

## Imminent Class Action Law Suits Over Soft Drink Sales in School

Now that it has just been announced publicly, I write to formally advise you of the imminent filing of massive class action law suits in **Massachusetts** -- and **subsequently in other states** -- aimed at the sale of sugary soft drinks in schools; to warn of your inevitable involvement in these law suits as a named party or otherwise; and to suggest steps you may wish to consider taking now regarding your potential legal liability.

<http://www.nutraingredients-usa.com/news/ng.asp?n=65343-soft-drinks-obesity-lawsuit>

[http://www.boston.com/news/nation/washington/articles/2005/12/02/lawyers\\_ready\\_suit\\_against\\_soft\\_drinks/](http://www.boston.com/news/nation/washington/articles/2005/12/02/lawyers_ready_suit_against_soft_drinks/)

[http://news.yahoo.com/s/afp/20051214/ts\\_alt\\_afp/afplifestyledrinkjustice\\_051214060145](http://news.yahoo.com/s/afp/20051214/ts_alt_afp/afplifestyledrinkjustice_051214060145)

**TOBACCO LAW SUIT BACKGROUND:** As you may know, a campaign I helped start more than thirty years ago to use legal action as a weapon against the public health problem of smoking has been very successful. It has resulted in many multi-million dollar and even billion dollar verdicts or settlements in law suits initially regarded by many as "frivolous", eliminated cigarette commercials and billboards, killed off Joe Camel, helped create a massive drop in cigarette consumption, and a resulting decline in unnecessary premature deaths, disabilities, and health care costs.

See, e.g., <http://banzhaf.net> AND <http://ash.org/victories.html>

**FAT LAW SUIT BACKGROUND:** During the past several years, my colleagues and I have begun to duplicate this effort by using innovative legal actions as a weapon against the public health problem of obesity. So far, six fat law suits have been successful. They have banned trans fat from Oreo cookies, provided more accurate nutritional information, served as a catalyst for banning sugary soft drinks in New York City, and forced McDonald's to pay out \$20 million. Another law suit against McDonald's for contributing to the obesity of minors was recently reinstated by a unanimous U.S. Court of Appeals and subsequently by the trial judge -- all four of whom upheld the novel legal theories which many initially regarded as "frivolous." Moreover, as **discussed below**, even the threat of legal action against school board members over school soda sales has proven to be very effective.

See generally, <http://banzhaf.net/obesitylinks> AND <http://banzhaf.net/docs/sixwon>

**"COKE FOR KICKBACKS" [pouring rights] CONTRACTS:** As you are no doubt aware, many school boards have contracts under which sugary soft drinks are sold in schools. In return, the schools are compensated, usually in the form of commissions or bounties ("kickbacks") for every sugary soft drink sold to students. Because of the now-overwhelming evidence **[see below]** that making such beverages available at schools has a major role in promoting pediatric obesity, these arrangements have been chosen as the next major target by attorneys concerned about obesity-- many of whom, like myself, were also successful in using legal action against tobacco.

**THE IMMINENT LAW SUITS:** As reported in the media, these massive class action law suits will be brought initially in Massachusetts, and subsequently in a number of other states. The background and legal theories have been described in a number of news articles, **see below**. The suits will name bottlers as defendants, and argue that they were negligent and violated consumer protection laws in establishing such arrangements with school boards.

<http://banzhaf.net/docs/americanlawyer> AND <http://banzhaf.net/docs/washtimessoda>

**YOUR POTENTIAL NON-PARTY INVOLVEMENT:** Although current plans do not call for school boards or school board members to be included as named parties in the initial round of law suits, it is clear that school boards, and probably individual school board members, will nevertheless become involved in several ways. For example, even if they are never brought in as parties in the law suits, their unique role in the arrangements attacked by the law suits brought against bottlers will inevitably involve them as targets of pre-trial discovery seeking documents and their testimony under oath, requiring their testimony at any trials, their involvement in settlement discussions, and possibly -- if sought by the bottlers in actions for third-party contributions [i.e., to share in the legal liability] -- to pay any penalties for alleged breach of contract and/or other damages.

