# Food & Beverage

## LITIGATION UPDATE

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# Food & Beverage

**LITIGATION UPDATE**

## Legislation, Regulations and Standards

### Institute of Medicine (IOM)

**[1] IOM Committee Issues Follow-Up Study on Childhood Obesity**

The Institute of Medicine yesterday issued its latest **study** on childhood obesity prevention initiatives. The report generally calls on stakeholders to commit to childhood obesity prevention, evaluate childhood obesity efforts, monitor progress, and disseminate information about successful policies and interventions. With respect to **industry**, the report encourages food manufacturers to (i) promote products "that contribute to healthy lifestyles," (ii) reduce portion sizes and (iii) develop marketing campaigns that encourage healthy diets and the benefits of physical activity.

IOM recommends that Congress grant the Food and Drug Administration the authority to evaluate industry efforts to promote healthier lifestyles and designate an agency charged with evaluating industry compliance with existing self-regulatory guidelines.

## Litigation

**[2] Fourth Circuit Issues Ruling on Virginia's Alcohol Importation Law**

In a divided decision spawning three separate opinions, a three-judge panel of the Fourth Circuit Court of Appeals has sustained the constitutionality of several provisions of Virginia's Alcoholic Beverage Control Act and dismissed challenges to several other provisions as moot. ***Brooks v. Vassar*, No. 05-1540, -1541, -1791 (Fourth Circuit Court of Appeals, decided Sept. 11, 2006)**.

Upheld were provisions that provide "an exception to the three-tier import restriction for consumers who personally carry into Virginia no more than 1 gallon (or 4 liters) of alcoholic beverages for personal consumption" and authorize "state-owned and –operated ABC stores to market and sell only wine produced at Virginia 'farm' wineries." Dismissed as moot were provisions that "permit in-state producers of wine and beer, but not out-of-state producers, to by-pass the three-tier structure and sell directly to in-state retailers and consumers." The legislature apparently amended these provisions while the appeal was pending.

Virginia's "three-tier" system requires producers and sellers of alcoholic beverages to sell their products in the state to Virginia-licensed wholesalers

only, who sell to Virginia-licensed retailers only, who then sell to consumers. Winery owners in Texas, California and Oregon challenged these and other requirements, claiming that they violated the dormant Commerce Clause of the U.S. Constitution by favoring in-state wine and beer producers and discriminating against out-of-state producers.

The district court determined that distribution, delivery and shipping privileges under the law that favored in-state producers were unconstitutional, and, before the court could issue rulings on post-judgment motions, the U.S. Supreme Court issued its decision in *Granholm v. Heald*, 544 U.S. 460 (2005), which addressed the relationship between the dormant Commerce Clause and state statutes similar to those at issue in Virginia. Thereafter, the district court refused to stay the operation of its order, and both the state and plaintiffs filed appeals as to different aspects of the court's order. The Virginia General Assembly then enacted a law that codified the district court's judgment regarding the distribution, delivery and shipping privileges; thus, the parties and the appeals court agreed that this aspect of the appeal was moot.

As to the narrow issues that remained in the case, the court determined that some essentially involved an attack on the three-tier system itself, which had been upheld as "unquestionably legitimate" in *Granholm*. The court also rejected the plaintiffs' claim that restrictions on the quantity of wine that may be imported by consumers constituted a restriction on the amount of wine that may be purchased out of state. According to the court, "Virginia regulates all *imports* of wine and beer into Virginia without regulating the prior *sales* of that wine and beer." Because in-state vintners are actually disadvantaged under the law to the extent that they must sell through retailers while consumers may buy directly from out-of-state producers, the court held that no Commerce Clause violation had been shown. The court also rejected the plaintiffs' contention that restricting sales in ABC stores to in-state winery products constituted unlawful discrimination.

A dissenting judge would have affirmed the district court's conclusion that the personal import exception and ABC stores' restriction are unconstitutional.

