Heat Puts Some in the Soup

Overly hot soup sparks lawsuits that parallel the famous hot coffee case.

By Gail Diane Cox
NATIONAL LAW JOURNAL STAFF REPORTER

FONTANA, CALIF.—Some restaurant-goers may soon suspect that their soup doesn't seem as steamy as it did last winter, and they'll be right. The temperature change isn't due to El Niño, though, but rather to Marshall L. Bitkower, a Southern California lawyer who this fall became the reigning expert on liability for scalding soup.

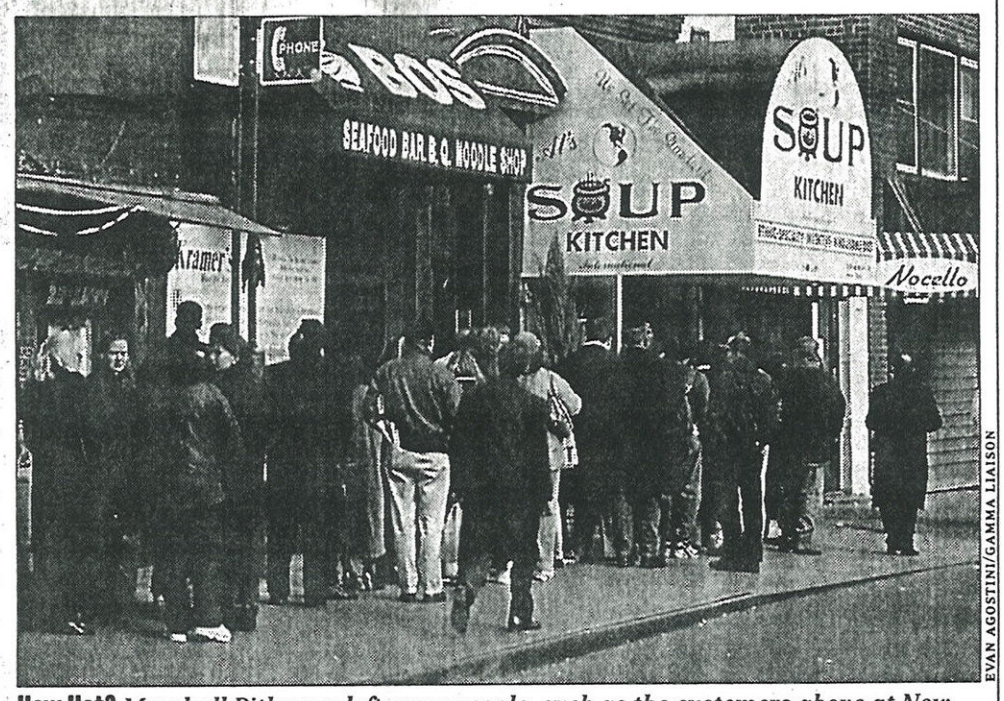
A chain of two dozen buffet-style restaurants based in Minnesota is among those that have telephoned Mr. Bitkower in recent weeks for guidance.

Mr. Bitkower said that after speaking with him, the chain vowed to lower the temperature of its soup and raise the height of its counters to make them less accessible to small children.

"There's no reason to serve soup any hotter than 145 to 155 degrees...and there needs to be an employee training manual that states that," said Mr. Bitkower, an Encino, Calif., sole practitioner who in September negotiated a $2.4 million structured settlement for a toddler who was burned when she pulled her father's soup—temperature undetermined—off a counter at a Country Harvest Buffet here.

Soup Proliferating

The settlement also will pay the little girl's parents $25,000 for emotional distress. It won final approval Oct. 23 at a San Bernardino Superior Court minor's conference. *Pino v. Country Harvest Buffet Inc.*, SCV 30820.



EVAN AGOSTINI/GAMMA LIAISON

How Hot? *Marshall Bitkower, left, says people, such as the customers above at New York's Soup Kitchen International, should beware if soup is hotter than 155 degrees.*

Hot-soup chains are proliferating like Starbucks outlets in major cities across the country, partly because of a popular episode on the hit television show "Seinfield" about a soup gourmet called the "Soup Nazi," so Mr. Bitkower's words may be of interest to an increasing number of soup entrepreneurs.

Not McDonald's

Mr. Bitkower himself sees his case as the "progeny of McDonald's"—a reference to the well-publicized litigation in which an elderly woman spilled hot coffee in her lap while driving. She won a multimillion-dollar award against the fast-food chain, but a judge reduced it to $300,000.

Mr. Bitkower says that other phone calls he's gotten are less inspiring. Two calls were from lawyers with similar claims that he predicts are likely to fail due to contributory negligence by parents. "But then," he adds, "to start with, nobody thought this was much of a case either."

Mr. Bitkower's opposing counsel, sole practitioner William Wheatley Jr., of Encinitas, Calif., was unavailable for comment.

The settlement judge, retired California Supreme Court Justice Armand Arabian, called the incident "every parent's nightmare, and every restaurant's nightmare, too."

The settlement's periodic payments are particularly appropriate because the little girl received second- and third-degree burns to her chest and will undergo a series of reconstructive surgeries, the judge said.

"I made the parents promise if I'm still alive when she gets married," Judge Arabian added, "they'll invite me to the wedding." NLJ

Execution-Time Reform Is in the Air

Reformers say it makes no sense to seek stays in the middle of the night.

