

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

U.S. Congress

[1] Harkin Introduces Bill Requiring Nutrition Disclosure by Restaurants; CSPI Issues Report on Nutritional Content of Kids' Menu Offerings

Senator Tom Harkin (D-Iowa) has introduced legislation ([S. 2108](#)) 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. "American parents are woefully uninformed on the fat and calories their children are getting in meals at popular restaurants," Harkins was quoted as saying during a February 24, 2004, press conference. The Menu Education and Labeling Act mirrors similar [legislation](#) introduced by Representative Rose DeLauro (D-Ct.) in November 2003 by requiring restaurants to post on menu boards or print in menus next to each item information about (i) calorie content, (ii) saturated fat and *trans*-fat content and (iii) sodium content. Harkin's bill differs from DeLauro's, however, by requiring operators of 20 or more vending machines to provide "conspicuous" signs that disclose the number of calories contained in each vending machine item. The legislation has been referred to the Committee on Health, Education, Labor, and Pensions.

During Harkin's press conference, the Washington, D.C.-based Center for Science in the Public

Interest (CSPI) issued an independent laboratory's nutritional [analysis](#) of typical kids' menu offerings from chains such as Applebee's, Chili's and Outback Steakhouse. CSPI findings include: (i) an Applebee's grilled cheese sandwich contains 520 calories and 14 grams of fat; (ii) Chili's "little chicken crispers" with a side of fries amounts to 710 calories and 15 grams of fat; and (iii) Outback Steakhouse's "boomerang" cheeseburger with a side of fries contains some 840 calories and 31 grams of fat. A CSPI nutritionist was quoted as saying that "Many parents appreciate the kid-friendly atmosphere and free crayons at places like Applebee's, but not many would expect adult-sized calorie counts in a children's meal." See *CSPI News Release*, February 24, 2004.

Food and Drug Administration (FDA)

[2] FDA Reopens Comment Period for *Trans* Fat Rulemaking

FDA has reopened for 45 days the comment period for a proposed rulemaking related to (i) nutrient content claims about *trans*-fatty acids, (ii) qualifying criteria for *trans* fat in current nutrient content claims for saturated fatty acids and cholesterol, (iii) lean and extra lean claims, and (iv) health claims about cholesterol-raising lipids. The agency hopes that the extended comment period will allow commenters to consider the *trans* fat labeling issues discussed in a December 2003 Institute of Medicine/National Academy of Sciences report titled *Dietary Reference Intakes: Guiding Principles for Nutrition Labeling and Fortification*. Among other things, that report recommends Daily Values for saturated fatty



acids, *trans*-fatty acids and cholesterol at the lowest possible levels. Comments are due by April 15, 2004. See [Federal Register](#), March 1, 2004.

Litigation

Interstate Commerce

[3] Costco Sues Washington State Liquor Control Board

Washington state regulations that prohibit retailers from buying alcoholic beverages directly from manufacturers violate federal antitrust laws and obstruct interstate commerce by limiting competition and forcing retailers to charge higher prices for beer and wine, according to a [lawsuit](#) filed February 20, 2004, in federal court by Costco Wholesale Corp. The complaint asserts that “Warehouse clubs and retailers would lower their costs and thus offer better prices and selection to consumers if permitted to negotiate discounts based on their efficient buying and distribution practices and good credit, to buy directly from all wineries and brewers where that makes economic sense, and to supply their stores through their own distribution system.” Current state law requires retailers to purchase alcoholic beverages only from distributors, which typically mark up prices by 10 percent or more; the Washington Legislature would have to approve any change in the law. Costco is reportedly the largest U.S. wine retailer, with some \$620 million in wine sales during 2003. See *Seattle Post-Intelligencer*, February 24, 2004.

First Amendment

[4] Third Circuit Rules Against “Got Milk?” Ads

The Third Circuit Court of Appeals has held that the “Got Milk?” dairy campaign violates the free speech of dairy farmers forced to pay for the ads under the Dairy Promotion Stabilization Act of 1983. [Cochran v. Veneman, No. 03-2522 \(3rd Cir. 2/24/04\)](#). The ruling overturns a lower court decision which held that dairy farmers had to contribute to the National Dairy Promotion and Research Board’s campaign, even though plaintiffs believed the advertisements did little to support sustainable agricultural products.

Attorneys for the U.S. Department of Agriculture contended that a joint marketing campaign was the only effective way to compete with other beverages because dairy prices and distribution are tightly regulated.

The Third Circuit decided, however, that the government’s interest in promoting the dairy industry wasn’t substantial enough to justify an infringement on the farmers’ free speech rights by requiring them to help pay for the ads. “Promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry’s interest more so than the government’s,” the Third Circuit said.

The “Got Milk?” campaign is the latest industry promotion whose funding has been found in violation of the First Amendment. Other courts have struck down similar fees previously required to support the “Beef: It’s What’s for Dinner” and the “Pork: The Other White Meat” campaigns for similar reasons. See *Adweek*, February 26, 2004.



