Loyola Consumer Law Review

Volume 4 | Issue 1 Article 5

1991

Consumer News

Colleen Connors Butler

Recommended Citation

Colleen C. Butler *Consumer News*, 4 Loy. Consumer L. Rev. 26 (1991).
Available at: http://lawecommons.luc.edu/lclr/vol4/iss1/5

Consumer News

Major Food Consumption Survey Flawed

According to the General Accounting Office ("GAO"), the Federal Food Consumption Survey, commissioned by the United States Department of Agriculture ("USDA"), is severely flawed and probably useless to the many governmental agencies that depend on the survey's data. The USDA has commissioned the survey every ten years for the last half century. The USDA uses the data to regulate food stamp and school lunch programs. State agencies, private research organizations, and other federal agencies also use the data. For example, the Environmental Protection Agency ("EPA") uses the data on consumption of fruit and vegetables in order to determine safe levels of pesticides. The Food and Drug Administration ("FDA") uses the same data to calculate public exposure to pesticides and toxic metals and to calculate nutrient consumption levels.

The GAO points to the survey's poor response rate as the main source of its problems. The survey was 89 pages long, and those who completed the survey received only $2.00 and some measuring spoons. Only 34% of the 12,000 consumers contacted responded to the survey, and no follow-up interviews were conducted. "The sample was so small for some subgroups that they may not be useful to extrapolate to the entire population," explains Kevin Donohue, assistant director of the GAO's Resources, Community and Economic Development division. Dick Thaxton, from the USDA, says "We are aware of the criticisms, and we've taken several steps to correct them."

The USDA paid approximately $ 6.2 million dollars for the survey which was conducted by National Analysts, Inc., a subsidiary of Booz, Allen and Hamilton, Inc. ("BA & H"). BA & H issued a statement following the GAO's study in which it stated: "BA & H believes the study's findings are valid for most of its intended purposes, but the GAO and BA & H investigations clearly indicate there are problems that require additional examination." Mike McCullough, Chairman of BA & H, has temporarily assumed leadership over the project, and the National Analyst official formerly in charge has resigned. McCullough adds that his company has "taken a number of steps to insure the quality and timeliness of the work. I'm professionally embarrassed by it."

In the meantime, some agencies, such as the FDA, have decided to use the flawed data anyway, while other agencies plan to use the data from the '77-'78 survey. However, many nutritionists say the old survey is flawed too. The '77-'78 survey had a 62% response rate, and many scientists were waiting for the new survey because they were dissatisfied with the data from the old survey. The EPA has decided to use the old survey because, despite its flaws, the agency feels it is more reliable than the latest survey. Nevertheless, they are dissatisfied. Linda Fisher, assistant administrator of the EPA's Office of Pesticides and Toxic Substances, explains: "It is out of date because eating patterns have changed. People are eating more fruits and vegetables."

The agencies also have another option. The Department of Health and Human Services publishes another study containing similar data, the Health and Nutrition Examination Survey ("HANES"). Many health professionals have always considered the HANES data to be more reliable anyway. Historically, the HANES studies have had response rates ranging from 77% to 86%. However, the HANES study does not collect the same statistics as the Food Consumption Survey, and sometimes its data points to different conclusions.

The GAO conducted its investigation at the request of Representative George E. Brown Jr. (D-California). Brown explained "[o]ne of my efforts for the last ten years has been to establish a framework for all such surveys to make them more comprehensive and reliable." Brown recently sponsored the Nutrition Monitoring Act written to provide for continuous monitoring of nutrition related data. Marion Nestle, chairwoman of New York University's Nutrition Department, was a big supporter of the legislation because of past problems with periodic surveys done on a massive scale. "What has happened with the survey is exactly why the committee has worked so to get the Nutrition Monitoring Act passed," said Nestle. The USDA has always opposed legislation calling for continuous monitoring. However, Brown noted their recent cooperation in the GAO study saying, "I am moderately encouraged by the positive response of the USDA."

FDA Moves to Limit Lead Content in Wine

The Food and Drug Administration ("FDA") proposed a limit on the lead content in wine of 300 parts per billion ("ppb"), beyond which the wine would be considered unsafe for human consumption. The FDA recommended that the Bureau of Alcohol, Tobacco and Firearms ("BATF"), which regulates the alcoholic beverage industry, adopt the new standard. The new standard, which applies to both domestic wines and imported wines, is only temporary and may be replaced by a more stringent proposed limit of 150 ppb.

