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# ICDC LEGAL UPDATE

July 2011



## From ICDC's desk in Penang...

The first half of 2011 saw three new publications. The office also fielded constant orders for the *Breaking the Rules*, *Stretching the Rules 2010* (BTR). While the BTR is unlikely to ever make the bestseller's list, steady interest in the report and other publications keeps our office administration on its toes.

BTR itself was launched officially at the Club de Presse Suisse on May 12, 2011 to commemorate the 30th anniversary of the Code. Our counterpart in Geneva, IBFAN-GIFA, hosted the celebrations in conjunction with this year's 64<sup>th</sup> World Health Assembly (WHA).

A 4-page Overview of the BTR was published for the press conference and for use at the WHA. ICDC's other contribution to the event was the publication of a commemorative issue of the *2011 State of the Code by Country* (see pic top right). The chart grades national measures on a fixed set of criteria based on scope, ambit and enforceability and shows where 197 countries are at with Code implementation.

Also out during this period was a company report on Fonterra, the first ever on New Zealand's biggest company. Published under our *Focus* series, the report chronicles the way Fonterra built its formula market on its Annum milk for mothers, often in violation of the Code.

Both publications are sold on the IBFAN website. IBFAN groups and supporters can get them free from ICDC.

Early in May, our Director attended Consumers International's World Congress in Hong Kong. One of the main themes on the agenda was a Code on junk food and she was able to speak on IBFAN's experience with codes which caught media attention.

In June, ICDC was invited by the Ministry of Health in Kuwait to do a national Code workshop. Credit points for continuing medical education were offered to participating health professionals, underscoring the importance of Code awareness.



(left) ICDC Director Annelies Allain speaks on Code violations to the media at the CI World Congress in Hong Kong. (Right) Country delegates from Fiji and Eritrea with their copies of the State of the Code by Country 2011 at this year's World Health Assembly.



ICDC Legal Advisor Yeong Joo Kean and ICDC Consultant Jean-Pierre Allain (front row, right) with health professionals at the national Code workshop in Kuwait.

ICDC Legal Advisor Yeong Joo Kean conducted the workshop with consultant Jean-Pierre Allain. He replaced ICDC Director, Annelies Allain, after the latter broke her hip in a bike accident in Holland days before the workshop. While not exactly a case of *hip, hip, hurray*, ICDC was lucky to be able to go on with the training with Jean-Pierre's support. Annelies is now back in Penang, on crutches but on the mend.

*Have a pleasant read! Raja Razak, Publication Support*

## HIGHLIGHTS

- USA
  - Class action lawsuits
  - Still at the bottom of the pile
- Saudi Arabia - Pfizer gets ticked off
- Laos - NGOs say No to Nestlé
- Switzerland - And now an Espresso formula machine!
- Myanmar - Danone messes up
- Central America - Pepsi catches 'em young !

## Law suits on false advertising and product liability in the US

In the first half of 2011, three class actions concerning the conduct of multinationals Abbott Laboratories, Mead Johnson and Philips Avent came to light. A class action is a lawsuit brought by a large group of people with legal or factual claims in common for legal remedies against a single defendant. Such class actions are common in complex product liability claims involving injuries associated with a particular product.

These cases are of interest to Legal Update (LU) readers as they pertain to product promotion and hazards of artificial feeding, issues that are central to the Code and the promotion of breastfeeding. The information below is valid at the time of issue of this LU. There may be developments which are not yet in the public domain.

### • The case against Mead Johnson

In *Nelson v. Mead Johnson & Company, LLC*, a case about false advertising, it was alleged that Mead Johnson falsely represented that **Enfamil LIPIL** is the only infant formula that contains DHA and ARA – fatty acids it claims are “clinically proved to improve brain and eye function in infants.”



