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United States Food Law Update: Health Care Reform, Preemption, Labeling Claims and Unpaid Interns: The Latest Battles in Food Law

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UNITED STATES FOOD LAW UPDATE: HEALTH CARE REFORM, PREEMPTION, LABELING CLAIMS AND UNPAID INTERNS: THE LATEST BATTLES IN FOOD LAW

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This edition of the Food Law Update explores four legal issues arising in the first half of 2010 reflective of the diverse nature of the food law specialist. As the national debate surrounding the merits of health care reform dominated the legislative agenda, this article first will discuss the food labeling rules embedded within section 4205 of the Patient Protection and Affordable Care Act of 2010.[1] The authors then analyze the preemptive reach of the Federal Food, Drug, and Cosmetic Act and the Meat Inspection Act with respect to three separate California statutes regarding animal welfare standards, retail labels on meat packages and state-based mislabeling claims for "natural" products. Section three further discusses litigation concerning allegedly misleading label claims of health benefits, nutritional composition, natural foods and Country-of-Origin. The final section of this Update explores an increasingly important legal issue common in the local foods/small scale production content—the use of unpaid "interns" as labor and potential changes in regulatory oversight.

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1. Pub. L. No. 111-148 (2010), *amended by* Pub. L. No. 111-152 (2010).

As in previous editions of this update, necessity dictates that not every change is included; rather, the authors have limited their analysis to significant changes within the broader context of food production, distribution, and retail. The intent behind this series of updates is to provide a starting point for scholars, practitioners, food scientists, and policymakers dedicated to understanding the shaping of food law in modern society. Tracing the development of food law through these updates also builds an important historical context for the overall development of the discipline.

I. HEALTH CARE REFORM AND FOOD LAW: DO WE REALLY WANT TO KNOW HOW MANY CALORIES ARE IN A HARDEE'S THICKBURGER®?

One Thousand Three Hundred and Twenty. That's the number of calories in a Hardee's 2/3 pound Monster Thickburger®.[2] Of course, a consumer confronted with this staggering number could opt for the Original Thickburger®, which, at a mere 860 calories, seems positively healthful by comparison.[3] And a one-calorie Diet Coke, of course.[4] But do consumers really want to know how many calories are in their fast food? Apparently there is a compelling health rationale,[5] and thus the much-maligned health care reform law included a little-known provision mandating the nutrition labeling of chain restaurant standard menu items such as the Thickburger®.[6] This represents one of the first forays by the federal government into nutrition labeling in the food away from home sector. Previous federal nutrition labeling requirements exempted food sold at restaurants,[7] and only recently have state and local govern-

2. *See Nutrition Information*, HARDEES.COM, http://www.hardees.com/system/pdf_menus/9/original/Hardees_Nutritionals_5.20.10.pdf?1285096241 (last visited Dec. 20, 2010).

3. *Id.*

4. *See Calories in Diet Coke*, CALORIECOUNT.ABOUT.COM, http://caloriecount.about.com/calories-coca-cola-diet-coke-i98053 (last visited Nov. 22, 2010).

5. *See* Disclosure of Nutrient Content Information for Standard Menu Items Offered for Sale at Chain Restaurants or Similar Retail Food Establishments and for Articles of Food Sold From Vending Machines, 75 Fed. Reg. 39,026 (July 7, 2010) (stating that "nutritional information through menu labeling would provide Americans the opportunity to exercise personal responsibility and make informed choices about their diets" and citing studies that providing nutrition information assists customers in making healthier eating decisions at restaurants).

6. 21 U.S.C. § 343(q)(5)(H) (2006).

7. *See* 21 U.S.C. § 343(q)(5)(A)(1) (2006) (exempting restaurants from the general nutrition labeling requirements).

ments, on an *ad hoc* basis, required restaurants to provide some form of nutritional information on their menus.[8] For example, as of May 2008, New York City requires calorie displays on menus of chain restaurants with over 15 locations nationwide.[9] California enacted a similar bill with state-wide implementation effective January 1, 2011.[10]

The amendments to the Food, Drug, and Cosmetic Act require chain restaurants, defined as a restaurant with twenty or more locations operating under the same name and offering substantially the same menu items, to disclose the number of calories and a statement indicating the suggested daily caloric intake.[11] The calorie disclosure must be on the printed menu and menu board (including a drive-through menu board).[12] In addition, restaurants must provide customers, upon request, printed information regarding calories, total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, fiber, and total protein[13]—in sum, the nutrition information generally required on packaged food products.[14] A similar rule applies to individuals owning or operating twenty or more vending machines.[15] In this case, the vending machine operator must provide a sign in close proximity to the selection button for each item that discloses the caloric content.[16]

On July 7, 2010, the Food and Drug Administration (FDA) solicited comments to help guide the development of implementing regulations.[17] The agency specifically requested information on cur-

8. *See generally*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, COMPARISON OF MENU LABELING POLICIES, *available at* http://cspinet.org/new/pdf/comparison_of_ml_policies_6-9.pdf (last visited Dec. 20, 2010).

9. 24 RULES OF THE CITY OF NEW YORK § 81.50. For a more thorough discussion of the New York City regulation and accompanying legal challenges to the menu labeling requirements, see A. Bryan Endres, *United States Food Law Update, Consumer Protections and Access to Information rBST, BPA, the ADA and Color Additives*, 4 J. FOOD L. & POL'Y 263, 291-293 (2008).

10. *See* S.B. 1420 (Cal. 2008) (codified at section 114094 of the California Health and Safety Code).

11. Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (2010) (codified at 21 U.S.C. § 343(q)(5)(H)).

12. *Id.*

13. *Id.*

14. *See* 21 U.S.C. § 343(q)(1)(C) and (D) (2006).

15. Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (2010) (codified at 21 U.S.C. § 343(q)(5)(H)(viii).

16. *Id.*

17. *See* Disclosure of Nutrient Content Information for Standard Menu Items Offered for Sale at Chain Restaurants or Similar Retail Food Establishments and for Articles of Food Sold From Vending Machines, 75 Fed. Reg. 39,026 (July 7, 2010).

rent menu board labeling practices, methodologies for considerations related to condiments and custom orders, and any other factors deemed relevant by the public.[18] Although this action represents a potentially controversial first step into greater federal oversight of nutrition in the restaurant industry, the FDA noted that due to the proliferation of state and local menu board labeling requirements, several stakeholders sought a national approach to ensure uniformity and flexibility in the provision of additional nutrition information. Of course, the final FDA rules, due no later than March 23, 2011,[19] will determine if these stakeholders get what they bargained for, and it remains to be seen whether calorie disclosures will entice consumers to switch from the Thickburger® to more modest offerings.

II. CALIFORNIA PREEMPTION ACTIONS

In several respects, California is the prototypical laboratory for the exploration of alternative regulatory regimes.[20] Most notably, the Clean Air Act provides a mechanism for California to establish vehicle emissions standards beyond the federal minimum.[21] Within the food context, California was among the early leaders in establishing production standards for organic foods.[22] Not surprisingly, California is a leader in developing novel animal welfare and labeling requirements. Likewise, it is not surprising that a host of litiga-

18. *Id.* at 39,027-28.

19. Public Law 111-148 requires the agency to issue proposed regulations implementing the restaurant labeling rules no later than March 23, 2011. *Id.* at 39,027.

20. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'") (quoting New State Ice Co. v. Liebmann, 282 U.S. 262, 311 (1932) (Brandeis, J., concurring)).

21. *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009). *See also* 42 U.S.C. § 7543(a) (2006) (generally prohibiting states from implementing emission controls standards); *id.* at § 7543(b)(1) (providing a waiver provision that allows states adopt emissions control standards if certain criteria are met).

