

Legal Updates & News

Legal Updates

Tufts Study May Spark New Wave of Litigation Related to Food Industry Underreporting of Caloric Content

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Tufts University published a new study in the January 2010 issue of the *Journal of the American Dietetic Association* finding that several restaurant chains and packaged-food manufacturers are underreporting the caloric content of their products. The study analyzed the caloric content of meals from national sit-down and fast-food chain restaurants and frozen meals purchased from supermarkets. Tufts researchers concluded that the caloric content information was, on average, 18 percent more than reported for the restaurant meals and, on average, 8 percent more than reported for packaged food. Because the sample population was small, however, researchers concluded that additional testing is required to assess whether underreporting is taking place on a national scale.

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Previous findings regarding a national restaurant chain's underreporting of caloric content of its diet menu items led to a rash of litigation and initial activity among legislators at all levels of government. In 2008, a media company investigated the "Weight Watchers" items on Applebee's menus and issued a similar finding that the menus consistently underreported the caloric and fat content of those items. State and federal class action and consumer lawsuits quickly followed throughout the country alleging that Applebee's and Weight Watchers misrepresented the fat and caloric content of their dishes. For instance, despite the menu advertising that Applebee's Garlic Herb Chicken only contained 6 grams of fat, an analysis of the dish found that it actually contained three times as much. This litigation currently remains pending in state and federal courts throughout the country.

The recent Tufts study may likely soon spark a similar wave of reactive consumer and class action litigation. Other food purveyors may also be at risk as these types of studies continue to proliferate. Plaintiffs are likely to look to California as the jurisdiction for such lawsuits. In addition to its broad unfair competition law, California has recently enacted Section 114094 to the Health and Safety Code, which requires that food facilities with at least 19 other food facilities disclose nutritional information for items on their menus. Cal. Health & Safety Code § 114094(b) and (c). From July 1, 2009 to December 31, 2010, such food facilities are required to disclose nutritional information of their menu items, including, among other ways, by a brochure on the table, a menu insert, or a table tent. Cal. Health & Safety Code § 114094(b). Beginning January 1, 2011, every food facility must provide the caloric content for its items

on the menu itself. Cal. Health & Safety Code § 114094(c). Enforcement of this section is by the local enforcement agency. Cal. Health & Safety Code § 114094(h). A food facility that violates this section is guilty of an infraction, punishable by a fine from \$50 to \$500. Cal. Health & Safety Code § 114094(k).

Though as of now there is no private right of action under this section, plaintiffs will likely argue that violation of Cal. Health & Safety Code § 114094 provides the foundation for a claim of unlawful conduct under California's Business and Professions Code § 17200. Plaintiffs are also likely to bring claims under §§ 17200 and 17500 for false and deceptive advertising.

Food purveyors will probably have several defenses available to them, including that the highly individualized nature of such claims precludes class certification. For further information on this topic and other consumer litigation matters, please contact [David McDowell](#) or [Will Stern](#).