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# Private Parties and the FFDCA: How Creative Litigants Have Circumvented Section 310 and Undermined the NLEA's Express Preemption Amendments

## **Cover Page Footnote**

J.D. candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2006, Wheaton College. The author wishes to thank Maile Hermida for her thoughtful help and feedback in reviewing this comment. In addition, the author wishes to thank the staff of the Catholic University Law Review whose edits undoubtedly improved this comment.

# PRIVATE PARTIES AND THE FFDCA: HOW CREATIVE LITIGANTS HAVE CIRCUMVENTED SECTION 310 AND UNDERMINED THE NLEA'S EXPRESS PREEMPTION AMENDMENTS

*By Joe Dages*<sup>+</sup>

“[T]he way we eat represents our most profound engagement with the natural world. Daily, our eating turns nature into culture, transforming the body of the world into our bodies and minds.”<sup>1</sup> Individuals are deeply connected to the food they consume.<sup>2</sup> This connection creates a justifiable interest in knowing what is in one’s food and ensuring that food is responsibly labeled and subject to appropriate consumer protection by the government.<sup>3</sup> However, increased regulation can impose costs on industry *and* consumers.<sup>4</sup>

Food companies face a labyrinthian regulatory scheme governing the labeling of food and beverage products.<sup>5</sup> Under the current scheme, multiple government actors have overlapping jurisdiction over food labeling.<sup>6</sup> This

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1. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 10 (2006).

2. *Id.*

3. *Id.* at 10–11.

4. See, e.g., Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658, 2669–71 (Jan. 15, 2009) (codified at 7 C.F.R. pts. 60 and 65) (discussing the multitude of comments from industry indicating that mandating Country of Origin Labeling (COOL) for meat products would greatly increase costs for manufacturers and consumers); see also Elaine Watson, *DEFRA: Changing Labels Costs “Substantially” More Than We Thought*, FOOD MANUFACTURE (Dec. 9, 2010), [http://www.foodmanufacture.co.uk/Packaging/DEFRA-Changing-labels-costs-substantially-more-than-we-thought?utm\\_source=copyright&utm\\_medium=OnSite&utm\\_campaign=copyright](http://www.foodmanufacture.co.uk/Packaging/DEFRA-Changing-labels-costs-substantially-more-than-we-thought?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright).

The author discusses the findings of a study conducted on behalf of the British government, which found that merely mandating COOL on food products could significantly increase costs for manufacturers to accurately account for the origin of each ingredient in complex food products consisting of several ingredients. *Id.*

5. See, e.g., *Ensuring Safe Food: from Production to Consumption*, Nat’l Acad of Sciences, 25, (1998). The National Academy of Sciences explained that “[t]he food safety system in this country is complex and multilevel,” and “essentially uncoordinated.” *Id.* The Academy notes that, “[a]s a consequence, the government’s role is also complex, fragmented, and in many ways uncoordinated.” *Id.* See also NEAL D. FORTIN, *FOOD REGULATION*, 23–32 (2009) (discussing the large number of agencies that exert jurisdiction over regulating the food and beverage industry and how that jurisdiction overlaps).

6. See FORTIN, *supra* note 5, at 23–32 (listing the multitude of government entities with jurisdiction over various, frequently overlapping, aspects of the food and beverage industry).

overlap in jurisdiction creates uncertainty about whether a private litigant can enforce federal food labeling laws through actions in state courts.<sup>7</sup> California, by virtue of its strong consumer protection statutes, stands at the forefront of a litigation laboratory where courts have struggled with labeling law issues in recent cases, such as *Pom Wonderful LLC v. Coca-Cola Co.* and *In re Farm Raised Salmon Cases*.<sup>8</sup>

At first glance, it may seem as though the goals of consumers conflict with those of food manufacturers.<sup>9</sup> A deeper examination, however, reveals that consumers and food companies want the same regulatory environment: a system that ensures food is safe, labels are honest so as to foster competition in the marketplace, and food remains affordable.<sup>10</sup> Attempting to achieve this regulatory balance has continuously vexed Congress, courts, executive agencies, and state governments.<sup>11</sup> Therefore, to provide legal clarity and promote the mutual interests of consumers and manufacturers, Congress should prohibit private litigants from bringing lawsuits in state courts if the underlying facts supporting the claim rely on product labeling information that is subject to express preemption under the Federal Food, Drug, and Cosmetic Act (FFDCA).<sup>12</sup>

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7. See *infra* notes 13–24 and corresponding text.

8. See *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012); *In re Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008).

9. For example, in *Physicians Comm. for Responsible Med. v. Glickman*, a variety of consumer and health groups brought suit against the United States Department of Agriculture (USDA) in 2000, alleging the Department failed to protect the public by catering to the interests of the food industry by developing an advisory committee that did not adequately represent their views. 117 F. Supp. 2d 1, 3 (D.D.C. 2000).

10. See, e.g., *About GMA: For Consumers*, GROCERY MANUFACTURERS ASSOCIATION, <http://www.gmaonline.org/about/for-consumers/> (last visited July 21, 2013) (stating that, “its members are committed to ensuring that consumers have safe, healthy food and grocery options. . . . GMA and its members are constantly working to provide consumers with helpful, easy-to-understand and essential information about grocery products and nutrition”). The Grocery Manufacturers Association (GMA) is a trade association representing the largest food and beverage companies in the country. *About GMA*, GROCERY MFRS. ASS’N, <http://www.gmaonline.org/about/> (last visited July 21, 2013).

11. See Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 FOOD & DRUG L.J. 371, 371–72 (2002) (“Legal scholarship, however, has failed to develop a comprehensive theory of the proper role for government in the area of food regulation and public nutrition. Indeed, a close look at U.S. nutrition policy at the dawn of the twenty-first century reveals not a ‘coordinated, comprehensive set of policy directives,’ but rather a collection of distinct programs that affect, in a variety of ways, food production, consumption, and regulation.”). The author further explains that “[t]he patchwork nature of nutrition policy can be partially attributed to the complexity of the interests that government has sought to protect, the diversity of goals it has aimed to achieve, and substantial confusion and disagreement over the proper nature and scope of governmental intervention.” *Id.*

12. Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301–399 (2006 & Supp. 2012).

State regulation of food products has roots stretching back to the eighteenth century,<sup>13</sup> long before the federal government passed its first food safety act in 1906.<sup>14</sup> The power to regulate in-state police activities that have a bearing on health and safety is reserved for the states.<sup>15</sup> States have historically chosen to exercise this power by enacting statutes designed to regulate food manufacturers' labeling claims.<sup>16</sup> California, widely considered to be a leading state on matters involving consumer protection, has been particularly active in developing a variety of legal mechanisms for policing the food industry.<sup>17</sup> On a timeline running roughly concurrent to that of federal efforts, California enacted several statutes aimed at food labeling and consumer protection, including the Sherman Food, Drug, and Cosmetic Law (Sherman Law), the

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13. See FORTIN, *supra* note 5, at 4 (noting that Massachusetts passed food laws banning the sale of "unwholesome" foods as early as 1785). An implied warranty of wholesomeness has long been part of United States common law since at least 1815. See Harry C.W. Melick, *The Sale of Food and Drink*, 17 (Prentice-Hall 1936) (citing *Van Bracklin v. Fonda*, 12 Johns. 468 (N.Y. 1815)) (referencing an inference made by the author based on dictum in the court's opinion that suggests "there was an implied warranty of wholesomeness").

