

# A Smorgasbord of Attac



In 1988, when a federal jury in New Jersey awarded Antonio Cipollone, a retired cable splicer, \$400,000 in damages against cigarette manufacturer Liggett Group Inc. for his wife's death from lung cancer, skepticism regarding smokers' suits against the tobacco industry remained strong. After all, the verdict represented the first time a jury had awarded damages against the tobacco industry since smoker lawsuits first appeared in the 1950s.<sup>1</sup> Legal commentators predicted no increase in new cases following the verdict, believing it was simply unlikely that juries would ever sympathize with sick smokers, who had long been warned about the risks of smoking.<sup>2</sup> Though the cigarette industry continues to prevail in most of the cases against it, and the number of those cases has fallen dramati-

cally, those who predicted no surge in litigation following the *Cipollone* verdict were certainly proved wrong. Of course, not every sudden uptick in litigation against a particular industry portends a new mass tort, and there are significant differences between the cigarette suits and claims against the food and beverage industry. Nevertheless, recent events, including a number of new proposed class actions filed against fast-food companies, and various steps by government groups, including new and proposed legislation, seem to suggest that the same alliance of public-health groups, consumer advocacy groups, academics, state attorneys general, and plaintiffs' lawyers may be joining forces against the food and beverage industry.

# orks on the Food Industry

by Harold K. Gordon and Carol A. Hogan



## GOVERNMENT STUDIES AND REPORTS

The list of public-health community studies and reports on food-marketing practices, food labeling, and obesity-related disease continues to grow. History has taught that these types of studies and reports can provide powerful evidence for food-industry claims, particularly to prove damages.

In 2001, the Surgeon General issued a report finding that obesity had reached epidemic proportions in the United States and that there were about twice as many overweight children and almost three times as many overweight teenagers as there had been in 1980. Office of the Surgeon General, U.S. Dept. of Health & Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, foreword at xiii (2001). In April 2005, the California Department

of Health Services estimated that the total direct and indirect costs to California in 2000 from "physical inactivity, obesity, and overweight" amounted to \$21.68 billion. California Dept. of Health Services, *The Economic Costs of Physical Inactivity, Obesity, and Overweight in California Adults During the Year 2000*, exec. sum. at v (2005).

In December 2005, the Institute of Medicine issued a report on the food industry's marketing to children, which drew significant media attention and will likely be cited by public-health officials, plaintiffs' attorneys, and others in support of litigation and legislation to curtail certain marketing practices. Institute of Medicine of the National Academies, *Food Marketing to Children and Youth: Threat or Opportunity?* (2005). Among other findings, the report revealed that the food, beverage,

and restaurant industry spent about \$11 billion on advertising in 2004, including \$5 billion on television advertising alone; that the preponderance of advertising targeted at children pertained to high-calorie and low-nutrient food products; and that there was “strong” statistical evidence that food and beverage advertising on television was associated with “adiposity” (body fat) in children aged two to 11 and adolescents aged 12 to 18. *Id.* at ES-3, 7.



In September 2006, the Federal Communications Commission (“FCC”) publicly announced its plans to study links among television advertising, viewing habits, and the rise of childhood obesity. The FCC has put together a task force, which includes official members of the food, television, and advertising industries; consumer advocacy groups; and health experts.

### “PUBLIC INTEREST” GROUP ACTION

Founded in 1971, the Center for Science in the Public Interest (“CSPI”) is the undisputed leader among America’s “food police,” with annual funding of \$17 million. Center for Science in the Public Interest, *available at* <http://www.cspinet.org>. The group advocates for nutrition and health, food safety, and alcohol policy. While the CSPI touts itself as a public-interest group, its consolidated financial statements make clear that it has a litigation agenda:

[P]romote changes in the American food supply and in food policies through the litigation process, including identifying deceptively labeled or advertised products appropriate for class-action lawsuits, providing expertise and resources to private class-action litigants, initiating litigation under state laws that bar unfair or deceptive marketing practices, and filing lawsuits to improve food policies.