22. CAL. HEALTH & SAFETY CODE § 26569.13 (1979) (repealed 1990). *See also* A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organics and Other Legal Challenges for the Industry's Next Ten Years*, 12 DRAKE J. AGRIC. L. 17, 19 (2007) (discussing early state organic certification laws).

tion follows passage of these new production requirements. The following section discusses two key preemption decisions in the federal and state courts of appeal regarding slaughter of "downer" animals and point-of-sale labels on meat products. Within the context of preemption, this section further analyzes a third federal district court case exploring the interplay between the Federal Food, Drug, and Cosmetic Act and misbranding claims brought under California law.

A. California Animal Rights Law Survives Preemption Challenge before the Ninth Circuit

A major piece of California legislation aimed at the humane treatment of non-ambulatory or "downer"[23] animals at slaughterhouses has, for the most part, survived a preemption challenge by meat industry groups. In March, the Court of Appeals for the Ninth Circuit held in *National Meat Association v. Brown*[24] that the Federal Meat Inspection Act (FMIA) does not preempt certain provisions of the California Penal Code that prescribed criminal penalties for stockyards and slaughterhouses that receive and process non-"downer" animals for slaughter.

The case comes on the heels of considerable controversy. In 2008, the Humane Society of the United States released a video of non-ambulatory cows at California slaughterhouses being kicked, electrocuted, and dragged with chains, as well as other flagrant abuse.[25] The video triggered the largest beef recall in United States history.[26] In response, the California legislature amended §599f of its penal code to (1) prohibit slaughterhouses and stockyards from buying, selling, receiving, or processing non-ambulatory animals; (2) prohibit slaughterhouses and stockyards from butchering, processing, or selling meat from non-ambulatory animals for human consumption, and (3) prohibit slaughterhouses from holding non-ambulatory animals without taking "immediate action to humanely euthanize the animal."[27] In response to video footage showing immobile cows being rammed with bulldozers and blasted through the nostrils with high-pressure water hoses, the amendments also stipu-

23. *See* CAL. PENAL CODE § 599f(j) (West 2010) (defining "non-ambulatory" as being "unable to stand and walk without assistance").

24. 599 F.3d 1093 (9th Cir. 2010).

25. *Id.* at 1096.

26. *Id.*

27. CAL. PENAL CODE § 599f(c) (West 2010). *See also Brown*, 599 F.3d at 1096.

lated humane handling methods for moving non-ambulatory animals.[28]

Shortly before the Act's newly amended provisions were to take effect, the National Meat Association (NMA) filed suit in federal district court seeking declaratory and injunctive relief.[29] The district court held that the FMIA preempted the California law and entered a preliminary injunction; the State of California, along with the Humane Society and several other animal rights organizations, filed an interlocutory appeal.[30]

On appeal, the NMA argued that FMIA's specific provisions dealing with non-ambulatory animals preempted California's new law. Specifically, 21 U.S.C. § 603(a) requires federal inspection of all animals capable of being sold into interstate commerce as meat for human consumption.[31] Federal regulations require that any animals identified as non-ambulatory during these inspections be classified as "U.S. Suspect" and held for further examination;[32] if further inspection reveals certain diseases, then the animal must be disposed of.[33] If, however, the animal passes this second-level inspection, it may be slaughtered and distributed for human consumption.[34] The FMIA contains a general preemption provision prohibiting states from prescribing additional or differing requirements "with respect to premises, facilities, and operations of any establishment at which inspection is provided."[35]

Focusing carefully on the express preemption clause of the FMIA, the Court of Appeals rejected NMA's arguments. It reasoned that while the clause preempted laws that dealt with "premises, facilities, and operations" of slaughterhouses, the California provisions simply regulated the *types of animals* that can and cannot be slaughtered in California slaughterhouses.[36] As the California provisions "[do not] require *any* additional or different inspections than

28. CAL. PENAL CODE § 599f(e) (West 2010) ("[A] non-ambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.").

29. *Brown*, 599 F.3d at 1096.

30. *Id.* at 1097.

31. *Id.*

32. 9 C.F.R. § 309.2(b) (2010). *See also Brown*, 599 F.3d at 1097.

33. 9 C.F.R. §§ 309.4-309.18. *See also Brown*, 599 F.3d at 1097.

34. 9 C.F.R. § 309.2. *See also Brown*, 599 F.3d at 1097-98.

35. 21 U.S.C. § 678 (2006). *See also Brown*, 599 F.3d at 1098.

36. *Brown*, 599 F.3d at 1098. *See also* Cavel Int'l, Inc. v. Madigan, 500 F.3d 551 (7th Cir. 2007) (holding that the FMIA does not preempt state law banning horse slaughter); Empacadora de Carnes de Fresillo v. Curry, 476 F.3d 326 (5th Cir. 2007) (same).

does the FMIA, [it] is thus not a regulation of the 'premises, facilities, and operations' of slaughterhouses."[37] On the issue of implied conflicts preemption, the court noted that it is not impossible to comply with both sets of regulations at once because the FMIA does not *require* that non-ambulatory animals be slaughtered for human consumption.[38] Instead, said the court, the FMIA's inspection procedures apply *if* an animal is to be slaughtered for human consumption; the question of *whether* certain animals should be slaughtered "is up to the states."[39]

While the bulk of the California provisions survived a preemption analysis, the court suggested in dicta that the humane handling provision of the California law would not survive a preemption challenge because it prescribed "additional" or "different" requirements that would be in conflict with federal law (in particular, the federal law allows the dragging of unconscious non-ambulatory animals, whereas the state law does not).[40] But because the district court had failed to make the requisite findings of likelihood of irreparable injury and balance of the equities needed to justify a preliminary injunction, the Court of Appeals vacated the district court's order in its entirety.[41]

The *Brown* decision has broader significance within the context of the continuing controversy surrounding California's recent push for more robust animal welfare laws. In 2008, California voters passed the Prevention of Farm Animal Cruelty Act - popularly known as Proposition 2 - which prohibits the confinement of certain animals (including chickens, veal calves, and sows) in ways that do not allow the animals to extend their limbs or otherwise roam freely about.[42] Though the new provisions are not scheduled to take effect until 2015, considerable confusion already exists as to prohibited activities and enforcement methodologies.[43] In July 2010, ani-

37. *Brown*, 599 F.3d at 1099.

38. *Id.*

39. *Id.* at 1099-1100.

40. *Id.* at 1101.

41. *Id.*

42. *Prop 2 Wins in California!*, ANIMAL LEGAL DEFENSE FUND (Nov. 5, 2008), http://aldf.org/article.php?id=757; *Text of Proposed Laws*, CAL. SEC'Y OF STATE, http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop2 (last visited Dec. 20, 2010).

43. One of the largest California egg producers, J.S. West, recently spent $3.2 million upgrading to larger, air-conditioned chicken cages furnished with such luxuries as hen-style nail files. J.S. West company president Eric Benson told the *Wall Street Journal* in August that the cages "go way beyond" Proposition 2 requirements. Jean Guerrero, *Cracking California's Egg Rules*, WALL ST. J. (Aug. 19, 2010),

mal rights activists and California legislators united behind a new law, pushed through the California Assembly as A.B. 1437, which bans all out-of-state eggs that do not comply with Proposition 2 requirements.[44] So despite the recent partial victory for animal rights activists in *Brown,* litigation over animal welfare will surely continue: The protectionist language in A.B. 1437 leaves the law susceptible to a Dormant Commerce Clause challenge, and the National Meat Association will likely continue to pursue its challenge of the California Penal Code's humane handling methods, using the Ninth Circuit's dicta as substantial leverage.