Not true: The endorsement on the label says Enfamil is the only brand with LIPIL

The class action lawsuit alleged that consumers were duped into paying more for the expensive **Enfamil LIPIL** formula over cheaper brands. The Plaintiff brought the action on behalf of herself and all purchasers of **Enfamil LIPIL** infant formula in the United States over a five year period between 2005 and 2010. Despite arguing that it did nothing wrong, Mead Johnson agreed to pay up to USD 12 million to settle the class action. “Rather than spend money fighting the lawsuits, we choose to resolve the case in a way that benefits Enfamil customers”, a spokesperson for Mead Johnson said in what appears to be an exercise in damage control. The case is a victory for consumers who believe that no company should be allowed to falsely advertise.

Note from LU:

See also write up in *Breaking the Rules, Stretching the Rules, 2010* under the section on Mead-Johnson to find out how Mead Johnson had to fork out another USD 13.5 million to a rival company for the very same false advertisement. Had the Code been implemented as law in the US, the question whether or not Mead Johnson ads were misleading would not arise as no advertisements would be allowed in the first place. Additionally, the health and nutritional claims made about the product is a promotional practice prohibited by subsequent World Health Assembly resolutions.

### • The case against Abbott Laboratories

In September 2010, several lawsuits were filed across the US against Abbott following a recall of its premium **Similac** infant formula. The recall was made after some cans of the product were found to be infested with beetles and their larvae, the cause of diarrhea and gastrointestinal distress in some infants who were fed the contaminated formula.

Although Abbott claimed that testing has shown that 99.8% of the recalled products are bug free, concerned parents swamped



Beetle formula, anyone?

Abbott's website, social media, news and parenting forums across the internet with fears that their children might have consumed or gotten ill due to Similac infested with insects.

In the lawsuits, Abbott was accused of negligence in failing to prevent the beetle contamination, illegal enrichment and failure to warn consumers about the risk of beetle contamination despite knowing about it a week before the recall. Legal Update is still waiting for more information following interim applications concerning these lawsuits, so watch this space!

### • The case against Philips Avent

As more and more regulatory bodies are outlawing Bisphenol-A ("BPA") polycarbonate plastic feeding bottles, a settlement has been reached to resolve a class action lawsuit against Philips Avent. The company was accused of making, marketing and selling plastic baby bottles and sippy cups without adequately disclosing to consumers that the products contained BPA and warning about the potential health risks associated with BPA exposure.

Philips denied any wrong doing and contended that it relied upon approval by food and drug agencies. Philips also contended that it disclosed the presence of BPA in the products. However, taking into account the uncertainty, the risks and delay inherent in lawsuits, it agreed to enter into the settlement to avoid further costs and burdens of litigation.

Under the settlement, consumers who purchased any Avent plastic baby bottles or sippy cups from the period January 1, 2001 through the present are allowed full or partial cash refund for money spent on the products.

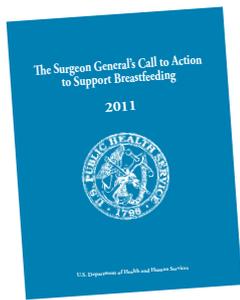


Bad bottles – refunds are being organised to resolve all claims relating to BPA products.

The settlement, pending final court approval, does not cover individual claims for personal injury.

## Still at the bottom of the pile

With so many risks associated with artificial feeding, it is timely that the US Surgeon General (SG) issued a "Call to Action to Support Breastfeeding" in January 2011.



This 88-page document, can be downloaded from [www.surgeongeneral.gov](http://www.surgeongeneral.gov)

The Call recommends that action be taken to ensure that formula companies are held accountable for complying with the International Code of Marketing of Breastmilk Substitutes. Even though the Call is not mandatory and covers only infant formula, it is a step forward for the US where the Code's status has been ambivalent. The US was the only

country voting against the Code 30 years ago. It has, however, not objected to subsequent World Health Assembly (WHA) resolutions which reiterate the Code.

ICDC's Director met with the SG at the WHA and showed that the US is still "at the bottom of the pile" in the *State of the Code by Country 2011*. The SG promised to look into improving the US position.