14. See *Pure Food and Drug Act of 1906*, Pub. L. No. 59-384, 34 Stat. 768 (1906).

15. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (stating that "[t]here are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers . . . [that] relate to the safety, health, morals, and general welfare of the public.") *overruled on other grounds by* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."); *Mugler v. Kansas*, 123 U.S. 623, 657-59, 663-64 (1887) (discussing the right of states to regulate and ban the sale of intoxicating liquors to promote the general welfare); *Munn v. Illinois*, 94 U.S. 113, 135-36 (1876) (upholding an Illinois law providing for the inspection of grain warehouses on grounds the state was acting within its police powers).

16. See *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 431-32 (Cal. 2004) (discussing various state laws enacted in Wisconsin, Maryland, Ohio, and New York designed to prohibit manufacturers' claims that could mislead consumers).

17. See, e.g., CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006) (providing that, "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual"). Another section of the statute, known as Proposition 65 requires California's Office of Environmental Health Hazard Assessment to publish a list of chemicals known to the state to cause cancer. CAL. HEALTH & SAFETY CODE § 25249.8. Proposition 65, also provides for a private right of action, which allows "any person in the state to bring suit under the Act, and permits the award of money damages for violations." See Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 Chap. L. Rev. 357, 369 (2010) (citing CAL. HEALTH & SAFETY CODE §§ 3000-3204 (2003)). This statutory framework has created prolific litigation against a variety of industries for failing to adequately warn consumers of risks. See Linnekin, *supra*, at 369-70 (discussing the multitude of Proposition 65 lawsuits filed against food manufacturers in California for failure to warn despite the fact that Prop 65 was never intended to apply to food and beverages); see also Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 Ecology L.Q. 303, 305-06 (1996) (discussing the purpose of Proposition 65 and noting that "[p]roposition 65 represents the most ambitious attempt by a state to regulate hazardous chemical exposure through information disclosure rather than direct mandate").

Unfair Competition Law (UCL), the False Advertising Law (FAL), and the Consumers Legal Remedy Act (CLRA).<sup>18</sup>

Unlike the California statutes mentioned above, section 310 of the FFDCA contains a provision limiting who may enforce the act: “[e]xcept as provided in subsection (b) of this section, all such proceedings for the enforcement, or to restrain violations, of [the FFDCA] shall be by and in the name of the United States.”<sup>19</sup> This provision prevents private parties from bringing suit under the FFDCA.<sup>20</sup> In addition, section 403A(a) of the FFDCA includes several preemption provisions that require state labeling laws to be identical to some of the federal standards articulated in the FFDCA’s statutory provisions and implementing regulations.<sup>21</sup> The identical language of these state provisions present an important question: can creative private litigants bring lawsuits inherently predicated on information regulated under the FFDCA but facially pleaded under a state statutory or regulatory provision?

Recent litigation in the California Supreme Court and the Ninth Circuit exemplifies how courts have struggled with this question.<sup>22</sup> The California Supreme Court ruled in the *In re Farm Raised Salmon Cases* that private

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18. Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE §§ 109875 et seq. (West 2012); Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (West 2008); False Advertising Law, CAL. BUS. & PROF. CODE § 17500 (West 2008); Consumers Legal Remedy Act, CAL. CIV. CODE §§ 1750, 1760 & 1770(a)(1)–(22) (West 2009 & Supp. 2013).

19. Federal Food, Drug, and Cosmetic Act of 1938 § 310, 21 U.S.C. § 337 (2006) [hereinafter *FFDCA*]. The FDA has jurisdiction over the enforcement of labeling violations under the FFDCA, but the Federal Trade Commission (FTC) has jurisdiction over advertising-related infringement. See Federal Trade Comm’n, *Enforcement Policy Statement on Food Advertising*, May 1994, available at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm> (“Since 1954, the FTC and the FDA have operated under a Memorandum of Understanding, under which the Commission has assumed primary responsibility for regulating food advertising, while FDA has taken primary responsibility for regulating food labeling.”). Determining what constitutes a label and what constitutes advertising is a complicated topic that is beyond the scope of this Comment. This Comment concentrates on food labeling violations under the FDA’s enforcement jurisdiction and not advertisement violations under the FTC’s jurisdiction.

20. See *Animal Legal Def. Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 283 (D. Mass. 1986), aff’d, 802 F.2d 440 (1st Cir. 1986) (holding the private litigants could not bring suit under the FFDCA); *Nat’l Women’s Health Network, Inc. v. A. H. Robins Co., Inc.*, 545 F. Supp. 1177, 1178 (D. Mass. 1982) (stating “I have no difficulty in holding that no private right of action can be implied under the Federal Food Drug and Cosmetic Act”); *State of Fla. ex rel. Broward County v. Eli Lilly & Co.*, 329 F. Supp. 364, 366–67 (S.D. Fla. 1971) (ruling that the State of Florida could not bring suit to enforce the FFDCA where the defendant drug company allegedly failed to properly warn consumers). Section 310(b), however, does provide for limited enforcement of FFDCA provisions by state authorities if the food in question is located within the confines of the state. FFDCA § 310(b), 21 U.S.C. § 337(b).

21. FFDCA § 403A(a)(1)–(5), 21 U.S.C. §§ 343–1(a)(1)–(5) (2006 & Supp. 2012). This language was added to the FFDCA in 1990 with the passage of the Nutritional Labeling and Education Act (NLEA). Nutritional Labeling and Education Act, Pub. L. No. 101–535, 104 Stat 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.).

22. *In re Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008); *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012).

parties *were not* barred from enforcing state law provisions that arguably fall under the preemptive purview of the FFDCA.<sup>23</sup> Just four years later, the Ninth Circuit held in *Pom Wonderful LLC* that claims based on the Lanham Act, which protects merchants and consumers from unfair competition, *were* preempted by the FFDCA.<sup>24</sup>

This Comment begins by discussing the existing federal statutes that govern food labeling, specifically the FFDCA and the Nutritional Labeling and Education Act (NLEA). Special attention will be paid to the legislative history of the FFDCA and NLEA provisions that relate to the preemption of state laws and those that govern food colorings and product ingredient composition claims. The relevant provisions of the Lanham Act will also be briefly examined.

Next, this Comment reviews states' rights under the constitutional "police powers" doctrine in the context of food labeling. The discussion then turns to the curious relationship between the FFDCA, the Lanham Act, and various state statutes—in particular the Sherman Law, the UCL, the FAL, and the CLRA. The court decisions in *In re Farm Raised Salmon Cases* and *Pom Wonderful LLC v. Coca-Cola Co.* will be discussed to highlight the difficulty courts have in understanding and applying federal and state laws relating to food labeling and consumer protection.

Finally, this Comment suggests that, although the current legal landscape in this arena may seem reconcilable, case law demonstrates that this body of law is burdened with irregularities and inconsistencies and reveals a judicial split in interpreting the preemptive nature of the FFDCA. Such a paradigm of enforcement creates an unnecessarily confusing environment that courts, consumers, and businesses struggle to apply and comply with. Therefore, this Comment argues that Congress should prohibit private entity lawsuits if the underlying facts supporting the claim rely on product labeling information that is subject to express preemption under the FFDCA.

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23. See *In re Farm Raised Salmon Cases*, 175 P.3d at 1184 (holding the FFDCA does not preempt state law claims predicated on disclosure requirements identical to the provisions of section 403A).

24. *Pom Wonderful*, 679 F.3d at 1176. The *Pom Wonderful* court remanded the state law claims, leaving the determination as to whether the claims could proceed to the district court. *Id.* at 1178–79. At the time the District Court issued its opinion, it was unclear if one needed to be eligible for restitution in order to bring suit under California's UCL and FAL. *Id.* However, the *Pom Wonderful* court explained that this question was subsequently settled by the California Supreme Court in *Kwikset Corp. v. Superior Court* and *Clayworth v. Pfizer, Inc.*. *Id.* at 1178–79 (citing *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 895 (Cal. 2011); *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1088 (Cal. 2010) (noting that standing under the UCL & FAL does not depend on eligibility for restitution)).

