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## FEDERAL APPEALS COURT FINDS STATE FOOD LABELING LAW UNCONSTITUTIONAL

by

Steven J. Rosenbaum and Sarah E. Taylor

In its recent decision in *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), the U.S. Court of Appeals for the Second Circuit held that regulations requiring certain factual information to appear on food labels violated the First Amendment. This decision raises serious doubts that commercial speech can be regulated merely to satisfy the public's "right to know."

In *International Dairy Foods*, the Court of Appeals reversed a district court decision denying the dairy manufacturers' motion for preliminary injunction to prevent enforcement of a Vermont labeling law. The law was enacted after the Food and Drug Administration approved recombinant Bovine Somatotropin (rBST) in 1993 for use in cows to increase milk production. Based on its finding that milk derived from rBST treated cows is indistinguishable from that produced by untreated cows, FDA determined that no special labeling was required to identify dairy products derived from cows treated with rBST. Vermont nonetheless enacted a statute requiring that dairy products made from the milk of treated cows be identified through point-of-purchase labeling. VT. STAT. ANN. tit. 6, § 2754(c).

Implementing regulations specified that the required rBST message could be displayed on the product label or through a sign posted at the point-of-purchase. The regulations permitted the rBST statement to be accompanied by the following statement:

The United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows. It is the law of Vermont that products made from the milk of rBST-treated cows be labeled to help consumers make informed shopping decisions.

Vermont Department of Agriculture, rBST Notification and Labeling Regulations Relating to Milk and Milk Products, § 3.1 (Mar. 10, 1995)

The Court of Appeals found that the rBST labeling law clearly implicated "core First Amendment values," because it "indisputably require[d] [manufacturers] to speak when they would

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Steven J. Rosenbaum is a partner and Sarah E. Taylor is Of Counsel in the Washington, D.C. offices of Covington & Burling. Mr. Rosenbaum specializes in litigation. Ms. Taylor specializes in food and drug law and advertising law. They represented the plaintiffs in the litigation described above.

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rather not." *International Dairy Foods*, 92 F.3d at 72. In analyzing such an encroachment on free speech rights, the court applied the test created by the Supreme Court in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Under this test, a regulation of commercial speech cannot be upheld under the First Amendment unless the government can establish that its interest in the regulation is "substantial." *Id.* at 566. The Court of Appeals emphasized that the government cannot carry this burden through "mere speculation or conjecture; rather [it] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *International Dairy Foods*, 92 F.3d at 73, citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

There was no dispute between the parties in the case concerning the safety of rBST use. As the Court of Appeals noted in its decision, based upon "exhaustive studies," FDA determined that rBST had "no appreciable effect on the composition of milk" and presented no "human safety or health concerns associated with [the] food products." *International Dairy Foods*, 92 F.3d. at 73. The court concluded from the extensive record in the case that "there is no evidence from which an objective observer could conclude that rBST has any impact at all on dairy products." *Id.*

The Court of Appeals found that Vermont had not, and, based on the record, could not, establish a genuine harm that the rBST labeling would help to alleviate. "[The State] 'does not claim that health or safety concerns prompted the passage of the Vermont Labeling Law,' but instead defends the statute on the basis of 'strong consumer interest and the public's right-to-know . . .'" *Id.*, quoting district court decision, 898 F. Supp. 246, 249 (D. Vt. 1995). The court concluded that, while the record in the case establishes that "consumers want to know whether rBST has been used in the production of their milk[,] . . . [i]t is clear . . . that the state itself has not adopted the concerns of the consumers; it has only adopted that the consumers are concerned." *Id.* at n.1. The Court of Appeals held that "[t]hese interests are insufficient to justify compromising protected constitutional rights." *Id.* at 73.

In reaching this decision, the Court of Appeals recognized that, unless the government is required to establish that its regulation of commercial speech will materially alleviate a real harm, manufacturers could be required to disseminate an unlimited range of information:

Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered.

*Id.* at 74. This does mean that consumers are without any remedy, however. As the court recognized, "those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it." *Id.* The Second Circuit reversed the district court decision and instructed that a preliminary injunction be entered against enforcement of the labeling requirement. Plaintiffs and the state subsequently settled the lawsuit, with the state stipulating to the issuance of a permanent injunction against the labeling requirement.

The *International Dairy Foods* decision represents an important extension of the commercial speech doctrine. Most decisions involving that doctrine have concerned governmental efforts to restrict commercial speech. The precise contours of the limitations upon governmental powers to compel commercial speech have received far less attention. The Second Circuit's clear dichotomy between compelled speech requirements necessary to alleviate real harm, and those merely serving an inchoate public "right to know," provides important guidelines for judicial decision making.

The *International Dairy Foods* decision calls into question a range of federal and state regulations compelling businesses and other members of the public to divulge information to serve a public "right to know." The decision indicates that, unless required information serves to abate an established, and not merely hypothetical harm, the regulation is vulnerable to constitutional attack.