

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 28
Judiciary

(Delegate Arnick)

Common Sense Food Consumption Act

This bill prohibits a person from bringing a civil action against a seller of food for damages or injunctive relief based on a claim of injury or death resulting from a person's weight gain or obesity, or a health condition that is related to weight gain or obesity. It does not prohibit an action: (1) in which a seller knowingly and willfully violated a federal or State law applicable to the marketing, distribution, advertisement, labeling, or sale of food which proximately caused the injury or death resulting from weight gain, obesity, or a related health condition; (2) for breach of contract or express warranty in connection with the purchase of food; or (3) for the sale of adulterated food.

Fiscal Summary

State Effect: None. The bill would not directly affect governmental operations or finances, but may potentially reduce the number of lawsuits filed in State courts.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: The Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) share jurisdiction over claims made by food product manufacturers. FTC regulates food advertising, whereas FDA oversees food labeling.

Food Labeling

FDA regulates food labeling through the Nutrition Labeling and Education Act of 1990 (NLEA). NLEA prescribes specific requirements for nutrient content claims and health claims on food labels. Absolute and comparative terms used in food labels must meet strict scientific standards that are in accordance with FDA food labeling regulations.

Food Advertisements

Section 12 of the Federal Trade Commission Act (15 USCS § 52) regulates food advertising. FTC requires that advertising be truthful and nondeceptive. FTC also requires advertisers to have evidence to back up claims made in their ads.

According to FTC's *Deception Policy Statement*, it considers an ad deceptive if it contains or omits information that: (1) is likely to mislead consumers acting reasonably under the circumstances; and (2) is important to the consumer's decision to buy or use the product. In its analysis, FTC uses the "reasonable consumer" standard and looks at the entire ad in context, not just the statement in question, when evaluating advertisements. Ads geared towards children are evaluated from a child's point of view. FTC analysis looks at both express and implied claims in the ad. FTC does not look at the intent of the advertiser when evaluating potentially deceptive ads, since the provisions impose a strict liability standard.

State Law

State law does not expressly prohibit persons from bringing suits against a seller of food for damages or a health condition based on obesity.

The Maryland Consumer Protection Act (CPA) offers consumers in the State protections similar to that of the FTC Act, and features an extensive list of unfair or deceptive trade practices. The list is not exclusive, and includes offenses where intent is a prerequisite. With respect to false advertising, the Commercial Law Article defines "advertising falsely" as the use of any advertisement, including labels, which is materially misleading. Maryland courts have deferred to FTC standards when evaluating CPA violations. *See Golt v. Phillips*, 308 Md. 1; 517 A.2d 328 (1986); *Luskin's Inc. v. Consumer Protection Division*, 353 Md. 335; 726 A.2d 702 (1999).

Consumers who bring civil liability cases against manufacturers of food and drugs typically use the violation of these statutes as the basis of counts in tort, usually counts alleging strict liability in tort and general negligence counts. Plaintiffs tend to rely on the strict liability count more than negligence. This is because under the civil liability

standard for strict liability in tort, a seller of a product in a defective condition that is unreasonably dangerous to the user or consumer is liable for the physical harm caused to the user or consumer of the product if: (1) the seller was engaged in the business of selling the product in question; and (2) the product was expected to reach and did reach the consumer or user without substantial change from the condition in which the product is sold. Under strict liability, it does not matter if the seller exercised the utmost care during the preparation and sale of the product. However in negligence, the plaintiff has to prove that the defendant had a duty of care to the plaintiff, breached this duty, and that the breach of this duty was the proximate cause for the plaintiff's injury.

Background: A New York federal judge's dismissal of two highly publicized class action lawsuits against McDonald's sparked members of Congress and several state legislators to introduce so-called "cheeseburger laws." Currently, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming have enacted such laws limiting the civil liability for weight gain or obesity claims against food sellers. Similar legislation did not pass in Congress.

The Centers for Disease Control (CDC) estimates that approximately 30% of U.S. adults aged 20 years and older are obese and two-thirds of adults in the U.S. are overweight or obese. CDC also reports that 59% of Maryland adults are overweight or obese. According to a 2003 study by CDC, Maryland ranks twenty-eighth among the states with 21.9% of its adult population considered clinically obese.

An individual is considered obese when their weight is 20% (25% for females) or more above the maximum desirable for their height. Individuals 100 pounds or more overweight are considered morbidly obese.

Additional Information

Prior Introductions: HB 15 of 2005, an identical bill, received an unfavorable report from the Judiciary Committee. SB 315 of 2005, the cross filed version of the bill, was withdrawn.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Health and Mental Hygiene; National Council of State Legislatures; National Restaurant Association; *Frequently Asked Questions: A Guide for Small Business, Federal Trade*

Commission Enforcement Policy Statement on Food Advertising (May 1994), Federal Trade Commission; Maryland Law Encyclopedia; Department of Legislative Services

Fiscal Note History: First Reader - January 31, 2006
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