The proposed limit of 300 ppb is

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quite modest and does not threaten a large segment of the wine industry. In comparison, the Environmental Protection Agency ("EPA") is seeking to limit the lead content in drinking water to 15 ppb. Currently, approximately 3% of the wines tested by the BATF contain more than 300 ppb. Some imported brands have lead contents above the recommended 300 ppb, and a few have contents as high as 1,980 ppb.

Domestic wine makers appear quite satisfied with the limit and are not opposed to an even stricter standard. BATF studies show that domestic wines average 41 ppb. The Wine Institute, a California trade association, issued a report titled "Putting Lead into Perspective" which claimed that California wines had an average lead content of 21 ppb. The report, issued in August, pointed out that there was no federal standard for lead content in wine and may have helped spur the FDA into action.

However, European wine makers appear more concerned, and the new proposed limit could upset current trade negotiations between the United States and the European Economic Community ("EEC"). EEC officials have already indicated that the proposed limit of 300 ppb is probably acceptable, but they are not prepared to accept a more stringent standard. France already complies with the limit of 300 ppb and its International Wine and Vine Office supports such a limit. However, according to the BATF study, imported wines have an average lead content of 96 ppb, more than twice the average of domestic wines. EEC officials and French wine makers alike have expressed concern about the prospect of a more stringent limit. EEC officials have commented that "a lower lead tolerance level, i.e. below 300 ppb, would affect a more substantial number of [EEC] wines imported into the U.S. . . . the problems of wine on the shelf or in transit and the method used in determining such a level will still have to be resolved."

The FDA is also working on formal regulations that would ban the use of leaded foil caps on wine bottles. The foil cap surrounding the cork is a major source of lead in wine. The lead from the foil seeps through the cork over time. Last year, the Wine Institute urged winemakers to switch to alternative caps, such as plastic caps, and some wineries had already begun phasing out lead foil caps.

California State's Attorney, Dan Lungren, sued several California winemakers alleging that their use of lead foil caps posed a threat to public health. Lungren sued under Proposition 65, the state's Safe Drinking Water and Toxic Enforcement Act, and the case settled before trial. According to the settlement agreement, the winemakers were to begin using alternative caps, such as plastic caps, January 1, 1992. However, the wineries are not required to re-cap wine bottled in previous years. Other winemakers, including European winemakers not parties to the lawsuit, may stop using lead foil caps to avoid liability.

In the meantime, the FDA recommends that consumers completely remove the foil. The BATF study showed a "significant" increase in lead content when a wine was poured from a bottle in which the neck capsule was surrounded by leaded foil. The FDA also suggests that consumers wipe the rim of the bottle with a cloth moistened with lemon juice or vinegar. The acid in the lemon juice apparently dissolves lead.

Other sources of lead may also contaminate wine. EEC officials report that increased lead content comes from a variety of sources, including acid rain and increased pollution from highways and incinerators located in the wine regions. It is also believed that wine absorbs lead from crystal containers. Consumers should avoid storing wine in a crystal decanter for longer than an evening.

Co-op Ad Agreements Provide Legal Means of Price Fixing

Co-op advertising may provide manufacturers with a means to effectively fix prices of consumer products by eliminating price competition at the retail level. Manufacturers use co-op ad agreements to prevent retailers from advertising low prices. At the same time, these co-op ad agreements deprive consumers who rely on advertising for important price information.

Co-op ads work in the following way: A manufacturer contracts with its retail dealers to advertise brand name products jointly. The manufacturer agrees to help pay for the ads, perhaps paying 100% of the advertising costs, as long as the dealer agrees to follow the manufacturer's advertising guidelines. Typically, the manufacturer will demand either that the ads contain only the "minimum suggested advertised price" for the product or that the ads contain no mention of price whatsoever. For example, Minolta, who signed a consent decree with antitrust prosecutors in 1986 in which it agreed to stop fixing retail prices, now employs a co-op ad program that dictates advertised prices. The price or lack of price in an ad does not necessarily preclude any chance that the product will go on sale. However, co-op advertising effectively bars the dealer from competing on price and prevents consumers from comparison shopping through the newspaper.

Co-op advertising, common in the consumer electronics industry, is spreading as manufacturers of other consumer goods are discovering how effective it is. By maintaining the highest possible price today, a manufacturer realizes higher profit margins in the short-term and in the long-term because price and brand image are intertwined. Liz Christensen, co-op ad manager for Nike, Inc., notes that "[i]f consumers constantly see Nike brand at 50 percent off, the long-term perception of what Nike stands for — quality and value — isn't the same."

