

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards U.S. Congress

#### [1] House Passes Legislation Aimed at Preventing Frivolous Lawsuits

Early last week, the House of Representatives passed the Lawsuit Abuse Reduction Act of 2004 ([H.R. 4571](#)) by a vote of 229 to 174. “Youth sports are shutting down in the face of lawsuits for injuries and even hurt feelings,” House Judiciary Committee Chair F. James Sensenbrenner, Jr. (R-Wis.), was quoted as saying. “Monkey bars and other once common equipment are now endangered species at playgrounds. As a result, children stay home and get fat, and their parents sue the restaurants that serve them. The Girl Scouts in metro-Detroit alone have to sell 36,000 boxes of cookies each year just to pay for liability insurance,” he said.

Among other things, the proposal would

- (i) establish mandatory sanctions for lawyers, law firms or parties who file frivolous lawsuits;
- (ii) remove the “safe harbor” provision of Rule 11 of the Federal Rules of Civil Procedure that allows parties and their attorneys to avoid sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions has been filed;
- (iii) prevent forum-shopping by requiring that personal injury claims be brought only where the plaintiff resides, where the alleged injury took place or in the state

of the defendant’s principal place of business; and (iv) allow sanctions for frivolous or harassing conduct during discovery. The Lawsuit Abuse Reduction Act now heads to the Senate. *See House Judiciary Committee News Release*, September 15, 2004.

### Department of Health and Human Services (HHS)

#### [2] Federal Working Group Seeks Input on Definition of “Bioactive Food Components”

An interagency working group spearheaded by HHS is [seeking](#) written comments on a definition of “bioactive food components” as a first step in developing ways to evaluate the compounds’ health effects and role in preventing disease. Examples of such constituents include lycopene (tomatoes), long-chain omega-3 fatty acids (fatty fish), isoflavones (soybeans), sulphorophane (broccoli), and resveratrol (red grapes). The working group would like specific comments on the following questions: “(1) What categories/classes of compounds should be considered as bioactive food components? (2) What categories/classes of compounds should *not* be considered as bioactive food compounds? How should the definition be modified to reflect exclusion of these compounds? (3) Should essential nutrients be included as bioactive food compounds? [and] (4) Should synthetically derived components used in fortified foods and dietary supplements be considered under this definition?” Comments are due by November 1, 2004. *See Federal Register*, September 16, 2004.



## Food and Drug Administration (FDA)

### [3] FDA Proposal Targets Egg Safety

FDA has issued a proposed regulation aimed at reducing the number of illnesses caused by shell eggs contaminated with *Salmonella Enteritidis* (SE); the Centers for Disease Control and Prevention estimates that consumption of contaminated eggs results in 118,000 cases of salmonellosis annually. The proposal would require implementation of various SE prevention measures by all egg producers with 3,000 or more laying hens that produce shell eggs for retail sale and do not process their eggs with a food-safety treatment, e.g., pasteurization. Such measures would include requiring producers to (i) obtain breeding stock from sources that sell Salmonella-free chicks, (ii) refrigerate eggs at or below 45 degrees Fahrenheit if eggs are kept at the farm for more than 36 hours after laying and (iii) implement a pest- and rodent-control program in poultry houses. FDA's action reportedly comes seven years after the Center for Science in the Public Interest petitioned the agency to develop a mandatory on-farm Salmonella-control program. Comments on the proposal are due by December 21, 2004. See *FDA News*, September 20, 2004; *The New York Times*, September 21, 2004; *Federal Register*, September 22, 2004.

## Litigation

### [4] Lawyers and Public Health Activists Single Out Marketing Practices as Potential Vulnerability of Food Industry

Plaintiffs' attorneys and public health advocates who believe that food and beverage companies should be held liable for obesity and its attendant

health effects convened at Boston's Northeastern University School of Law on September 18-19, 2004, for a [conference](#) organized largely by longtime anti-tobacco lawyer Richard Daynard. Recurring themes during the two-day event focused on 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.

Keynote speaker Kelly Brownell, director of the Yale Center for Eating and Weight Disorders, said he did not support litigation against food companies a year ago but has since changed his mind, comparing various industry actions to avoid responsibility for practices that "promote" obesity to the "playbook" used by tobacco manufacturers. Such playbook actions, Brownell said, include (i) avoiding blame by assigning blame to individuals; (ii) emphasizing the role of physical activity over the role of diet; (iii) "colluding" with the [American Dietetic Association](#) by saying there are no "good" or "bad" foods; (iv) decrying certain government attempts to address the obesity issue while simultaneously demanding legislation to provide immunity from liability in obesity-related lawsuits; (v) disputing or distorting the science to plant doubt over the alleged health effects of their products with the public and with legislators; and (vi) using totalitarian language to describe those who find fault with their business practices (e.g., food police).

