

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] FTC Issues Proposed Consent Agreement to Settle Charges Involving KFC Ads Touting Fried Chicken as “Better” Eating ..... 1
- [2] Citing First Amendment Rights, FTC Official Says Agency Will Not Impose Ban on Food Advertising to Kids ..... 1
- [3] FDA Issues Final Rule on Administrative Detention of Food Posing Potential Threat to Humans or Animals ..... 2
- [4] U.K. Parliamentary Committee Issues Long-Awaited Obesity Report..... 2

#### Other Developments

- [5] New CAMY Study Claims Alcohol Product Ads Outnumber Those Promoting Responsible Consumption ..... 2
- [6] CSPI Conference to Target Corporate Influence on Science and Policy..... 3

#### Media Coverage

- [7] “Overcoming Obesity in America,” *Time*, June 7, 2004..... 3

#### Scientific/Technical Items

- [8] Harvard Study Links Soft Drink Consumption to Diabetes Risk in Women..... 3
- [9] Male Breast Cancer Rates Linked to Trends in Obesity ..... 4

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Trade Commission (FTC)

##### [1] **FTC Issues Proposed Consent Agreement to Settle Charges Involving KFC Ads Touting Fried Chicken as “Better” Eating**

The FTC has issued a [proposed settlement](#) resolving charges that a fall 2003 KFC television advertising campaign contained false claims about the nutritional value and healthiness of its Original Recipe fried chicken. “Today’s action signals food advertisers that the FTC will not tolerate misleading advertisements to consumers who are trying to eat healthier and watch their weight,” FTC Chair Timothy Muris was quoted as saying. “More than ever before, today’s consumers need truthful information about diet and health in food marketing,” he said.

FTC’s complaint charged KFC with making false claims that eating two Original Recipe chicken breasts was healthier than eating a Burger King Whopper. According to FTC, two such pieces of chicken contain less total fat (38 grams vs. 43 grams) and saturated fat (12 grams vs. 13 grams) than the burger, but contain more *trans* fat (3.5 grams vs. 1 gram), more cholesterol (290 mg. vs. 85 mg.), more salt (2,300 mg. vs. 980 mg.), and more calories (760 vs. 710). The complaint also alleged the KFC ads represented that eating its chicken was compatible with “low carbohydrate” weight-loss programs. The Atkins and South Beach diet plans, however, specifically caution against consumption of breaded, fried foods.

The proposed settlement agreement prohibits KFC from making those or similar claims about the nutritional value and weight-loss or other health benefits of its chicken products absent “competent and reliable scientific evidence” to substantiate the claims. After an announcement of the proposed agreement is published in the *Federal Register*, the agreement will be subject to public comment until July 2, 2004, after which time FTC will decide whether to make it final. See *FTC News Release*, June 3, 2004.

##### [2] **Citing First Amendment Rights, FTC Official Says Agency Will Not Impose Ban on Food Advertising to Kids**

A high-ranking FTC official reportedly reiterated on Monday that a blanket ban on food marketing to children would be unconstitutional. “The agency is not going to ban free speech that is not misleading,” Todd Zywicki, FTC’s policy planning director, said during a Cato Institute policy forum titled “Kids, Cartoons and Cookies: Should We Restrict the Marketing of Food to Children.” His comments echoed those of FTC Chair Timothy Muris, who was quoted last week as saying that “even our dogs and cats are fat, and it’s not because they’re watching too much advertising.”

Others participating in the June 7, 2004, policy forum included Daniel Jaffe, the executive vice president of the Association of National Advertisers, and Dale Kunkel, a University of California-Santa Barbara communications professor and member of the American Psychological Association’s Task Force on Advertising and Children. Among other things, Kunkel evidently asserted that food advertising



has contributed to making 15 percent of American youth overweight because children younger than age 4 fail to distinguish between ads for junk food and regular programming. Kunkel co-authored the February 2004 [Report of the APA Task Force on Advertising and Children](#). See *Time*, June 4, 2004; *The Washington Times*, June 8, 2004.

## Food and Drug Administration (FDA)

### [3] FDA Issues Final Rule on Administrative Detention of Food Posing Potential Threat to Humans or Animals

FDA has issued a [final regulation](#) that establishes procedures for the administrative detention of food for which the agency has credible information that indicates the food poses “a threat of serious adverse health consequences or death to humans or animals.” Effective July 6, 2004, the rule implements one of four food-related provisions of the Public Health Security and Bioterrorism Preparedness Response Act of 2002. Among other things, the final rule requires (i) detention orders to be approved by FDA district directors and (ii) detained articles of food to be held in secure locations. A detention can not exceed 30 days. See *Federal Register*, June 4, 2004.

## United Kingdom (UK)

### [4] U.K. Parliamentary Committee Issues Long-Awaited Obesity Report

“Should the gloomier scenarios relating to obesity turn out to be true ... this will be the first generation where children die before their parents as a consequence of childhood obesity,” says a recently issued 148-page [report on obesity](#) from the House of Commons Health Committee. Estimating the cost of overweight and obesity to Britain at up to £7.4 billion annually, the report acknowledges the

complexity of the obesity issue and recommends comprehensive measures by all stakeholders to address the problem. Among other things, the report specifically calls for (i) health education campaigns warning of weight-related health risks, (ii) the removal of snack vending machines from schools, (iii) an industry-led voluntary withdrawal of food advertising that targets children, (iv) a “traffic light” labeling system that indicates the energy density of foods – i.e., red/high density, amber/medium density, green-low density, and (v) government-supported exercise opportunities. See *Health Committee News Release*, May 27, 2004.