Co-op advertising works because retailers depend on the advertising dollars. Many smaller retailers cannot afford to advertise on their own, yet most retailers agree that advertising is necessary in order to compete for a shopper's attention. "We are mostly worried about being competitive, and having that ad money is a way to keep

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Recent Cases

The United States Supreme Court Holds That Consumer Debtors May Reorganize Under Chapter 11

In *Toibb v. Radloff,* 111 S.Ct. 2197 (1991), the United States Supreme Court held that a consumer debtor not engaged in an ongoing business falls within Section 109 of the Bankruptcy Code and is therefore eligible for reorganization under Chapter 11, 11 U.S.C. 1101 *et seq.* Although Chapter 11 was intended to be used primarily by business debtors, the Court did not impose an ongoing business requirement because it found no underlying policy consideration or congressional intent for such a requirement, and the plain language of the Bankruptcy Code permitted individual debtors to file under Chapter 11.

Background

Sheldon Baruch Toibb ("Toibb") worked as a consultant to the Independence Electric Corporation ("IEC") from March, 1983 until April, 1985. After being terminated from IEC, Toibb failed to find employment as a consultant in the energy field. On November 18, 1986, Toibb filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* in the United States Bankruptcy Court for the Eastern District of Missouri.

Toibb had no secured debts but had unsecured debts and a disputed federal tax priority claim. His nonexempt assets included 24 percent of IEC's shares and a possible claim against his former IEC business associates. When Toibb learned that his IEC shares were worth $25,000 to the company's board of directors, he decided to avoid liquidation under Chapter 7 by bringing his case under the reorganization provision of Chapter 11.

Toibb's plan for reorganization included paying his unsecured creditors approximately 11 cents on the dollar plus, for six years, paying 50 percent of either IEC dividends or proceeds from the sale of IEC stock, up to the full amount of the debt. The Bankruptcy Court dismissed Toibb's petition on the grounds that he was not engaged in an ongoing business and therefore not entitled to Chapter 11 protection.

The decision was affirmed on appeal to the United States District Court for the Eastern District of Missouri. Both lower courts relied on a prior decision by the Court of Appeals for the Eighth Circuit that Chapter 11 relief was unavailable to persons not engaged in business.

The United States Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit found that the Bankruptcy Court had the authority to dismiss the petition on its own motion. In addition, the Eighth Circuit found its prior decision controlling. The United States Supreme Court granted certiorari because of a conflict between the circuits as to whether a nonbusiness debtor may reorganize under Chapter 11.

The Code's Plain Language is Dispositive

The Supreme Court found that the plain language of the Bankruptcy Code answered the question of whether reorganization under Chapter 11 was available to Toibb. In Section 109 of the Code, Congress specifically stated, "Only a person that may be a debtor under Chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title." 11 U.S.C. 109. Congress specifically excluded stockbrokers, commodity brokers, and railroads but not nonbusiness individual debtors.

The Court then looked to Section 109(b) to determine whether Toibb was a debtor under Chapter 7. "A person may be a debtor under Chapter 7 of this title only if such person is not 1) a railroad, 2) a domestic insurance company, bank, . . . or 3) a foreign insurance company, bank, . . . engaged in such business in the United States." Therefore, Toibb qualified as a debtor under Chapter 11 because he met the statutory requirement of Chapter 7, and Chapter 11 does not specifically exclude individual debtors who lack ongoing businesses.

Congress Did Not Intend to Exclude Consumer Debtors

In determining Congress's intent, the Supreme Court examined the statutory language first. Since the language of Section 109 was clear, there was no reason to consider the legislative history of the statute. Although the Court believed there was an understanding that Chapter 11 would be used primarily by business debtors, it found legislative history and intent did not clearly indicate individual consumer debtors were excluded from reorganization under Chapter 11. Accordingly, the Court disposed of the argument posed in the amicus curiae brief that the legislative history supported the theory that Chapter 11 was intended only for business debtors.

The Court, instead, agreed with Toibb's argument that Congress, acting through Chapter 11, did not have the single goal of protecting business debtors; Congress also sought to maximize the value of bankruptcy estates. Chapter 11 protects an estate's value because a debtor's reorganization plan would not be confirmed unless either all creditors accepted the debtor's plan or all creditors are guaranteed to receive at least the same amount they would receive under Chapter 7 liquidation. Therefore, there can be no contention that creditors would be in a worse position if the debtor reorganized under Chapter 11 rather than liquidated under Chapter 7. Absent a showing of harm to the creditors, the Court found nothing in Chapter 11 to support the inference that Congress intended to exclude consum-