I. A LARGE BODY OF EXISTING AND LARGELY OVERLAPPING LAW GOVERNS  
FOOD LABELING, ADVERTISING, AND MARKETING

A. *Relevant Federal Laws Regulating Food Labeling, Advertising, and  
Marketing*

1. *The 1938 Version of the Federal Food, Drug, and Cosmetic Act*

Before Congress passed the FFDCFA in 1938, the Pure Food and Drug Act of 1906 was the primary statute governing the regulation of food.<sup>25</sup> In 1933 Congress recognized that rapid advances in technology and commerce had rendered the Pure Food and Drug Act of 1906 outdated.<sup>26</sup> Congress still spent over five years considering various versions of what eventually became the FFDCFA.<sup>27</sup> Congress passed the FFDCFA largely due to concerns that the country lacked a uniform approach to branding, marketing, and selling food.<sup>28</sup>

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25. See Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906). Congressional action to pass the Pure Food and Drug Act of 1906 was spurred, at least in part, by Upton Sinclair's gruesome accounts of meat packing facilities in Chicago in the famed novel *The Jungle*. See Sheryl Lawrence, Comment, *What Would You Do with A Fluorescent Green Pig?: How Novel Transgenic Products Reveal Flaws in the Foundational Assumptions for the Regulation of Biotechnology*, 34 *ECOLOGY L.Q.* 201, 213-14 (2007). Food safety testing was particularly unpleasant in the early days of the Food and Drug Administration (FDA) when government officials tested food by having volunteers consume items suspected to be poisonous. See FORTIN, *supra* note 5, at 5.

26. See S. 1944, 73rd Cong. (1933); *Food, Drugs and Cosmetics: Hearing on S. 1944 Before the S. Subcomm. on Commerce*, 73rd Cong. 11 (1933) (statement of Hon. Henry A. Wallace, Sec'y of Agriculture) ("The Food and Drugs Act of 1906 was something of an innovation in Federal legislation. . . . But present day conditions in the food and drug business are very different from what they were more than a quarter century ago."). Senator Copeland's food safety bill, introduced on June 12, 1933, included several new sections not codified under current law at that time, including a section prohibiting false advertising of food and beverage products. S. 1944 §§ 9(a)-(b). President Franklin Roosevelt also expressed the need for reform, noting in a letter to Congress that, "[n]o comprehensive attempt at reform in the regulation of commerce in food and drugs has been made since 1906. I need not point out to you how much has happened since that time . . . . A measure is needed which will extend the controls formerly applicable only to labels to advertising." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: A RECOMMENDATION FOR LEGISLATION TO EFFECT A REFORM IN THE REGULATION OF COMMERCE IN FOOD AND DRUGS, H.R. DOC. NO. 74-142, at 1-2 (1935).

27. As noted above, Senator Copeland first introduced a food safety bill on June 12, 1933. See *supra* note 26. The FFDCFA did not become law until June 25, 1938. Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 et seq. (2006 & Supp. 2012)).

28. See 81 CONG. REC. 7312 (1937) (statement of Rep. Coffee). Representative Coffee stated

[a]n outstanding weakness of the [Pure Food and Drug Act of 1906] is its failure to provide for supervision of advertising. . . . Advertising has become such an important factor in determining the buying habits of the public that the need for honest advertising, as well as for honest labeling, is now almost universally recognized.

*Id.*; see also 81 CONG. REC. A321 (1937) (statement of Rep. O'Day) (describing the need for the federal government to establish uniform labeling, marketing, and quality standards); H.R. REP.

Most notably, the FFDCa vested enforcement powers in the federal government.<sup>29</sup> In addition, the FFDCa broadened the definition of “food,” to enlarge the government’s scope of jurisdiction.<sup>30</sup> Consistent with its underlying purpose, the law also attempted to strengthen provisions prohibiting the misbranding of food.<sup>31</sup>

Another notable provision of the FFDCa called for new uniform labeling of food products, which requires inclusion of the following information: “(1) the ‘common or usual name’ of the food; (2) the net quantity of contents; and (3) the name and address of the manufacturer, packager, or distributor.”<sup>32</sup> The FFDCa also established standards of identity for common foods.<sup>33</sup> The purpose of this provision was to promote truthfulness for the benefit of consumers.<sup>34</sup> The law directed the FDA to “promulgate regulations fixing and establishing for any food, under its common or usual name so far as

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No. 75–2139, at 3 (1938) (letter of Hon. Henry A. Wallace, Sec’y of Agriculture) (noting that the “clear intent of [the FFDCa] is to close the channels of interstate commerce to food, drugs, cosmetics, and devices that are adulterated or misbranded.”).

29. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75–717, § 307, 52 Stat. 1040, 1046 (1938).

30. § 201(f), 52 Stat. at 1040 (defining food as “(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.”).

31. § 403, 52 STAT. at 1047 (providing the circumstances under which a food is deemed misbranded). At least one author has implied, however, the misbranding section of the FFDCa could have been broadened. See Gail H. Javitt, *Supersizing The Pint-Sized: The Need for FDA-Mandated Child-Oriented Food Labeling*, 39 Loy. L.A. L. Rev. 311, 317 n.42, 318 (2006) (comparing the FFDCa’s misbranding provisions with the Pure Food and Drug Act’s misbranding provisions and noting that “the authority granted was conditional, and therefore limited”); see also Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 Food & Drug L.J. 49, 51–53 (1997) (noting that “[t]he wording of the section . . . reveals that Congress was concerned that this provision be applied carefully and with good judgment” and that the FDA has limited the information that must be provided to consumers “to that necessary to accurately identify the basic nature” of the food).

32. JAVITT, *supra*, note 31 at 317; see also Claudia L. André, Comment, *What’s in That Guacamole? How Bates and the Power of Preemption Will Affect Litigation Against the Food Industry*, 15 GEO. MASON L. REV. 227, 230 (2007) (noting that, “[a] major component of the [FFDCa] was to provide ‘informative labeling’ to the public, especially for food items that would affect those who could not take care of themselves, such as infants”).

33. 21 U.S.C. § 341 (2006 & Supp. 2012). The regulations promulgated to develop the standards of identity are set forth in 21 C.F.R. §§ 130 to 169 (2012).

34. See *Fed. Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 229 (1943) (discussing regulatory framework which requires FDA to promulgate standards of identity to promote “honesty and fair dealing”); see also *United States v. An Article of Food Consisting of 126 Cases, More or Less, Each Containing 12 Three-Pound Jars, Labeled: (Case & Jar) “Pure Raw Honey Packed For J.G. Samples,”* 550 F. Supp. 15, 19 (W.D. Okla. 1982) (noting that standards of identity protect consumers from economic adulteration and allow them to make informed decisions in selecting food).

practicable, a reasonable definition and standard of identity.<sup>35</sup> Standards of identity have been promulgated for a wide range of products.<sup>36</sup>

## 2. Nutrition Labeling and Education Act of 1990 and the Amendments to the FFDC Act

Although some portions of the FFDC Act remain codified in their original form,<sup>37</sup> much of the statute has been amended over the years.<sup>38</sup> Several subsequent congressional acts have nevertheless focused on preserving many of the core motivations behind the FFDC Act by strengthening the labeling provisions and consumer protection goals of the 1938 Act.<sup>39</sup> Of particular note is the NLEA, which strengthened the FDA's regulatory authority over health and nutrient claims and mandated more detailed labeling requirements for manufacturers of food products.<sup>40</sup>

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35. FFDC Act § 401, 21 U.S.C. § 341 (2006). Standards of identity have been subjected to considerable and often narrowly focused legal scholarship. See John Agar, *Generally Recognized As Sour Cream: Treating Standards of Food Identity as a Success*, 44 FOOD DRUG COSM. L.J. 237, 247 (1989) (noting that the statutory and regulatory framework for developing standards of identity is adequately flexible for society's needs); Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Product Information*, 47 FOOD & DRUG L.J. 185, 199–201 (1992) (discussing the benefits of standards of identity from a consumer oriented perspective); Richard A. Merrill & Earl M. Collier, Jr., "Like Mother Used to Make": *An Analysis of FDA Food Standards of Identity*, 74 COLUM. L. REV. 561, 562 (1974) (providing an in-depth overview of FDA's authority to promulgate standards of identity and conducting a cost-benefit analysis of issuing standards of identity).

