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Pink Slime and the Legal History of Food Disparagement

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The current “pink-slime” controversy over the unlabeled use of “lean finely textured beef” (LFTB) in more than 75% of the nation’s hamburgers, including within the federal school lunch program, is not a new phenomenon. Over the last 25 years there have been several news stories regarding issues in the nation-wide food chain that have garnered significant traction with the public and adversely affected some agricultural industries for a period of time.

Alar

The first was the “Alar” scare affecting the apple industry. In 1989, the CBS news program, “60 Minutes,” reported on a 1989 report of the Natural Resources Defense Council (NRDC) stating that children faced increased dangers from pesticide use such as Alar, which was applied to apples. The report was supported by scientific research and had been preceded by consumer concerns and boycotts three years earlier. Washington apple growers were adversely affected when consumers stopped buying apples in reaction to the story. The growers sued the NRDC, CBS and CBS affiliates carrying the broadcast in the state of Washington. The case, *Auvil v. Columbia Broadcasting System* was dismissed because the growers were not able to prove the broadcast statements were false. 67 F.3d 816 (9th Cir. 1995).

As a result of the Alar incident and the apple industry’s lack of legal recourse for its losses, the food industry was successful in passing specific food disparagement laws in Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota and Texas. These laws were meant to protect producers of perishable food from the effects of false

statements. These statutes are sometimes referred to as “veggie-libel” laws. The agricultural industry successfully argued that the Alar case demonstrated that common law defamation and product disparagement claims did not adequately address the vulnerable nature of the industry because perishable food items could spoil before false or misleading information could be corrected and transmitted out to the public. Due to this vulnerability, food producers needed their own laws and lucrative remedies.

The statutes vary slightly from state to state, but typically provide liability to the producers of the product for damages and “any other appropriate relief” if:

- (1) a person disseminates information to the public relating to a perishable food product, which is “a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.”;
- (2) the person knows the information is false; and
- (3) the information states or implies that the perishable food product is not safe for consumption by the public.

Most of the statutes require an ill-intent by the person disseminating the untruthful information rather than mere negligence in disseminating information that turns out to be based on something other than scientific facts or reliable data.

Mad Cow in Beef Supplies

The first well-publicized legal test for these new laws came in 1998. Oprah Winfrey aired an episode on April 16, 1996, in which she expressed concern regarding the prevalence of

bovine spongiform encephalopathy (BSE) or “mad cow disease” in the United States. Ms. Winfrey was sued by a cattle producer in Texas under the new food disparagement law in the case *Texas Beef Group v. Winfrey*. 11 F. Supp. 2d 858 (N.D. Tex. 1998). Of concern were several statements made during the show, including “this disease could make AIDS look like the common cold”; “14% of all cows are ground up, turned into feed and fed back to other animals”, and Ms. Winfrey’s comment that “it has just stopped me cold from eating another burger.”

Following the broadcast, April live cattle futures contracts on the Chicago Mercantile Exchange dropped the then daily allowable limit of \$1.50 per hundred pounds. Cash prices for fed cattle also dropped during the two weeks following the airing of the show. The case was not actually tried under Texas’ food disparagement law because the court granted the defendants’ judgment as a matter of law on all claims except the business disparagement claim.

In deciding whether a claim had been presented on Texas’ food disparagement law, the court held that fed cattle are not “perishable” and their product was not a food product that would perish or decay beyond marketability within a limited period of time as required under the state’s law. The court also held that the plaintiffs failed to prove false statements were made or that the defendants knew the statements were false during the broadcast, which was another requirement for recovery under the law. The remaining claim for business disparagement was decided by a jury in Ms. Winfrey’s favor because there was no proof the statements were made deliberately and with malice.

The common law action for business disparagement generally requires the plaintiff to prove:

- (1) the statement was communicated or published to a third person;

- (2) the statement played a material and substantial part in inducing others not to deal with the plaintiff;

- (3) the statement was false; and

- (4) the defendant acted with wrongful intent or malice.

Some courts also require proof that the publication of the statement caused harm, that the harm was intended or that the defendant knew the statement was false but published the statement in reckless disregard of its truth or falsity.

The district court’s decision that the beef producers could not prove their food disparagement claim was appealed to the Fifth Circuit Court of Appeals. The district court’s opinion was affirmed because of the lack of proof of any false statements, but the court declined to review the issue of whether live cattle were perishable as defined by the statute. A concurring opinion argued the food disparagement law was meant to provide protection for cattle farmers and ranchers as well as producers of food items like apples. The judge noted that cattle begin to diminish in value once they have passed their marketable weight and the claim should have been remanded for trial to determine whether the plaintiff could prove the cattle’s value decayed “beyond marketability.” The judge noted that the law meant to distinguish between perishable products and “highly processed foods.”