**YOUR POTENTIAL INVOLVEMENT AS A PARTY:** Far more serious is the real possibility that school boards -- and possibly even individual school board members -- will become involved as named parties to these law suits. This could happen in several ways. **First**, the bottler defendants could seek to bring the school boards in as necessary parties. They presumably would argue that it is the school boards -- entities charged with the primary responsibility for protecting the health of the children -- which made the final decision to provide students with sugary soft drinks during school, and that the school boards are therefore an essential part of any resolution of the problem. **Second**, perhaps as the result of pre-trial discovery of previously unknown facts -- e.g., secret memos or minutes of school board meetings, "wining and dining" of school board members or other benefits to them, etc. -- the pleading by the initial plaintiffs could be amended to include new parties such as school board members. **Third**, other parents who believe that the school board and its members are at least equally at fault -- including some who might wish to run for school board membership and/or have other agendas they wish to promote -- may bring new law suits against the school board and/or its members, and then probably seek to have these new law suits consolidated with the existing law suits (i.e., those by the initial plaintiffs against the bottlers).

**YOUR POTENTIAL LEGAL LIABILITY:** School boards -- and in some cases even individual school board members -- could be sued and potentially held liable under a variety of legal theories ("causes of action"). Some of the major ones are discussed very briefly below.

**NEGLIGENCE:** School boards -- and perhaps even individual school board members -- could be sued for breaching their duty to protect the students who attend the school. It could be alleged that, in view of the overwhelming body of scientific and medical evidence that the availability of sugary soft drinks at schools is a major factor in causing obesity -- not only because of the unnecessary calories actually consumed in school, but also by the impact such at-school consumption has on children's eating and drinking habits outside of the school venue -- the school board was negligent (did not exercise reasonable care) in providing these sugary soft drinks to students. After all, if a court can conclude, in view of supposedly widely recognized dangers of dodge ball, that it was negligent for a school to permit young children to play the game at school, it can even more easily conclude that, in view of the more clearly known dangers of sugary soft drinks, it is negligent to serve them in schools. See *Lindaman v. Vestal Cent. Sch. Dist.*, 785 N.Y. S.2d 549 (N.Y. App. Div. 2004).

**DEFENSES:** The defense that the arrangement was only done to bring in money may well be both counterproductive and ineffective: **counterproductive** because such a defense virtually acknowledges the wrongfulness and health harm of providing the drinks by claiming that such unhealthy action would not have been taken but for the payments; and **ineffective** because it is unlikely that doing anything which significantly endangers the health of even a few children can ever be fully justified by crass financial considerations. The traditional negligence defenses of comparative negligence and assumption of risk would appear to be very limited and possibly inapplicable to young children who can hardly be expected to fully understand and appreciate the dangers of eating sugary soft drinks, and/or to parents who can't effectively control what their children drink within the confines of a school.

**INTENTIONAL TORTS:** It could also be argued, in the alternative, that given the well-known dangers of providing sugary soft drinks in schools, the actions of the school board were intentional rather than merely negligent in the sense that they knew with "substantial certainty" that the decision would result in some health harm to at least some of the children (even if that was not their purpose). For example, in an early successful fat law suit, my law students argued that McDonald's had committed the intentional tort of battery by merely failing to warn customers that their french fries contained beef fat; i.e., that they acted with the intent ("substantially certain knowledge" rather than purpose) of causing customers to suffer a harmful or offensive bodily contact by eating beef. Although originally ridiculed at "frivolous," McDonald's ultimately paid over \$12 million to settle the law suit.

**EFFECT ON IMMUNITY:** One of the consequences of bringing a cause of action based upon an intentional tort is that it may abrogate the traditional defense of sovereign or charitable immunity, See, e.g., *Hardwicke v. Am. Boychoir Sch.*, 368 N.J. Super. 71, 75 (N.J. Super. Ct. 2004). It also opens the door to punitive damages.

