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State Meat Label Restrictions Face Preemption Challenges

By **Robert Hibbert and Amaru Sanchez** (March 6, 2019, 2:37 PM EST)

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With a focus upon the emerging cell-cultured meat industry, there has been considerable recent discussion about the significance of jurisdictional differences at the federal level between the U.S. Department of Agriculture and the U.S. Food and Drug Administration. But what now appears to be moving on a parallel track are various recently enacted laws or proposed legislation at the state level designed to impose new labeling requirements and/or restrictions for meat-alternative products, both cell- and plant-based, generally designed to restrict access to traditional terminology such as "ground beef" on such products' labels.

In general, these initiatives would restrict the use of such terms to products derived only from edible portions of any livestock or poultry carcass. Some of these state Initiatives would even go so far as to criminalize the labeling of food products inconsistent with such state requirements.[1] The growing list of states pursuing such initiatives includes Arizona, Arkansas, Colorado, Indiana, Mississippi, Missouri, Nebraska, North Dakota, Washington and Wyoming.

What is unclear, at least to us, is how, if enacted, these state initiatives could withstand a legal challenge based upon a claim of federal preemption. For instance, while details are still scarce, federal preemption may have played a role in the recent settlement of the lawsuit challenging the Missouri law prohibiting a food product from being labeled as meat if it is not derived from harvested livestock or poultry.[2]

In the interim, this article will explore, at a high level, issues of federal preemption in the food space and possible implications for the emerging cell-based protein and plant-based meat alternative industries.

Preemption: A Brief Synopsis

Federal preemption is based on the supremacy clause of the U.S. Constitution,[3] and "occurs when a state law is invalidated because it conflicts with a federal law."[4] "Preemption can take on three different forms: express preemption, field preemption, and conflict preemption."[5] Express preemption occurs when a federal law expressly states that it is intended to preempt state law. It constitutes a

federal command that states may not regulate in an area of federal authority, and the scope of that preemption is governed by the terms of the statute.

Field preemption is established when Congress has legislated so comprehensively as to occupy the entire field at issue. Finally, conflict preemption can occur in two situations: (1) when “it is impossible for a private party to comply with both state and federal requirements,” or (2) when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”[6]

Invocation of Federal Preemption in the Food Space

Language in both the Federal Meat Inspection Act, or FMIA, and the Poultry Products Inspection Act, or PPIA, explicitly states that marking, labeling and ingredients requirements in addition to or different than those required under the FMIA and the PPIA may not be imposed by any state or territory.[7]

This hidden superpower, which attaches to all USDA-regulated products, has consistently been invoked by the meat and poultry industries to turn back any number of state and local initiatives to make just such impositions,[8] and there is some recent history to suggest that this reality may have influenced some members of the cell-based industry to more willingly embrace the idea of USDA inspection oversight.

For example, in Armour v. Ball, two meat producers brought an action against state officials alleging a conflict between federal and state law, and requesting a declaration that the marking, labeling, packaging and ingredient provisions of the Michigan statute were "in addition to, or different than" those imposed under the federal act and regulations issued pursuant thereto, and therefore preempted by virtue of 21 U.S.C.A. Section 678 and Article VI, Clause 2, of the United States Constitution.[9]

The court held that under the supremacy clause, the FMIA preempted provisions of the Michigan law concerning the transportation and sale in commerce of meat food products, and the marking, labeling and ingredient requirements of the federal regulations preempted Michigan law.[10]

In a narrower but somewhat similar fashion, the Federal Food, Drug and Cosmetic Act, or FDCA, as amended by the Nutritional Labeling and Education Act, expressly states that “no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce … any requirement for the labeling of food of the type required by” nearly every subsection of Section 343 “that is not identical to the requirement of such section.”[11]

This statute has generally been successfully invoked for food products regulated by the FDA. In Regan v. Sioux Honey Association Cooperative, a Wisconsin law did not permit a food to be labeled “honey” if the pollen was removed.[12] However, the Sioux Honey Association Cooperative argued that despite its product not containing pollen, it was required under federal law to identify the food as “honey,” its common or usual name, on the product label.[13] The District Court for the Eastern District of Wisconsin agreed, and concluded that the Wisconsin law “impose[d] a requirement which is not imposed by federal law, and is therefore not identical to federal law” and was preempted.[14]

Note, however, that various courts have indicated that federal preemption under the FDCA does not necessarily apply to every type of state-imposed food labeling requirement. In Cortina v. Goya Foods Inc., the court held that federal preemption does not apply to state labeling requirements concerning carcinogens in food.[15]

Similarly, the court in Garcia v. Kashi Co.[16] declined to conclude that federal preemption applied to a state law regarding "natural" food labeling claims. The common thread behind these court decisions is that the viability of a finding of federal preemption largely turns on whether the label or statement at issue is directly governed by the terms of the FDCA.

