When Organic is Not Organic, Even When the USDA Says It Is

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Producers of agricultural products go to great lengths to achieve the U.S. Department of Agriculture's "organic" label. Under the USDA's National Organic Program (NOP), organic certification is a complex time-consuming process. The program implements the broad objectives of the federal Organic Foods Production Act of 1990 (OFPA), by establishing national standards for the production, marketing and labeling of organic products across the country. By creating uniform standards for what is organic, Congress intended to replace a myriad of often chaotic and conflicting state laws governing organic products. Although states are permitted to maintain their own organic certification programs, they may do so only with USDA approval, and only USDA-certified producers can sell or label their products as organic.

Still, many consumers have challenged the USDA's organic label with state law claims. Most recently, in Marentette v. Abbott Laboratories, a class action lawsuit was filed against Abbott Labs for falsely advertising its Similac infant formula products as organic. Abbott Labs achieved USDA organic certification, but the suit alleged that the company's infant formula was not organic because it contained preservatives. The federal court dismissed the state law claims, deciding that the state's consumer protection laws were preempted by, and in direct conflict with, the USDA's decision to certify the infant formula as organic.

However, Marentette is the exception to a recent trend of court decisions holding that state consumer protection claims are not preempted entirely by USDA certification. In Segedie v. Hain Celestial Group, Inc., a federal court refused to dismiss state law claims against Hain Celestial for falsely advertising its "Earth's Best" products as "organic" and "all-natural." The court noted that the USDA certification program does not provide any federal remedy to consumers "duped" into purchasing falsely labeled organic products. Consumers can file complaints with the USDA against non-compliant producers which may result in fines and loss of certification. However, the federal law provides no "private right" for consumers to sue the offending producers themselves. The court concluded that by allowing the false advertising claims to proceed, the consumer protections of the USDA certification program would be enhanced rather than obstructed.

Some state courts also have side-stepped the USDA organic certification program in upholding their state's consumer protection laws. In Quesada v. Herb Thyme Farms, Inc., the California Supreme Court allowed a class action lawsuit to proceed against an organic farmer for falsely advertising its herbs as organic, when in fact the farmer mixed organic and conventional herbs before selling them as "Fresh Organic." The court distinguished between state law claims challenging the USDA's organic label, which are preempted, and claims against organic producers for fraudulently misusing the label. As in the Hain Celestial case, the court concluded the USDA's fines against producers (for failing to comply with certification standards) act only as a floor and not a ceiling for potential liability.

The U.S. Supreme Court has yet to consider these state law challenges to the USDA certification program, and only one federal appellate court provides guidance. In the case of In re Aurora Dairy Corp., the U.S. Court of Appeals for the Eighth Circuit dismissed state consumer protection claims against Aurora Organic Dairy and the retailers of its organic milk (including Costco, Target, Safeway and Whole Foods) as preempted by USDA certification. However, the Eighth Circuit allowed false advertising claims to proceed pertaining to certain gratuitous statements accompanying the USDA organic label. The milk's packaging included claims that the dairy's cows enjoyed fresh air, clean water, exercise and a 100 percent organic diet. The Eighth Circuit therefore drew an important distinction between state claims challenging the USDA's organic label, and claims of false advertising not directly related to the organic certification process.

Many courts look to the Aurora decision as guidance in struggling to draw the line between allowing consumers to file false advertising claims against organic producers and the federal preemption of such claims. However, most courts are not bound by this decision and must await further guidance from the U.S. Supreme Court or other appellate courts. In the meantime, as noted in the Hain Celestial case, given the number of consumer protection laws and cases filed across the country, there likely will be many differing court interpretations of the same preemption standards. Even where federal preemption is recognized, it is rarely interpreted to be a pervasive restriction on state laws claims, and allows for numerous exceptions.

Producers of organic products cannot rely entirely the USDA's organic designation as a shield against state consumer protection laws. Before advertising their products as organic, all-natural or something similar, producers need to assess the accuracy of their claims and their underlying compliance of the factual circumstances that allowed them to achieve organic certification in the first place.

If you have any questions, or if you think your business needs assistance in determining the standards for selling and labeling products as organic, contact Barley Snyder Partner Chris Churchill at 717-399-1571, or contact him at cchurchill@barley.com.

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