Center for Science in the Public Interest Financial Statements and Independent Auditor’s Report, June 30, 2006 and 2005, at Note 2. CSPI has a “litigation director” and has aligned itself in many of its litigation efforts with well-known former proponents of litigation against the tobacco companies. One example is Richard Daynard of the Public Health Advocacy

Institute (“PHAI”) at Northeastern University. He is described on the Northeastern University School of Law’s web site as being “at the forefront of the national movement to establish the legal responsibility of the tobacco industry for tobacco-induced death, disease and disability.” Daynard now chairs the Obesity and Law Project at the PHAI, and since 2004, he and his group have been advocating lawsuits against the food industry, under state consumer-protection statutes based on food and beverage marketing to children.<sup>3</sup>

CSPI has been involved in numerous lawsuits and other actions against the food industry. In June 2006, CSPI brought a class-action lawsuit against KFC seeking to either ban its use of partially hydrogenated oils or require KFC to inform customers that its food contains trans fat. *Hoyte v. Yum! Brands, Inc. d/b/a KFC*, No. 4526-06, 2006 WL 1648127 (D.C. Super. Ct.). The case was subsequently removed to federal court, where a motion to dismiss is pending. *Hoyte v. Yum! Brands, Inc. d/b/a KFC*, No. 06-1127 (D.D.C.). In October 2006, CSPI stated that it was withdrawing from the lawsuit after KFC announced that it was switching to a trans-fat-free frying oil in certain of its foods, though other parties to the suit will continue to pursue the action. CSPI Press Release, *CSPI Withdraws From Lawsuit After KFC Cuts Trans Fat* (Oct. 30, 2006).



CSPI Press Release, *CSPI Withdraws From Lawsuit After KFC Cuts Trans Fat* (Oct. 30, 2006).

In addition, CSPI recently sued Nestlé and Coca-Cola over the release of Enviga, their new energy drink, seeking restitution and an injunction prohibiting the claim that Enviga burns more calories than it provides, resulting in “negative calories.”

CSPI Press Release, *Watchdog Group Sues Coke, Nestlé For Bogus “Enviga” Claims* (Feb. 1, 2007). The action was brought in federal court under the New Jersey Consumer Fraud Act. *Ctr. for Science in the Pub. Interest v. The Coca-Cola Co.*, No. 07-539 (D. N.J.).

CSPI has continued its litigation efforts in 2007, announcing on January 8, 2007, that it was assisting the representation of a Florida woman in her proposed class action against Kraft Foods, alleging that Kraft deceptively marketed its foil-pouch drink Capri Sun as “All Natural,” notwithstanding that the beverage is composed of water, high-fructose corn syrup, and

small amounts of juice. The suit claimed that although high-fructose corn syrup is no more harmful than other sugars, it is an artificial ingredient and thus the Capri Sun drink is not “All Natural” as advertised. CSPI Press Release, *Kraft is Sued for Falsely Calling Capri Sun Drink “All Natural”* (Jan. 8, 2007). CSPI dropped the lawsuit once Kraft abandoned the “All Natural” claim. *Id.*

Beyond its litigation agenda, CSPI has on multiple occasions petitioned regulatory agencies overseeing the nation's food supply for new measures it believes will promote food safety and nutrition. In November 2006, for example, CSPI petitioned the Food and Drug Administration (“FDA”) to design a national set of symbols identifying healthy foods that will be more consumer-friendly than the dozens of different logos and labels currently employed by food manufacturers for that purpose. CSPI Press Release, *FDA Urged to Create New “Healthy Food” Labeling System* (Nov. 30, 2006). On December 1, 2006, CSPI sent a letter to FDA commissioner Andrew von Eschenbach urging the agency to test and publish levels of acrylamide, an alleged human carcinogen in processed foods, and to limit acrylamide in foods such as cereal, potato chips, and cookies. CSPI Press Release, *CSPI Urges FDA to Test for Acrylamide in Foods* (Dec. 1, 2006). So far this year, CSPI is attempting to get the U.S. Department of Agriculture (“USDA”) to establish maximum levels of sodium in different categories of meat and poultry products, citing statistics by sodium researchers that halving the salt content in processed and restaurant foods would save 150,000 lives a year in the United States. CSPI Press Release, *USDA Urged to Limit Sodium in Meat and Poultry Foods* (Jan. 3, 2007).