36. See 21 C.F.R. §§ 130 to 169 (2012). Standards of identity are developed by the FDA, however, food manufacturers who believe the standards developed are unfair or overly burdensome may challenge the standard. See *Nat'l Nutritional Foods Ass'n v. Food & Drug Admin.*, 504 F.2d 761, 806 (2d Cir. 1974) (evaluating a challenge to the scope of standards of identity for vitamins and minerals); see also *Corn Prod. Co. v. Dep't of Health, Ed. & Welfare, Food & Drug Admin.*, 427 F.2d 511, 513, 517 (3d Cir. 1970) (finding that a standard of identity that is supported by substantial evidence, which comports with the established practices of other manufacturers, and that will not impose undue economic hardship, shall be upheld).

37. For example, the definition of food has never been amended. See FFDC Act § 201(f), 21 U.S.C. § 321(f) (2006).

38. See Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105–115, 111 Stat. 2296 (1997) (codified in scattered sections of 21 U.S.C.) (amending the FDA's food contact material pre-market approval requirements); FDA Food Safety Modernization Act, Pub. L. No. 111–353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.) (enacting sweeping food safety reforms that place an emphasis on prevention rather than reaction); see also *Significant Amendments to the FD & C Act*, UNITED STATES FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticActFFDCAct/SignificantAmendmentstotheFFDCAct/default.htm> (last visited July 30, 2013) (listing no fewer than twenty-four significant amendments to the FFDC Act since 1980 alone).

39. See JAVITT, *supra* note 31, at 319–20 nn. 55–56 (discussing amendments to the FFDC Act after 1938 that expanded the scope of the FDA's authority concerning consumer protection).

40. Nutritional Labeling and Education Act, Pub. L. No. 101–535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.) (2006 & Supp. 2012). President George H.W. Bush, upon signing the NLEA, noted that the Act made "two significant changes" to law:

Congress passed the NLEA during a time when the legislature believed that health and nutrient claims made by manufacturers of food and beverage products were not accurate<sup>41</sup> and that the nutrition disclosure requirements for these products were too lax.<sup>42</sup> When passing the NLEA, Congress noted that the FDA was too slow in reforming the regulations controlling health and nutrient claims.<sup>43</sup> At the time, at least some in Congress believed it was unfair and burdensome to require manufacturers to comply with standards and regulations that varied from state to state because this variance would result in the practical implication of forcing the manufacturers to label products differently in every state.<sup>44</sup> Senator Hatch noted that “inconsistent State and local laws seriously disrupt food manufacturing and distribution, resulting in higher prices for consumers, . . . [and] frustrate food safety and nutrition education efforts by presenting consumers with varying and inconsistent information and warnings.”<sup>45</sup> Some in Congress believed that a uniform federal labeling policy that preempted state labeling laws was essential “to make order out of chaos in the regulation of food and to give consumers confidence in place of uncertainty.”<sup>46</sup> But Congress also recognized that states traditionally play a role in the regulatory oversight of the food industry, noting that, “the States should never be preempted unless a strong Federal regulatory system is in place.”<sup>47</sup>

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(1) “requir[ing] food manufacturers to include more nutrition information on their labels” and (2) “prohibit[ing] food manufacturers from making health claims on their labels unless the claims are permitted by the Department of Health and Human Services.” Statement On Signing the Nutrition Labeling and Education Act of 1990, 2 PUB. PAPERS 1585 (Nov. 8, 1990). After the NLEA was passed the FDA promulgated a number of regulations covering health and nutrient claims. *See, e.g.*, 21 C.F.R. §§ 101.13, 101.54 – 101.69 (2012) (covering nutrient content claims for a number of terms, including but not limited to, “high”, “light”, and “good source”); 21 C.F.R. § 101.14(a)(1) (2012) (providing that in order for a health claim to be made, a relationship must exist between an ingredient in the food and a disease or health condition).

41. *See* H.R. REP. NO. 538 (1990), reprinted in 1990 U.S.C.C.A.N. 3337–39.

42. *Id.* The existing regulations only required disclosure of nutritional information when a health claim was made. *Id.* at 3338.

43. *Id.* (noting that it had taken the FDA eleven years to update the food labeling regulations and that no final regulations were ever published).

44. *See* 136 CONG. REC. 16610–11 (Oct. 24, 1990) (statement of Sen. Hatch). Representative Waxman also noted that the NLEA provisions providing for federal preemption of state labeling and health claims have “particular appeal” under the law as the food and beverage industry would have great difficulty in complying with state labeling and marketing laws. *See* 136 CONG. REC. 20418 (July, 30 1990) (statement of Rep. Waxman).

45. 136 CONG. REC. 16611 (Oct. 24, 1990) (statement of Sen. Hatch).

46. *Id.*

47. 136 CONG. REC. 20418 (July 30, 1990) (statement of Rep. Waxman). Rep. Waxman, however, was also sensitive to the need for uniformity and preemption of state laws touching on food labeling, noting that “numerous conflicting and inconsistent State and local [food labeling] laws” would make it “difficult and even impossible for companies to operate in interstate commerce.” *Id.*

Against this backdrop, Congress enacted provisions in the NLEA that require manufacturers of food products to provide detailed information about the nutritional content of products sold.<sup>48</sup> The Act also vested the FDA with discretionary authority to determine what information must appear on labels.<sup>49</sup> To implement the law, the FDA issued food-labeling regulations detailing the information that must appear on the nutrition facts panel.<sup>50</sup> The NLEA also expanded section 310 of the FFDCFA to provide states with the ability to initiate legal actions for FFDCFA violations so long as the non-compliant product was located within the confines of the state.<sup>51</sup>

The NLEA also includes several noteworthy provisions under a section titled “National Uniform Nutrition Labeling.”<sup>52</sup> This section articulates the NLEA’s provisions preempting state labeling requirements, which require all state laws covering products subject to a standard of identity<sup>53</sup> and the disclosure of food colorings<sup>54</sup> to be identical to their federal labeling law counterparts. Finally, Congress also responded to concerns over the need to continue enabling states to possess consumer protection powers by requiring the Secretary of Health and Human Services to conduct a study exploring the extent to which the NLEA would conflict with state labeling laws.<sup>55</sup>

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48. FFDCFA § 403(q), 21 U.S.C. § 343(q) (2006 & Supp. 2012).

49. *Id.* For instance, in enacting these more stringent labeling requirements, the NLEA allows the FDA to remove information relating to a nutrient if such information “is not necessary to assist consumers in maintaining healthy dietary practices.” FFDCFA § 403(q)(2)(B), 21 U.S.C. § 343(g).

50. *See* 21 C.F.R. §§ 101 et seq. (2012).

51. FFDCFA § 310(b), 21 U.S.C. §§ 337(b) (2006).

52. FFDCFA §§ 403A(a)(1)–(5), 21 U.S.C. §§ 343–1(a)(1)–(5).

53. FFDCFA § 403A(a)(1), 21 U.S.C. § 343–1(a)(1). Specifically, this section provides: no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—  
(1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 343(g) of this title

*Id.*

54. FFDCFA § 403A(a)(3), 21 U.S.C. § 343–1(a). Specifically, this section provides: no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—  
(3) any requirement for the labeling of food of the type required by section 343(b), 343(d), 343(f), 343(h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section

FFDCFA § 403A(a)(3), 21 U.S.C. § 343–1(a).