Note from LU: In 2010, Michelle Obama began a campaign against obesity which recognises breastfeeding as a way to prevent obesity in children. A new IBFAN poster explains the link between breastfeeding and the prevention of childhood obesity. It can be downloaded from [www.ibfan.org/art/Obesity\\_IF-ENGLISH.pdf](http://www.ibfan.org/art/Obesity_IF-ENGLISH.pdf).

## Laos-based NGOs take on Nestlé

In an unprecedented move, 18 Laos-based international NGOs, including Save the Children, Oxfam, Plan International, Health Frontiers and World Vision, announced they would boycott Nestlé's 2012 competition for a prize of almost half a million US dollars for outstanding innovation in water, nutrition, or rural development projects.

The NGOs criticised Nestlé for its marketing strategies in an open letter and outlined how the company continues to violate the Code in Laos. Among other things, Nestlé was accused of:

- Advertising and other forms of promotion to the public of breastmilk substitutes (BMS).
- Promotion of BMS in hospitals and health care facilities.
- Not translating labels into the local language.
- Where labels are translated into Lao language, the marketing approach of Nestle does not give enough public health consideration to the fact that the poorest and most vulnerable mothers and families are ethnic and illiterate.
- Allowing their representatives to actively visit hospitals, especially paediatric wards and nurseries and providing incentives to doctors and nurses such as organising and funding trips and gifts.
- Conducting seminars for health workers in which misinformation is given.
- Conducting promotion of formula milk at pre-schools including misinformation.

- Using unscientific and unsubstantiated claims that formula increases intelligence and enhances immunity thus encouraging family income being spent unnecessarily on formula and keeping households poor.

Nestlé has promised investigation but denies outright that Nestlé reps provide incentives to doctors and nurses to promote formula usage.

The response prompted a rebuke from Dr. Leila Srour, a paediatrician and co-author of the letter. "If Nestlé feels that paying for flights to Thailand to attend conferences is not a big incentive for health care workers with very low salaries, I don't know what they're thinking," she said.



Dr. Srour – lead campaigner

The issue of perceived deceptive marketing remains the most troublesome, said Srour who from 2005 led the campaign on Nestlé **Bear Brand** logo, which until 2009, featured a baby bear held in the breastfeeding position by a mother bear (see Legal Update April 2009). "The **Bear Brand** logo is responsible for the deaths and developmental delay of many Lao children mistakenly fed inappropriate products as breastmilk substitutes," she said, citing instances in which coffee creamer labelled with the same bear logo had been fed to children. Following a wave of negative publicity, Nestlé removed the **Bear Brand** logo from coffee creamer in Laos. But on follow-up formula labels, the baby bear remains on the mother's lap.

The open letter confirms what IBFAN and ICDC have always known, based on their independent monitoring – that Nestlé is a frequent and systematic Code violator. The Laos letter caught much attention in development circles and helps to underscore the need for the international community to hold corporations to account everywhere but particularly in poor developing countries where they endanger health simply by wanting to expand markets and enlarge profit margins.

## Pfizer gets ticked off in Saudi Arabia

Pfizer has been making its presence felt in the baby food sector ever since it bought over Wyeth Nutritionals in 2009 but not in a good way. It has gotten itself in trouble with public health authorities in several countries for its marketing practices, as has been reported in *Breaking the Rules, Stretching the Rules 2010*. The most recent episode concerns company promotion in schools, supermarkets as well as from a special booth during the opening ceremony of a breastfeeding clinic in a hospital in Jeddah, Saudi Arabia.

Their action prompted the Saudi government to warn the company that they would get more than a slap on the wrist if found guilty of Code violations again.

In a letter issued by the General Administration of Nutrition, Pfizer was given a blow-by-blow account of their transgressions which include handing out gifts of formula with 'communication cards' directly to mothers; giving them free advice on infant nutrition vis à vis formula feeding; distributing coupons for a draw; offering prizes of free formula for the winners in schools and supermarkets and using pharmacies to market Pfizer/Wyeth products.

