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NINTH CIRCUIT RELEASES TRADER JOE'S FROM RETAINED-WATER POULTRY SUIT ON PREEMPTION GROUNDS

by Frank Cruz-Alvarez and Britta Stamps Todd

Food-labeling class actions became one of the hottest trends in recent years, yet published appellate opinions on the issues remain rare. The Ninth Circuit approved the dismissal of one such food-labeling class action last week in *Webb v. Trader Joe's Company* based on federal preemption, strengthening the argument for defendants in future cases to avoid prolonged litigation over a federally-regulated label.

Many people would agree that something about Trader Joe's products has always made them seem better—healthier, even—than similar products at any other grocery store. A big part of the magic behind why Trader Joe's products appear superior to other stores' products is the label Trader Joe's puts on its products. But Trader Joe's cannot write whatever it wants on the labels, and it comes as no surprise that each food label is highly regulated.

At issue in *Webb* is the label on chicken breasts, chicken thighs, and chicken wings. Specifically, the plaintiff filed suit regarding the labels' statement that each of those poultry products contained "[u]p to 5% retained water." The plaintiff purchased those products at various Trader Joe's stores and took them to be examined at a food testing lab. She claimed that the lab concluded the products contained, on average, 9% retained water rather than the 5% or less retained water claimed on the labels. She filed a putative class action against Trader Joe's, alleging violations of California's Consumer Legal Remedies Act, California's Unfair Competition Law, and California's False Advertising law in addition to causes of action for breach of express and implied warranties, theft by false pretenses, and unjust enrichment.

Naturally, poultry products are subject to many regulations, including the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451. The Food Safety and Inspection Service ("FSIS") has authority to oversee the labeling of poultry products, and requires any company using a label with retained-water data to make available the protocol used to measure the retained water to FSIS. And where a poultry product label makes any "special statement" (including health claims, ingredient and processing method claims, and claims regarding the raising of animals), the entire label must be submitted for approval by FSIS. Trader Joe's labels on its chicken products not only stated the retained-water percentage, but also told consumers "no antibiotics ever," "no added hormones," and "all vegetarian fed"—each of which constitute a "special statement" requiring approval from FSIS.

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In its ruling on Trader Joe's motion for judgment on the pleadings, the district court held that the plaintiff's claims were expressly preempted under 21 U.S.C. § 467e because the PPIA set forth the regulations for the products' labels. The Ninth Circuit affirmed the district court's dismissal with prejudice, explaining that the plaintiff's claims were preempted on two grounds.

First, the state-law claims are expressly preempted because FSIS did not object to Trader Joe's retained-water data collection protocol. The lack of objection by FSIS allows the products to enter the stream of commerce under the federal regulations. Second, because Trader Joe's included those "special statements" on the chicken labels as well, FSIS actually reviewed the entirety of the labels, creating a second basis for express preemption of plaintiff's state law claims.

The plaintiff could not show that the protocol used by the private food testing lab that examined her products was the same as the protocol Trader Joe's submitted to FSIS for review. Thus, the plaintiff essentially sought to impose her own retained-water protocol on Trader Joe's that was different from, or in addition to, what was required by statutes and regulations implementing the PPIA. Any further label requirements the plaintiff sought to impose via her state-law claims would inherently be "different from" those required by the PPIA, which therefore preempts her claims. 21 U.S.C. § 467e. The Ninth Circuit held that the plaintiff could not get around the FSIS approval of Trader Joe's labels to move forward with any of her state-law claims.

At the end of the opinion, the Ninth Circuit drops a hint to future plaintiffs in food-labeling class actions, however. In explaining why dismissal with prejudice was warranted, the court pointed out that the only way this plaintiff's claims "might not be preempted" would be if she could plausibly allege that the products she purchased were examined using Trader Joe's exact data collection protocol but obtained different results. If the plaintiff could have done that, she could have argued Trader Joe's misrepresented its data to the FSIS, potentially keeping her claims alive. While the court recognized that it is unclear whether the protocol Trader Joe's submitted to the FSIS for approval is even available to the public, it is easy to foresee an opposite outcome to this case if the plaintiff was able to allege that her products contained 9% retained water when tested with Trader Joe's own protocol.

The obvious lesson remains: if a federal regulation imposes requirements or approval processes for a food label, and the producer has complied with those federal regulations, express preemption can be a quick avenue for dismissal of a potentially far-reaching class action.