55. Nutritional Labeling and Education Act, Pub. L. No. 101–535, § 403A(b), 104 Stat 2353, 2364 (1990) (codified as amended in scattered sections of 21 U.S.C.).

### 3. *The Lanham Act*

The stated purpose of the Lanham Act, also known as the Trademark Act of 1946,<sup>56</sup> is “to protect persons engaged in [] commerce against unfair competition.”<sup>57</sup> The Lanham Act provides for two major causes of action: one against unregistered trademark infringement and another against product disparagement.<sup>58</sup> Curiously, the drafters of the Act did not envision section 43(a) of the Act, which is codified at section 1125(a) of title 15, as particularly important.<sup>59</sup> However, today it serves as the primary means by which private entities may bring suit for false advertising in a wide variety of contexts.<sup>60</sup>

The Lanham Act enables any individual who believes that he or she will be damaged by another entity’s false or misleading product advertising to bring suit against that entity and to seek civil damages.<sup>61</sup> This section has been

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56. Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051 *et seq.* (2006 & Supp. 2012)).

57. 15 U.S.C. § 1127 (2006); *see also* Elizabeth Williams, Annotation, *Standing to Bring False Advertising Claim or Unfair Competition Claim Under § 43(a)(1) of Lanham Act* (15 USCS § 1125(a)(1)), 124 A.L.R. FED. 189, 204 (1995) (explaining the purpose of the Lanham Act). The drafters of the Act wanted to create a uniform federal law for unfair competition due to the belief current federal unfair competition law prior to 1946 was weakened by court actions. J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:7 (4th ed. 2012).

58. 15 U.S.C. § 1125(a)(1)(A)–(B) (2006); *see also* J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 45, 45–46 (1996) (discussing the two prongs of Section 43(a) claims).

59. MCCARTHY, *supra* note 57, at § 27:7 (noting that at the time of the Lanham Act’s passage, § 43(a) was viewed as a “minor” section); *see also* Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 679 (1984) (stating the legislative history of the Lanham Act’s Section 43(a) is quite limited because the drafters did not view it as important).

60. McCarthy, *supra* note 58, at 45; *see* Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999) (discussing the requirements a plaintiff must show to bring a false advertising claim under the Lanham Act). The Ninth Circuit happens to hear a considerable number of Lanham Act false advertising claims from the entertainment industry. *See, e.g.*, *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108 (9th Cir. 1992) (listing the standing requirements for Lanham Act claim for voice impersonation); *Halicki v. United Artists Commc’ns, Inc.*, 812 F.2d 1213, 1213–14 (9th Cir. 1987) (analyzing false advertising claims in the entertainment industry context); *Smith v. Montoro*, 648 F.2d 602, 603–04 (9th Cir. 1981) (finding a Lanham Act claim valid for false advertising where purveyors of a motion picture removed the name of actor in a film). *But see* *Alfred Dunhill Ltd. v. Interstate Cigar Co., Inc.*, 499 F.2d 232, 236 (2d Cir. 1974) (noting that the Lanham Act’s false advertising provisions were meant to have some limitations in applicability).

61. Section 1125(a)(1)(B) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— . . .

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

interpreted to require a plaintiff to show the following elements in order to state a false advertising claim:

(1) that the defendant made a false statement of fact about its product in a commercial advertisement; (2) that the statement actually deceived or has a tendency to deceive a substantial segment of its audience; (3) the deception is likely to influence the purchasing decision; (4) the defendant caused the false statement to enter interstate commerce; and (5) the plaintiff[] ha[s] or is likely to be injured as a result.<sup>62</sup>

Complainants who successfully invoke the protection of the Lanham Act are entitled to a variety of remedies, including damages, injunctive relief, and attorney's fees.<sup>63</sup>

### *B. Federal Preemption of State Laws*

#### *1. State Police Powers*

It has been settled law for more than a century that the powers reserved to the states include certain "police powers" that permit the state to regulate those issues having a bearing on health, safety, morals, and general welfare.<sup>64</sup> Where Congress intends to preempt a state law touching upon these powers, it

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15 U.S.C. § 1125(a) (2006).

62. *Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 462 (5th Cir. 2001).

63. The Lanham Act provides for treble damages in counterfeit actions. 15 U.S.C. § 1117 (2006 & Supp. 2012); *see also* *Burger King Corp. v. Mason*, 710 F.2d 1480, 1495 (11th Cir. 1983) (noting that the court may award treble damages at its discretion); *Procter & Gamble Co. v. Haugen*, 627 F. Supp. 2d 1287, 1302–04 (D. Utah 2008) (holding an award of twenty million dollars in damages for false advertising in violation of the Lanham Act was appropriate). Injunctive relief may also be awarded at the discretion of the court under the Lanham Act. 15 U.S.C. § 1116 (2006 & Supp. 2012); *see also* *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 750 (8th Cir. 1980) (finding injunctive relief an appropriate remedy for advertising-related claims under the Lanham Act). In some cases attorney's fees will also be awarded in Lanham Act claims. *See* § 1117; *Quaker State Oil Ref. Corp. v. Kooltone, Inc.*, 649 F.2d 94, 95 (2d Cir. 1981) (acknowledging judges are "given considerable discretion in awarding reasonable attorney's fees" under the Lanham Act).

64. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (affirming district court ruling that the regulation of avocado transportation is within California's police powers); *Lochner v. New York*, 198 U.S. 45, 53 (1905), *abrogated as recognized in* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Mugler v. Kansas*, 123 U.S. 623, 657 (1887) (discussing whether a ban on brewing liquor was within a state's police powers); *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (noting that police powers allow for the regulation of personal interactions when required for the public good). The Constitution created a federal government with limited powers. *See* U.S. CONST. art. I (describing the limited enumerated powers of the federal Congress). The Tenth Amendment specifically states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. CONST. amend. X.

must do so with caution and precision.<sup>65</sup> There is a strong presumption against the preemption of state laws relating to police powers.<sup>66</sup> This presumption applies with particular force to state regulation of food.<sup>67</sup> Since the early days of our nation's founding, states have exercised this power by enacting various statutes designed to regulate claims made in food labels.<sup>68</sup>

## 2. Relevant Constitutional Preemption Doctrines

Although the federal government holds limited powers, the nation's founders provided that "the Laws of the United States . . . shall be the supreme Law of the Land."<sup>69</sup> The Supremacy Clause has been interpreted to provide for several forms of preemption of federal law over state law, including field preemption, conflict preemption, and express preemption.<sup>70</sup>

### a. Field Preemption

Field preemption of a state law is justified when a federal scheme of regulations is so pervasive that it may be inferred that Congress left the states no opportunity to add to the body of federal law, where a dominant federal interest precludes state regulation on the same subject, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."<sup>71</sup> Field preemption is based on the principle that "federal regulation of a field of commerce should not be

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65. The Supreme Court has recognized "the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citations omitted).

66. *Id.*; see also *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (discussing when preemption of state law is appropriate); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (recognizing that state police powers should not be preempted unless clearly stated by Congress).

67. See *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894) (noting "[i]f there be any subject over which it would seem the States ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products.").

68. *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 430–32 (Cal. 2004) (discussing various state laws enacted in Wisconsin, Maryland, Ohio, New York designed to prohibit manufacturer's claims intended to mislead consumers).

69. U.S. CONST. art. VI, cl. 2.

70. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983) (noting that Congress may preempt states expressly and by implementing "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for States to supplement it," and also noting that state law may be preempted when it conflicts with federal law).

71. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

deemed preemptive of state regulatory power in the absence of persuasive reasons.<sup>72</sup>

Illustrating the limits on this principle is *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, in which the Supreme Court reviewed a federal statute that was passed to promote development of the privatized nuclear energy industry.<sup>73</sup> After the federal law was passed, California passed a law prohibiting nuclear plant construction until disposal programs for nuclear waste were put in place.<sup>74</sup> The Supreme Court held that the federal law did not preempt the state law despite the fact that the federal government occupied the field of nuclear energy.<sup>75</sup> The Court noted that congressional intent left the door open for states to pass laws regulating atomic energy for economic reasons.<sup>76</sup>

### b. Conflict Preemption

Conflict preemption arises when compliance with both state and federal law is impossible<sup>77</sup> or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>78</sup> For instance, in *Florida Lime & Avocado Growers, Inc. v. Paul*, a California law was enacted that imposed minimum maturity standards on avocados sold in the state, requiring them to contain at least eight percent oil by weight.<sup>79</sup> These same maturity standards were also imposed on avocados imported from other states, including Florida, which happened to be the California avocado

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72. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Justice Story is often credited with developing the foundations of field preemption in the first half of the nineteenth century. See, e.g., *Mayor of New York v. Miln*, 36 U.S. 102, 153–61 (Story, J., dissenting). Justice Story argued that a New York law touching upon the treatment of individuals arriving into the state via seaports was preempted because only the federal government could enact laws dealing with interstate commerce. *Id.* Justice Story noted that attention must be paid to the “full purpose and effect” of the law in question rather than to its purported goal. *Id.*; see also *Prigg v. Pennsylvania*, 41 U.S. 539, 608–26 (1842) (discussing the nature of inherent Constitutional powers delegated to the federal government and preemption over state laws touching upon personal liberties of runaway slaves).

73. 461 U.S. at 194–95.

74. *Id.* at 194.

75. *Id.* at 220–23 (reasoning that the Atomic Energy Act did not conflict with California’s nuclear energy law because there is evidence in the legislative history and structure of the statutory scheme that the Atomic Energy Act, although intended to promote nuclear power, could accommodate efforts by states to regulate nuclear power development for economic reasons).

76. *Id.* at 222–23.

77. *Fla. Lime*, 373 U.S. at 142–43.

78. *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941). The Supreme Court first articulated the doctrine of conflict preemption in 1829. See *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (upholding a Delaware law permitting the construction of a dam across a navigable stream on grounds the federal government had enacted no laws touching upon such construction).

79. 373 U.S. at 134.

growers' biggest source of competition.<sup>80</sup> Florida-grown avocados typically did not contain more than eight percent oil until after they were no longer ripe.<sup>81</sup> Federal regulations imposed no oil content requirements on avocados sold to the public.<sup>82</sup> Despite the existence of these dual laws, the Supreme Court held the California law was not preempted by federal law as there was not "actual conflict between the two schemes of regulation that both cannot stand in the same area."<sup>83</sup>

*c. Express Preemption*

Express preemption exists where Congress indicates in clear statutory language that a federal law is intended to preempt state laws on the same subject.<sup>84</sup> However, even where an express preemption clause exists, the court must still consider the "substance and scope of Congress' displacement of state law."<sup>85</sup> The Supreme Court in *Jones v. Rath Packing Co.* considered a California statute that required the net weight of foods, including meats, packaged for sale not to weigh less than as labeled on their packaging.<sup>86</sup> The Federal Meat Inspection Act (FMIA) and FDA regulations created pursuant to the Act allows for reasonable variations in weight statements on meat product labels.<sup>87</sup> The Court held that because the California law did not allow for reasonable variations in weight claims on meat product labels, it imposed a requirement different from the FMIA and, therefore, was expressly preempted.<sup>88</sup>

*C. Relevant California Laws Regulating Food Labeling, Advertising, and Marketing*

California has enacted several statutes regulating food labeling and advertising including the Sherman Food, Drug, and Cosmetic Law (Sherman Law), the Unfair Competition Law (UCL), the False Advertising Law (FAL), and the Consumers Legal Remedy Act (CLRA).<sup>89</sup> Consistent with the

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80. *Id.* at 139–40.

81. *Id.* at 140.

82. *Id.* at 134.

83. *Id.* at 141.

84. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (noting that "when Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall") (citations omitted).

85. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

86. 430 U.S. at 526. This statute applies to meat products regulated by the U.S. Department of Agriculture (USDA) under federal statutes. *Id.* at 528.

87. *Id.* at 528–30 (quoting 21 U.S.C. § 601(n)(5) (2006)). The statute also prohibited states from enacting "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the [FMIA]." *Id.* at 530 (quoting 21 U.S.C. § 678 (2006)).

88. *Id.* at 530–32.

89. Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE §§ 109875 *et seq.* (West 2012); Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (West 2008);

requirements of the FDCA,<sup>90</sup> the Sherman Law imposes labeling requirements that are functionally identical to federal requirements for artificial food colorings.<sup>91</sup> The Sherman Law also prohibits the sale of misbranded food.<sup>92</sup> A food is deemed misbranded if it is advertised in any false or misleading way.<sup>93</sup>

Similar in nature to the Lanham Act, the UCL, FAL, and CLRA are consumer protection-oriented statutes that seek to promote fair competition through honest advertising.<sup>94</sup> The UCL proscribes “acts or practices which are unlawful, or unfair, or fraudulent.”<sup>95</sup> California courts have interpreted the FAL to prohibit false advertising and “advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”<sup>96</sup> Conduct violates the CLRA if it is “likely to mislead a reasonable consumer.”<sup>97</sup> California courts have explained that the CLRA should be construed liberally to support its goal of protecting consumers.<sup>98</sup>

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False Advertising Law, CAL. BUS. & PROF. CODE § 17500 (West 2008); Consumers Legal Remedy Act, CAL. CIV. CODE §§ 1750, 1760 & 1770(a)(1)–(22) (West 2009 & Supp. 2013).

90. FDCA §§ 403A, 21 U.S.C. §§ 343–1 (2006 & Supp. 2012) (permitting states to only enact statutes that impose labeling requirements that are identical to those specified by federal law).

91. CAL. HEALTH & SAFETY CODE § 110740 (West 2012) (providing “[a]ny food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact”) *Id.* The FDCA provides in section 403(k) that a food is misbranded “[i]f it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact.” FDCA § 403(k), 21 U.S.C. § 343(k) (2006).

92. CAL. HEALTH & SAFETY CODE § 110765 (West 2012).

93. CAL. HEALTH & SAFETY CODE § 110660 (West 2012).

94. The UCL defines unfair competition to “include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” CAL. BUS. & PROF. CODE § 17200 (West 2008). The CLRA proscribes “[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” CAL. CIV. CODE § 1770(a)(7) (West 2009 & Supp. 2013). The FAL provides “[i]t is unlawful to make or disseminate or cause to be made or disseminated before the public in this state...any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.” CAL. BUS. & PROF. CODE § 17500 (West 2008).

95. *O’Donovan v. CashCall, Inc.*, 278 F.R.D. 479, 499 (N.D. Cal. 2011) (quoting *Cel-Tech Comm’n, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999)) (noting further that a practice need not be unfair and unlawful or deceptive and unlawful for the practice to be prohibited).

96. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1193 (S.D. Cal. 2005) (quoting *Leoni v. State Bar*, 704 P.2d 183, 194 (Cal. 1985)).

97. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal. Rptr.3d 36, 46 (Cal. Ct. App. 2006)).

98. *See Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 938 (C.D. Cal. 2012) (quoting *Colgan*, 38 Cal. Rptr.3d at 46).