Particular areas of vulnerability that Brownell predicts for food companies include encouraging overconsumption by increasing portion sizes, "exploiting" children through advertising and marketing practices, "lying" about the science, and "manipulating" ingredients. To protect children from what he deems a "toxic environment,"



Brownell advocates regulating advertising aimed at kids, ending product placements in various media, and creating “healthy schools by rejecting pouring rights contracts with soft drink companies. Brownell is the co-author of [\*Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It.\*](#)

Attacks on the ethics of food and beverage companies were continued by Stephen Joseph, a California lawyer currently involved in two *trans* fat-related cases against McDonald’s who sued Kraft Foods in 2003 over the *trans* fat content of Oreo cookies. Comparing the industry’s ethics to those of Enron, Joseph said that “a few symbolic lawsuits across the board” would likely affect industry behavior.

Conference speakers who provided the most specific targets for possible litigation represented the Washington, D.C.-based [\*Center for Science in the Public Interest\*](#) (CSPI). Executive Director Michael Jacobson asked fellow participants about the potential of suing television networks for negligence by airing commercials for products deemed unhealthy, while CSPI Litigation Director Steve Gardner suggested that “worthy” legal actions could be brought against (i) Newman’s Own, for promoting its marinara sauce as “all natural” when it contains high-fructose corn syrup; (ii) Quaker Oats, for including “artificially flavored” blueberry bits in Aunt Jemima Blueberry Waffles; and (iii) dairy producers, for promoting milk consumption as a “magic bullet” in successful weight loss.

Noting that lawsuits against tobacco companies were initially deemed frivolous, George Washington University Law Professor John Banzhaf advocated filing more lawsuits using theories (e.g., deceptive marketing practices) outlined in the potential “roadmap to success” provided by Judge Robert Sweet in his January 2003 dismissal of obesity-related

claims against McDonald’s. [\*Pelman v. McDonald’s Corp., No. 20 Civ. 7821 \(RWS\) \(U.S. District Court, Southern District, New York\) \(decided January 22, 2003\).\*](#) Banzhaf suggested other lawsuits against (i) school boards or individual school board members for breaching their fiduciary duties to children by signing pour rights contracts for vending machines with soft drink manufacturers and (ii) physicians for not advising patients to lose weight.

Susan Linn, a psychology instructor at Harvard Medical School and author of [\*Consuming Kids: The Hostile Takeover of Childhood.\*](#) discussed various alleged effects of advertising and marketing to children, claiming that the food industry is “doing everything it can to undermine parental authority” with advertising that encourages kids to nag their parents to buy certain products. She was particularly critical of brand licensing practices, citing as examples Coca-Cola Barbies and Kraft Macaroni & Cheese boxes that feature SpongeBob SquarePants.

New York University Professor Marion Nestle echoed Linn’s condemnation of industry marketing practices and issued her own condemnation of food products’ “questionable” health claims and health organization (e.g., American Heart Association) endorsements. 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.”



## Deceptive Trade Practices

### [5] **Complaint Alleges NutraSweet Co. and Others Deceive Consumers**

NutraSweet Co. is among four named defendants accused of consumer fraud in a pro se [complaint](#) filed September 15, 2004, in U.S. District Court for the Northern District of California. *Bellon v. Nutrasweet Co.*, No. 04-8872. The other three named defendants are Robert Moser, former CEO of NutraSweet; the American Diabetes Association; and Monsanto Co.

Pro se plaintiff Joe Bellon describes himself as a California resident and “consumer of NutraSweet, Diet Coke and Diet Pepsi.” He purports to bring the action as a private attorney general and a class representative. The complaint does not specifically identify the purported class except to allege that it contains “millions of individual members” who “unwittingly consume the product Aspartame and suffered [sic] damages thereby all on a continuing daily basis.”

The lawsuit alleges that the artificial sweetener aspartame is “a deadly neurotoxin unfit for human consumption” and that defendants have misrepresented the product’s health and safety. Plaintiff alleges that aspartame causes more than 25 diseases, including asthma, brain cancer, diarrhea, and vision loss, and that it “mimics symptoms or worsens” more than a dozen diseases, among them diabetes, Alzheimer’s Disease, and Attention Deficit Disorder. Plaintiff’s claims for relief rely on RICO (the Racketeer Influenced & Corrupt Organizations Act), California Consumers Legal Remedies Act, California Civil Code Sections 1780-84, California Commercial Code, and common-law fraud. Plaintiff seeks damages awards exceeding \$100 million and injunctive relief.