### [3] MDL Panel Consolidates Federal Actions Involving French Fries

The Judicial Panel on Multidistrict Litigation has consolidated six lawsuits pending in federal courts around the country against McDonald's Corp. Filed in Illinois, California, Florida, and Tennessee, the cases allege that the company misled the public about the presence of gluten, wheat or dairy derivatives in its french fries. According to the panel, "Plaintiffs seek to recover from defendant on various theories, such as negligence, statutory and common law fraud and products liability; five of the six actions bring their claims on behalf of a putative nationwide class of consumers of McDonald's french fries." To avoid duplicative discovery, prevent inconsistent pretrial rulings and conserve resources, the panel determined that centralization of the actions in the Northern District of Illinois was necessary. The panel notes in its August 2006 order that it learned of three additional cases pending in Florida, Louisiana and Maryland, and that these and any other related actions "will be treated as potential tag-along actions." MDL cases are generally returned to their originating courts when pre-trial proceedings have concluded.

# Legal Literature

**[4] Adele Nicholas, "Super-Sized Liabilities: The obesity epidemic creates a host of new worries for employers," *Inside Counsel*, September 2006.**

This **article** discusses the increasing number of lawsuits filed under the Americans with Disabilities Act (ACT) by employees who allege weight-based discrimination. According to author Adele Nicholas, "Until recently the ADA was rarely a successful avenue for obesity discrimination claims because of a 1991 advisory opinion from the EEOC [Equal Employment Opportunity Commission]. That opinion said that being overweight or obese does not amount to a covered disability except in cases of morbid obesity that substantially limits a major life activity." Nicholas explains that the EEOC has lately supported several "regarded as disabled" cases, "where an overweight person becomes covered under the ADA because his or her employer presumed the employee was unable to adequately perform job functions due to his or her weight." Moreover, if a plaintiff has a disabling condition as the result of obesity, or if obesity is a symptom of an underlying condition, then he or she may also have an actionable ADA claim.

State-level causes of action are apparently becoming more successful as a result of new state laws that expressly prohibit workplace discrimination on the basis of appearance or that prohibit discrimination against employees based on their lawful, after-work lifestyle. "The biggest problem is when employers make unwarranted assumptions that obesity will limit an individual's ability to perform a job," said an EEOC spokesperson. When it comes to employee benefits, Nicholas concludes, "the best advice for employers seeking to avoid claims of discrimination against overweight employees is to tread lightly."

# Other Developments

**[5] Federal Rules Committee Chair Outlines Changes to E-Discovery Rules**

Speaking before a capacity crowd of 300 lawyers in Kansas City, Missouri, U.S. District Judge Lee Rosenthal this week reviewed the proposed changes to the Federal Rules of Civil Procedure on the discovery of electronically stored information that will take effect, absent congressional action, on December 1, 2006. During the September 12 e-discovery CLE forum hosted by Shook, Hardy & Bacon and the University of Kansas School of Law, Judge Rosenthal highlighted the differences between e-discovery and traditional document discovery to explain why the Federal Rules Advisory Committee, which she chairs, decided that new rules were needed. Because computers automatically overwrite, recycle or otherwise change electronic data, the new rules will require attorneys to meet and confer early in the litigation process to decide what to do about the discovery of electronically stored information. The rules also contemplate active judicial participation in e-discovery and contain provisions on the accessibility of e-information, the form of production, privilege and work product claims, and sanctions.

Judge Rosenthal also indicated that her committee has proposed a change to Rule 502 of the Federal Rules of Evidence providing that an agreement about waiver as to inadvertently disclosed electronic information, which agreement is incorporated into a court order, will be effective

as to third parties if reasonable steps have been taken to preserve the privilege. In other rules developments, Judge Rosenthal noted that the Judicial Conference is expected to approve the results of her committee's "style project," by which every rule has been re-written or re-formatted for clarity and simplicity. The committee is also planning to (i) publish proposed changes that would make time-counting uniform across all of the federal rules and establish more realistic time deadlines; (ii) examine expert disclosures and obligations; and (iii) explore whether changes are needed to pleading and summary judgment rules.

