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Is the Food Industry Cooking Up a Recipe to Defeat Food Labeling Reform?

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Feature

As the feature for this issue, the ***Reporter*** *presents comments by Bruce A. Silverglade* on food labeling reform. This article is reprinted with permission from the* ***Legal Times****, 1992.*

Is The Food Industry Cooking Up A Recipe To Defeat Food Labeling Reform?

The Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) are promising that new user-friendly food labels will soon be on grocery store shelves. But as evidenced in "Regulators Dish It Out on Food Labeling," Legal Times (January 27, 1992) the food industry and its Washington representatives are fast at work attempting to influence the rulemaking process. Whether consumers will actually find the new and improved labels on store shelves will depend on how the food industry exercises its clout.

The FDA and USDA are working diligently to clean up the food label. Acting in accordance with the Nutrition Labeling and Education Act of 1990 (NLEA), the FDA has proposed sweeping new requirements specifying everything from when a food can be labeled as "light" to when a food manufacturer can claim that its product can reduce the risk of cancer. The USDA, which is responsible for regulating meat and poultry, has joined FDA in this monumental effort.

The food industry originally supported the new law in exchange for a Congressionally mandated ban on tougher state and local government labeling requirements. Many food companies, however, soon became disenchanted with this quid pro quo. The ink was barely dry on the NLEA when these companies convinced their Washington D.C.-based trade associations to plan a concerted effort to delay, weaken and ultimately subvert the requirements of the new law.

Extension Ad Infinitum?

Congress gave the FDA two and one-half years, until May, 1993, to implement the new requirements, a generous period of time considering the lifesaving benefits of food labeling reform. According to FDA estimates, the new labeling requirements will reduce the incidence of heart disease and cancer by more than almost 39,000 cases over a 20 year period. The FDA also estimates that the new requirements will lead to corresponding savings in health care costs to the tune of roughly $100 billion (almost 100 times the cost of changing labels) over the same period of time.

The National Food Processors Association (NFPA) and the Grocery Manufacturers of America (GMA), however, are claiming that the industry needs more time to change the labels of their products to comply with the requirements of the new law. The NLEA's mandatory nutrition labeling requirements and limits on health claims are supposed to take effect on May 8, 1993. But that deadline is now in doubt as the industry is pressing FDA to take advantage of an "undue economic hardship" clause in the NLEA that allows the agency to postpone compliance in extraordinary cases for one year, until May, 1994. According to the trade associations, the entire industry deserves the one year extension. The rationale for this across-the-board delay is that (hold on to your soup cans for this one) there aren't enough printing presses in the country to print all the new labels in time. Oh well, when the law isn't on your side, argue the facts. But when the facts aren't on your side, any excuse is better than none. Not to be outdone, the American Meat Institute has recently asked USDA for a three year extension of time.

The Politics of Health Claims

In addition to seeking delays, NFPA and GMA are also trying to weaken the substance of the new proposed rules. The industry is mounting its biggest effort against FDA's restrictions on health and nutrition claims. Under FDA's proposals, health claims would be limited to a number of well-supported findings about the relationship between diet and disease, focusing on the benefits of a diet low in fat, cholesterol and sodium. Nutrition claims such as "No cholesterol" would have to meet FDA standards and be accompanied by appropriate qualifying disclosures.

Many responsible members of the industry such as Pillsbury and others actually breathed a sigh of relief when the FDA proposed new limits on health claims. While health claims were always a big money maker for the industry, many companies were sick and tired of their competitors passing off everything from breakfast cereals to margarine as panaceas for illnesses ranging from cancer to heart disease.

But companies that cannot easily reformulate their products to qualify for health and nutrition claims under the FDA's plans are likely to lose market share to healthier products and have convinced their trade associations to fight the new rules. The Grocery Manufacturers, the National Food Processors, and other trade groups have, in turn, joined forces with a cadre of former Reagan administration officials to trumpet an alternative free market approach to the regulation of health and nutrition claims in an attempt to beat back the FDA and weaken the agency's proposed regulations.

