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FDA Warning Isn't Enough Proof For Takings Claim

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In DiMare Fresh Inc. v. United States,[1] the Court of Federal Claims squashed tomato growers' hopes of a takings-based theory of recovery stemming from consumer avoidance of raw tomato products after incorrect U.S. Food and Drug Administration warnings.

In June 2008, the FDA released two consumer alerts warning the public to avoid certain raw red tomatoes that were potentially linked to a rare strain of salmonella. In the months before the warnings, Salmonella Saintpaul infected hundreds of Americans, primarily in the Southwest. Ultimately, further investigation revealed the FDA's initial assessment was incorrect and the agency eventually pinpointed the real culprit: Mexican peppers. Despite retracting the tomato warnings in July 2008, some members of the tomato industry felt the blight of dried-up product demand.

In an attempt to recover a portion of their losses, a group of tomato producers, packers and shippers from Florida and Georgia filed suit. Their singular theory of recovery hinged on the takings clause of the Fifth Amendment. At its core, any takings claim must demonstrate that the government has deprived a property owner of their property in order to serve a public interest. Once this is demonstrated, the government must pay the property owner just compensation for their item or real estate. The seminal example of a taking is when a government seizes, and subsequently pays for, private land necessary to build a road.

In DiMare, plaintiffs argued the FDA's incorrect warning statements constituted a legal taking of the value of their perishable tomato crop. This constructive taking, plaintiffs argued, was in the interest of public welfare because it was aimed at preventing the spread of salmonella. They contended the FDA's incorrect warnings caused sales of tomatoes to dramatically decline. Producers from Georgia reported 32 percent of the spring 2008 crop was left in the fields to rot. In Florida, after the FDA announcements, producers sold boxes of tomatoes once worth $19 for as little as $0.50.

To persuade the court, plaintiffs offered an arguably analogous case involving poultry in Yancey v. United States.[2] There, shortly after the Yancey family purchased their turkey flock, a government quarantine to prevent the spread of avian influenza shut down the interstate sale of poultry eggs. The Yanceys relied on interstate sale of hatching eggs and were forced to sell their breeding flock at dramatically discounted slaughter prices. The quarantine rendered the Yanceys' healthy breeding birds

nearly worthless, ultimately ending the Yanceys' business. In Yancey, the court held that because "the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys' losses."[3]

The DiMare court found several FDA-cited cases more on point for the 2008 salmonella warnings. These cases denied takings claims when government statements caused financial detriment, but "lacked the requisite 'legal effect' to rise to the level of a regulatory taking."[4] For example, in A-1 Cigarette Vending Inc. v. United States,[5] government pamphlets and letters informing businesses about impending regulations, which caused decreased sales, did not constitute a regulatory taking because the pamphlets were advisory in nature, and therefore had no actual legal effect on plaintiffs' property. Similarly, the tomato advisories in DiMare could not be considered a government action with a sufficient legal effect on property interests, as the FDA itself had not taken any direct action with respect to plaintiffs' property. Had the FDA used its powers of seizure or injunction of tomato sales, the court may have perceived the required legal effect.

At its core, plaintiffs' takings claim required the independent buying patterns and choices of consumers to be attributed to the government. Plaintiffs argued that but for the FDA's warnings, consumption and sales would not have decreased. And the court agreed that the public chose not to eat tomatoes because of perceived health risks. Nonetheless, even a clear showing of public avoidance of tomatoes due to FDA warnings was not enough.

DiMare held that because there were only health warnings and no outright ban or quarantine, the necessary level of government-initiated legal effect on plaintiffs' property interests was not demonstrated. Thus, a taking was impossible. Because a taking could not have occurred, the DiMare plaintiffs were unable to survive a Rule 12(b)(6) motion to dismiss.

Despite plaintiffs' avoidance of tort claims or any "mention of negligence, misrepresentation, or failure to observe a duty of care on the part of the FDA,"[6] the court discussed these hypothetical claims as a more plausible option. Stating, "a more obvious legal theory of recovery would have been that the FDA negligently misrepresented the danger of consuming plaintiff's tomatoes and that the U.S. is liable to plaintiffs as a result of the government's negligence."[7] Regardless of conceivable advantages in plausibility for pleading purposes, the court recognized the likely futile nature of these tort claims, as the FDA would typically be immune from tort liability for such discretionary warnings.

Interestingly, plaintiffs rooted much of their argument in the inaccuracy of the FDA salmonella warnings, despite the fact that establishing wrong, incorrect or unreasonable government action is generally not required for compensation. Although not addressed by the DiMare Court, it is important to note that, if the court held the FDA's warnings had a sufficient legal effect on the producers' property interests, such a taking would have been compensated, even if the tomato warnings had been correct. "Even if the government's regulatory action were presumed to be reasonable, a compensable taking may still occur."[8]

Practically, DiMare should prevent a flood of takings claims in the wake of garden-variety governmental warnings. Ultimately, the FDA's duty is to protect and promote human health. As the FDA's attention turns more toward food-safety concerns, any other holding would stifle the agency's ability to issue timely and potentially life-saving health warnings to the public. Furthermore, holding the FDA accountable for what was ultimately a shift in consumer buying choices would result in future liability whenever there are changed purchasing patterns in response to governmental advisories or announcements.

A successful and plausible takings claim requires proof of government action with a sufficient legal effect — mere warnings on matters of public safety are not enough. An outright ban on product sales or highly restrictive geographic quarantine, however, may provide the requisite legal effect for a successful takings claim.

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[1] 13-519 C, (Fed. Cl. Sept. 18, 2014).

[2] 915 F.2d 1534 (Fed. Cir. 1990).

[3] Yancey, 915 F.2d at 1542.

[4] DiMare, 13-519 C, (quoting defendant’s motion to dismiss).

[5] 49 Fed. Cl. 345 (2001).

[6] DiMare, 13-519 C.

[7] Id.

[8] Yancey, 915 F.2d at 1540.

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