Lean Finely Textured Beef

The public outcry against LFTB was fierce, but not immediate. On December 30, 2009, the *New York Times* ran an article in which the process, safety issues, and prevalence of LFTB in the food supply were raised. The article relied on email communications from Gerald Zirnstein, a former United States Department of Agriculture scientist whose opinion was that the approval process was flawed. Mr.

Zirnstein’s internal emails were obtained via a Freedom of Information Act request. One of Mr. Zirnstein’s emails is from where the term “pink slime” originated. There was little public outcry from the article.

On April 12, 2011, a national celebrity-chef Jamie Oliver ran a segment in which he replicated his imagined version of the processing of LFTB using common household items, including a washing machine and a bottle of ammonia. Mr. Oliver’s primary purpose was to educate viewers that LFTB was prevalent in the school lunch program, which was the general topic of his network show. In February 2012, McDonald’s, Taco Bell, and Burger King announced they would no longer use LFTB in their products.

Following an announcement that a large quantity of LFTB was purchased for school lunches, a petition on the on-line website “Change.org” was posted on March 6, 2012 and garnered more than 250,000 signatures of support in three weeks. On March 7, 2012, ABC News reported that 70% of the ground beef in supermarkets contained LFTB. On March 15, 2012, the USDA affirmed the safety of LFTB, but allowed each school lunch program to decide whether it would allow LFTB to be used. Throughout the remainder of March 2012, nation-wide supermarket chains announced that they would discontinue selling products containing LFTB or provide labeled options for consumers. By the end of March, Beef Products, Inc. (BPI), the largest producer of LFTB suspended operations at three of its four locations. Beef packers were also experiencing significant financial losses from the controversy.

By the end of March, governors from beef producing states joined with Secretary of Agriculture Thomas Vilsack to calm the public and assure the safety of the product. By the first part of April, the USDA had approved

requests to voluntarily label products containing LFTB. Further, a survey was released on April 5, 2012, finding 88% of U.S. adults were aware of LFTB and 76% expressed some concern with the product.

Current Lawsuit

On September 13, 2012, Beef Products, Inc. sued ABC News, broadcast newscasters, former USDA scientists, and a former BPI executive turned whistle-blower in a 263 page petition. In the case titled, *Beef Products, Inc. v. American Broadcasting Companies, Inc.*, BPI makes defamation, product disparagement, defamation by false implications, defamation by implication, product disparagement by implication, violation of South Dakota's Agricultural Food Products Disparagement Act, S.D.C.L. § 20-10A-1 *et seq.*, and tortious interference with business relations claims. Damages sought, according to the petition, are actual damages of \$400 million, treble damages and punitive damages. News reports have pegged the claimed damages at \$1.2 billion. On October 24, 2012, the defendants moved to transfer the state case to federal court based on diversity jurisdiction. The defendants promptly filed a motion in federal court to dismiss the lawsuit. There has not yet been any ruling on the motion to dismiss.

Common Law Claims for Defamation, Product Disparagement, and Tortious Interference with Business

BPI claims the ABC News broadcast in which it was reported that 70% of the ground beef in grocery stores contained LFTB caused consumers to demand that grocery stores stop carrying ground beef in which LFTB was

present and for which they had no knowledge of its presence. As a result of the public's knowledge of the use LFTB, most national grocery chains refused to sell the product or sell it without labeling it. BPI also claims the news reports caused significant financial harm to the company and caused the layoff of more than 650 employees in three factories that were forced to shut down due to the decrease in demand.

In order to succeed on their defamation claims, BPI will have to show that the information reported was actually false, was not an opinion, and that there was actual knowledge of the falsity. In addition, BPI may have to show that there was ill intent on the part of the news organization to do harm. BPI's petition alleges that ill motive and that the news organization knew its stories were false can be proven by the fact that BPI and industry representatives sent letters and public relations videos, fact sheets, and articles to the defendants that the defendants ignored. In reviewing a motion to dismiss, the court will review the petition and consider all allegations made by BPI as true. Only if the stated allegations fail to prove all elements of the claim will the court dismiss the claim. Courts do not often dismiss cases at this early stage, so it is possible that one or more of these claims could survive the initial motion to dismiss if the judge decides the petition sufficiently alleges statements provided by the news organization lack truthfulness and the news organization was aware it was presenting untruthful information.

In the *Winfrey* case, the court did not dismiss the food disparagement, negligence, or defamation claims until after all evidence discovery had been completed. The allegations and statements within the news reports, however, appear to fall somewhere between the Alar case in which there was a scientific report and years of controversy prior to the report and

the *Winfrey* case in which a lot of the "defamatory" statements complained of appeared to be a little sensational and more like stated opinions rather than facts. One or more of these claims will likely be BPI's best chance for overcoming a motion to dismiss the case and possibly summary judgment.

South Dakota's Food Disparagement Law

South Dakota's food disparagement statute contains many similar elements that must be proven by BPI. BPI will likely face an uphill battle on proving some of these elements.