The above are all violations under Saudi law – wicked Wyeth.

## And now an Espresso formula machine!

In May 2011 Nestlé launched a new product range called the “BabyNes nutrition system”. Although only available in Switzerland, Nestlé press releases ensured the gadget was reported worldwide by the media. **BabyNes** is modelled after the Nespresso coffee machine which achieved a SFr3 billion turnover for Nestlé in 2010 with actor George Clooney doing the sales pitch.

Because of the Code, no Clooney or any other star will be allowed to promote **BabyNes** but it will happily float on Nespresso’s publicity. **BabyNes** swallows similar pre-packaged pods and emits a warm formula feed in 6 different compositions for babies 0-36 months old. In 60 seconds. The machine costs US\$284 and the single serve pods are priced at US\$ 2.20 per feed – double the price of conventional powdered milk feeds per day. Expensive, but a “must have” for affluent gadgety-minded parents looking for a quick formula fix.

Never mind the risk of artificial feeding or concerns about contamination because formula is not reconstituted at 70° following WHO guidelines. Or that each feed adds an aluminium capsule to our garbage mountains.



A neat system or another silly marketing gadget?

From the Code's perspective, ICDC judges the idealising text and images on the **BabyNes** website to be promotional. In its response, Nestlé told ICDC the **BabyNes** website is compliant with the Swiss Code and is a sales channel allowing consumers to purchase the product on-line just like a shop. Besides, the company claims that the website has the notice saying that 'Breast is Best'. This notice, although required by the Code, does not give Nestlé license to require that parents fill in contact details to get information about the 0-6 month pod. Companies are not allowed to seek contact with mothers.

However, taking note of ICDC’s remarks that the language and images on the **BabyNes** website are idealising, Nestlé promised to get input from neutral external stakeholders and make changes but only if “others” agree with ICDC, because, of course, Nestlé “respects the WHO Code”.

Yet a new battle in an on-going war.

## Danone – messing up in Myanmar

Since Danone took over the NUMICO group of companies in 2009, it promised a root and branch review of marketing practices so as not to compete with breastfeeding.

In May 2011, an ad in Myanmar tabloids and journals shows formula products such as **Mamex** and **Mamil**. The ad offers umbrellas as gifts in exchange for empty tins or tin covers. A local actress, Lu Min, with her family show off Dumex products and gifts. There was a notice that infant formula products are not eligible for exchange of gifts but that alone does not negate the promotional effect of the ad.

Danone is reminded that under Code Article 11.3, companies are required to monitor their marketing practices independently of any other measures taken for implementation of the Code.

The company is reviewing its internal governance procedures relating to marketing by September 2011.

Dare we hope that ads such as the one found in Myanmar will no longer see the light of day? Time for Danone to show that it means what it says and say what it means, also in Myanmar !



The family of actress Lu Min adds glamour to Dumex’s products and gifts.

## Catching 'em young !

They keep on coming, the miniature Pepsi feeding bottles from Central America. First detected some years ago, no one knows where and how these bottles are marketed but they undermine breastfeeding by promoting bottle feeding and suggesting sugarloaded contents as suitable for babies at the time when they should be breastfed. The slogan on the bottle is 'Gotta have it !'

It's not the only way that Pepsi messes with health. *The New Yorker* (16 May 2011) featured an 8-page spread on PepsiCo and its 'journey' from soft drinks and salty, fatty snacks through to providing 'health to the world'. The company has lured away professionals like Derek Yach, who up to 2002 worked at the World Health Organization (WHO). A clever way to buy itself into know-how and policy setting. The article quotes Yach as saying: "The food industry is a trillion dollar industry, and you better not mess with us." Ominous, indeed, especially as cash-strapped WHO seems to be embarking on so-called stakeholder forums that would allow companies like Pepsi to get a say in health policy formulation.



Pepsi 'sucks'