B. FMIA Preemption of State Point-of-Sale Warnings on Meat Products

In a case decided in late 2009, a California state court of appeals examined the terms "label" and "labeling" as used in the Federal Meat Inspection Act (FMIA) and concluded that the federal law preempts state law requirements pertaining to "point-of-sale" warnings on meat products.

The case, *American Meat Institute v. Leeman,*[45] involved implementation of the California Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65) and the FMIA's meat labeling requirements. Proposition 65 requires the state to maintain a list of all chemicals known to cause cancer or reproductive toxicity and requires retailers to warn consumers about products sold in their stores that contain such chemicals.[46] One of the ways a retailer may give warning is via "point-of-sale" notices – that is, signs or advertisements placed on or near the display case or shelf where a product is offered for sale but not actually placed onto

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http://online.wsj.com/article/SB10001424052748703908704575433881581660408.html. Nonetheless, the move drew criticism from the Humane Society, which has consistently maintained that the only way to comply with Proposition 2 requirements is to raise chickens in cage-free environments. *Id.* Association of California Egg Farmers Executive Director Debbie Murdock, whose organization has called for clearer standards, summed up her position on the law for the *Wall Street Journal:* "'Who knows what the law states.'" *Id.*

44. Jim Miller, *Bill Would Apply Caged Hen Rules To Out-Of-State Eggs,* THE PRESS-ENTERPRISE (May 11, 2009), http://www.pe.com/localnews/inland/stories/PE_News_Local_S_eggs11.4644e80.html; Press Release, Humane Society of the United States, Governor Schwarzenegger Signs Landmark Egg Bill Into Law (July 6, 2010), *available at* http://www.humanesociety.org/news/press_releases/2010/07/ab1437_passage_070610.html.

45. 102 Cal. Rptr. 3d 759, 763 (Cal. Ct. App. 2009), *review denied,* No. S179937 2010 WL 1088008 (Cal. 2010).

46. *Leeman,* 102 Cal. Rptr. 3d at 763.

the packaging itself.[47] To be in compliance with Proposition 65 requirements, the point-of-sale sign must clearly state that the particular meat product on display contains a chemical known to the state to cause cancer and/or cause birth defects or other reproductive harm.[48]

At the federal level, the USDA has implemented a detailed regulatory scheme for meat labeling.[49] These regulations provide generally that "no final labeling shall be used on any product unless the sketch labeling of such final labeling has been submitted for approval" to the applicable regulatory agency.[50] Furthermore, the FMIA contains an express preemption clause that prohibits states from enacting "marking, labeling, packaging, or ingredient requirements in addition to, or different than" those contained in the FMIA.[51] The FMIA also defines "labeling" as "all labels and other written, printed, or graphic matter (1) upon any article or its container or wrappers, or (2) accompanying such article."[52] Accordingly, the plaintiffs argued that point-of-sale warnings constituted "labeling" under the FMIA because they constitute "written, printed or graphic matter" that *accompany* the meat to which it relates.[53] The trial court granted summary judgment for the plaintiffs, and the appeals court affirmed, holding that the FMIA expressly preempted Proposition 65's labeling requirements as applied to meat products.[54]

On appeal, the central question for the court was whether warnings that accompany meat products constitute "labeling" within the scope of the FMIA. Because the FMIA does not define specifically the word "accompany," the court turned to U.S. Supreme Court precedent for its analysis. In *Kordel v. United States*,[55] the Court interpreted the word "labeling" within the context of the FDCA. Critically, the Court held that certain material "accompanies" a product – and therefore constitutes "product labeling" – if the mate-

47. *Id.* at 763-64.

48. *Id.* at 764. *See also* People *ex. rel.* Lundgren v. Cotter & Co., 62 Cal. Rptr. 2d 368, 372 (Cal. Ct. App. 1997) ("[A] merchant can comply with Proposition 65 by posting a sign stating that the products are known to the state to cause cancer and/or are reproductively toxic.").

49. *See* 9 C.F.R. §§ 317.1-317.400 (2010); *Leeman*, 102 Cal. Rptr. 3d at 765.

50. 9 C.F.R. § 317.4(a); *Leeman*, 102 Cal. Rptr. 3d at 765.

51. 21 U.S.C. § 678 (2006). *See also Leeman*, 102 Cal. Rptr. 3d at 765.

52. 21 U.S.C. § 601(p). *See also Leeman*, 102 Cal. Rptr. 3d at 775-76.

53. *Leeman*, 102 Cal. Rptr. 3d at 776.

54. *Id.* at 767, 785.

55. 335 U.S. 345, 351-52 (1948).

rial "supplements or explains [the product]...No physical attachment one to the other is necessary."[56] The Court further held that material constitutes "labeling" if it is "designed for use in the distribution and sale" of the product.[57]

The *Leeman* court expressly adopted the *Kordel* Court's definition of "labeling" for purposes of its FMIA analysis, noting that Congress had defined the word "labeling" in the FMIA by borrowing the FDCA's definition of that word (as interpreted by *Kordel).*[58] With that work done, the *Leeman* court's express preemption analysis is straightforward: It concludes that the purpose of Proposition 65 warnings was to communicate to consumers that *this particular piece of meat* contains carcinogens or reproductive toxins, and that point-of-sale warning signs containing this product-specific information, though not physically attached to the product, necessarily will "supplement or explain the meat offered for sale" and will be used "in the distribution and sale" of the product.[59] Accordingly, the court held that the point-of-sale warnings constituted "labeling" within the meaning of the FMIA preemption clause.

Though decided by a state court, the *Leeman* case nonetheless deserves an extended mention in this Update because of the court's comprehensive search for the meaning of the terms "label" and "labeling" as used in the FMIA. In addition to examining the USDA's own interpretation of the terms in various policy memorandums and informal guidance, the court reviewed caselaw interpreting the terms as used in statutes with similar wording - namely, the Federal Food, Drug, and Cosmetic Act and the Federal Insecticide, Fungicide, and Rodenticide Act. This thorough search for meaning may well guide other courts (including federal ones) in future labeling litigation.

C. FDCA Does Not Preempt State Law-Based Mislabeling Claims

A California federal district court ruled in June 2010 that the express preemption provisions of the Federal Food, Drug, and Cosmetic Act (FDCA) did not preempt suits brought under state law for false or misleading product labels. In *Chavez v. Blue Sky Natural Beverage Co.*[60]–a class action suit brought on behalf of consumers

56. *Leeman,* 102 Cal. Rptr. 3d at 778 (quoting *Kordel,* 335 U.S. at 350).
57. *Id.*
58. *Id.* at 781-82.
59. *Id.* at 784-85.
60. 268 F.R.D. 365 (N.D. Cal. 2010).

allegedly deceived by the packaging and labeling on Blue Sky beverage cans—the plaintiffs argued the labels implied that the soda was canned in New Mexico, when in fact it was not.[61] The plaintiffs alleged violations of the California Business and Professional Code and the Consumers Legal Remedies Act, as well as common law claims of fraud, deceit, and misrepresentation.[62] The defendants argued that the FDCA preempted the claims.