Another “advocate” to watch is John Banzhaf, a George Washington University professor who is a longtime proponent of tobacco litigation. Banzhaf has asserted in a CNN interview that fast food, like nicotine, triggers an addictive response in the brain. Transcript, CNN Live (June 22, 2003), available at <http://banzhaf.net/docs/cnn.html>. In addition, press reports have recently appeared discussing the efforts of food scientists to calibrate the taste and smell of food products to make them more enticing. See Patricia Callahan et al., *Where there's smoke, there might be food research, too*, Chicago Tribune, Jan. 29, 2006.

The Physicians Committee for Responsible Medicine (“PCRM”) has also been mounting litigation against the food indus-

try. In 2005, PCRM filed two lawsuits claiming that the dairy industry was misleading consumers with deceptive advertising that made scientifically unsubstantiated claims about the effect of dairy products on weight loss. *Physicians Comm. for Responsible Med. v. Int'l Dairy Foods Assoc.*, Law No. CL05001320 (Va. Cir. Ct.); *Physicians Comm. for Responsible Med. v. Kraft Foods, Inc.*, Chancery No. 05002179 (Va. Cir. Ct.).



The defendants removed the actions to federal court pursuant to the Class Action Fairness Act of 2005, where the cases were consolidated and dismissed for failure to state a claim.

*Physicians Comm. for Responsible Med. v. Gen. Mills, Inc.*, No. 05-958, 2006 WL 3487651 (E.D.Va. Nov. 30, 2006).

## EARLY LEGAL ACTION BY GOVERNMENT AGENCIES AND ADVOCACY GROUPS

In the late 1970s, a consortium of plaintiffs, which included the Committee on Children's Television, Inc., and the California Society of Dentistry for Children, sued a number of food- and advertising-industry companies, including General Foods Corporation and Ogilvy & Mather International Inc. The plaintiffs alleged that the defendants improperly marketed and advertised certain breakfast cereals to children that should have been more accurately described as “sugar products” or “candy breakfasts.” *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 664 (Cal. Sup. Ct. 1983). The case was brought under California's consumer protection statute, which prior to being amended by voters in 2004 did not require plaintiffs to show injury. California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq. (2005), amended by Proposition 64. Noting that “[a]llegations of actual deception, reasonable reliance, and damage are unnecessary,” the California Supreme Court concluded that the claims were sufficient to overcome a motion to dismiss. *Comm. on Children's Television*, 673 P.2d at 668.

Then, in the late 1980s, the attorneys general of several states pursued McDonald's for allegedly deceptive advertisements. The group included then-New York attorney general Robert Abrams, who asserted in 1987 that McDonald's made deceptive claims about the sodium and saturated-fat content of

certain food products and about the artificial ingredients and preservatives in its shakes. See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 528–29 (S.D.N.Y. 2003) (discussing an April 24, 1987, letter by Abrams asserting allegedly deceptive claims by McDonald's). State attorneys general and other government agencies have remained active in policing conduct in the food and beverage industry. In 1991, for example, Abrams reached an agreement with Coffee-mate, KFC, and Dunkin' Donuts to restrict various allegedly misleading health claims.<sup>4</sup> The same year, the Federal Trade Commission ("FTC") sued Stouffer Foods Corporation, asserting that it had engaged in deceptive advertising by falsely telling consumers that its Lean Cuisine products had a low sodium content. *In re Stouffer Foods Corp.*, No. 9250, 1993 FTC LEXIS 196 (Aug. 6, 1993); see generally Felix H. Kent, *The FTC Flexes Its Muscle*, N.Y.L.J., at 3 (Dec. 17, 1993). As a result, an administrative law judge issued an order prohibiting Stouffer from misrepresenting the sodium content of any of its frozen-food products; this was followed by an FTC order extending the scope of the decision beyond sodium to all ingredients. Federal Trade Commission, *FTC Upholds Law Judge's Ruling That Stouffer Food Corp. Made False Low Sodium Claims In Ads For Lean Cuisine* (Oct. 4, 1994). In August 2005, California's attorney general sued a number of food companies, including Frito-Lay, PepsiCo, H.J. Heinz, and Wendy's International, asserting that they failed to warn consumers that certain of their processed potato products contained acrylamide, the alleged carcinogen. *California v. Frito-Lay, Inc.*, No. BC338956 (Cal. Super. Ct. Los Angeles Cty.). The case seeks an order mandating a warning to consumers and unspecified monetary damages.

