Turkey, Mashed Potatoes and a Dollop of Preemption

November 23, 2011

Tomorrow is Thanksgiving – the biggest American "eating" day of the year. So we thought we'd share a few fun facts. Did you know the average person on Thanksgiving eats around 4,500 calories? (By the way, that's more than double the daily amount a person should eat). For instance, on average one cup of mashed potatoes is 238 calories. One cup of stuffing is 363 calories. One cup of eggnog is 342 calories and a slice of pumpkin pie will set you back 323 calories. We haven't even gotten to the sweet potatoes covered in marshmallows, the cranberry sauce or the gravy. Yikes!

On a day like Thanksgiving -- when let's face it, we are going to eat it anyway -- maybe it is better not to know things like you'll have to walk 30 miles or swim for 5 hours to work off your Thanksgiving feast. But, for most of the other days of the year, we generally like knowing what is in the food we are eating (if you really want to know, check out this article about how the average Thanksgiving dinner is chock-full-of chemicals – just not enough to kill us). So, while as drug and device lawyers we focus on the "D" in FDA, as consumers we appreciate the "F". And, when there is a favorable preemption decision in the food arena, it piques our interest as drug lawyers and as eaters.

That is exactly what we get in the case of Jones v. Dinequity, Inc., 2011 Cal. App. Unpub. LEXIS 8724 (Cal. App. Nov. 14, 2011). Defendant is the parent company of the popular restaurant chain, Applebee's. Applebee's menu includes a selection of "Weight Watchers" items for which it lists the grams of fat, grams of fiber and calories. Id. at *2. Plaintiff filed a putative class action on behalf of California residents who ordered Weight Watchers menu items at Applebee's claiming discrepancies between the actual and the posted nutritional information and seeking relief under California's consumer rights statutes. Id. Plaintiff based her allegations on independent laboratory testing of certain menu items. Id. The court found plaintiff's state law claims were preempted by the Food, Drug, and Cosmetic Act (FDCA) and its 1990 amendment, the Nutrition Labeling and Education Act (NLEA) because plaintiff was attempting to impose on Applebee's a broader obligation than that required by the federal government. We like the sound of that.

We all know that when you flip over a package of food in the supermarket, you are going to see a Nutrition Facts Panel. That panel on packaged foods is required by the NLEA and its content is heavily regulated by the FDA – much like drug labeling. But, prior to some 2010 amendments, restaurants like Applebee's were exempted from those mandatory labeling requirements. So, restaurants could "voluntarily" decide to include on their menus nutrient content or health benefits claims regarding their food. And, that's where food and drugs part company – there is no such thing as "voluntary" labeling of a drug. A pharmaceutical manufacturer can't opt to include additional information in its label, but a restaurant (and any other food manufacturer) can.

But, just because it's voluntary, doesn't mean it isn't regulated – and we're back on familiar ground. The NLEA says is that if a restaurant chooses to make "nutrient content claims" – statements such as "low sodium" or "contains 100 calories" -- they must meet the requirements of §343(r) which governs claims on food labels regarding levels of nutrients or the relationship of such nutrients "to a disease or health-related condition." The NLEA also contains an express preemption provision preventing states from imposing "any requirement on nutrient content claims in the label or labeling or food that is not identical to the requirement of section 343(r)." Id. at *9. What does §343(r) require? That

> "restaurants making nutrient content claims are subject to the reasonable basis standard. [I]n lieu of analytical testing, restaurants may show they have a reasonable basis for making the claim."

Id. at *8-9 (citation and quotation marks omitted). But the plaintiff's claims were based on analytical testing – and that's where preemption comes in.

While plaintiff attempted many arguments to avoid preemption, the one most interesting to us non-food lawyers was her claim that consumer protection laws "are not preempted by the NLEA because they do not impose labeling requirements, and thus fall outside the federal statutory scope." Id. at *15. To make her argument, plaintiff misplaced her reliance on a pesticide labeling case that actually supported the defense position (Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)), but she could just have easily cited any number of drug or device cases that likewise would have gone against her. Whatever the context, it afforded the court an opportunity to make a nice preemption statement:

"Here, plaintiff is suing under regulatory state laws proscribing deceptive practices. The gravamen of her claim is that the menu labels are not precisely accurate as shown by lab testing, and are thus deceptive. This imposes a broader obligation on defendant's food labeling than the federal "reasonable basis" standard, by seeking to enforce a more exacting standard of compliance. Thus, her state law claims are preempted . . . to the extent they exceed the federal standard."

Jones, at *15-16.

The court also quickly dismissed plaintiff's argument about the "strong presumption against preemption" finding that the "presumption is inapplicable when Congress has shown its clear and manifest purpose to preempt." Id. at *17.

Because plaintiff's complaint also contained a "brief, general allegation that defendant lack a reasonable basis for the menu postings," id. at *4, the court entertained what appears to be a purported parallel claim to enforce the federal food labeling regulations. Id. at *18. After considering the evidence, the court concluded that Applebee's procedures for determining nutrient levels were reasonable and plaintiff "presented no competent evidence to the contrary." Id. at *22. So, it was a win-win for the defense.

As for Thanksgiving, we say forget the calories, the fat, the sugar, the sodium, the chemicals and go for it. Loosen the belt a few notches and enjoy. Then you can start that 30 mile walk at midnight (or sooner) at your local mall!