**OTHER DEFENSES:** Since neither negligence nor assumption of risk are defenses to an intentional tort, the defendants would have to argue consent. But the legal effect of consent by children to activities which can be harmful to them is obviously very limited, particularly for young children. Moreover, for any such consent to be effective, the children must have been fully informed of the dangers -- something which schools can hardly claim is true when they themselves are actively promoting the sale of sodas to the students and profiting from it.

**BREACH OF FIDUCIARY DUTY:** As an additional and potentially powerful legal claim, it can be argued that school boards and their members violated not only their duty to exercise ordinary care (as in negligence), but their legal duty to exercise a much higher standard of duty and care to the children and their parents in their role as fiduciaries. The law imposes these much higher fiduciary duties where there is a significant imbalance in knowledge and power between the parties (e.g., doctor-patient, attorney-client, customer-banker, etc.), and where, as a result, the weaker party justifiably relies on the more knowledgeable party's guidance. Since exactly this relationship exists between students (and their parents) and the school board, a strong argument for the existence of this higher fiduciary duty can be made. It will be further bolstered by the argument that the students in many cases are a captive audience who, as a practical matter, cannot readily obtain cold drinks during the school day except as provided by the school itself. See, e.g., my threatening letter to the Seattle School Board: <http://banzhaf.net/docs/seattleltrs.html>

**BREACH OF FIDUCIARY DUTY - SEATTLE:** It may be important to note that the "breach of fiduciary duty" argument was the basis of a law suit which threatened to target the individual members of the Seattle School Board if they did not substantially modify their Coke For Kickbacks contract. Although only a threat was made, and no litigation has actually been commenced, the warning itself generated national as well as world-wide publicity, support from the major area newspapers and also attorneys, parents, and other groups. **[see links below]** The result was a major change in the contract terms, one remarkably similar to the American Beverage Association's recent so-called voluntary policy **[see below]**.

**IMMEDIATE ACTION MAY BE REQUIRED:** The initial law suits will be filed in Massachusetts very shortly, and soon thereafter similar class action law suits will be filed in a number of additional states. It therefore would seem to be appropriate, if not imperative, that school boards and their members take at least some preliminary actions at their earliest convenience regarding their involvement and potential legal liability. It is respectfully suggested that they, at the very least:

**BE KNOWLEDGEABLE:** School board members should be fully aware of the very serious health and medical dangers of the current and escalating epidemic of obesity among children. Even more importantly, they should be aware of the overwhelming evidence that having sugary soft drinks available in schools contributes significantly (i.e., is a "substantial factor") in causing these problems, including pediatric diabetes, metabolic syndrome, etc. It is equally important to know that a growing number of large as well as small school districts -- in some cases, like California, including the entire state -- has discontinued providing sugary soft drinks at schools, and that in many cases they have done so with little loss of income by switching to healthier beverages. Only by possessing such knowledge can school board members hope to make intelligent and fair decisions as "reasonably prudent persons" are required to do regarding this issue, and avoid arguments by plaintiffs that they remained willfully ignorant or were negligent in refusing to become informed. Ignorance of the law is no excuse, and neither is ignorance of the facts upon which such vital health-related decisions must be based.

**BE PREPARED:** Rather than waiting for a call for comments, reaction, or underlying facts from an administrator, reporter, politician, or angry parent once a "Coke For Kickbacks" class action law suit has been filed in the jurisdiction, and the risk that a hasty statement or a "no comment" could have serious adverse consequences, it would be wise for school board members, and school administrators and spokesman, to make sure they have all the relevant facts **[see above]** and then begin to take whatever steps may seem to be appropriate. These steps could range from establishing a committee or other body to gather the facts and study the issue, to scheduling a thorough review and even reconsideration the issue at the earliest possible opportunity. Decisions made even a year ago probably should be reconsidered in the light of vastly changed circumstances, including: new and more compelling scientific and medical evidence, the growing number of school districts which has stopped providing sugary soft drinks in schools, the growing number of legislative measures aimed at this problem which have been introduced, changes in public opinions as reflected in polls, etc. Considering all that has happened recently, a statement by a school board that it simply stands by a decision made years ago -- and is not even going to reconsider it -- is not likely to be very smart litigation or public relations strategy.