### PRIVATE CLASS ACTIONS EMERGE

The first proposed consumer class actions against the food and beverage industry emerged in 2002 in New York. Ashley Pelman and Jazlen Bradley, two minors, and their parents sued McDonald's as members of a proposed class. Pelman and Bradley asserted that they had become overweight and developed certain obesity-related diseases, including diabetes, coronary heart disease, and high blood pressure, as a result of their consumption of McDonald's products. Judge Robert Sweet of the Southern District of New York dismissed the original complaint for lack of specificity, *Pelman*



Recent events seem to suggest that an alliance of public-health groups, consumer advocacy groups, academics, state attorneys general, and plaintiffs' lawyers may be joining forces against the food and beverage industry.



*v. McDonald's Corp.*, 237 F. Supp. 2d 512, 519 (S.D.N.Y. 2003), and subsequently granted McDonald's motion to dismiss the amended complaint because the plaintiffs failed to adequately allege that McDonald's caused the plaintiffs' injuries and that McDonald's representations to the public were deceptive. *Pelman*, 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003). Plaintiffs appealed, however, and the Second Circuit vacated and remanded Judge Sweet's dismissal of claims premised on the New York Consumer Protection Act, finding that the plaintiffs sufficiently met the notice-pleading requirements of the Federal Rules of Civil Procedure. *Pelman*, 396 F.3d 508 (2d Cir. 2005).

Receiving the case on remand, Judge Sweet directed the plaintiffs to provide details about the particular advertisements that they alleged were deceptive, their awareness of the advertisements, and the purported injuries that resulted. *Pelman*, 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005). The plaintiffs filed a second amended complaint, and McDonald's again moved to dismiss it. This time, however, the motion was denied. *Pelman*, 452 F. Supp. 2d 320 (S.D.N.Y. Sept. 16, 2006). Although not addressing the legal sufficiency of the claims, Judge Sweet concluded that the plaintiffs complied with his directive by supplying sufficient details for McDonald's to answer the complaint. The case now appears to have proceeded into discovery.

The legal effort to ban the use of partially hydrogenated vegetable oils also began with class-action litigation. In 2003, a San Francisco attorney filed two class actions—one seeking to ban Kraft Foods from selling Oreos containing hydrogenated oil and the other against McDonald's for allegedly misleading its customers into believing that it had switched to a lower-trans-fat cooking oil.<sup>5</sup> Plaintiff's counsel quickly dropped the cases but contends that he did so only after the defendants agreed to reduce trans fat in their products.

In 2004, the alcoholic-beverage industry was hit with two proposed class-action complaints. The proposed class members consisted of the parents and guardians of underage consumers of certain alcoholic beverages, who alleged deliberate and reckless targeting of such consumers in marketing campaigns. *Eisenberg v. DeGross*, No. 04-1081, 2006 U.S. Dist. LEXIS 4058, at \*11–13 (N.D. Ohio). Alleging violations of the Ohio Consumer Sales Practice Act and certain common-law claims, they sought recoupment of the funds

their children spent on illegal purchases of alcoholic beverages and an injunction to prevent defendants from continuing to market alcoholic beverages to underage drinkers. *Id.* at \*12–13. In granting the defendants' motion to dismiss the two complaints, the court held that the plaintiffs failed to assert legally cognizable injuries and did not provide sufficient notice to each defendant of the particular advertising and marketing practices they alleged were harmful. *Id.* at \*13–17.

