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Lines Are Drawn for Big Suit over Sodas

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It is lunchtime at Grover Cleveland High School in Portland, Ore. A steady stream of thirsty teenagers poke dollars into the three Coca-Cola machines in the hallway. By the end of lunch period, the Coke With Lime, Cherry Coke and Vanilla Coke are sold out.

Elsa Peterson, a senior at Grover Cleveland and the student body president, said she knew she could bring healthier juices from home. "But it's easy to walk up with a dollar and just get a pop."

That, says Stephen Gardner, staff lawyer for the Center for Science in the Public Interest, is exactly the problem. In an age of soaring obesity rates among children, he argues that soda and other sugary beverages are harmful to students' health and that selling those drinks in schools sends a message that their regular consumption is perfectly fine.

In a lawsuit they plan to file in the next few months, Mr. Gardner and half a dozen other lawyers, several of them veterans of successful tobacco litigation, will seek to ban sales of sugary beverages in schools.

The lawsuit is to be filed in Massachusetts, which has strong consumer protection laws and happens to be where some of the lawyers are based, and will name Coca-Cola, PepsiCo and their local bottlers, the lawyers say. It will be the first of many such state lawsuits, they say.

The \$92 billion beverage industry, dominated by Coca-Cola and PepsiCo, is gearing up for a counterattack. Last week, the American Beverage Association, the lobbying group for the beverage industry, released a study arguing that soda sales in schools are not a significant contributor to rising childhood obesity rates.

The study, which was paid for by the association but conducted by an outside economist, concluded that school vending machine sales of non-diet soda declined by 24 percent from 2002 to 2004 and that the average high school student consumes just one 12-ounce nondiet soda a week from school vending machines.

"This study confirms what previous studies have shown: that consumption of full-calorie sodas purchased from school vending machines during normal school hours is a very minor source of calories in the diets of American youth," said Susan K. Neely, president of the American Beverage Association, which last year changed its name from the National Soft Drink Association.

Across America, almost half of all public schools have exclusive contracts with beverage companies. According to a report published in August by the Government Accountability Office, the investigative arm of Congress, 75 percent of all high schools, 65 percent of all middle schools and 30 percent of elementary schools have beverage contracts.

Such contracts have been promoted as a continuing source of revenue for schools needing cash. The deals often give schools a large upfront payment and a share of the collected revenue. But a study of public school contracts in Oregon concluded that the amount of money received by schools is not that significant and that by far, most of the revenue goes to the companies, not the schools.

The study, done by the Community Health Partnership, a public health advocacy group in Oregon, found that school districts received just \$12 to \$24 per student annually. "Some people have the perception that there is a huge amount of money in this for schools," said Nicola Pinson, a lawyer who was hired by the Community Health Partnership to do the study, the most extensive analysis done on school contracts to date. "But we need to put it in perspective with overall budgets and how much money the companies are getting."

For the 2005-6 school year, for instance, Portland's school district has projected that it will receive \$250,000 from vending sales at its 15 high schools, an amount representing 0.06 percent of a total district budget of \$396 million, according to school budget documents.

Ms. Pinson contends that while schools certainly earn some money, Coke and Pepsi bottlers get the better end of the deal. She says that the Hillsboro school district's 12-year contract with the Coca-Cola Bottling Company of Oregon, for instance, requires the district to buy 420,000 beverage cases over the life of the contract; that translates into students spending a total of \$10 million. Of that, \$3 million will go to the district and \$7 million will go to the bottler.

"This is all coming from the community's pockets," Ms. Pinson said. "You have to ask whether this is really an effective way to do fund-raising for schools."

According to the Oregon study, which analyzed 19 contracts covering 186,000 students, some contracts even reward schools when students purchase the most caloric and unhealthiest of options. The Portland school district's contract with the Coca-Cola Bottling Company of Oregon stipulates that schools get 50 percent from every 20-ounce bottle of Coke, but only 35 percent for a 12-ounce can and 30 percent for a bottle of water or juice.

Ms. Neely of the American Beverage Association said that contracts involve "two willing parties" and that schools have the ability to negotiate what they want to sell in vending machines. More broadly, Ms. Neely said that the beverage industry had taken steps to address concerns over soda sales in school.

In August, the beverage association announced that beverage companies would stop selling soda and other drinks with added sugar in elementary schools and would restrict the sale of

regular, full-calorie soda in middle schools to after-school hours only. Next month, the association is planning to run an ad campaign about the new policy.

Mr. Gardner of the Center for Science in the Public Interest, a nutrition advocacy group, said that the beverage association's policy did not adequately address the sales of beverages in high schools, which is where the majority of purchases occur.

The Massachusetts lawsuit will focus specifically on sales of what it terms unhealthy beverages (likely to mean full-calorie sodas, sports drinks, iced tea drinks and juice drinks without much juice) in high schools and will argue that such sales constitute unfair and deceptive marketing. The suit will also cite the ways in which the large illuminated Coke and Pepsi machines lining school halls and cafeterias are an "attractive nuisance."

"They're selling to a captive audience that isn't really in a position to fully evaluate all the health risks," said Andrew A. Ranier, a partner at McRoberts, Roberts & Ranier in Boston and one lawyer involved in the suit. "And they're not telling people about the risks."

Three tobacco litigation experts are also involved in the suit: Tim Howard, a Florida lawyer who helped the state win a \$17 billion settlement against tobacco companies in 1997; Stephen A. Sheller, a partner at Sheller Ludwig & Badey in Philadelphia, who was involved in a successful \$10 billion tobacco class action in Illinois state court that is currently under appeal; and Richard A. Daynard, an associate dean at the Northeastern University School of Law who has served as an adviser to many of the state tobacco lawsuits that led to a \$246 billion settlement in 1998.

Mr. Gardner and the rest of the Massachusetts coalition say they think the scientific research linking soda and obesity is strong. Numerous studies have shown, for instance, that people do not compensate for liquid calories in the way they would for, say, a slice of pizza or a handful of cookies because drinks do not create the same sense of fullness.

In a study published in the medical journal *Lancet* in 2001, Dr. David S. Ludwig, director of the obesity program at Children's Hospital Boston and an associate professor of pediatrics at Harvard Medical School, found that each additional daily serving of a sugar-sweetened beverage increased the risk of obesity by 60 percent.

The American Beverage Association says that there are also studies that show no link between consumption of soft drinks and obesity.

The Massachusetts lawyers say they think that their legal foray is likely to get greater public support than the much-publicized suit against McDonald's by two obese New York teenagers.

"This is different from the fat kid who goes to McDonald's," said Mr. Gardner, speaking at an obesity lawsuit conference organized by Professor Daynard in September. "This is a captive audience and they're using schools to get their brands into the hearts and minds of students."

One detail yet to be decided is whether the group will seek financial damages. Under Massachusetts's consumer protection law, successful plaintiffs are entitled to \$25 per violation, which could mean \$25 for every time a student has purchased a soda in a public high school in Massachusetts over the past four years.

Mr. Gardner said he and the other lawyers realize that damages could run into the billions. "We haven't decided about this yet," he said. "We don't want this to come off looking like a greedy-lawyer lawsuit."

Brian Libby contributed reporting from Portland, Ore., for this article.