## Legal Literature

### [6] *Journal of Public Health Policy* to Publish Special Section on “Legal Approaches to the Obesity Epidemic”

The Public Health Advocacy Institute’s Obesity-Law Task Force has assembled six papers into a special section of the *Journal of Public Health Policy*. The papers promote law as “a powerful process for shaping health policy in general and the food environment in particular.” The special section’s title, “Legal Approaches to the Obesity Epidemic,” mirrors the name of the Institute’s annual conferences. Pre-publication copies of the special section were distributed during the Institute’s second annual conference, which concluded last weekend and is summarized above. Formal publication of the special section is expected soon.

“Individually, these papers offer issue-by-issue information and insights into key aspects of obesity and the potential for controlling it through public policy changes,” according to the special section’s introduction. “Collectively, they are a unique handbook of guidance for all those in law and public health who want to help achieve a permanent reversal of the obesity epidemic using the tools of law.”

One paper advances litigation as a private enforcement tool to prevent obesity. Authors Richard Daynard, Tim Howard and Cara Wilking discuss possible causes of action; “address and refute industry claims that obesity-promoting food consumption behaviors are solely a matter of ‘personal responsibility’”; and, in the words of the special section’s introduction, anticipate that “the discovery process triggered by lawsuits would compel defendant food companies to disclose internal research and policy documents that might





be used as evidence against them – the kinds of internal documents that helped persuade juries of tobacco industry wrongdoing.” Daynard is an Institute founder and veteran tobacco-control advocate.

Another paper, “Food Marketing to Children in the Context of a Marketing Maelstrom,” discusses what the special-section introduction calls “the huge escalation of marketing to children since the 1980s and describes the range of techniques that food companies use to promote consumption and brand loyalty of obesity-producing foods: Advertising that undermines parental controls by encouraging children to nag parents into making unhealthy food purchases; product placement in prime-time ‘family’ television programs and movies; internet ‘advergaming’ websites that focus children’s attention on product brands by incorporating them into computer games; infiltrating school educational resources with product-promoting materials; and tie-ins between particular food brands and toys, movies, and TV characters.”

The four remaining titles in the special section focus on the “obesity epidemic” itself, legislative approaches, potential regulatory steps, and “the need for global solutions.”

## Other Developments

### [7] Describing Language on Fat and Carbs as “Vague and Meaningless,” CSPI and Others Call for Changes in Federal Dietary Advice

The Center for Science in the Public Interest (CSPI) and more than 25 nutrition experts yesterday encouraged the Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) to bolster the take-away messages in the 2005 *Dietary Guidelines for Americans*. The

two agencies issued the guidelines in late August and expect to issue final dietary advice for maintaining good health in January 2005. In a September 21, 2004, [letter](#) to HHS, the nutrition experts praise the scientific basis for the forthcoming guidelines, but call for the nine key dietary recommendations to be revised “in way that is accurate, understandable, actionable, and most conducive to improved diets.” Among other things, they advocate changing the current recommendation of “Choose fats wisely for good health” to “Eat less cheese, beef, pork, whole and 2 percent milk, egg yolks, pastries, and other foods that are high in saturated fat, *trans* fat, or cholesterol.” The group proposes revising the main carbohydrate message from “Choose carbohydrates wisely for good health” to “Drink fewer soft drinks and limit cake, cookies, frozen desserts, and other foods rich in refined sugars.” See *CSPI News Release*, September 21, 2004.

### [8] Journalism and Law Professors Urge End to Product Placement in Editorial Content of Magazines

Sixty-one journalism and law professors from across the country have called on the American Society of Magazine Editors (ASME) to revise its editorial policies to “deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage” by requiring product placement disclosure in the publications of ASME members. “If magazines become mere tout sheets for products and the interests of those who sell them,” the academics assert in their September 20, 2004, [letter](#) initiated by Commercial Alert, “then every story will be suspect, and the reading public may have nowhere to turn for information that is truly independent of reigning commercial interests.” The letter includes a quote



from a General Mills brand public relations director who reportedly told *PR Week* that “It depends on the magazine and the publisher, but I see much more openness to (product placement) now than there ever has been before. Where it used to be church and state, there is much more of a willingness to come together and at least discuss it – not always a willingness to do it, but a willingness to discuss.”