Several new proposed class actions against food- and beverage-industry defendants have been filed in multiple jurisdictions in the past year. Their timing and similar allegations suggest coordination by a national consortium of plaintiffs' counsel. In *Hardee v. Del Mission Liquor*, No. GIC 844745 (Cal. Super. Ct. San Diego Cty.), the plaintiff sued on her own behalf and as a representative of a proposed class of consumers of certain breakfast cereals touted as “low sugar” that allegedly, unbeknownst to plaintiff, contained “other carbohydrates,” making the defendants' representations that the cereals had nutritional value over their full-sugar breakfast products false. In February 2006, a proposed consumer-fraud and false-advertising class action was filed against Merisant Company, the maker of the artificial sweetener Equal Sugar Lite. The complaint asserts that Merisant deceived consumers by declaring that Equal Sugar Lite contained half the calories and carbohydrates of sugar when in fact the product was composed of about 90 percent sugar and thus contained the same amount of carbohydrates as sugar. *Markowitch v. Merisant Corp.*, No. 06-846 (N.D. Ill.) (dismissed with prejudice pursuant to stipulation entered June 14, 2006).

McDonald's again found itself the target of class-action lawsuits following announcements the company made regarding its french fries. On February 8, 2006, McDonald's announced that the trans-fat content in a large order of its fries was one-third higher than previously reported, the total fat content was 20 percent higher, and the total number of calories was 570 instead of 520.<sup>6</sup> And on February 13, 2006, the company revealed that wheat and dairy products were used to flavor its fries.<sup>7</sup> Within weeks of each announcement, McDonald's was named in proposed class actions in New York, Florida, Illinois, and California. Invoking consumer-fraud statutes in each jurisdiction, the complaints seek class certification on behalf of consumers who claimed they would have “moderated” their intake of fries if they had known their true caloric

*continued on page 32*

## A SMORGASBORD OF ATTACKS ON THE FOOD INDUSTRY

*continued from page 15*

and fat content,<sup>8</sup> those claiming they were injured because they had purchased McDonald's fries believing they were free of gluten and milk or wheat allergens,<sup>9</sup> and vegans (vegetarians who do not eat animal byproducts, such as milk) who asserted that they would not have consumed McDonald's fries if they had known they contained dairy products.<sup>10</sup> A number of these cases were centralized by the Multidistrict Litigation Panel and are now pending in the Federal District Court for the Northern District of Illinois. *In re McDonald's French Fries Litig.*, No. MDL-1784, 444 F. Supp. 2d 1342 (Jud.Pan.Mult.Lit. 2006); *In re McDonald's French Fries Litig.*, No. 06-4467 (N.D. Ill.).

The recent *E. coli* bacteria outbreaks have also demonstrated the heightened readiness to litigate against the food and beverage industry. Even before health officials warned about possible contamination from spinach, one Seattle law firm had already filed its first lawsuit, and within weeks of the outbreak, it filed several others.<sup>11</sup> Indeed, just three days after the FDA advised the public not to eat fresh spinach, a proposed class action was filed in Cook County, Illinois, to recover the purchase price paid for fresh spinach that had to be discarded because of concerns over the *E. coli* outbreak.<sup>12</sup> On the regulatory front, in November 2006, CSPI formally petitioned the FDA to issue regulations regarding inspections and mandatory standards governing manure, water, and sanitation on farms to help reduce future incidents of *E. coli* contamination. CSPI Press Release, *CSPI Petitions FDA to Regulate Manure, Water and Sanitation on Farms* (Nov. 15, 2006).

The same routine recently unfolded in reaction to an *E. coli* outbreak associated with Taco Bell. The same Seattle law firm filed two federal lawsuits just days after Taco Bell pulled green onions from its restaurants. *Minis v. Yum! Brands, Inc.*, No. 06-5392 (E.D. Pa.); *Keller v. Yum! Brands, Inc.*, 06-1480 (N.D.N.Y.). Illustrating the difficulty in accurately tracing the source of food contamination at a national fast-food chain with a menu containing many different food ingredients, in December 2006, investigators from the Centers for Disease Control and Prevention said the likely source of the outbreak was not the green onions that Taco Bell used, but lettuce. FDA officials said they planned to continue trying to trace the contaminated lettuce to its source.<sup>13</sup> The finding led to

the voluntary dismissal of claims against the supplier of Taco Bell's green onions. *Minis v. Yum! Brands, Inc.*, No. 06-5392, Stipulation of Dismissal (E.D. Pa. Dec. 14, 2006); *Keller v. Yum! Brands, Inc.*, 06-1480, Stipulation of Dismissal (N.D.N.Y. Dec. 14, 2006).

