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FOOD DISPARAGEMENT

— by Neil E. Harl*

The case against Oprah Winfrey, brought by a group of Texas cattle feeders, has focused attention on a movement that has been quietly spreading through the states—the enactment of food disparagement statutes.¹ To date, about one-fourth of the states have enacted such statutes² with several more states considering similar legislation.³ In two states, Colorado and Delaware, statutes passed by the state legislature were vetoed by the governors.⁴ On February 18, 1998, the Federal District Court for the Northern District of Texas dismissed the count alleging violation of the food disparagement statute.

Nature of the legislation

Although no two statutes are precisely identical, the food disparagement legislation exhibits similar provisions. Indeed, it has been reported⁵ that the legislation was drafted as a model bill by a Washington, D.C. law firm hired by the American Feed Industry Association. The same article indicated that state chapters of the American Farm Bureau “began agitating for passage.”⁶

The Texas statute, which is typical of those enacted, provides that a person is liable if— (1) the person disseminates in any manner information relating to a perishable food product to the public; (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.⁷ The person is liable to the producers of the product for damages and “any other appropriate relief” arising from the person’s dissemination of the information.⁸

The statute goes on to state that in determining whether the information is false, the trier of fact is to consider whether the information was based on “reasonable and reliable scientific inquiry, facts or data.”⁹ Finally, the Texas legislation defines “perishable food product” to mean “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.”¹⁰

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As noted,¹¹ the statutes differ in several significant respects. The Florida statute¹² is more direct as to the specification of falsity in stating that false information “is that information which is not based on reliable, scientific facts and reliable, scientific data.”¹³ The Florida legislation also defines “disparagement” in terms of “willful or malicious dissemination” of false information.¹⁴ The Arizona law requires that the individual, to be liable, must have “intentionally” disseminated false information about a perishable agricultural food product.¹⁵ South Dakota law states that a person “who disparages a perishable agricultural food product with intent to harm the producer” can be held liable for treble damages.¹⁶

Reasons for the statutes

The statutes appear to have been enacted in response to the so-called “Alar” scare of 1989.¹⁷ The CBS news program, “60 Minutes,” had reported on a 1989 report of the Natural Resources Defense Council (NRDC) in which the NRDC took the position that young children faced increased dangers from pesticide use such as with a herbicide known as Alar when applied to apples.¹⁸ The report was supported by scientific research¹⁹ and had been preceded by consumer concerns and boycotts three years earlier.²⁰

Washington apple growers filed suit against the NRDC, CBS and CBS affiliates carrying the broadcast in the State of Washington. That suit was dismissed by the Washington federal district court on the grounds that the plaintiffs failed to meet their burden of proving that the broadcast was verifiably false.²¹

The disparagement statutes were apparently drafted in response to the judicial disposition of the Alar complaints by producers.

Constitutionality

The major issue with the food disparagement statutes is whether such legislation is constitutional. The U.S. Constitution states that “Congress shall make no law...abridging the freedom of speech, or of the press...”²²

with the provision also applicable to the states through the Fourteenth Amendment.

The common law tort of product disparagement generally required the plaintiff to prove that (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.²³ Some courts have adopted the Second Restatement of Torts analysis which requires that the plaintiff establish that publication of the statement would cause 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.

Some commentators argue that food disparagement legislation should be viewed as dealing with a matter of great public interest and concern and that the statutes should be assessed on the basis of defamation jurisprudence²⁴ with the probable requirement that plaintiffs must prove a statement's falsity. A number of the state statutes have seemingly ignored this requirement.²⁵ That raises troubling constitutional issues in those states. The Texas statute, by requiring that the alleged disparager "knows" the information is false,²⁶ is less affected by that infirmity.

Further litigation will be necessary for the constitutional standing of the various statutes to be ascertained.

From a broader policy perspective, a good argument can be made that society is best served by rules which allow open, robust debate on matters of great public interest and concern. Food safety clearly falls into that category.

FOOTNOTES

- ¹ E.g., Ga. Code §§ 2-16-1 through 2-16-4; Okla. Stat., tit. 2, §§ 3010 through 3012.
- ² Ala. Code §§ 6-5-620 through 6-5-625; Ariz. Rev. Stat. § 3-113; Fla. Stat. § 5.065; Ga. Code §§ 2-16-1 through 2-16-4; Idaho Code §§ 6-2001 through 6-2003; La. Rev. Stat. tit. 3, §§ 4501 through 4504; Miss. Code §§ 69-1-251 through 69-1-257; Ohio Rev. Code Ann. § 2307.81 (Anderson 1995 & Supp. 1996); Okla. Stat., tit. 2, §§ 3010 through 3012; S.D. Cod. Laws §§ 20-10A-1 through 20-10A-4; Texas Civ. Proc. & Rem. Code §§ 96.001 through 96.004. See ; Colo. Rev. Stat.

§ 35-31-101 (criminalizes "knowingly to make any materially false state" regarding an agricultural product.

E.g., H.F. 106, Iowa General Assembly (1996).

See Semple, n. 17 *infra* n. 14.

Segal, David, "When a Put-Down of Produce Could Land You in Court," Washington Post, May 27, 1997, p. E1.

Id.

Texas Civ. Proc. & Rem. Code § 96.002(a).

Texas Civ. & Rem. Code § 96.002(b).

Texas Civ. Proc. & Rem. Code § 96.003.

Texas Civ. Proc. & Rem. Code § 96.001.

See n. 5 *supra*.

Fla. Stat. § 865.065(2)(a).

Id.

Id.

Ariz. Rev. Stat. § 3-113(B).

S.D. Cod. Laws § 20-10A-3.

See generally Semple, "Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws," 15 *Va. Env'tl. L.J.* 403 (1995). See also Benderman, Christenson and Quesenberry, "Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes," 34 *Harv. J. on Legis.* 135 (1997).

¹⁸ See Bradford and Whyatt, "Intolerable Risk: Pesticides in Our Children's Food," Natural Resources Defense Council (1989).

¹⁹ See Semple, *supra* n. 17 at 407-408.

²⁰ See Nader v. EPA, 859 F.2d 747, 749-51 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

²¹ *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 941 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995).

²² U.S. Const., Amendment I.

²³ Semple, *supra* n. 17 at 419.

²⁴ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁵ See Ariz. Rev. Stat. § 3.113(E)(1); Ala. Code § 6-5-621(1); Fla. Stat. § 5.065(2); Ga. Code § 2-16-2(1); La. Rev. Stat. § 3:4502(1); Miss. Code § 69-1-253(a); Ohio Rev. Code § 2307.81(B)(2).

²⁶ Texas Civ. Proc. & Rem. Code § 96.002(a)(2).___

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-ALM § 13.03.*

AVOIDABLE TRANSFERS. The debtor was a producer of soybean seed and had contracted with a dealer to produce soybean seed from foundation seed

owned by the dealer. The debtor also contracted with several growers to grow the seed. The debtor was to receive a premium on each bushel of seed delivered to the dealer and paid a premium to the growers out of the premium received from the dealer. The debtor lost its state grain license and its business was operated under the state Department of Agriculture for the purpose of winding up the debtor's affairs. Although most of the