On the issue of express preemption, the *Chavez* court noted that although the FDCA includes a preemption clause (codified at 21 U.S.C. § 343-1(a)) that lists certain provisions expressly preempting state law, the relevant section addressing "false or misleading labeling" was not among them.[63] The crux of the defendants' implied preemption analysis revolved around § 337(a) of the FDCA, which provides that only the federal government and the States (and not private citizens) may bring civil enforcement proceedings for violations of the FDCA.[64] The defendants argued that this provision effectively committed enforcement to the FDA, to the exclusion of state consumer law claims; the defendants also argued that such claims would stymie the purpose of the FDCA (ostensibly, consistent enforcement of food labeling requirements).[65] The *Chavez* court brushed off these arguments, holding that the lack of an FDCA express preemption clause addressing false and misleading labeling demonstrated that Congress had no "clear and manifest" intent to occupy the entire field of food labeling.[66] The court also cited to the Supreme Court's recent decision in *Wyeth v. Levine*,[67] in which the Court stated that while Congress enacted the FDCA "to bolster consumer protection against harmful products," it did not provide a federal cause of action for consumers injured by those products because it determined that "widely available state rights of action provided appropriate relief for injured consumers."[68]

In holding that the FDCA does not preempt state law remedies for false and misleading packaging claims, the *Chavez* court falls in line with several other district courts in California that have recently

61. *Id.* at 368.
62. *Id.* at 369.
63. *Id.* at 370.
64. 21 U.S.C. § 337(a) (2006); *Chavez*, 268 F.R.D. at 371.
65. *Chavez*, 268 F.R.D. at 371-73.
66. *Id.* at 372.
67. 129 S. Ct. 1187 (2009).
68. Chavez, 268 F.R.D. at 373 (quoting *Wyeth*, 129 S. Ct. at 1199).

held that the FDCA does not preempt state claims for allegedly false and misleading "natural" labels.[69]

III. OTHER LABELING ACTIONS

According to a nationwide study published by the FDA in March 2010, more than 50% of consumers read the food label on a product the first time they purchase it.[70] The FDA study also found that 56% of those surveyed believe that "only some" or "none" of the nutrient claims found on food labels (e.g., "low fat" or "high in fiber") are accurate.[71]

However, consumers are not the only ones casting a critical eye toward health-related food labels. In February 2010, the FDA issued warning letters to 17 companies.[72] Though these warning letters specifically targeted certain health claims (for example, 0 g *trans* fat claims, or nutrient content claims on food or beverages marketed to children under the age of 2), the FDA also issued an open letter to the food industry indicating that the agency would step up general enforcement of labeling violations.[73] Parallel consumer lawsuits against some of the companies singled out by the FDA (as discussed below) have already commenced.

This consumer skepticism and heightened agency attention may be, at least in part, what is driving the recent spate of lawsuits alleging that food manufacturers are misleading the public as to the purported health benefits of their products. This section of the Update divides the discussion of these labeling claims into four separate sections: false health claims, mislabeled and misbranded products,

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69. *See, e.g.*, Lockwood v. Con-Agra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009); Wright v. General Mills, No. 08CV1532, 2009 WL 3247148 (S.D. Cal. Sept. 30, 2009); Hitt v. Arizona Bev. Co., No. 08CV809, 2009 WL 449190 (S.D. Cal. Feb. 4, 2009).

70. Conrad J. Choiniere & Amy Lando, *2008 Health and Diet Survey*, U.S. FOOD AND DRUG ADMIN., http://www.fda.gov/Food/ScienceResearch/ResearchAreas/ConsumerResearch/ucm193895#HEALTHATTITUDES (last visited Nov. 18, 2010).

71. *Id.*

72. *Warning Letters*, U.S. FOOD AND DRUG ADMIN. (Mar. 3, 2010), http://www.fda.gov/Food/LabelingNutrition/ucm202859.htm. *See also* Brad Dorfman and Susan Heavey, *U.S. Warns Nestle, Others For Misleading Food Claims*, REUTERS, Mar. 3, 2010, *available at* http://www.reuters.com/article/idUSN03386 5520100303?pageNumber=1

73. Open Letter from Margaret Hamburg, Comm'r of Food and Drugs, U.S. Food and Drug Admin., to Industry (Mar. 3, 2010), *available at* http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm.

"natural" products litigation, and country-of-origin labeling (COOL) actions.

A. False Health Claims Litigation

1. Yo-Plus Probiotic Yogurt

Fitzpatrick v. General Mills,[74] which challenges the health claims made as to Yoplait Yo-Plus yogurt, is a typical example of the health claims litigation now pending in courtrooms across the country.

In July 2007, General Mills began selling Yoplait Yo-Plus yogurt, which is a version of its regular yogurt supplemented with probiotic bacteria and vitamins that purportedly promote digestive tract health.[75] General Mills subsequently launched a marketing blitz that touted the "key benefit of digestive health" offered by Yo-Plus yogurt.[76] Marketing tactics included a multimedia advertising campaign, promotional materials sent to health professionals, and health claims on Yo-Plus packaging.[77] The marketing emphasized regular consumption of the probiotic yogurt as essential to health. Indeed, up until September 2008 Yo-Plus containers contained a statement that implored consumers to "[e]at Yo-Plus every day to help maintain a balance of good-for-you bacteria in your digestive system and regulate digestive health."[78]

In August 2009, Florida consumer Julie Fitzpatrick filed a putative class action in Florida federal district court alleging that she had been deceived by General Mills' health claims on Yo-Plus yogurt. The suit, which alleges violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and a common law claim for breach of express warranty, states that the plaintiff ate Yo-Plus yogurt over a 12-month period, but that her digestive tract health remained the same "before, during and after" eating the yogurt.[79]

In early January, the district court certified a class of "all persons who purchased Yo-Plus in the state of Florida to obtain its claimed digestive health benefit."[80] The court held that issues common to the class of potentially thousands of members predominated

74. 263 F.R.D. 687 (S.D. Fla. 2010).
75. *Id.* at 690.
76. *Id.* at 691.
77. *Id.*
78. *Id.*
79. *Fitzpatrick*, 263 F.R.D. at 692.
80. *Id.* at 698.

over individual issues, with the main one being whether the Yo-Plus marketing campaign was deceptive and misleading. As the court put it:

> General Mills cannot evade the unmistakable fact that the objective – and realization – of its marketing campaign was to present Yo-Plus to Florida consumers as a product that . . . aids in the promotion of digestive health. The Court is not persuaded that the bulk of Florida consumers made the decision to purchase Yo-Plus, which is priced significantly higher than regular Yoplait yogurt, for reasons unrelated to its purported digestive health benefits. Indeed, the most obvious reason why consumers would buy Yo-Plus is that it promises something extra, and that something extra is a digestive health benefit.[81]

As of this writing, an interlocutory appeal by General Mills is pending with the Court of Appeals for the Eleventh Circuit.

Spurred on by the successful class certification in *Fitzpatrick*, other plaintiffs have subsequently filed copycat suits that rely upon similar consumer protection statutes and/or common law fraud actions. In addition to the Florida action, cases are pending in California,[82] New Jersey,[83] and Ohio.[84] In June 2010, the Judicial Panel on Multidistrict Litigation (MDL) denied a request to transfer and consolidate the cases, finding that they all involve statewide class claims that "will likely not overlap significantly."[85] The MDL panel noted that "[b]ecause all plaintiffs are represented by mostly common counsel and General Mills is the sole defendant, the parties have every ability to cooperate and minimize the possibilities of duplicative discovery and/or inconsistent pretrial rulings."[86]

The outcome of the Yo-Plus class action litigation may be influenced by The Dannon Company's recent agreement with the Federal Trade Commission to refrain from making certain health claims about its Activia brand yogurt after the FTC ruled that Dannon did not have adequate scientific evidence to support its claims.[87] As part of the settlement, Dannon agreed to clarify that consumers must eat three servings a day of Activia (which Dannon markets as a competitor to Yo-Plus) to gain the digestive benefits the company claims the

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81. *Id.* at 697.

82. *Johnson v. General Mills, Inc.*, No. 8:10-cv-00061 (C.D. Cal. filed Jan. 14, 2010).

83. *Amin v. General Mills, Inc.*, No. 2:10-cv-00305 (D.N.J. filed Jan. 19, 2010).