Whether courts will determine that any of these purported class actions satisfy such basic class-action requirements as commonality, predominance, and manageability will depend in part upon the contours of the different consumer-fraud statutes they invoke and whether those statutes require proof of such individualized elements as reliance and actual deception. A recent 2006 New York Appellate Division opinion illustrates the hurdles confronting a proposed consumer-fraud action against a food manufacturer in New York. *In Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D.3d 63, 808 N.Y.S.2d 766 (2d Dep't 2006), the plaintiffs sued the maker of the snack food Pirate's Booty after it was revealed that it and related products had a fat and caloric content substantially higher than advertised. The Appellate Division reversed the trial court's certification order, finding that because some of the plaintiffs' New York consumer-fraud and common-law claims required a showing that class members relied on the defendants' allegedly misleading fat and calorie statements and were deceived, the class was overbroad, as some consumers may have purchased the snacks regardless of their fat and caloric content. *Id.* at 72-73, 808 N.Y.S.2d at 773.<sup>14</sup>

In contrast, it is no surprise that parents and advocacy groups have announced their intention to file proposed class-action lawsuits in Massachusetts under the state's liberal consumer-protection law, Massachusetts General Law Chapter 93A, targeting Viacom's and Kellogg's marketing of junk food to children<sup>15</sup> and the sale and marketing of soft drinks in schools by soft-drink companies and their bottlers.<sup>16</sup> Plaintiffs who claim to have been injured by an unfair or deceptive act or practice may seek class certification directly under Chapter 93A "if the use or employment of the unfair or deceptive practice has caused similar injury to numerous other persons." *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 481 (Mass. 2004). Courts considering class-certification motions under Chapter 93A need not adhere to each of the certification elements required under Federal

Rule 23. *Id.* at 485. In addition, the statute requires neither proof that a plaintiff relied on a representation nor evidence that a defendant intended to deceive the plaintiff. *Id.* at 486. An advertisement may be deceptive under Chapter 93A if it merely has the capacity or tendency to mislead reasonable consumers. *Id.* at 487–89.

Even under Massachusetts' liberal consumer-protection statute, however, the basic requirements of causation and injury are required for there to be a justiciable controversy.<sup>17</sup> Apart from questions of reliance or damages, whether any of the recently filed proposed class actions will gain traction may turn on these threshold elements to maintain a claim. For instance, the plaintiffs in the proposed Massachusetts action against Viacom and Kellogg appear to claim that each child they represent was injured simply when he or she witnessed one of the allegedly improper Kellogg advertisements because children are subsequently hard-wired to want food that "contributes to poor health." CSPI Pre-suit letter to the CEOs of Viacom and Kellogg (Jan. 18, 2006). There is no allegation that any of the children actually consumed the food products of "poor nutritional quality" at issue and suffered any adverse health consequences, such as diabetes or obesity, because of the products. *Id.* If they never actually consumed the products or suffered any diet-related harm from them, or their parents purchased them for reasons wholly unrelated to the allegedly improper advertisements, where is the injury?

Assuming any of the pending food suits get past the threshold pleading stage and into document and deposition discovery, as it appears the *Pelman* case recently has, it is conceivable that consumers may learn that certain fast foods and beverages do indeed reflect years of research and design efforts by food-company scientists and marketing executives and that still more products will be shown to contain unexpected ingredients or a higher fat and calorie content. Individual plaintiffs who can demonstrate physical or economic injury from purchasing such products in reliance on misleading manufacturer statements may have a consumer-fraud claim. In the class-action context, however, just as certification has been denied or reversed in virtually every class action proposed against the cigarette manufacturers,<sup>18</sup> the individualized inquiry inherent in a consumer

food or beverage transaction should preclude litigating such claims on a classwide basis, given such consumer-specific questions as why a product was purchased, whether a company statement or advertisement was objectively deceptive, and whether a consumer's alleged physical injuries were caused by the product or multiple alternative risk factors.

