By Eric F. Greenberg, Attorney-at-law

Food Lawsuits Might Be Aiming Mostly for Stigma

A lot of people have been talking lately about what we eat, driven largely by the so-called Make America Healthy Again (MAHA) movement. This has already led to product re-formulations and re-imagined labeling and marketing of foods (lots of folks touting their protein content, for example), and big changes in government-subsidized food programs.

But less-visible battlegrounds over food are those in new lawsuits. One's in California, the other's in Texas.

In the California case, the state alleges that big food companies are "using the deceitful tactics [they] inherited from the Big Tobacco industry to flood the market with harmful [ultraprocessed] products [which the plaintiffs allege are addictive, just like tobacco] and to aggressively sell those products to children."

So, notice they're not saying only that the foods can have adverse effects on health if you eat them, or that nutrition science has emerged that points to health problems if you eat too much of them, or that that's just the way things appear to have worked out. Rather, they're alleging something quite aggressive and striking: that food companies knowingly and intentionally "designed food to be addictive, they knew the addictive food they were engineering was making their customers sick, and they hid the truth from the public."

California's complaint alleges that the food makers' actions violate California's unfair competition law and also that they created a "public nuisance." They are seeking, among other things, an injunction stopping "further deceptive marketing," and money for consumer education on the health risks of ultraprocessed foods.

But, as noted below, these might not in fact be their true goals for the lawsuit.

For one thing, they might not win. Any case where a plaintiff is required to prove a defendant's intent behind its actions, not just that it took those actions, is always a heavy lift. Sure, there's general agreement that the healthfulness of American diets could be improved, but it's another thing entirely to prove that it's *because* food companies are intentionally doing harmful things to public health. The food companies deny this, and, incidentally, they will likely point out that there's no generally accepted definition of what is and isn't an 'ultraprocessed' food, so the case's targets aren't even that clear.

So it's possible the California officials are not so much seeking the remedies their lawsuit lists but instead are just hoping that by filing this lawsuit, all manner of different popular foods are tarred with the stigma of being bad for you, leading consumers to avoid them. Making policy by stigma, rather than changes in law or regulation or court order, is sometimes HHS Secretary Robert F. Kennedy, Jr.'s preferred approach (FDA is part of HHS.) It's what he did with artificial dyes. He didn't move to change any regulations, he just pressured companies to stop using the dyes. One thing's for certain: This case is likely to bump along in litigation for many years, and even if it gets thrown out or settled quickly, its arguments will continue to be part of the public diet-and-health debate.

The other case is over a new Texas law that requires warnings about a list of 44 substances including synthetic dyes, preservatives, emulsifiers, surface-active agents, oils, and other additives. A key provision of the law requires a label warning about "the use of" any of the 44 ingredients, if the FDA "requires the ingredient to be named on a food label" of a human food. Among the listed substances is titanium dioxide, which is also used to make food packaging, so this law, in addition to requiring dramatic new label warnings, could result in the market disfavoring that, and perhaps other, packaging component substances.

Texas says the 44 substances are unsafe. But the required warning language is, um, odd. It would say: "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom."

It's odd wording because the warning doesn't mention the FDA, which, in fact, lawfully permits the use of those ingredients in the U.S. Oddity #2 is that the law also has a provision by which the Texas law would be preempted by federal law or regulation that is worded confusingly enough to puzzle most observers about when and to whom it would apply.

So, several trade organizations have sued the state of Texas seeking to have the new law declared unconstitutional because, for example, they allege the warning violates the companies' First Amendment free speech rights by requiring them to make statements that are incorrect. They argue, among other things, that it's not true that those foreign governments recommend against human consumption of all 44 of the substances, not to mention that the "listed ingredients have been used safely in American foods and beverages for decades." They also assert that federal law preempts (overrides) the state labeling requirement.

It's possible this case, too, is a stigma game for the Texas officials. In the meantime, a social media-worthy stigma might end up attaching to all 44 of those substances, which could lead companies to avoid using them and that, in turn again, might have been Texas' goal in the first place, regardless of the validity of their safety arguments. **PW**

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