

Vol. 16 No. 3

April 4, 2008

THREAT OF LITIGATION MASQUERADES AS REGULATORY VEHICLE

by
Joseph E. Silvia

Recently, the Center for Science in the Public Interest (CSPI) gave notice that it would bring a lawsuit against two alcoholic beverage companies unless they halt the making and selling of products containing natural energy boosting ingredients, such as caffeine and ginseng. The group has publicly chastised these companies, charging their business practices are “sinister attempts to prey on a new generation of future problem drinkers.” This is the latest example of how “public interest” activist groups use lawsuit threats and public demonization as ways to circumvent democratic methods to regulate business conduct.

In the letter, CSPI alleged that Tilt and Bud Extra are “adulterated products” and that their producers engage “in practices that are both unfair and deceptive with respect to the marketing and sale of Tilt and Bud Extra.” CSPI intends to seek a permanent injunction prohibiting Anheuser-Busch and Miller from manufacturing and offering for sale any alcoholic beverage containing caffeine or any other ingredient not expressly recognized as “safe” for use in alcoholic beverages. The letter also warned that the group would forum shop their consumer protection law violation claims to plaintiff-friendly jurisdictions like Massachusetts and California. CSPI would seek an injunction preventing the companies from freely promoting these products. CSPI further claims that it may seek restitution, damages, attorneys’ fees, and disgorgement of profits, which would be placed into a *cy pres* charitable fund.

Organizations like CSPI now routinely seek to shape the business practices of corporations or whole industries by threatening expensive litigation. For example, CSPI threatened Cadbury-Schweppes, maker of 7UP, with a lawsuit in mid-2006 regarding marketing practices. By early-2007, the company dropped the marketing campaign and was immediately praised by CSPI, after which the lawsuit was dropped. In mid-2007, the Kellogg Company agreed to a settlement whereby Kellogg would adopt heightened nutrition standards, in return for the dropping of a threatened lawsuit led by CSPI.

While the merit of the science and studies is debatable, it is not debatable whether this is the proper way to enact policy change in business commercial practices. Targeted businesses are forced to weigh the heavy cost of litigation and reputation damage, not to mention the high risk of a jury trial, with the merit of their mission to provide new consumer choices in a highly competitive marketplace. Policy should be made not by forcing businesses hand, but by careful analysis of the issues, detailed examination of costs and benefits, and ultimately a decision by those charged with making policy, who remain beholden to those who are to be regulated by such policy.

Joseph E. Silvia is Chief Policy Counsel to the Washington Legal Foundation.

About WLF and the COUNSEL'S ADVISORY

The Washington Legal Foundation (WLF) is the nation's largest non-profit, free enterprise public interest law and policy center. WLF litigates *and* publishes in order to advocate legal policies that promote economic growth, job creation, and the civil liberties of business. As a 501(c)(3) tax exempt organization, WLF relies upon the charitable support of individuals, businesses, associations, and foundations to fund its programs.

This COUNSEL'S ADVISORY is one of WLF's seven publication formats. Its purpose is to inform the free enterprise community about a development in the legal policy world that can be favorably impacted by the immediate involvement of legal experts and business and community leaders.

For more information on the Washington Legal Foundation, please contact Daniel J. Popeo, Chairman, at (202) 588-0302.

**Washington Legal Foundation
on the World Wide Web:**

<http://www.wlf.org>