84. *Brock v. General Mills, Inc.*, No. 1:10-cv-00060 (N.D. Ohio filed Jan. 12, 2010).

85. *In Re* General Mills, Inc., Yoplus Yogurt Prod. Mktg. and Sales Practices Litig., 716 F.Supp. 2d 1371 (J.P.M.L. 2010).

86. *Id.*

87. Timothy Williams, *Dannon Settles With F.T.C. Over Some Health Claims*, N.Y. TIMES (Dec. 16, 2010), at B6.

yogurt can provide.[88] The FTC action follows a September 2009 class action settlement in which Dannon agreed to change the marketing and labeling of its Activia products and pay $35 million to reimburse consumers deceived by the company's claims.[89]

2. Omega-3 Fatty Acids

Two separate lawsuits have challenged statements made by food companies regarding the health benefits of omega-3 fatty acids. One of these cases, *Zeisel v. Diamond Foods, Inc.*,[90] targets a company that was the subject of the FDA warning letter action mentioned above. In February, the FDA sent a warning letter to Diamond Foods advising the company that the claims it was making about omega-3 on its shelled walnut packaging were false and misleading;[91] in March, the *Zeisel* putative class action suit was filed. The complaint alleges that Diamond Foods' claims linking consumption of the omega-3 fatty acids contained in walnuts to improved heart health and a lower risk of heart disease are false and misleading, and therefore violate the California Consumers Legal Remedies Act. [92] In September, the case survived a motion to dismiss on grounds that the Federal Food, Drug, and Cosmetic Act preempted the state claims; in doing so, the court cited to the *Chavez* decision discussed above.[93]

An earlier-filed state court suit, *Aust v. NW Natural Prods., Inc.*,[94] makes similar claims against a maker of omega-3-enriched gummy fish. That suit follows on the heels of a 2009 Federal Trade Commission letter that warned the defendant that its labels might be vio-

88. *Id.*

89. *Id.*

90. Complaint, Zeisel v. Diamond Foods, Inc., No. 10-cv-01192, 2010 WL 1459053 (N.D. Cal. 2010).

91. Warning Letter from Roberta Wagner, Dir., Office of Compliance, Ctr. For Food Safety, FDA, to Michael Mendes, President, Diamond Foods, Inc. (Feb. 22, 2010), *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm202825.htm.

92. Zeisel v. Diamond Foods, Inc., No. 10-cv-01192, at 1-2 (N.D. Cal. Sept. 3, 2010) (order denying defendant's motion to dismiss), *available at http://www.foodliabilitylaw.com/uploads/file/Zeisel.pdf.* The Complaint also alleged unlawful and fraudulent business practices, false advertising, and unjust enrichment. *Id.*

93. *Id.* at 4. *See supra* notes 60-69 and accompanying text (discussing the *Chavez* case).

94. No. 2:2010cv00496 (Wash. Super. Ct., King County, filed Mar. 23, 2010).

lating federal false advertising laws.[95] As of this writing, the *Aust* case is pending in King County Superior Court in Washington State.

B. Allegations of Misleading Nutritional Claims

In addition to health claims cases, recent lawsuits have targeted companies who have allegedly misled consumers as to the nutritional content of their products, with varying success. In May 2010, a federal district court in California dismissed a putative class action against Unilever, the maker of "I Can't Believe It's Not Butter Spread," which claimed that the company deceived consumers by labeling its butter substitute as being "made with a blend of nutritious oils" despite containing partially hydrogenated vegetable oil – a artificial substance that the plaintiffs argued "has no nutritional value and is known to cause a number of health problems."[96] The decision, *Rosen v. Unilever United States, Inc.,* held that while the plaintiffs' state law claims survived a preemption challenge under the federal Nutrition Labeling and Education Act, they did not survive a 12(b)(6) motion to dismiss for failure to state a claim.[97] The court held that the plaintiffs failed to plead with any particularity both the major premise (that "all constituent oils [in the spread] must be nutritious in order for the blend to be nutritious") and the minor premise ("that partially hydrogenated oil is not nutritious") upon which the suit was based.[98]

Pending litigation filed in early 2010 has also taken aim at misleading fat content claims. In February, plaintiffs represented by the same attorney filed two separate putative class action lawsuits against Kellogg Co. and Quaker Oats in California federal district courts, alleging that the two companies misrepresented the *trans* fat content of some of their baked goods. The complaint in *Chacanaca v. Quaker Oats Co.* alleges that Quaker Oats advertised its Chewy Granola Bars as containing zero grams of *trans* fat when in fact they contained levels of the artificial fat that made the products "dangerous and unfit for human consumption."[99] The complaints allege vio-

95. Letter from Mary K. Engle, Assoc. Dir., Div. of Adver. Practices, Fed. Trade Comm'n, to Robert E. Armstrong (Oct. 30, 2009), *available at* http://www.ftc.gov/os/closings/091030northwestclosingletter.pdf.

96. Rosen v. Unilever United States, Inc., No. 09-02563, 2010 WL 4807100, at *1 (N.D. Cal. 2010).

97. *Id.* at *4

98. *Id.* at *5-6.

99. Chacanaca v. Quaker Oats Co., No. 10-0502, 2010 WL 4055954 (N.D. Cal. 2010).

lations of various California consumer protection statutes, as well as common law unfair competition claims.[100] Another suit, *Higginbotham v. Kellogg Co.*,[101] makes similar allegations against Kellogg's NutriGrain bars and several brands of cookies.[102]

Consumer plaintiffs have also targeted foods advertised and labeled as "low in sodium" or generally "healthy." In March 2010, a complaint filed in New Jersey federal district court alleged that Campbell's Soup Co. misrepresented the salt and fat content in its "Less Sodium" and "Healthy Request" soup brands. The complaint in *Smajlaj v. Campbell Soup Co.* claims that the company's "25% Less Sodium" tomato soup contains 480 mg of sodium per serving – exactly the same amount as the company's regular tomato soup.[103] And it claims that Campbell's advertises its "Healthy Request" soup line as being "low in fat and cholesterol" when in fact certain varieties of that soup contain *more* grams of fat per serving than the regular soup line.[104] The complaint alleges violations of the New Jersey Consumer Fraud Act, as well as claims for breach of express warranty and unjust enrichment.[105]

C. Natural Foods Litigation

1. High Fructose Corn Syrup

A New Jersey district court has taken a potentially significant step toward resolution of the ongoing and seemingly never-ending litigation battle over whether drinks containing high fructose corn syrup (HFCS) may include an "all natural" label. *Coyle v. Hornell*

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100. *Id.*

101. Complaint at 15-17, Higginbotham v. Kellogg Co., No. 10-CV-255 (S.D.Cal. Feb. 1, 2010).

102. In addition to the suits against Kellogg and Quaker Oats, a New York resident filed a similar labeling claim in California federal district court in March against Dreyer's Grand Ice Cream, a company that had previously been targeted by the FDA in its warning letter actions the month before. However, that suit was dismissed in August after the court held that the plaintiff did not have standing to bring the claim under California consumer protection laws. Carrea v. Dreyer's Grand Ice Cream, Inc., No. C 10-01044 (N.D. Cal. Aug. 24, 2010) (order granting plaintiff's motion for reconsideration and granting defendant's motion to dismiss).

103. Complaint at 2, Smajlaj v. Campbell Soup Co., No. 1:33-av-00001 (D.N.J. filed Mar. 12, 2010), *available at* http://classactionlawsuitsinthenews.com/wp-content/uploads/2010/03/Campbell-Tomato-Soup-Class-Action-Complaint.pdf.

104. *Id.* at 7-8.

105. *Id.* at 9-10.