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The Reaganomics Of Nutrition Education

Reagan era economists, who now defend the interests of the food industry while working in the private sector, base their criticisms of FDA on both economic theory and consumer survey evidence. For example, John Calfee and Paul Rubin, two former Reaganites who worked in the Federal Trade Commission's (FTC) Bureau of Economics, cite an economic theory that goes something like this: If the government refrains from issuing tough regulatory requirements, food companies will have an incentive to highlight the best selling attributes of their products. While companies will not tell consumers the whole truth about their products, different companies will tell different parts of the truth, and in the long-run, consumers will be able to learn more about diet and health than they would under the FDA's program.

The assumption is that people will discern part of the nutrition puzzle each time they see a claim on a label, and in the long run, figure out the whole truth about the relationship between diet and disease. For example, a food label for a high fat food such as cooking oil may truthfully, yet misleadingly claim "No Cholesterol," but consumers will learn from labels of competing products that health authorities recommend that consumers reduce their consumption of fat, not just cholesterol, in order to reduce their risk of heart disease.

What really happens is that people, being what they are, i.e human beings and not economic models, are duped. Surveys taken by FDA demonstrate, for instance, that approximately 40 percent of consumers believe that a food labeled "No Cholesterol" is also low in fat. The FDA is understandably concerned that the public is misled by high fat foods such as cooking oils and margarine that are labeled in this manner.

So much for the theoretical component of the economists' argument. Calfee and Rubin, however, also cite consumer studies that supposedly support their position. The primary study they rely on is a 1989 FTC staff report on the Kellogg's All-Bran campaign which claimed that the company's cereal, as part of a high-fiber, low-fat diet, could help reduce the risk of cancer (the cereal is now advertised by Kellogg as a sure way to prevent constipation). The FTC survey showed that the campaign alerted the public to the importance of a high fiber, low fat diet.

Kellogg's campaign, however, was far from an example of how free market forces can improve the welfare of John and Jane Doe. The campaign was actually developed in conjunction with a government agency, the National Cancer Institute (NCI). In working with NCI, Kellogg followed a procedure similar to the one that FDA now proposes to require all food companies to follow. Kellogg approached the government and asked for permission to refer to official NCI dietary recommendations in the campaign. NCI granted Kellogg permission only after the company agreed to make substantial changes in the campaign to prevent consumers from being misled. In short, the survey evidence in support of a free market approach to health claims is about as thin as the theoretical underpinnings of this approach.

Constitutional Right To Hype?

Former Reagan Administration officials who have passed through the revolving door have also ginned up legal arguments against the FDA's tough new approach to regulating health claims. According to John Bode, former Assistant Secretary of the Department of Agriculture, the FDA's proposals (please brace yourself) violate food companies' First Amendment rights to free speech.

The tobacco and alcoholic beverage industries have long wrapped themselves in the cloth of the First Amendment in an attempt to capture the high moral ground and defeat attempts to ban cigarette, beer and wine advertising. The difference here is that FDA's restrictions on health claims are limited to preventing consumers from being exposed to misleading claims — and misleading advertising has never enjoyed First Amendment protection.

Food companies who rest their case on free speech grounds may be setting themselves up for a fall. In recent years, the Supreme Court has steered away from expanding First Amendment protection of commercial free speech and instead has upheld governmental restrictions on dubious advertising practices. In 1980 the Supreme Court stated that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corporation v. Public Service Commission,* 447 U.S. 557, 562 (1980). In that case, the Supreme Court established a four-prong test to determine if restrictions on commercial speech are unconstitutional: (1) for commercial speech to come within the protection of the first amendment, the speech must concern lawful activity and not be misleading; (2) the proposed limitations on commercial speech must have a substantial government interest; (3) the proposed limitation must directly advance the government's interest; (4) and the proposed limitation should be no more extensive than is necessary to serve that interest. (*Central Hudson,* 447 U.S. at 566).