Additional presentations were made by in-house counsel for Bayer HealthCare LLC, Lorillard Tobacco Co., Sprint Nextel, Inc., The Coca-Cola Co., and Miller Brewing Co. They provided insight into how corporations that are not in the litigation business are attempting to address their potential e-discovery obligations both before and after litigation is filed.

### [6] International Congress on Obesity Prescribes Global Ban on Junk Food Advertising

The 10th Annual International Congress on Obesity convened last week in Sydney, Australia, where experts considered whether the World Health Organization (WHO) should ask member states to prohibit the marketing of unhealthy food to children younger than age 13. The proposal came in a **report** made by the International Obesity Task Force, which recommended that WHO should not only favor statutory measures over industry self-regulation, but should also "monitor and enforce compliance with a new international code" regulating all advertising outlets and the internet in particular.

Strategies to effect policy change also included joining forces with anti-tobacco marketers, although some health officials reportedly argued that likening junk food to tobacco was misleading. "There's a big difference between food and tobacco," Australian Federal Health Minister Tony Abbot was quoted as saying. "Every single cigarette does you harm. But even so-called junk food in small quantities occasionally is okay." Others apparently questioned whether marketing bans would be effective in the fight against obesity. One marketing professor, while in support of an international movement, was said to have noted that Quebec's ban on junk food advertising appeared to have little effect on the province's overall obesity levels. *See ABC Online*, September 5, 2006; *The Australian*, September 7, 2006; *APNews.MyWay.com*, September 12, 2006.

High-sugar drinks and their purported association with obesity was also addressed at the Sydney meeting. Dr. Susan Jebb, a British nutrition researcher, attributed the rising sales of healthy beverages, such as pure fruit juice, to "mounting evidence of a link between the consumption of sugar-rich drinks and obesity." Nevertheless, she elaborated, the link is still a tenuous one. "Policy makers are in the unenviable position of being criticized if they intervene without evidence of likely success, yet denigrated if they fail to take adequate steps to protect public health," she said. "The challenge is to develop a proportionate response." *See 10th International Congress on Obesity Press Release,* September 6, 2006.

### [7] American Beverage Association Launches $10 Million Campaign to Advertise School Beverage Guidelines

The American Beverage Association last week introduced print and online advertisements in major newspapers, magazines and trade journals to promote awareness of its new School Beverage Guidelines. Funded by The Coca-Cola Co., PepsiCo and Cadbury Schweppes Americas Beverages, the effort represents "the first time three major beverage companies have united on an industry ad campaign," an association spokesperson was quoted as saying. "This industry is clearly committed to doing its part for school wellness."

The School Beverage Guidelines were created by industry leaders in conjunction with the Alliance for a Healthier Generation, a joint initiative of the William J. Clinton Foundation and the American Heart Association, to provide "lower-calorie, nutritious, smaller-portion beverage choices" to school children. These choices include milk and 100 percent juice with no added sweeteners in 8-ounce and 10-ounce servings for elementary and middle school students, respectively. High school students will also have access to these drinks in 12-ounce servings, as well as no- or low-calorie beverages, light juice and sports drinks. *See American Beverage Association News Release*, September 7, 2006.

### [8] Consumer Advocacy Group Annual Meeting to Target Alleged Harmful Effects of Marketing to Children

Campaign for a Commercial-Free Childhood (CCFC) has published the **schedule** for its annual "Consuming Kids" conference slated for October 26–28, 2006, in Boston, Massachusetts. Presentations will include those titled "Food Sleuth: Blending Media Literary with Nutritional Information – Recipe to Reduce Childhood Obesity, Catalyst for Critical Thinking and Strategy to Counter Commercialism" and "Legislation 101: Getting Soda and Junk Food Out of Schools."

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