Brewing Co.,[106] is the latest in a series of cases filed in federal court that have challenged "all natural" product labels on Snapple beverages and Arizona Iced Tea.[107] The plaintiffs in these cases allege that "the complicated process used to create HFCS does not occur in nature and that the molecules in HFCS were not extracted from natural sources, but instead were created through enzymatically catalyzed chemical reactions in factories" and therefore cannot be considered "natural" ingredients.[108]

In 1993, the FDA solicited comments from the public on the issue, but ultimately declined to initiate rulemaking procedures to establish a definition for the term "natural."[109] Instead, it decided to maintain its informal policy of defining a "natural" product as one in which "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected in the food."[110] Since that time, the FDA has taken a case-by-case approach to the certification of particular ingredients as "natural," and has implemented only one regulation addressing the issue.[111] In 2009, the Court of Appeals for the Third Circuit held that the FDA's informal guidance on the term "natural" was insufficient to accord the definition the weight of federal law and therefore did not preempt state law mislabeling claims.[112]

That preemption ruling by the Third Circuit allowed cases like *Coyle* - which are based primarily on state consumer protection statutes and common law fraud claims - to continue. In *Coyle*, however, the defendants asked the district court to dismiss the action pursu-

106. No. 08-02797, 2010 WL 2539386 (D.N.J. 2010).

107. Holk v. Snapple Beverage Corp., 575 F.3d 329 (3d. Cir. 2009) (holding that FDA's guidance on the term "natural" did not carry the force of federal law and therefore did not preempt state claims under consumer protection statutes and the common law); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742, 2010 WL 3119452 (S.D.N.Y. 2010) (denying plaintiffs' motion to certify a class without addressing preemption issues); Covington v. Hornell Brewing Co., et al., No. 08-21894 (S.D. Fla. June 6, 2010) (order dismissing case with prejudice) (dismissing putative class action suit); Von Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d 1066 (E.D. Cal. 2010) (holding that FDA's guidance on the term "natural" did not carry the force of federal law and therefore did not preempt state claims under consumer protection statutes and the common law).

108. *Von Koenig*, 713 F. Supp. 2d at 1071.

109. *Coyle*, 2010 WL 2539386 at *2.

110. *Id.* at *2.

111. *Id.* at *3.

112. *Holk*, 575 F.3d at 341-42. *See also Von Koenig*, 713 F. Supp. 2d at 1076 (accepting as persuasive the *Holk* court's preemption ruling for purposes of an analysis of the safe harbor exception to California consumer protection laws).

ant to the abstention doctrine of primary jurisdiction, which is applicable when "an action that is otherwise within the court's jurisdiction raises some issue of fact that falls within the expertise and experience of an administrative agency."[113] The court agreed, noting that the case satisfied each of the four factors typically used in determining whether the doctrine applies.[114] First, categorizing HFCS as a "natural" ingredient involved "technical or policy considerations" within the FDA's particular area of expertise, and the question was appropriately within the FDA's discretion.[115] Second, and more critically, the court worried that any determination it made as to the status of HFCS as a "natural" ingredient could be inconsistent with rulings made by other district courts in the course of other currently pending HFCS litigation.[116] The court therefore referred the question of HFCS as a "natural" ingredient to the FDA and stayed the action for six months pending a determination.

And so the HFCS saga will continue for now. The administrative review process that the *Coyle* court used to send its question to the FDA is discretionary; it directs the FDA Commissioner to "institute a proceeding to determine whether to issue, amend, or revoke a regulation or order, or take or refrain from taking any other form of administrative action."[117] The *Coyle* court, recognizing this, reserved the right to extend the time period if the FDA indicated it would resolve the issue, or to terminate the stay and answer the question itself if the FDA were to decline the referral.[118]

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113. *Coyle* at *3 (citing Reiter v. Cooper, 507 U.S. 258, 268 (1993)).

114. The factors are:

(1) whether the question at issue is within the conventional expertise of judges or whether it involves technical or policy considerations within the agency's particular area of expertise;

(2) whether the question at issue is particularly within the agency's discretion;

(3) whether there exists a substantial danger of inconsistent rulings;

(4) whether a prior application to the agency has been made. *Id.*

115. *Id.* at *4.

116. *Id.* at *4.

117. 21 C.F.R. § 10.25 (2010). *See also Coyle* at *4, FN 6.

118. *Coyle* at *5. As this article went to press, the *Coyle* court lifted the stay and allowed the case to proceed after the FDA formally notified the court that it would not provide guidance on the term "natural." Coyle v. Hornell Brewing Co., No. 08-2797 (D.N.J. Sept. 23, 2010). More recently, two other federal district courts have dismissed with prejudice "all natural" claims against Snapple Beverage Corporation. *See* Holk v. Cadbury Schweppes Americas Beverages, No. 07-3018 (D.J.N. Nov. 23, 2010); Weiner v. Snapple Beverage Corp., No. 07-8742 (S.D.N.Y. Jan. 21, 2011).

2. Other "Natural" Products

After two years of litigation, Tyson Foods has reached a settlement in a lawsuit which claimed that the company had falsely labeled its chickens as "raised without antibiotics."[119] The proposed settlement, filed in January 2010, sets aside $5 million for a multi-tiered plaintiff class: up to $50 in recovery for consumers who can provide a receipt of purchase, up to $10 in recovery for plaintiffs who can estimate how much they spent, and a $5 coupon for those who simply claim to have purchased the mislabeled chickens.[120] A company spokesperson said that Tyson believes it "acted appropriately" with regard to its "Raised Without Antibiotics" labeling initiative, but felt it prudent to "resolve this legal matter and move on."[121]

D. Country-of-Origin Labeling

There have been several significant developments in county-of-origin labeling (COOL) litigation since the Spring 2009 Update[122] – the most significant of which is a Washington federal district court's rejection in February 2010 of a challenge to the U.S. Department of Agriculture's final COOL regulations. In *Easterday Ranches v. USDA,* a beef processing company that frequently imports Canadian cattle into the U.S. for slaughter argued that the USDA's COOL rules impermissibly conflicted with prior country-of-origin rules issued by the Treasury Department.[123] The district court disagreed, holding

119. *In Re* Tyson Foods Inc., Chicken Raised Without Antibiotics Consumer Litig., No. RDB-08-1982 (D. Md. May 11, 2010) (memorandum opinion and order granting settlement).

120. Ben Nuckols, *Settlement Over Tyson's No-Antibiotics Claim Offered,* TULSA WORLD, Jan. 15, 2010, http://www.tulsaworld.com/business/article.aspx?subjectid=47&articleid=20100115_47_E6_BALTIM861949&rss_lnk=5.

121. *Id.*

122. *See* A. Bryan Endres, *United States Food Law Update: Pasteurized Almonds and Country of Origin Labeling,* 5 J. FOOD L. & POL'Y 111 (2009).