Since the *Central Hudson* decision, the Supreme Court has upheld several restrictions on commercial speech, *See,* e.g., *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986). FDA's proposed rules governing health and nutrition claims would likely be upheld, especially considering that since *Central Hudson,* the Court has loosened the last criterion by holding that the restriction need not be "the least restrictive means available" but rather "narrowly tailored" to serve a legitimate governmental interest. *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 479 (1989). The Court defined "narrowly tailored" as requiring "a 'fit' between the legislature's ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best

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Recent Legislative Activity

Generic Drug Fraud

The federal **Generic-Drug Fraud Act of 1992** was recently signed into law. The Act provides that companies or individuals that are found to have defrauded the Federal Drug Agency may be barred from dealings with the agency for up to ten years. Violators of the generic approval process are subject to a series of civil penalties.

The Act requires that the Secretary of Health and Human Services forbid any corporation convicted of a felony related to the generic drug approval process from participating in any agency procedures for at least one, and up to ten years. A second felony conviction would result in a corporation or individual being permanently barred.

Individuals who had been convicted of any felony concerning the development or approval of a generic drug would never be permitted to take part in the development or approval process on behalf of any other individual or corporation. **P.L. 102-282**

Alcohol Awareness

The **Senate** is considering the **Alcoholic Beverage Act of 1991,** which would require all print and broadcast media advertisements of alcohol to include health warnings. The new bill is an attempt to educate consumers of the harmful effects of alcohol consumption, especially those under the legal drinking age. Under the bill, a print advertisement must include a warning located in a prominent and conspicuous place and must also contrast with the ad in typography, layout and color. A television or radio advertisement must include a statement read in an audible and deliberate manner and in a length of time that allows for a clear understanding of the message. In addition, television ads will be required to carry a visual warning to be read by the viewer. Currently, warnings are only included on the products themselves and not in the advertisments.

The new bill will also require the Secretary of Health and Human Services to be responsible for establishing and maintaining a toll free number for assistance referred to in some of the warnings. **1991 H.R. 1443.**

Radon Awareness

The **House of Representatives** has proposed the **Radon Awareness & Disclosure Act of 1991** in an attempt to control excessive radon exposure by improving the accuracy of radon testing products and increasing public awareness of radon. The Act would require the Environmental Protection Agency ("EPA") to establish a program to set up minimum performance criteria for devices that test radon levels and to set up proficiency requirements for radon testing technicians. The Act would also establish the President's Commission on Radon Awareness to examine existing public awareness programs concerning radon and work on strategies to raise awareness.

Additionally, the Act would require radon testing in public schools. Local agencies would be responsible for school testing and the results would be available to the public. **H.R. 3258, 102d Cong., 1st Sess. (1991).**

Insurance Regulation

The **Senate** recently introduced the **Insurance Protection Act of 1991** which would establish the Insurance Regulatory Commission ("Commission"). Under the Act, the Commission would collect insurance data, including periodic statements and legal actions against insurers, and refer possible illegal matters to the Department of Justice for action. Aside from regulatory duties, the Commission would set mandatory reserves for life insurers and establish minimum standards for banks that issue letters of credit for reinsurance.

The Act would also establish the National Insurance Guaranty, a nonprofit corporation, that would provide for the payment of covered claims and provide a uniform system for the liquidation of insolvent member insurers. The Act, however, would relieve members of liability under any state law regarding insolvency. **S. 1644, 102d Cong., 1st Sess. (1991).**

Health Insurance Reform

In July, **New York** passed a health insurance law that prevents profit making insurance companies from discriminating on the

ANNOUNCEMENT

The ***Loyola Consumer Law Reporter*** is currently accepting lead articles and feature columns for publication in upcoming issues. The ***Reporter*** publishes articles by practitioners, scholars and consumer experts that explore in depth legal developments affecting consumers. Upcoming articles will address insurance issues for CERCLA claims and steps consumers can take to avoid environmental liability when purchasing real estate.

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