The professors encourage ASAE to update its editorial guidelines by (i) requiring disclosure of the amount of money or the fair market value of any goods received from an advertiser mentioned in an article, (ii) requiring the words “advertising” or “advertisement” or “promotion” in a typeface larger than the publication’s normal editorial body text typeface in advertorials or special sections, and (iii) increasing enforcement mechanisms for those who violate ASAE’s editorial guidelines.

**Commercial Alert’s** purported mission is keeping “the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community, environmental integrity, and democracy.” In September 2003, the organization filed petitions with the Federal Trade Commission and the Federal Communications Commission asking the agencies to investigate product placement practices on television, claiming that “Television networks interweave advertising and programming so routinely that they are, in effect, selling to advertisers a measure of control over aspects of their programming.” Examples of such placement mentioned in the petitions include the “Coca-Cola Red Room” in “American Idol” and various McDonald’s products in the August 27, 2003, episode of “Big Brother 4.”

## Media Coverage

### [9] “Beware Food Companies’ Health Claims,” Jane Brody, *The New York Times*, September 21, 2004

“You may think that a genuine interest in consumer health prompts food companies to market products that claim to reduce the risk of heart disease or cancer or help people lose weight. Think again,” charges Jane Brody in a denunciation of the validity of health-related claims and health organization endorsements that increasingly appear on various food products. One example of a dubious health claim, according to Brody, appears on Dreamfields low-carbohydrate pasta products: “Now you can eat the pasta you love without all the carbs you don’t.” The claim is questionable, Brody says, because “Dreamfields has enriched semolina (wheat flour) as the first ingredient and derives 84 percent of its calories from carbohydrates.” New York University’s Marion Nestle is quoted as saying that such claims are “calorie distracters” and give consumers permission “to eat as much as much of [a food product] as they want. Yes, it’s great to get the *trans* fat out of chips and pretzels, but these foods still have calories and they’re still junk food.”

## Scientific/Technical Items

### Cardiovascular Disease

#### [10] Global Study Evaluates Modifiable Risk Factors for Heart Disease

A recently published study of acute myocardial infarction spanning 52 countries examines the importance and effect of risk factors for coronary



heart disease worldwide (Yusuf, et al., "Effect of Potentially Modifiable Risk Factors Associated with Myocardial Infarction in 52 Countries (the INTERHEART study): Case-Control Study," *The Lancet* 364: 937-52. 2004). The massive study included 15,000 cases and 15,000 controls. Nine risk factors, largely derived from developed countries, were examined and an estimated risk for each risk factor was computed. Abnormal blood lipid levels, assessed by high-density lipoprotein/low-density lipoprotein ratios, were the most important risk factor for heart disease over all geographic regions in the study and accounted for nearly one-half of the population attributable risk for acute myocardial infarction. Other risk factors, including smoking (population attributable risk (PAR) estimate of 35%), history of hypertension (PAR 18%), diabetes (PAR 10%), abdominal obesity (PAR 20%), psychological factors (PAR 32%), daily consumption of fruits and vegetables (PAR 14% for lack of daily consumption), regular alcohol consumption (PAR 7%), and low physical activity (PAR 12%) were all significantly related to acute myocardial infarction. The associations were observed for both men and women, old and young, throughout all regions of the world. According to the authors, the nine risk factors accounted for roughly 90 to 95 percent of the population attributable risk for overall cardiovascular disease in men and women.

## Soft Drinks

### [11] North Carolina Researchers Implicate Soft Drinks in Obesity Epidemic

Energy intake from the consumption of soft drinks in the United States increased some 135 percent between 1977 and 2001, according to a new study published in the October issue of the *American Journal of Preventive Health*. Data from the study were derived from three food surveys of more than 73,000 Americans that included age groups ranging from 2-year-olds to senior citizens. The study found that daily calories from soft drinks and fruit drinks nearly tripled between 1977 and 2001, rising from 2.8 percent to 7 percent of the total caloric intake in the daily diet. Overall, this amounted to a 278 average daily calorie increase. Young adults aged 19-39 reportedly drank the most soft drinks, boosting consumption from about 4 to almost 10 percent. Milk consumption over the same period, however, dropped. Overall, Americans derived 38 percent less of their daily calories from milk. The authors, researchers from the University of North Carolina at Chapel Hill, were quoted as saying that "the obesity epidemic may be aggravated by the increase in sweetened beverage intake." Barry Popkin and Samara Nielsen also noted that "little research has focused on the beneficial impacts of reduced soft drink and fruit drink intake. This would seem to be one of the simpler ways to reduce obesity in the United States." See *UNC News Release*, September 16, 2004; *CBS News.com*, September 17, 2004.





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