**BE PRO-ACTIVE:** If, in light of all these changed circumstances, it appears that an existing policy of providing sugary soft drinks in schools may no longer be appropriate, it is suggested that school's boards and their individual members be pro-active rather than passive; in other words, that they take action rather than waiting for law suits. They can request that their staffs or other governmental resources help provide them with all the latest information upon which to make a decision, and then actively consider what their options may be. Existing Coke For Kickbacks contracts may have provisions providing for early cancellation and/or at least modifications. Even if they do not, bottlers eager to avoid litigation and/or adverse publicity may be willing to re-negotiate a contract or to permit the vending machines to be turned off during the school day, to substitute healthy beverages for sugary soft drinks, etc. -- especially in light of the American Beverage Association's new so-called voluntary policy:

See, e.g., <http://www.ameribev.org/pressroom/Sept2005OverwhelmingSupport.asp>

**INDUSTRY ACTIONS WHICH MAY AFFECT YOU:** Many recent articles have described how the beverage industry is taking active steps to protect themselves from these coming law suits -- in part by trying to deflect the blame to others, including school boards and school board members. For example, Coca Cola has adopted a policy renouncing and denouncing Coke For Kickbacks contracts in an obvious effort to place the onus of these arrangements on small local bottling companies and the school boards; see, e.g.: <http://banzhaf.net/docs/cokeno>

**THE AMERICAN BEVERAGE ASSOCIATION** after for so long denying that soft drinks sold in schools played any significant role in causing obesity, now has very substantially modified its position to impliedly concede this connection. The new voluntary policy would require limiting the access of students to vending machines during the school day, providing for healthier drinks, etc. As the media is reporting, this is another effort by the industry to deflect blame, and it will make it easier to argue that the beverage industry is doing its part, and that it is the school boards which are primarily to blame.

In closing, while I am primarily a legal activist who, like my colleagues, is very concerned about pediatric obesity and willing to use legal action as a weapon against it, I also have a great deal of respect and concern for school boards and their members who will very soon find themselves in the middle of this major legal onslaught. I hope, therefore, that they will take whatever actions seem to them to be most appropriate to protect their interests and the interests of the schools and the school children. This, at a minimum, includes becoming fully informed about all the facts, reconsidering policies regarding "pouring rights" contracts in the light of new facts and developments, then taking whatever action may be appropriate, and being prepared for the law suits before they are actually filed. Failing to take any steps whatsoever is the worst course of action, and will only heighten the perceptions that schools and school boards are part of the obesity problem, rather than a part of the solution.

### **LINKS RELATED TO SEATTLE LAW SCHOOL "COKE FOR KICKBACKS" CONTRACT:**

CNN Commentary: <http://banzhaf.net/docs/toobin.html>

Seattle Newspaper Article: [http://seattlepi.nwsourc.com/local/129155\\_coke02.html](http://seattlepi.nwsourc.com/local/129155_coke02.html)

Seattle Newspaper Article: [http://seattlepi.nwsourc.com/local/128553\\_soda27.html](http://seattlepi.nwsourc.com/local/128553_soda27.html)

Seattle Times Article: <http://archives.seattletimes.nwsourc.com/cgi-bin/taxis.cgi/web/vortex/display?slug=fatsuit02m&date=20030702&query=banzhaf>

Washington Times Article: <http://www.washtimes.com/business/20030626-102218-3717r.htm>

Editorial: [http://seattlepi.nwsourc.com/opinion/129007\\_colaed.html](http://seattlepi.nwsourc.com/opinion/129007_colaed.html)

Another Editorial: [http://seattlepi.nwsourc.com/opinion/129007\\_colaed.html](http://seattlepi.nwsourc.com/opinion/129007_colaed.html)

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