D. *The In re Farm Raised Salmon Cases and Pom Wonderful LLC v. Coca-Cola Co. Litigations*

1. *In re Farm Raised Salmon Cases*

In 2008 the California Supreme Court considered a consolidated consumer-driven class action lawsuit, known as the *In re Farm Raised Salmon Cases* litigation, which was brought against several grocery stores.<sup>99</sup> Consumers had purchased farm-raised salmon that had been treated with chemicals called astaxanthin and canthaxanthin.<sup>100</sup> These chemicals allegedly act as a coloring agent to the flesh of the salmon, turning the flesh from grey to pink and orange/red.<sup>101</sup> The plaintiff argued that the grocery stores failed to label the packaged salmon as containing food coloring.<sup>102</sup>

The plaintiffs sought relief under several statutes: the UCL, CLRA, and the FAL.<sup>103</sup> The California Supreme Court found the FFDCA did not preempt the plaintiff's cause of action.<sup>104</sup> Notably, the court was unwilling to hold that section 310 of the FFDCA precluded the private cause of action because the basis of the claim was not the FFDCA, but rather state statutes.<sup>105</sup>

2. *Pom Wonderful LLC v. Coca-Cola*

Four years after the *In re Farm Raised Salmon Cases* decision, the Ninth Circuit considered a similar claim in *Pom Wonderful LLC v. Coca-Cola Co.*<sup>106</sup> The plaintiff, Pom Wonderful, a manufacturer of pomegranate juice, brought suit alleging that Coca-Cola misled consumers through false labeling of a juice blend drink sold under the Minute Maid brand.<sup>107</sup> The Minute Maid beverage was labeled as "pomegranate blueberry" juice despite the fact it contained minimal amounts of pomegranate and blueberry juice.<sup>108</sup>

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99. *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1173 (Cal. 2008). The appeals courts upheld the district court's decision to sustain the defendant's motion to dismiss. *Id.* at 1173.

100. *Id.*

101. *Id.* at 1174. The plaintiffs contended, "the color of salmon is an indication of its origin, quality, freshness, flavor, and other characteristics." *Id.* at 1173.

102. *Id.* at 1173.

103. *Id.* at 1173. In order to make a valid claim under the UCL, one must allege the business practice in question is unlawful. *Id.* at 1174. The plaintiffs relied on the provision in the Sherman Act requiring disclosure of food colorings to allege a violation of the "unlawful" prong of their UCL violation claim. *See id.* at 1174 (implying that satisfaction of an "unlawful" prong is required to make a UCL claim); *see also supra* notes 92–93 and accompanying text.

104. *In re Farm Raised Salmon Cases*, 175 P.3d at 1184.

105. *Id.* at 1173.

106. 679 F.3d 1170, 1172 (9th Cir. 2012).

107. *Id.* at 1173–74.

108. *See id.* at 1173 (noting that Coca-Cola's beverage contained "about 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice"). The Coca-Cola product's front label "displays the product's name and a vignette depicting each of those fruits." *Id.*

Like the plaintiffs from the *In re Farm Raised Salmon Cases* litigation, Pom Wonderful predicated a portion of its claim on California state statutes including the UCL and FAL.<sup>109</sup> However, the court refused to consider the merits of these state claims due to lack of standing.<sup>110</sup> Pom Wonderful also brought suit under the Lanham Act's false-advertising provision.<sup>111</sup> The court interpreted the FFDCA as broadly preempting Pom Wonderful's Lanham Act claims given that Coca-Cola's beverage seemingly complied with the FFDCA.<sup>112</sup>

## II. CURRENT FEDERAL AND STATE STATUTES HAVE CREATED A CONFUSING BODY OF LAW APPLICABLE TO FOOD AND BEVERAGE PRODUCT LABELING

### A. Creative Private Litigants Have Found Ways to Engage the FFDCA

Congress left the states some leeway to enforce their own laws concerning food and beverage products when it enacted the NLEA, but the current regulatory scheme has produced a highly complex body of case law.<sup>113</sup> On the one hand, Congress manifested its clear intent that only the government should be able to enforce the FFDCA when it enacted section 310 in 1938.<sup>114</sup> Congress also made it clear in section 403A that states may not mandate labeling requirements that are not identical to the federal food labeling provisions for food colorings or products subject to a standard of identity.<sup>115</sup> On the other hand, states such as California have adhered to this congressional

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109. *Id.* at 1174.

110. *Id.* at 1178–79 (stating at the time of the district court's ruling, it was unclear if one needed to be eligible for restitution in order to bring suit under California's UCL and FAL).

111. *Id.* at 1174 (noting that Pom Wonderful alleged various violations of California state statutes).

112. *Id.* at 1175–77 (affirming the district court's holding that the FFDCA barred Pom's Lanham Act claim and noting that FFDCA limits the circumstances under which plaintiffs can bring Lanham Act claims, imposing restrictions even in circumstances where the FDA has not found that a specific act violates the FFDCA). In arriving at its decision, the court relied on *PhotoMedex, Inc. v. Irwin*, in which the Ninth Circuit held the FFDCA barred a Lanham Act claim against a medical device manufacturer alleging that the manufacturer marketed a device as approved by the FDA when the FDA had not yet seen the device because the FFDCA allowed the manufacturer some leeway in determining whether the device was actually cleared and the FDA had not yet declared whether there was a violation. *Id.* at 1176 (citing *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010)). The basis of this holding centered on an FDA regulation that enabled manufacturers to make such claims absent FDA review if the manufacturer believed their device was sufficiently similar to another device that had been approved by the FDA. *PhotoMedex*, 601 F.3d at 924–26.

113. See 136 CONG. REC. 20418 (July 30, 1990) (statement of Rep. Waxman) (discussing the need for states to have leeway to enact their own labeling laws).

114. See FFDCA § 310, 21 U.S.C. § 337(a) (2006) (stating that the FFDCA's default rule gives enforcement power solely to the federal government, except where explicitly stated to the contrary).

115. See FFDCA § 403A(a)(1) & 403A(a)(3), 21 U.S.C. § 343–1(a)(1) & § 343–1(a)(3) (2006 & Supp. 2012).

dictate and enacted statutes with labeling requirements materially identical to those in the FFDCA.<sup>116</sup> Private parties have used these statutes to bring lawsuits under the guise of other consumer protection statutes (such as the UCL, FAL, and CLRA) creating an environment where, in essence, private litigants are enforcing the FFDCA in state courts.<sup>117</sup> Additional federal laws, such as the Lanham Act, intersect with the scope of activity regulated by the FFDCA, further blurring the issue.<sup>118</sup>

*B. In re Farm Raised Salmon Cases and the Enforcement of State Laws Identical to the FFDCA by Private Parties: When Does Section 337 Apply?*

The plaintiffs in *In re Farm Raised Salmon Cases* sought relief under state statutes even though they were likely aware that the FFDCA contains provisions regulating food-coloring labeling,<sup>119</sup> vests enforcement power over claims relating to food coloring in the government alone,<sup>120</sup> and preempts states from enacting any labeling laws that are not identical to the FFDCA.<sup>121</sup> As such, the plaintiffs sought to have the court read their complaint as solely predicated on state law claims.<sup>122</sup> According to the plaintiffs, FFDCA preemption of their private cause of action could only apply if the claim itself was based on a state law imposing labeling requirements that were not identical to those specified in the FFDCA.<sup>123</sup>

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116. Compare CAL. HEALTH & SAFETY CODE § 110740 (West 2012) with 21 U.S.C. § 343(k) (2006).