The first problem for BPI is similar to the one faced by the cattleman in the district court in Texas. It must prove it produces an "agricultural food product," as defined by South Dakota's law, S.D.C.L. § 20-10A, defining it as a food product sold or distributed in a form that will "perish" or "decay beyond marketability" within a period of time.

BPI's own petition describes the process by which LFTB is produced. The refrigerated beef trimmings are heated to 105 degrees, spun through two centrifuges where the lean meat is separated from the fat, the lean meat is then treated with ammonia gas, and the final product is flash-frozen as it runs through the systems and machinery designed by BPI. In the *Winfrey* case, the Texas district court held that live fed cattle were not agricultural food products because they were not perishable or had not decayed beyond marketability. If the South Dakota district court considers this issue in reviewing the state food disparagement claim, there is debate as to how the court will classify a heated, processed, and flash-frozen product run through a series of systems and machinery. Whether the product is perishable or subject to decay beyond marketability within a short period of time, as required by the statute, is certainly a question

both sides can vigorously argue. The court, however, may do well to avoid deciding this issue altogether and focus, instead on the statements made by the defendants.

The second big obstacle for BPI is whether ABC News and the remaining defendants disparaged LFTB, as defined by the statute. The statute requires that the defendants knew the information they reported was false and that they stated or implied that an agricultural food product is not safe for consumption by the public. Further, in order to recover treble damages, BPI must show that the defendants had an intention to harm BPI when they disparaged the product. In the *Winfrey* case, the Fifth Circuit held that the facts of that particular lawsuit showed that there was no proof of false statements or knowledge of false statements.

Also, BPI's claims arise out of the loss of revenue it incurred when the demand for its product dropped. Whether the demand dropped due to public concerns regarding the safety of the product or due to the public's disgust with the idea of the product and the lack of transparency of its widespread use throughout the food industry may generate an interesting question. In *Winfrey*, the issue was clearly the safety of the beef supply, but for BPI it must demonstrate that the decrease in demand for its product was caused by reports regarding the safety of the product rather than a lack of public knowledge of how LFTB is produced and a lack of labeling. BPI may not be able to prove that the statements implied LFTB was unsafe, as required under the law.

There is little legal precedent interpreting food disparagement laws. In the BPI case, it is possible the court could conclude that LFTB is not an agricultural food product that falls within the protections of the statute. But, it seems more likely the court will follow the guidance of the Fifth Circuit and decide the

issue on the lack of knowledge by the defendants regarding the falsity of the statements. With the previously published accounts of LFTB by the *New York Times* and the primary issue raised by the news reports being the prevalence of the product in the food system without the public's knowledge, it seems most likely the court will be able to make this determination alone.

First Amendment Issues

The First Amendment of the United States Constitution promises that "Congress shall make no law... abridging the freedom of speech, or of the press..." This amendment applies to states through the Fourteenth Amendment. In the *Winfrey* case, the district court held that the subject of the speech, which was the safety of the United States' beef supply, was an issue of legitimate public concern, so the court reviewed the speech under the strictest standards in evaluating First Amendment protections of speech.

One of the most widely debated concerns with food product disparagement and defamation claims against news reports of food is the concern that the lawsuits are brought to chill speech and are violative of news organizations' and individuals' first amendment rights. South Dakota's food disparagement law requires BPI prove the defendants knew the information was false, which is similar to the Texas statute at issue in the *Winfrey* case.

Some online accounts have classified this lawsuit as a "SLAPP" suit. SLAPP stands for a strategic lawsuit against public participation. SLAPP lawsuits are not brought by plaintiffs with an expectation to win the suit, but are meant to intimidate criticism of their product, company, or political view either through the legal process itself or the mounting costs of litigating the long and complicated claims. The most common claims are

typically defamation, business interference, and conspiracy, which can be difficult to defend as these generally engender many factual questions which are not resolved in pre-trial motions. Several states have enacted statutes to protect against these types of abusive lawsuits, but South Dakota does not have any statutory protections against SLAPP.

Whether a lawsuit is actually a SLAPP suit is a question of fact for the judge or jury to decide, but without any statute to apply in the current case, this determination will not be made. It is important to note, however, that with the passage of food disparagement laws and others, such as laws that make it illegal to videotape an animal producer's operation recently enacted in some states, the agricultural industry is not afraid to bring suit against news reports that adversely affect their business. The cost to media and other organizations in defending these suits could begin to have a stifling effect, if these types of lawsuits become more commonplace.

Future of Pink Slime Litigation

Despite several instances prior to Spring 2012, the pink slime debate did not gain traction in the media or with the public until ABC News covered the process and its largely unknown prevalence in the United States' ground beef supply. While the public outrage seems to have died down for the time being, the legal process is just beginning. Previous cases arising out of food disparagement claims have not been successful for the parties that brought the suit. It is unlikely there will be a much different outcome in this lawsuit. The debate as to whether BPI's product will forever be "pink slime" is in the lawyer's hands now.

For More Information:

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