Takeaways

What does this mean for the emerging cell-based protein and plant-based meat alternative industries? The answer to that question seems clear for cell-based meat and poultry products. As indicated in the joint statement by USDA Secretary Sonny Purdue and FDA Commissioner Scott Gottlieb, once these the foods enter the production stage, ongoing inspection authority and related jurisdiction (including over labeling) will revert the USDA through the Food Safety and Inspection Service.[17] In this context, cell-based meat and poultry products would, without question, come under the protective umbrella of labeling preemption under the FMIA and the PPIA.

The answer is less clear for cell-based seafood and plant-based meat alternative products. Unlike cell-based meat and poultry products, their manufacture would be overseen by the FDA. As a result, and as discussed above, the closer question of preemption depends on whether the relevant state requirement is part of a preempted field and/or is in direct conflict with the applicable federal requirement.

On one hand, an argument can be made that the FDCA requires these products to be labeled by their common/usual name or in a way that accurately describes the "basic nature of the food or its characterizing properties or ingredients."[18] As a result, any further state labeling requirement that arguably would directly or indirectly establish labeling requirements that are somehow in conflict with those accepted under the FDCA could be preempted. On the other hand, a counterargument could assert that if the FDA has not taken any definitive action regarding the labeling of these products, they are not entitled to such preemptive effect.[19]

The increasing level of both public and private interest in this emerging food category guarantees the existence of continued debate and controversy over questions of how such products are identified and labeled. Issues of federal preemption will accordingly play a critical role in driving the degree to which the marketplace provides a uniform answer.

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[1] See Mo. Rev. Stat. § 265.494(7); see also Mo. Rev. Stat. § 265.496; see also Legislative Bill 14, A Bill for An Act relating to agriculture; to provide for truth in advertising and labeling in the sale of meat and food plans; to define terms; to prohibit misleading or deceptive practices; to provide a penalty; and to provide an operative date, 106 Legislature, First Session (2019).

[2] Susan Kelly, Meatingplace.com, Suit challenging Missouri definition of meat settled: report (Feb. 14, 2019), http://www.meatingplace.com/Industry/News/Details/84026.

[3] “[T]he Laws of the United States ... shall be the supreme Law of the Land[.]” U.S. Const. Art. VI, Clause 2.

[4] Mason et al. v. SmithKline Beecham Corp., No. 08-2265 (7th Cir. Feb. 23, 2010).

[5] Aux Sable Liquid Products v. Murphy, 526 F.3d 1028, 1033 (7th Cir. 2008).

[6] Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

[7] 21 U.S.C. § 678 (meat); 21 U.S.C. § 467(e) (poultry).

[8] Rath Packaging Co., 430 U.S. 519 (1977); see also American Meat Institute v. Pridgeon, 724 F.2d 45 (6th Cir. 1984); Armour v. Ball, 468 F.2d 76 (6th Cir. 1972), cert. denied, 411 U.S. 981 (1973); Kraft Foods North America Inc. v. Rockland County (S.D.N.Y. Feb. 26, 2003).

[9] Armour v. Ball, 468 F.2d 76 (6th Cir. 1972), cert. denied, 411 U.S. 981 (1973).

[10] Id. at 85.

[11] 21 U.S.C. § 343-1(a)(1)–(5).

[12] Regan v. Sioux Honey Ass’n Co-op., 921 F. Supp. 2d 938 (E.D. Wis. 2013).

[13] Id.

[14] Id at 943; see also Painter v. Blue Diamond Growers (C.D. Cal. May 24, 2017, No. 2:17-cv-2235)

[15] 94 F. Supp. 3d 1174 (S.D. Cal. 2015).

[16] 43 F. Supp. 3d 1359 (S.D. Fla. 2014).

[17] FDA Statement, Statement from USDA Secretary Perdue and FDA Commissioner Gottlieb on the regulation of cell-cultured food products from cell lines of livestock and poultry (Nov. 18, 2018), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm626117.htm.

[18] 21 CFR § 101.3(b)(1)-(3); see also 21 CFR 102.5(a).

[19] Garcia, 43 F. Supp. 3d at 1373–74 (citing Holk v. Snapple Beverage Corp., 575 F.3d 329, 339–41) (holding that informal FDA policy statements are not entitled to preemptive effect).