Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 21 No. 5 March 9, 2012

A NUTRITION LABEL FOR EACH STATE?: FEDERAL COURT PREEMPTS LAWSUIT AIMED AT PACKAGED FOODS

by
David Biderman

As one of the deans of the Chicago School of Law and Economics, Judge Richard Posner would no doubt agree that we live in a world of tradeoffs. Speaking on behalf of the U.S. Court of Appeals for the Seventh Circuit, Judge Posner late last year applied this tradeoff principle in *Turek v. General Mills*, 662 F.3d 423 (7th Cir. 2011). Specifically, in enforcing the preemption provisions of the Nutrition Labeling and Education Act ("NLEA"), the court ruled that when federal legislation tells food manufacturers what they should disclose about their products, private litigants cannot thereafter sue to require disclosure beyond the federal requirements. The decision stands as a victory for the food industry and should curtail some consumer class actions against food manufacturers.

The background is as follows: In 1990 Congress enacted the NLEA as part of a federal effort to, as then FDA commissioner David Kessler announced, "help millions of Americans make healthier choices about their diet." NLEA mandated that food manufacturers provide standardized information about their products' contents, which is displayed in the now familiar "Nutrition Facts Panel" appearing on nearly every food product package. This panel requires manufacturers to identify a standard serving size per package, the amount of calories and fats per serving, as well as a specified panel of nutritional elements.

To assure consistent and uniform labeling, NLEA also added the tradeoff: A provision which barred states from imposing any "requirements . . . made in the label or labeling of food that is not identical" to these under the federal labeling standards. In other words, only labeling requirements that are "identical" to those of the federal government may be enforced by the state. This provision recognizes that once the federal government has spoken, a state cannot require anything that is not the same. At the same time, it allows states to enforce labeling that is identical to federal standards.

Against this backdrop, in September 2010, Carolyn Turek, an Illinois consumer, sued General Mills and Kellogg's over the way they labeled the fiber in their Fiber One and Fiber Plus chewy bar products. Apparently prompted by a newspaper account describing different fiber types (which she attached to her complaint), Ms. Turek claimed that the fiber contained in these bars, inulin, a product

---

David Biderman is a partner practicing in the San Francisco and Los Angeles offices of the law firm Perkins Coie. He was the lead partner on the team that successfully defended General Mills in the *Turek* case described in this *Legal Opinion Letter*.

extracted from the chicory root, was somehow less beneficial than "natural" fibers found in fruits and vegetables. Reciting a series of alleged deficiencies in inulin fiber, she sought a court order that would have required defendants to disclose that the fiber in their bars was in some way not "natural," or to otherwise account for the alleged distinctions in fiber type. She did so even though the FDA regulations recognize no such distinctions and impose no such requirements.

Defendants initially put aside the debate about how a fiber derived from chicory root is not "natural" or whether inulin is worse or better than other fibers. They instead moved to dismiss the case at the outset on the grounds that the claim was barred by the preemption provision in NLEA. The Court granted the motion. Ms. Turek appealed to the Seventh Circuit.

In affirming the dismissal, the Seventh Circuit made clear that food manufacturers enjoy wide protection from consumer protection claims based on labeling. The court noted that it made complete sense for Congress to limit private litigants' rights to sue to impose any "non-identical" disclosure requirements. As the court noted, such requirements would subject food manufacturers to confusing and differing regulations in every state, which could lead to a dizzying array of food labeling provisions—thwarting the very consistency and uniformity that Congress originally sought. As Judge Posner stated, "packaged food products … are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food in more than one state crazy."

The court then evaluated the labeling of fiber on the General Mills and Kellogg's products. It concluded that the description of fiber was consistent with federal regulations requiring manufacturers to disclose the amount of fiber in a serving of their products. It found plaintiff's claims were not identical to those of federal law, which does not make any distinction between inulin and other types of fibers.

The court went further in dismissing the plaintiff's claims. Focusing on the provision that only identical requirements could be enforced, the court found that even if plaintiff's required disclosures were consistent with federal regulations, that was not enough: "Consistency is not the test; identity is." Again, even if these disclosure requirements did not conflict with federal law, the claims were still barred. Only claims seeking identical disclosures would be permitted.

This is an important decision in light of the apparent uptick in class action cases challenging food labeling and disclosure under state consumer protection statutes. The decision makes clear that the NLEA pre-emption language will be broadly interpreted. Courts must carefully evaluate complaints over food labeling for potential dismissal. If the decision is properly followed, it will protect food manufacturers who label their products in accordance with federal law and will assure that consumers have consistent information about the food products they buy.

  ISBN 1056 3059