These lawsuits appear to be attempts to use the courts for social engineering and behavior modification. Such issues should be the domain of legislatures and regulators. At an even more basic level, they are the responsibility of parents and consumers old enough to understand that advertising is designed to sell a product and that certain foods and beverages should be consumed in moderation as part of a balanced diet.

## LEGISLATIVE ACTION

Recently, there has been an increase in various legislative efforts to regulate the food industry. One such measure recently approved by the New York City Board of Health requires all city restaurants to phase out artificial trans fats from the foods that they serve. New York City Health Dept., *Press Release—Board of Health Votes to Phase Out Artificial Trans Fat From New York City's Restaurants* (Dec. 5, 2006). Chicago is considering a similar prohibition affecting restaurants with more than \$20 million in annual sales.<sup>19</sup> The Boston Public Health Commission is also contemplating a trans-fat ban.<sup>20</sup> In addition, the New York City Board of Health passed a measure requiring some restaurants to make calorie information publicly available by posting it on menus and menu boards, where consumers can see it when they order. New York City Health Dept., *Press Release—Board of Health Votes to Require Calorie Labeling in Some New York City Restaurants* (Dec. 5, 2006).

Trans fats are a byproduct generated when liquid vegetable oil is turned into solid oil through hydrogenation, a chemical process.<sup>21</sup> Restaurants and food manufacturers have used trans-fat oils in their food products, claiming it made their food crispier or moister, which customers preferred, and gave baked goods a longer shelf life. Some studies have linked trans fats to increased levels of low-density lipoprotein (or "bad cholesterol") in the blood, leading to an increased risk



of heart disease, and decreased levels of high-density lipoprotein (or “good cholesterol”),<sup>22</sup> although some commentators remarking on the recent trans-fat ban by the New York City Board of Health say the science on the risk of trans fats is inconclusive.<sup>23</sup>

Whether the various attacks on the food industry will ever gain traction is unknown. What we do know is that with millions of dollars at stake, the “obesity war” will surely continue to be fought for some time on a multitude of fronts. ■

*Jones Day associate Joseph A. Strazzeri assisted in the preparation of this article.*

**HAROLD K. GORDON**

1.212.326.3740

hkgordon@jonesday.com

**CAROL A. HOGAN**

1.312.269.4241

chogan@jonesday.com

<sup>1</sup> John Riley & David Henry, *Tobacco Firms Fire Back, Countering Jury Award of \$400G*, *Newsday*, June 15, 1988, at 7.

<sup>2</sup> Geoffrey Cowley, et al., *A Split Decision on Smoking—But a Jury Breaks the Industry’s Winning Streak*, *Newsweek*, June 27, 1988, at 48.

<sup>3</sup> Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, *N.Y. Times*, Apr. 9, 2004.

<sup>4</sup> Marian Burros, *Eating Well; Food Companies Agree To Modify Claims on Fat*, *N.Y. Times*, Oct. 30, 1991.

<sup>5</sup> Marian Burros, *A Suit Seeks to Bar Oreos as a Health Risk*, *N.Y. Times*, May 14, 2003; see also <http://www.bantransfats.com>.

<sup>6</sup> John Schmeltzer, *New fat stats for fries? Not lovin’ it—Self-testing reveals McDonald’s nutritional data was wrong*, *Chicago Tribune*, Feb. 9, 2006, at C-1; *McDonald’s Updates Info. on Fries*, *The Wall Street Journal*, Feb. 9, 2006, at D6.

<sup>7</sup> David P. Hamilton, *McDonald’s French Fries Contain Possible Allergens Wheat, Milk*, *The Wall Street Journal*, Feb. 13, 2006, at B4.

<sup>8</sup> *Raingevirtz v. McDonald’s Corp.*, No. 06-605 (E.D.N.Y.); *Reyes v. McDonald’s Corp.*, No. 06 CH 2745 (Ill. Cir. Ct. Cook Cty.). These actions were successfully transferred and removed, respectively, to the U.S. District Court for the Northern District of Illinois. On November 8, 2006, all claims other than the consumer-fraud count under Illinois law were dismissed. *Raingevirtz v. McDonald’s Corp.*, No. 06-2813 (N.D. Ill.); *Reyes v. McDonald’s Corp.*, No. 06-1604 (N.D. Ill.).