## Other Developments

### [5] New CAMY Study Claims Alcohol Product Ads Outnumber Those Promoting Responsible Consumption

Television advertising for alcohol products increased significantly from 2001-2002, while “responsibility” advertising – those ads unambiguously warning against drunk driving, encouraging use of designated drivers and promoting responsible consumption by those of legal drinking age – declined over the same period, according to a new [study](#) issued by Georgetown University’s Center on Alcohol Marketing and Youth (CAMY). In 2002, the number of commercials for alcohol products reportedly increased some 39 percent, while the number of responsibility ads dropped by 46 percent from 2001 levels. “This minimal amount of responsibility advertising does little to reinforce the messages of parents and teachers who are trying to prevent underage drinking,” CAMY’s executive director was quoted as saying. “Our children need to receive a more balanced message about alcohol,” he said. See *CAMY Press Release*, May 26, 2004.



## [6] CSPI Conference to Target Corporate Influence on Science and Policy

Corporations' alleged "use of science to frustrate regulation, thwart research on health risks and corrupt evidence-based medicine" will be the subject of a July 12, 2004, Center for Science in the Public Interest (CSPI) [conference](#) in Washington, D.C. Keynote speakers will include former Environmental Protection Agency Administrator Carol Browner on "Scientific Integrity in Policymaking" and U.S. Representative Henry Waxman (D-Calif.) on "The Politicization of Science by the Bush Administration." Food-related sessions at the event will include Brown University Professor David Egilman addressing the food industry's purported suppression of studies on the possible health effects of exposure to the butter flavoring (diacetyl) used to manufacture microwave popcorn. See *CSPI News Release*, May 26, 2004.

## Media Coverage

### [7] "Overcoming Obesity in America," *Time*, June 7, 2004

This special issue of *Time* magazine is reportedly the result of a joint *Time*/ABC News joint project and follows on the heels of their recent Summit on Obesity, a Williamsburg, Virginia, event involving government leaders, food company executives and public health activists. Individual articles discuss (i) various reasons that many Americans are overweight; (ii) "obesity warriors" such as Marion Nestle, Kelly Brownell, David Ludwig, and James Sallis, who advocate, among other things, soft drink taxes and food advertising restrictions; the purported link between obesity and urban sprawl; and popular diet plans. A *Time*/ABC News telephone survey of some 1,200 adult Americans reportedly revealed that 54 percent of respondents believed fast-food chains "use misleading advertising to sell

high-calorie food." Fifty-six percent of those surveyed "strongly" or "somewhat" supported a ban on advertising high-fat and high-sugar foods during children's TV programming and in children's magazines, while 74 percent strongly or somewhat supported government-mandated warning labels about weight-related health risks on high-fat and high-sugar food products.

## Scientific/Technical Items

### Soft Drinks

#### [8] Harvard Study Links Soft Drink Consumption to Diabetes Risk in Women

Results of a study presented this week at the American Diabetes Association's 64<sup>th</sup> Scientific Session indicate that women who drink at least one sweetened soft drink per day have an 85 percent increased risk of developing type-2 diabetes. The research is part of the on-going Nurses Health Study at Boston's Brigham and Women's Hospital. According to the study data, the women most prone to gaining weight had increased their consumption of non-diet soft drinks from less than one per week to more than one a day. Those women gained an estimated nine to 10 pounds during a four-year period. Women who cut their intake of soft drinks gained an average of three pounds or less during the same period. "It's not that sugar everywhere is important, but it seems that sugar specifically in liquid foods may be relevant ... sodas and other energy-providing drinks may lead to an over-consumption of energy that would lead to obesity and weight gain," lead researcher Matthias Schulze said. The Center for Science in the Public Interest reacted to the study by saying it "provides ammunition for education efforts, labeling changes and restricting soft drink consumption in schools." The National Soft Drink Association, however, called the study "uncon-

vincing and inconclusive” because it was not peer-reviewed or published and seemed to raise numerous questions about confounding factors in the development of type-2 diabetes. The trade group noted that soft drink consumption is not deemed a risk factor for type-2 diabetes by the National Institutes of Health or the American Diabetes Association. *See National Soft Drink Association Press Release*, June 7, 2004; *Associated Press*, June 8, 2004.

## Obesity

### [9] Male Breast Cancer Rates Linked to Trends in Obesity

A new study published in the recent issue of *Cancer*, the journal of the American Cancer Society, reports that the number of male breast cancer cases in the United States rose by 26 percent between 1973 and 1998. The rate of increase was smaller than that for women (52 percent) during the same time period, and the disease in men remains extremely rare. The cancer society’s Michael Thun, M.D., was quoted as saying, however, that the study “raises suspicion” about the role of obesity in breast cancer trends for both men and women. About 30 percent of U.S. adults are considered obese and, according to Thun, “fat tissue produces estrogen,” which can lead to breast cancer. *See The New York Times*, May 26, 2004.



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## LITIGATION UPDATE

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](mailto:mcowing@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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