

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legal Literature

- [1] **“Applying Lessons from Tobacco Litigation to Obesity Lawsuits,”** Jess Alderman, M.D., J.D., and Richard Daynard, J.D., Ph.D., *American Journal of Preventive Medicine*, January 25, 2006

These two authors, both of whom are affiliated with the Northeastern University School of Law, review the history of tobacco litigation and suggest ways that public health advocates can encourage food manufacturers to improve their products. “It is likely,” they conclude, “that litigation will be as necessary to address the obesity problem as it was to address the dangers of tobacco. The best approach is to focus on public health lawsuits under consumer statutes that decrease the industry’s incentive to use a scorched earth strategy and encourage the industry to improve the nutritional content of its products and to change its marketing practices.” The article is available [here](#).

### Litigation

#### Deceptive Trade Practices

- [2] **Consumer Groups Postpone Putative Class Action Against Soft Drink Companies; John Banzhaf Warns School Boards of Potential Liability**

Representatives of the Center for Science in the Public Interest (CSPI), a consumer advocacy group poised with the Public Health Advocacy Institute

(PHAI) to file a purported class action in Massachusetts over the presence of soft drinks in schools, reportedly said last week that “negotiations” with industry have led the groups to delay filing their lawsuit. An American Beverage Association official, however, was quoted as saying that any discussions with CSPI have occurred not with individual soft drink manufacturers but with the beverage trade group. “We are talking with them and listening to them, but it is a bit strong to characterize it as negotiations,” Kevin Keene said. *See Advertising Age*, January 18, 2006.

Meanwhile, longtime tobacco-control advocate John Banzhaf, a law professor at George Washington University, reportedly sent a [lengthy e-mail](#) to school boards and individual school board members around the country last month advising that they “could be sued and potentially held liable under a variety of legal theories” if the lawsuit in Massachusetts or similar suits go forward.

CSPI and PHAI have threatened to bring the action under the Massachusetts Consumer Protection Act claiming (i) soft drink companies market their products to children despite numerous studies that allege links between their consumption and such adverse health effects as obesity, tooth decay and Type 2 diabetes; and (ii) school kids are a “captive audience” vulnerable to the companies’ “false advertising” that depicts soft drinks as harmless. Richard Daynard, founder of the Boston-based PHAI, has also suggested that the lawsuit might allege that the availability of soft drinks in school



facilities represents an “attractive nuisance” similar to a property owner’s unfenced trampoline or swimming pool.

## Other Developments

### [3] Las Vegas Couple Sentenced to Prison for Fraud Scheme Against Wendy’s

The Las Vegas couple who admitted to having planted a human finger in a bowl of chili at a San Jose, California, Wendy’s restaurant in March 2005 were reportedly sentenced to lengthy prison terms last week in Santa Clara County Superior Court. Anna Ayala and Jaime Placencia pleaded guilty to charges of felony conspiracy and attempted grand larceny in September 2005. Ayala claimed to have bitten into the fingertip, which Placencia had purchased for \$100 from a co-worker injured in a workplace accident.

Superior Court Judge Edward Davila reportedly noted that “greed and avarice” had overtaken the pair in sentencing Ayala to serve nine years and Placencia to serve 12 years and four months in state prison. Davila also ordered the couple to pay nearly \$21 million in restitution to the fast-food chain. Wendy’s officials, however, have reportedly indicated that the company will seek no restitution provided Ayala and Placencia do not pursue a movie or book deal detailing their experience.

Negative publicity surrounding the chili contamination incident reportedly cost Wendy’s \$2.5 million in lost business nationwide. The company’s response to the event included reviewing food-handling procedures with the local health department, giving employees lie-detector tests, reviewing the safety records of suppliers, and offering a \$100,000 reward to anyone who could

identify the source of the contamination. *See Associated Press*, January 18, 2006; *The New York Times*, January 19, 2006.

### [4] SHB Attorneys to Address Food Industry Topics at Washington, D.C., Conference

Shook, Hardy and Bacon partners [Mark Dover](#), [Chris McDonald](#) and [Madeleine McDonough](#) will provide their insights into advertising, crisis management and functional food issues at a conference titled “Critical Update on Food Regulation and Compliance: Best Practices Forum for Corporate Counsel,” March 7-8, 2006, in Washington, D.C. Dover’s presentation will focus on advertising and marketing products to children, including relevant Federal Trade Commission issues; McDonald will discuss the elements of effective crisis management plans, including ways of dealing with the media and complying with required notifications under the law; and McDonough will look at regulatory and marketing issues with respect to functional foods. More information about the event is available [here](#).

## Scientific & Technical Items

### Alcoholic Beverages

#### [5] Wine Drinkers Consume Healthier Diets, Says Danish Study

People who drink wine make healthier food choices than people who drink beer, according to researchers at Denmark’s National Institute of Public Health. (D. Johansen, et al., “Food Buying Habits of People Who Buy Wine or Beer: Cross Sectional Study,” *British Medical Journal (Online First)*: 1-4, January 20, 2006.) Analyzing some 3.5 million transactions over a period of six months in



Danish supermarkets, the research team found that wine buyers bought more olives, fruits and vegetables, poultry, low-fat cheese, milk, and meat than people who buy beer. Purchasers of beer, on the other hand, selected more processed foods, sugar, cold cuts, chips, pork, butter/margarine, sausages, lamb, and soft drinks. Co-author Morten Gronbaek was quoted as saying that even though the study was limited to Danish consumers, studies in the United States and France have produced similar results. He added that wine drinkers tend to be educated, healthy and lean, or are more likely to be middle-aged women who drink moderately while beer drinkers are less educated and more likely to be healthy young men who consume large amounts of alcohol. *See Reuters*, January 19, 2006.



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Food & Beverage Litigation Update is distributed by  
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