123. No. cv-08-5067-RHW, 2010 WL 457432 (E.D. Wash. 2010). The Food, Conservation and Energy Act of 2008 Pub. L. No. 110-234, 132 Stat. 923 (2008) [hereinafter 2008 Farm Bill], represented a change in country-of-origin labeling requirements with respect to cattle imported into the United States for immediate slaughter. Prior to the 2008 Farm Bill, COOL labeling was regulated by U.S. Treasury rules, which allowed cattle born and/or raised in Canada or Mexico but exported to the U.S. for slaughter to be labeled exclusively as products of the United States. 19 C.F.R. § 102.11(a)(3) (2010); 19 C.F.R. § 102.20; *see also Easterday Ranches,* 2010 WL 457432 at *1. However, the 2008 Farm Bill's COOL provisions require such cattle to be labeled first as a product of the country in which they were born and/or raised, and then as a product of the United States. Food, Conservation, and Energy

that the COOL regulations mandated by the 2008 Farm Bill,[124] rather than implicitly repealing or conflicting with the Treasury marking rules,[125] "merely [provide] for the labeling of a particular set of commodities that were previously free from any COOL requirements."[126]

On the consumer action front, plaintiffs seeking to certify a class action lawsuit against a pet food maker that allegedly misrepresented the country of origin of its products were handed a defeat by the Court of Appeals for the Ninth Circuit in January 2010. The plaintiffs in *Kennedy v. Natural Balance Pet Foods* claimed that dog and cat food products made by the defendant were mislabeled because they contained "Made in the USA" labels despite containing ingredients sourced from China.[127] The district court denied class certification and dismissed the action; the court of appeals, in an unpublished opinion, agreed that the plaintiffs had failed to meet the commonality and typicality requirements of FRCP 23(a), but also held that the district court should have remanded the action to state court rather than dismissing it.[128]

Despite the Ninth Circuit's holding in *Kennedy*, country-of-origin labeling on pet food will likely continue to be a litigated issue, especially in the wake of the melamine-tainted pet food scare in 2007 that killed more than 4,000 cats and dogs and led to the largest pet food recall in history.[129] The melamine - a non-edible chemical used to make plastics and fertilizers - was traced back to China-sourced wheat gluten imported by the U.S. company ChemNutra. In February, a magistrate judge in Kansas City, Missouri sentenced the owners of ChemNutra, Stephen S. Miller and Sally Qing Miller,

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Act § 11002 (2008) (codified at 7 U.S.C. § 1638a(a)(2)(C)(2006)); *see also Easterday Ranches*, 2010 WL 457432 at *1; Endres, *supra* note 122, at 115.

124. Food, Conservation, and Energy Act § 11002 (2008).

125. 19 C.F.R. § 102.11.

126. *Easterday Ranches*, 2010 WL 457432 at *2.

127. *Kennedy v. Natural Balance Pet Foods*, No. 08-56378 (9th Cir. 2010) (unpublished opinion).

128. *Id.* at 2-4.

129. *See* Lisa Wade McCormick, *Chemnutra Owners Sentenced for Melamine-Tainted Pet Food*, CONSUMERAFFAIRS.COM (Feb. 6, 2010), http://www.consumeraffairs.com/news04/2010/02/chinese_formula22.html. *See also* A. Bryan Endres, *United States Food Law Update: Labeling Controversies, Biotechnology Litigation, and the Safety of Imported Food*, 3. J. FOOD L. & POL'Y 253, 278-80 (2007) (discussing the melamine-tainted pet food outbreak).

to three years' probation for their role in the incident.[130] The judge also ordered the Millers and ChemNutra to pay a total of $30,000 in fines.[131] The Millers had previously pled guilty to two strict-liability misdemeanor violations of the FDCA: one count of selling adulterated food and one count of selling misbranded food.[132] In addition to the criminal penalties, the Millers and ChemNutra had previously reached a $24 million civil settlement with owners of pets affected by the tainted food.[133]

E. Labeling for the Discerning Consumer: Profit Margin or Litigation Trap

The tie that binds all of these health claims and mislabeling actions together is, of course, the desire to stand out in a crowded food marketplace. Food companies know that consumers increasingly demand healthier foods (Wal-Mart's recent pledge to purchase more locally grown, sustainable produce is just one example of this trend);[134] they also know that they must differentiate their own products from the crowded market of "healthy" product choices. The desire to be different can be generalized across the food products industry: even the marketing of pet food as being "Made in the USA" is strategically aimed at consumers who would rather not see Fido's Tender Vittles become a victim of outsourcing and globalization. But it is also a matter of profit. A fundamental premise underlying the Yo-Plus, Campbell's Soup, and HFCS beverage litigation is that the defendant companies allegedly duped consumers into paying higher prices for "healthy" products that were allegedly not any healthier than the company's regular product offerings. Given the relative ease with which a product can be branded and sold using consistent, easily appealing messaging - for example, "Healthy Request" soup or yogurt with "good-for-you bacteria" - it is not surprising to see push back by regulators and consumers seeking substantiation. So long as the push for healthy food and product differentiation continues, likely so too will accompanying litigation.

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130. *Sentencing for Chemnutra Over Misdemeanor Violations in Melamine Litigation*, FIERCEBIOTECH.COM (Feb. 9, 2010), http://www.fiercebiotech.com/press-releases/sentencing-chemnutra-over-misdemeanor-violations-melamine-litigation.

131. McCormick, *supra* note 129.

132. *Id.*

133. *Id.*

134. Stephanie Clifford, *Wal-Mart to Buy More Local Produce*, N.Y. TIMES, Oct. 14, 2010, http://www.nytimes.com/2010/10/15/business/15walmart.html?_r=1&scp=1&sq= walmart%20to%20buy%20more%20local%20produce&st=cse.

IV. UNPAID FARM INTERNS: BALANCING THE NEED OF EDUCATION WITH EMPLOYEE PROTECTION

On March 22, 2010, Washington State Governor Chris Gregoire signed into law a bill establishing a pilot program for unpaid internships on small farms.[135] The bill is the Washington State legislature's means of addressing the need for beginning farmer training, while also protecting farm laborers from potential exploitation. For many years, internships have been a means for beginning farmers to learn sustainable or organic practices.[136] In theory, the farmer provides education and experience that would otherwise be unavailable to the intern.[137] Some farms, however, may use the intern more for grunt work than to provide mentorship,[138] a problematic situation that may create an unfair advantage and compromise wages and worker protections in the industry as a whole.[139] Regardless of how the farmer and intern perceive the relationship, farmers who take on unpaid interns may liable for costly labor law violations due to varying applicability of state and federal labor laws.[140]

The use of interns on farms has been garnering attention for several reasons. First, the practice has been on the rise in recent years as the local food movement increases demand for products from small farms and more people from non-farming backgrounds begin to pursue farming as a career (and experiential education to

135. *See* Farm Internship Program, 2010 Wash. Sess. Laws 1084 (codified at WASH. REV. CODE §§ 49.12.465, 50.04.237, 51.16.235) (expires Dec. 31, 2011).

136. Organizations such as the National Sustainable Agricultural Information Service have maintained databases to connect interns to farmers since 1989. *Sustainable Farming Internships and Apprenticeships*, NAT'L SUSTAINABLE AGRIC. INFO. SERV., http://attra.ncat.org/attra-pub/internships/ (last visited Nov. 4, 2010).

137. DOUG JONES, INTERNSHIPS IN SUSTAINABLE FARMING: A HANDBOOK FOR FARMERS 2 (Sarah I Johnston ed., 1999).

138. Leslie Cole, *Nurturing the Next Crop of Farmers*, OREGONLIVE.COM (July 27, 2010, 12:00 AM), http://www.oregonlive.com/foodday/index.ssf/2010/07/nurturing_the_next_crop_of_far.html.

139. Rob Rogers, *Organic Farmers Probed by State Over Free Labor*, MARINIJ.COM (July 3, 2010, 9:21 PM), http://www.marinij.com/ci_15437591?IADID.

140. *See, e.g.*, The Fair Labor Standards Act, 21 U.S.C. §§ 203(d), (e) (2006) (defining employer and employee); CAL. LAB. CODE § 1182.11 (West 2010) (establishing minimum wage for *all industries*); OR. REV. STAT. ANN. § 652.210 (West 2010) (defining employer and employee). *But see, e.g.*, ARK. CODE ANN. § 11-4-203(3)(F) (2009) (exempting any "individual employed by an agricultural employer who did not use more than five hundred (500) man-days of agricultural labor in any calendar quarter of the preceding calendar year" from the definition of employee).

facilitate the transition).[141] There are limited numbers of formal educational programs that offer instruction on operating a profitable, sustainable farm.[142] These programs may also be problematic to the extent that would-be farmers borrow money for tuition, thus starting their careers with a debt load that could act as a barrier to acquiring land and equipment. For the time being, this means interning on a farm is a desirable means of obtaining necessary experience.

