy for extending life.



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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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