<sup>9</sup> *Levy v. McDonald’s Corp.*, No. 06-60236 (S.D. Fl.); *Moffatt v. McDonald’s Corp.*, No. 06 CH 03305 (Ill. Ch. Ct. Cook Cty.). The same day the *Moffatt* complaint was filed in state court in Illinois, the parents of a five-year-old girl with food allergies sued McDonald’s in Florida state court, asserting she had fallen ill from undisclosed gluten in the company’s french fries. *Chimiak v. McDonald’s Corp.*, No. 2006-1597 (Fl. Palm Beach Cty.).

<sup>10</sup> *Sugich v. McDonald’s Corp.*, No. BC347519 (Ca. Super. Ct. Los Angeles Cty.). The *Sugich* proposed class also includes consumers who would not have purchased McDonald’s fries if they had known they were not wheat- or gluten-free.

<sup>11</sup> Heather Won Tesoriero & Peter Lattman, *How a Tiny Law Firm Made Hay Out of Tainted Spinach*, *The Wall Street Journal*, Sept. 27, 2006, at B1.

<sup>12</sup> Eric Herman, *Class-action lawsuit filed in Cook County*, *Chicago Sun-Times*, Sept. 19, 2006.

<sup>13</sup> Associated Press, *Lettuce most likely source of Taco Bell E. coli, feds say*, *Dec. 13, 2006*, available at <http://www.cnn.com/health>.

<sup>14</sup> Proof of actual deception and injury is required under the consumer-fraud statutes of other states as well, including Illinois and California, where some of the recent McDonald’s actions were filed. See *Price v. Philip Morris, Inc.*, No. 96236, 2005 Ill. LEXIS 2071, at \*140 (Ill. Sup. Ct. Dec. 15, 2005) (“[T]o meet the causation element of a Consumer Fraud Act claim . . . , the members of the class must have actually been deceived in some manner by the defendant’s alleged misrepresentations of fact.”) (citation omitted); *United Investors Life Insur. Co. v. Waddell & Reed, Inc.*, 23 Cal. Rptr. 3d 387, 388–89 (Cal. Ct. App. Jan. 20, 2005) (discussing the 2004 adoption of Proposition 64, which amended California’s unfair competition statute, California Business and Professions Code § 17200 et seq., to prohibit a private action under the statute unless the plaintiff has suffered injury in fact and has lost money or property).

<sup>15</sup> See CSPI Pre-suit letter to the CEOs of Viacom and Kellogg (Jan. 18, 2006), available at <http://www.cspinet.org/new/200601181.html>; CSPI Press Release, *Parents and Advocates Will Sue Viacom & Kellogg* (Jan. 18, 2006).

<sup>16</sup> See Banzhaf e-mail notice to school boards, school board associations, and their counsel, *Imminent Class Action Law Suits Over Soft Drink Sales in School* (Feb. 17, 2006), available at <http://banzhaf.net/docs/sodawarn>.

<sup>17</sup> *Hershenow v. Enterprise Rent-A-Car Co.*, 840 N.E.2d 526, 533–35 (Mass. 2006) (confirming that although consumers are not required to prove reliance on deceptive conduct to invoke Chapter 93A, they must be able to demonstrate causation, that is, that the alleged deceptive act injured them or caused them to suffer a loss). At least two bills are currently pending before the Massachusetts Legislature to curtail the ability of plaintiffs to seek class certification of consumer-fraud claims under Chapter 93A. Noah Schaffer, *Lawyers split on 93A reform bills*, *Massachusetts Lawyers Weekly*, Mar. 20, 2006, at 11.

<sup>18</sup> *E.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593 (1st Dep’t 1998), *aff’d*, 94 N.Y.2d 43 (1999).

<sup>19</sup> Monica Davey, *Chicago Weighs New Prohibition: Bad-for-You Fats*, *N.Y. Times*, July 18, 2006.

<sup>20</sup> *Trans Fats: Will They Get Shelved?* *The Wall Street Journal*, Dec. 9–10, 2006, at A6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *The Bloomberg Diet*, *The Wall Street Journal*, Dec. 9–10, 2006, at A8.