By Cynthia Scanlon
SPECIAL TO THE NATIONAL LAW JOURNAL

THE COMMON PRACTICE of executing inmates at midnight could be coming to an end in Arizona, thanks to a few words from U.S. Supreme Court Justice Sandra Day O'Connor.

In informal remarks made to the 9th U.S. Circuit Judicial Conference in Portland, Ore., at the end of August, the justice in charge of that circuit said states are partly to blame for the "worrisome" practice of judges' making midnight decisions about whether to permit executions.

Justice O'Connor urged states to change the hour of executions and the number of days warrants of execution remain valid. She also said she would like to see death warrants' validity extended to one week.

Arizona Supreme Court Chief Justice Thomas Zlaket and the Attorney General's office have been discussing such changes since the death penalty was reinstated there in 1992. But Justice O'Connor's expression of interest has sparked recent vows that action finally will be taken.

Paul McMurdie, chief counsel of the criminal appeals section for the Arizona Attorney General's Office, said AG Grant Woods has promised to introduce legislation to change Arizona's law to facilitate daytime executions. And Mike Arra, public affairs administrator and spokesman for the Department of Corrections, said that if an execution date arrives before the law is changed, his department has agreed to consult with the AG to try to schedule a reasonable execution hour.

"We're trying to put some sanity back into the situation," he said.

The problem, as they see it, is that decisions about life and death are being made late at night, when court staffs are at a minimum and everyone is exhausted.

RUSS CURTIS

Sandra Day O'Connor: *The justice gave a speech that has sparked an Arizona reform movement to change executions.*

"I'm not sure who gets justice if you have to wake up a justice at three o'clock in the morning" to request a stay of execution, said Mr. McMurdie. "I can understand why someone on the East Coast would be concerned about [judging] midnight executions on the West Coast."

Arizona law permits the state Supreme Court to issue a warrant of execution valid for one day, 24 hours only, but the court does not decide the precise hour of execution. That is left up to the Department of Corrections, which waits until midnight to allow as much time as possible for last-minute judicial stays of execution.

Legislative action would be required to extend the time a death warrant would be valid so that the time for last-minute appeals and stays could be extended to two or even seven days but end at, say, noon on a given date.

For 29 years, Arizona did not execute prisoners. Since the death penalty's reinstatement, eight of the state's inmates have been executed; 120 more wait on death row.

"These are very serious matters," observed Chief Justice Zlaket, "It would seem that we have some obligation to address them during a civilized time of day, when everyone is fresh and able to cope with difficult legal issues." NLJ

Is New FDA Reform Bad Medicine?

Critics say drug protections are diluted; liability raised.

By Bob Van Voris
NATIONAL LAW JOURNAL STAFF REPORTER

A NEW LAW overhauling the way drugs and medical devices are reviewed by the federal Food and Drug Administration will make it easier for manufacturers to get their products on the market. But critics say the law waters down protections contained in the old system, while raising new questions about potential products liability.

A number of lawyers and consumer advocates were particularly dismayed that Congress passed a provision permitting companies to circulate medical journal articles touting drugs and medical devices for uses that have not been FDA-approved.

The new FDA law, a package of amendments to the Food, Drug and Cosmetic Act titled the FDA Modernization Act of 1997, is the product of three years of often-rancorous debate in Congress. It was signed by President Clinton Nov. 21.

Alex MacDonald, of Boston's Robinson & Cole L.L.P., said the provision is surprising in light of health concerns raised by the diet drugs fen-phen and Redux, which he calls "the largest pharmaceutical disaster in the history of the U.S."

He said the drugs were often prescribed in combination, a use not approved by the FDA. Because the combination use was the subject of a 1992 journal article, however, the manufacturers could have promoted them under the new provisions by sending the article to doctors. Mr. MacDonald represents the survivors of a Massachusetts woman who claim she died as a result of using fen-phen in 1996. He said the case is the first wrongful-death action resulting from fen-phen or Redux. *Linnen v. A.H. Robins Inc.*, 97-2307 (Mass. Sup. Ct.).

Another provision that may generate new liability permits manufacturers of some medical devices to contract with FDA-approved outside researchers to test their products for safety and effectiveness instead of seeking testing by FDA staff. This may open these independent labs to future liability to people injured by the devices, lawyers said.

Proponents of federal tort reform have argued for a so-called FDA defense shielding manufacturers from liability for drugs and medical devices approved by the FDA. A saving grace of the new law, said Brian Wolfman, a staff lawyer with the Washington, D.C., group Public Citizen, is that it rejected such a provision. So although the law may impose less stringent requirements on the industry, manufacturers will not be able to use the requirements as a shield, he said.

This is not the case in Michigan, however, where tort reform proponents passed an FDA defense provision in 1995. At the same time that Congress loosened requirements on drug and medical device manufacturers, it also weakened remedies available to plaintiffs under state law, said Michigan state Sen. Gary Peters, who is campaigning to repeal the provision.

Proponents of the law said it will speed approval of new, life-saving treatments without weakening protections for consumers. But Dr. Sidney M. Wolfe, director of Public Citizen's Health Research Group, called it "the worst attack on the Food and Drug Administration's ability to protect consumers and patients in 91 years." NLJ