

The Legal “Pecking Order”: Ninth Circuit Finds Poultry Labeling Claims Preempted

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In a unanimous precedential decision, a Ninth Circuit panel recently affirmed the dismissal of a putative class action against Trader Joe’s, which alleged that the statement “Up to 5% Retained Water” on Trader Joe’s poultry product labels was misleading. According to Plaintiff, her independent testing showed Trader Joe’s poultry products contained a higher percentage of retained water. However, the Ninth Circuit affirmed the district court’s finding that federal law preempted Plaintiff’s challenge to those advertising claims. [Webb v. Trader Joe’s, No. 19-56389, 2021 WL 2275265 \(9th Cir. June 4, 2021\)](#).

As the Ninth Circuit’s decision explained, poultry testing and labeling are federally regulated under the Poultry Products Inspection Act (“PPIA”) and overseen by the Food Safety and Inspection Service (“FSIS”). Importantly, FSIS had already inspected and approved Trader Joe’s “Up to 5% Retained Water” claim. FSIS had also reviewed and declined to object to the testing protocol Trader Joe’s used to obtain the data supporting that claim. And because Trader Joe’s had never publicly published its testing protocol, the Court found Plaintiff had not (and could not) allege that her testing protocol was the same as that used by Trader Joe’s.

On this basis, the Ninth Circuit found Plaintiff’s claims were preempted by the PPIA. Since the FSIS had already reviewed and accepted Trader Joe’s testing protocol and labeling, requiring Trader Joe’s to conform to Plaintiff’s test protocol, or to accept Plaintiff’s test data, would impose requirements “in addition to, or different than those” required under federal law—namely, the PPIA.

Plaintiff tried to avoid that finding by arguing Trader Joe's protocol was not "preapproved" by FSIS. In other words, Plaintiff argued FSIS did not object to the testing protocol, but did not explicitly approve it either. The Court was not persuaded. It noted that under the PPIA, Trader Joe's was only required to make its protocol available to FSIS, which "may object to or require changes" within 30 days. And under the federal regulatory scheme, FSIS's decision not to object or otherwise require changes to the protocol constituted federal approval.

Many advertising class actions take issue with labels that are allegedly misleading. When those labels are subject to a federal regulatory scheme (more commonly the FDCA than the PPIA) in which the federal agency approves or signs off on a subsequently challenged statement, preemption can be a strong basis for a dismissal motion.

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