Warnings

[5] California Group Files Lawsuit Against Wine-Vinegar Manufacturers Claiming Lead Contamination

The Environmental Law Foundation of Oakland (ELFO) has filed a lawsuit under California's anti-toxics law, known as Proposition 65, against makers and sellers of popular wine vinegars, claiming that the product contains small amounts of lead. ELFO maintains that people of all ages are exposed to the lead, and that the exposures present "a risk of reproductive harm and other adverse health effects." Plaintiff's [complaint](#) alleges that lead can contaminate wine vinegar in the manufacturing process, and the non-profit wants retailers to either (i) require vinegar suppliers to provide tests proving that the products conform to Prop. 65 safety levels for lead or (ii) place consumer warnings on the products. Prop. 65 requires that businesses warn consumers of unsafe exposure to chemicals on a state list of carcinogens and reproductive toxicants. The law does not apply to chemicals that occur naturally in food, but any activity that increases levels in food could be a violation of the law. In response to the suit, attorneys representing wine vinegar manufacturers and importers said that lead occurs naturally in soil and is taken up by the grapes used to make the wine vinegar and, therefore, any lead in the product is not regulated by Prop. 65. *See The San Francisco Chronicle*, February 25, 2004.

Other Developments

[6] British Groups Issue Reports Calling for Curbs on Advertising and Other Measures

More than 100 British groups, including three Royal Colleges of Medicine and the British Heart Foundation, today submitted to Prime Minister Tony

Blair, other government ministers and the Food Standards Agency (FSA), a report whereby they "call upon the UK government to introduce legislation to protect children from advertising and promotions, targeted directly at children, which promote foods that contribute to an unhealthy diet. These include confectionary, crisps, savory snacks, soft drinks and other processed products containing high levels of fat, sugar or salt, excessive consumption of which is known to be detrimental to children's health. Voluntary approaches are not working, so statutory controls are needed to end commercial activities which promote these foods specifically to children."

Titled [*Children's Food and Health: Why Legislation Is Urgently Required to Protect Children from Unhealthy Food Advertising and Promotions*](#), the report urges FSA to consider, among other things, the following in formulating policy recommendations to government ministers: (i) "children have a right to grow up free from commercial pressures to buy, or pester their families to buy foods which are high in fat and/or sugar and/or salt that put their current and future health at risk"; (ii) many foods promoted to kids are high in fat, sugar or salt; (iii) advertising affects children's food choices; (iv) advertising codes of practice fail to consider the potential for harm to children's health from the *total* effect of advertising for unhealthy foods; and (v) young children are not able to fully understand the intent of advertising or the potential consequences of their food choices.

When hearing of the report's allegations, a Food and Drink Federation spokesperson was quoted as saying that any action to address the childhood obesity issue "needs to be based on sound science, and requires government and all stakeholders to work together with a commitment to achieving real results over the long term." *See Just-Food.com*, March 3, 2004.



In a related development, Britain's Consumers' Association last week published its [Health Warning to Government](#), a report containing 12 specific steps for government and industry to use in tackling rising obesity rates and diet-related diseases. The organization's demands include (i) an FSA industry standard for food marketing to kids, (ii) government-mandated nutrition labeling and (iii) consideration of a "fat tax" or other financial disincentives that would encourage food manufacturers to lower levels of fat, sugar and salt in processed foods.

The Consumers' Association is a London-based not-for-profit group of more than 700,000 members across Europe.

[7] NFPA Meeting to Target BSE-Related Issues

The National Food Processors Association (NFPA) is sponsoring a symposium titled ["Prion Inactivation: Current Technology and Future Research Needs,"](#) April 1, 2004, in Washington, D.C. The one-day event will feature government and food industry experts discussing regulatory and technological approaches to minimizing exposure of human food and animal by-products to transmissible spongiform encephalopathy prions. Those invited to speak at the meeting include Department of Agriculture Under Secretary for Food Safety Elsa Murano and Food and Drug Administration Deputy Commissioner Lester Crawford.

Scientific/Technical Items

Obesity

[8] New CDC Report Concludes That Most U.S. Adults Are Overweight or Obese

Thirty-five percent of U.S. adults were overweight (body mass index of 25 but less than 30) and 22 percent were obese (body mass index of 30 or higher) during 1999-2001, according to a Centers for Disease Control and Prevention report targeting body weight, alcohol use, smoking, and leisure-time physical activity. Titled [Health Behaviors of Adults: United States, 1999-2001](#), the 89-page report combines self-reported data from three years of the ongoing National Health Interview Survey. Other data in the report: (i) six in 10 adults were current drinkers; (ii) about 20 percent of adults consumed five or more drinks daily at least once in the past year; (iii) 23 percent of adults were current smokers; and (iv) 61 percent of adults engaged in some type of leisure-time physical activity.



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Food & Beverage Litigation Update is distributed by Mark Cowing 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 mcowing@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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