Second, with the economic downturn, the use of unpaid internships in all sectors has been on the rise,[143] and the U.S. Department of Labor (DOL) recently issued employer guidelines that clarify when an internship may be unpaid.[144] Although there is an exception for some agricultural work,[145] this clarification may have alerted state labor departments to potential violations and generated enforcement actions in California[146] and Oregon.[147]

If the current trend of rising interest in local foods and farming as a profession continue, issues of obtaining on-farm experiential education will also continue to rise. Although the shortage of train-

141. *See* Kim Severson, *Many Summer Internships are Going Organic*, N.Y. TIMES, May 24, 2009, http://www.nytimes.com/2009/05/24/dining/24interns.html?scp=1&sq=many%20summer%20internships%20are%20going&st=cse ("Katherine L. Adam, who runs the National Sustainable Agriculture Information Service, ... said 1,400 farms sought interns this year, almost triple the number two years ago. The number of small farms, which attract the new agrarians and can use the cheap, enthusiastic help, has grown sharply since 2003, according to the [D]epartment [of Agriculture].").

142. For a listing of for-credit sustainable agricultural programs, *see Farming For Credit Directory*, RODALE INSTITUTE, http://www.rodaleinstitute.org/ffc_directory (last visited Nov. 4, 2010). The United States Department of Agriculture (USDA) also publishes a directory that identifies universities and organizations providing education and training. U.S. DEP'T OF AGRIC., EDUCATIONAL AND TRAINING OPPORTUNITIES IN SUSTAINABLE AGRICULTURE (19th ed. 2009), *available at* http://www.nal.usda.gov/afsic/pubs/edtr/EDTR2009.pdf. The directory lists opportunities for training and research to support sustainable agriculture in addition to information on training in actual farming. *Id.*

143. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, April 2, 2010, http://www.nytimes.com/2010/04/03/business/03intern.html?scp=1&sq=the%20unpaid%20intern,%20legal&st=cse.

144. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET # 71: INTERNSHIP PROGRAMS UNDER THE FEDERAL FAIR LABOR STANDARDS ACT (2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf. Note, however, Federal courts may not apply all six factors. *See* Mathew H. Nelson, *Internships and Federal Law: Are Interns Employees?*, 36 EMP. REL. L. J. 42 (2010).

145. *See* 29 U.S.C. § 213(a)(6) (2006); 29 C.F.R. Part 780 (2010). Discussed in more detail *infra*.

146. *See* Rogers, *supra* note 139.

147. *See* Cole, *supra* note 138.

ing opportunities for beginning farmers especially is acute in labor-intensive sustainable systems, it presents a concern for all agriculture as the farming population ages.[148] In some states, such as California, unpaid internships are illegal because all employers must pay workers minimum wage[149] and overtime;[150] they also must invest in workers' compensation insurance.[151] However, there is a provision for offsetting pay with the costs of room and board—a typical consideration offered to interns.[152] Other states, such as Illinois[153] and Arkansas,[154] allow agricultural exemptions to the minimum wage similar to those found in the Fair Labor Standards Act.[155] Although general advice to always pay minimum wage is useful in guarding against legal liability,[156] such counsel does not account for the variety of legal rules that may apply and fails to provide farmers with information on how to navigate the conflicts between their own perceived need (unpaid labor) and desire (pass on knowledge) and the constraints of the law. State agencies should, at minimum, provide information on the parameters of state rules.[157] Ideally, however, states should consider farm internship laws such as Washington's, which proactively seek to address the concerns of the various stakeholders.

Washington's farm internship law requires farmers earning less than $250,000 to apply for a certificate from the Washington Department of Labor (WA-DOL), demonstrating they have a training or educational curriculum in place, and have a written agreement outlining the terms of the internships that is signed by the intern and filed with WA-DOL.[158] The law is advantageous because it pro-

148. MARY AHEARN & DORIS NEWTON, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., BEGINNING FARMERS AND RANCHERS 17 (May, 2009), *available at* http://www.ers.usda.gov/Publications/EIB53/EIB53.pdf.

149. CAL. LAB. CODE § 1182.11 (2010).

150. CAL. LAB. CODE § 1815 (2010).

151. CAL. LAB. CODE § 3700 (2010).

152. CAL. LAB. CODE § 1182.13 (2010).

153. ILL. COMP. STAT. 105/3(d)(2) (2010).

154. ARK. CODE. ANN. § 11-4-203(3)(H) (2010).

155. 29 U.S.C. § 213 (2006).

156. For instance, see Neil Hamilton's advice to treat interns as employees by tracking hours and paying minimum wages. Reggie Knox, *The Farm Intern Conundrum*, CALIFORNIA FARM FUTURES, Spring, 2010, at 3, *available at* http://californiafarmlink.org/pdfs/spring_2010.pdf.

157. For instance, the Oregon Department of Agriculture provides information on their website on complying with labor law in employing interns. Or. Dep't of Agric., *Farm Internships in Oregon*, OREGON.GOV, http://www.oregon.gov/ODA/farm_internships.shtml (last visited Nov. 22, 2010).

158. Farm Internship Program, 2010 WASH. SESS. LAWS 1084, *supra* note 135.

vides oversight of internships by the DOL, while also enabling and mandating education. Furthermore, it is a pilot program requiring the WA-DOL to submit an outcomes report to the legislature in December, 2011.[159] The data from this report may be useful to other states considering authorizing farm internship programs.

However, Washington law has a shortcoming in that it fails to integrate the minimum wage requirements and exemptions established by federal law, which could result in inadvertent noncompliance. Under federal law, employers must pay minimum wage unless exempt;[160] an agricultural employer is exempt from minimum wage requirements if he or she employed agricultural workers for fewer than 500 man days per quarter in the preceding year.[161] Because the Washington law imposes different standards than federal law (i.e., less than $250,000 in sales vs. 500 man days per quarter), farmers who follow the Washington program's requirements may nonetheless be in violation of federal law.

Nonetheless, this legislation is a valuable first step towards addressing a serious barrier to development of regional food systems. Even as formal programs increase, on-farm training likely will always remain an important learning opportunity, and many formal educational programs require an internship. Therefore, future legislation needs to address how to balance the training requirements for beginning farmers against demands of fairness and calls for employee wage and working condition protections.

V. CONCLUDING THOUGHTS

Consumer demand for a healthier and more transparent food system continues to expand thereby raising a variety of legal issues from employment of unpaid interns to work on small-scale farms for experiential learning purposes to increased complexity and sophistication in both required and voluntary labeling claims on products. Federal chain restaurant menu labeling requirements, litigation surrounding false health claims, and other allegations of mislabeling demonstrate the intensity of shifting food preferences and stakeholder's struggles to balance consumer demand and market positioning within legal limits. Finally, an important development to track, in light of multiple courts upholding the California animal welfare and labeling laws, discussed above, will be the willingness of

159. *Id.*
160. 29 U.S.C. § 206 (2006).
161. 29 U.S.C. § 213(a)(6)(a) (2006).

other states to experiment with a wide variety of food labeling and/or production requirements to satisfy their constituent's social, environmental and economic preferences. Although an exciting development from the consumer perspective, the resulting patchwork of rules created via the legal laboratory know as California and other states with strong consumer-protection laws could place a significant burden on firms with multi-state operations seeking to push the creative limits of food labels.