CLIENT ALERT

U.S. District Court Declines to Enjoin Vermont's Genetically Engineered Ingredient Labeling Law

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On Monday, Judge Christina Reiss of the United States District Court for the District of Vermont issued an 84-page opinion in *Grocery Manufacturers Association et al. v. Sorrell et al.*, No. 5:14-cv-117 (D. Vt.), denying the plaintiffs' request for a preliminary injunction and giving the state of Vermont the green light to proceed with its plan to implement Act 120, the state's food labeling law requiring disclosure of genetically-engineered (GE) ingredients.

Act 120 was signed on May 8, 2014, and on April 20, 2015, Vermont adopted rules to implement the law's disclosure requirements. The law is the first to require food manufactures to identify the presence of GE ingredients on product labels. If this week's decision is upheld, in just 14 months—by July 1, 2016—food manufacturers will have to disclose "with clear and conspicuous words" whether food products they sell in Vermont are or may be produced with GE ingredients.

The law requires food manufacturers using GE ingredients to label "packaged raw agricultural commodit[ies]" clearly and conspicuously as "produced with genetic engineering." 9 V.S.A. § 3043(b)(1). Likewise, it requires that they label packaged processed foods as "partially produced with genetic engineering," "may be produced with genetic engineering," or "produced with genetic engineering.'" 9 V.S.A. § 3043(b)(3). Act 120 would also prohibit food manufacturers using GE ingredients from labeling or advertising such products as "'natural,' 'naturally made,' 'naturally grown,' 'all natural,' or any words of similar import that would have a tendency to mislead a consumer." 9 V.S.A. § 3043(c).

Lead by the Grocery Manufacturers Association, a coalition of food industry trade associations challenged Act 120 and sought a preliminary injunction to halt enforcement of the law based on First Amendment, Due Process and Supremacy Clause grounds. Plaintiffs argued that they would suffer irreparable harm if a preliminary injunction was not granted, pointing to the time, expenses, and resources needed to comply with the law. For example, the plaintiffs maintained that:

- The vast majority of their products would have to be relabeled;
- "[S]ignificant costs" would be incurred to comply with the law;
- The labeling requirement was based on an impermissible political value judgment that GE ingredients were potentially harmful, such that their presence should be disclosed to consumers;
- To comply with the law, manufacturers would have to evaluate whether their products contain, or are likely to contain, GE ingredients and, if necessary, determine the feasibility of implementing labels in compliance with the state's requirements; and
- In order to meet the compliance deadline, manufacturers would be forced immediately (even prior to trial), to expend resources to provide for dual production systems.

In the order issued on Monday, the court denied plaintiffs' motion for a preliminary injunction, holding that they failed to establish a "clear showing" of irreparable hardships associated with the challenged aspects of Act 120. It further dismissed the plaintiffs' claims that strict scrutiny applies to Act 120's GE disclosure requirements, that those requirements violate the

Commerce Clause, and that Act 120 is preempted by certain federal statutes. The result is that Act 120's GE ingredient disclosure requirements largely survive, and that Vermont's efforts to implement those requirements may proceed unimpeded. The Court did raise substantial questions about the viability of the law's ban on "natural" claims on foods made with GE ingredients; however that is likely a hollow victory for the plaintiffs if other parts of Act 120 are allowed to take effect.

The court's opinion joins a growing wave of consumer activist opposition to the presence of GE ingredients in food. Class action claims have been brought against food manufacturers, alleging that claims that products made with GE ingredients are "natural" are false and misleading. Maine and Connecticut have already joined Vermont in passing GE ingredient food labeling laws, and fifteen other states considered similar labeling legislation in just the past year. Although many of these ballot measures failed—notably in California, Washington, Colorado and Oregon—momentum seems to be building. California's GE ingredient labeling law, Senate Bill 1381, failed by only two votes. States considering GE ingredient labeling laws, like California and Maine, which held a public hearing on its GE ingredient labeling law on April 30, are likely to be encouraged by the decision coming out of Vermont.

Notably, the positions of consumer activists are counter to those of the U.S. Food and Drug Administration (FDA), which regulates the safety of foods and food products. FDA does not distinguish GE plants from traditionally bred plants, and foods containing GE ingredients must meet the same safety requirements as foods without GE ingredients. In addition, FDA has a voluntary consultation process which encourages developers of GE plants to have their products evaluated before going on the market. Through this consultation process, the evaluations have shown that GE plants are generally just as nutritious as traditionally grown plants and are no more likely to cause an allergic or toxic reaction.

Consistent with FDA's position that there is no nutritional difference between traditional and GE ingredients, and in response to the growing movement in states to require GE ingredient labeling, the U.S. House of Representatives has taken up again the Safe and Accurate Food Labeling Act of 2015, which would ban states from requiring labels on genetically modified foods. Opposition to this bill is strong, however (critics refer to it as the "Deny Americans the Right to Know Act"), and its chances for passage are murky at best.

Given the increasing likelihood that Vermont's Act 120 will go into effect in 14 months, food manufacturers must weigh their options. They can choose to comply with the disclosure requirements and continue selling their products in Vermont, accepting any negative messages attached to the disclosure of GE ingredients. Alternatively, they can decide that the costs of compliance with Act 120 are too extreme and decide to stop sales of their products in the state. A third option was actually suggested by the court, which noted that "[i]f GE manufacturers and retailers believe a GE disclosure conveys a negative message about their products, Act 120 does not prevent them from 'correcting' that message with their own disclosures, which may include a statement that the FDA does not consider GE food to be materially different from non-GE food." In other words, the court said that it may be time for an education campaign that focuses consumer attention on the benefits of GE ingredients. Vermont's Act 120 is likely the beginning, not the end, and consumers will either need to become comfortable with the idea of GE ingredients in their food, or such ingredients may disappear from grocery store shelves.

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