117. See, e.g., *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 936, 940 (9th Cir. 2008) (holding a private litigant suit brought under the UCL, CLRA, and FAL was not preempted by the FFDCA); *Fraker v. KFC Corp.*, No. 06-CV-01284-JM (WMC), 2007 WL 1296571, at \*3–4 (S.D. Cal. Apr. 30, 2007) (finding a private litigant suit brought under the UCL, FAL and CLRA was preempted by the FFDCA); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1117–19 (N.D. Cal. 2010) (holding that to the extent a food manufacturer’s packaging was subject to FDA regulation and compliant with the FFDCA, a private litigant suit brought under the FAL, UCL, CLRA, and Lanham Act was preempted by the FFDCA).

118. See THEODORE H. DAVIS JR. & JORDAN S. WEINSTEIN, TRADEMARK LAW HANDBOOK § 14.08, at 590 (2011) (noting that “[l]awsuits by innovator pharmaceutical companies challenging claims by competitors that the competitors’ generic pharmaceutical products are equivalent to those of the innovator companies have required courts to address the relationship between the Lanham Act, on the one hand, and the FDCA, on the other”). *Id.* at 590. See also *Schering-Plough Healthcare Prod., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 503–06 (7th Cir. 2009) (addressing both the FFDCA and the Lanham Act in a prescription drug labeling suit).

119. FFDCA § 403(k), 21 U.S.C. § 343 (k) (2006). In determining which colorings had to be labeled under the NLEA regulations, the FDA decided color additives “not subject to certification may be declared ‘Artificial Color’, ‘Artificial Color Added’, or ‘Color Added.’ ” 21 C.F.R. § 101.22 (2012).

120. FFDCA § 310, 21 U.S.C. § 337 (2006).

121. FFDCA § 403A(a), 21 U.S.C. § 343–1(a).

122. Brief for Appellant at 20–30, *In re Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008) (No. B182901).

123. *Id.* at 23–25.

The California Supreme Court found the plaintiffs' arguments persuasive and held that the FFDCFA does not preclude this private cause of action because the basis of the claim was not the FFDCFA, but rather state statutes.<sup>124</sup> The court began its analysis by noting the strong constitutional presumption against preemption of state laws advancing police power functions.<sup>125</sup> After considering the express preemption provisions codified in the NLEA, the court concluded that Congress intended these provisions to be narrowly applied.<sup>126</sup> The court noted the express preemption language in the FFDCFA cannot be construed to impliedly preempt state claims on the basis that they stand as an obstacle congressional purpose.<sup>127</sup>

*C. Pom Wonderful LLC v. Coca-Cola Co.: Enforcement of Lanham Act Claims Predicated on Food or Beverage Labels by Private Parties and Section 310's Preemptive Purview*

In considering the plaintiff's Lanham Act claims, the Ninth Circuit in *Pom Wonderful* began its analysis by noting that the FDA has issued standard of identity regulations detailing how a beverage manufacturer may market its juice products.<sup>128</sup> The court then construed these regulations in light of section 310, noting that only that the government may enforce a violation the FFDCFA.<sup>129</sup> Faced with these apparently competing areas of positive law, the court interpreted the FFDCFA as broadly preempting the Lanham Act claims.<sup>130</sup> Specifically, the court found that "allowing such a suit would undermine Congress's decision to limit enforcement of the FDCA to the government" and "would require a court originally to interpret ambiguous FDA regulations, because rendering such an interpretation would usurp the FDA's interpretive

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124. *In re Farm Raised Salmon Cases*, 175 P.3d at 1181–82.

125. *Id.* at 1176; *see also* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (explaining that the Court presumes that Congress "does not cavalierly pre-empt state-law causes of action," but assumes that state police power has not been superceded by Congress unless the purpose to do so is clearly mandated).

126. *In re Farm Raised Salmon Cases*, 175 P.3d at 1179 (stating that "Congress, in light of the history of dual state-federal cooperation in this area, did not intend to limit states' options in a broad fashion; . . . the preemption provision at issue here, section 343–1, demonstrates Congress's care in deciding what to preempt and what to allow.").

127. *Id.* at 1179. The appeals court, when considering the defendant's motion to dismiss, found that because the Sherman Law food coloring labeling requirements are virtually identical to those specified in the FFDCFA, and explained that, "[t]o allow a private person to prosecute a state law private right of action based on a violation of the FDCA would interfere with that governmental prosecutorial discretion and federal government oversight and conflict with the clear congressional intent to provide for a comprehensive and exclusive governmental enforcement scheme." *In re Farm Raised Salmon Cases*, 48 Cal. Rptr. 3d 449, 455 (Cal. Ct. App. 2006).

128. 679 F.3d 1170, 1175 (9th Cir. 2012); *see also* 21 C.F.R. § 102.33(c)–(d) (2012) (providing the regulations pertinent in *Pom Wonderful*).

129. *Pom Wonderful*, 679 F.3d at 1175.

130. *Id.*

authority.”<sup>131</sup> This reasoning seems to be grounded in multiple preemption doctrines.<sup>132</sup>

### III. RECONCILING *IN RE FARM RAISED SALMON CASES* WITH *POM WONDERFUL LLC*

#### A. *Can In re Farm Raised Salmon Cases and Pom Wonderful LLC Be Distinguished on the Basis of the Statutes in Question?*

The holdings in *In re Farm Raised Salmon Cases* and *Pom Wonderful LLC* beg the question: are the two cases distinguishable based on differences between the statutes at issue in each case? *Pom Wonderful* dealt with competing federal statutes: the FFDCA and the Lanham Act.<sup>133</sup> The Lanham Act contains no preemption provision. Therefore, it seems that it is facially justifiable to conclude that the FFDCA’s preemption provisions hold considerable weight.<sup>134</sup> Conversely, *In re Farm Raised Salmon Cases* concerned competing state and federal statutes in the FFDCA and the Sherman Law, UCL, FAL, and CLRA.<sup>135</sup> Courts are bound to respect the traditional police power functions inherently delegated to the states by the Constitution<sup>136</sup> and the particularly strong presumption against preemption that governs state laws regulating food.<sup>137</sup> Therefore, since the Sherman Law in *In re Farm Raised Salmon Cases* was materially identical to the FFDCA, the California Supreme Court could not find an adequate justification to support either express or implied preemption.<sup>138</sup>

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131. *Id.* at 1175–76.

132. Black’s Law Dictionary defines “usurpation” as “[t]he unlawful seizure and assumption of another’s position, office, or authority.” BLACK’S LAW DICTIONARY 1685 (9th ed. 2009). The court in *Pom Wonderful* also utilized the term “undermine” in its analysis. 679 F.3d at 1175–76. These operative terms indicate the court utilized field, conflict and express preemption doctrines to justify the holding. See Parts I.B.1 & 2 and accompanying text (discussing when field, conflict, and express preemption are applicable).

133. 679 F.3d at 1174.

134. This contention garners additional support in light of more recent cases arguing the *Pom Wonderful*’s holding regarding preemption should be narrowly construed. See *Khasin v. Hershey Co.*, 2012 WL 5471153, at \*8–9 (N.D. Cal. Nov. 9, 2012) (citing *Pom Wonderful*, 679 F.3d at 1176–79) (interpreting the *Pom Wonderful* court’s holding to mean that the FFDCA preempts the Lanham Act only where the claim implicates the express preemption provisions of the FFDCA, but noting that the FFDCA does not necessarily preempt claims brought under state consumer protection statutes even when the claim touches upon the express preemption provisions of the FFDCA).

135. 175 P.3d 1170, 1173–74 (Cal. 2008).

136. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (noting a strong presumption against preemption applies to state laws touching upon police powers of the state).

137. See *Plumley v. Massachusetts.*, 155 U.S. 461, 472 (1894).

138. *In re Farm Raised Salmon Cases*, 175 P.3d at 1178–80.

*B. Additional Case Law Suggests In re Farm Raised Salmon Cases and Pom Wonderful LLC Cannot Be Distinguished on the Basis of the Statutes in Question*

While material distinctions may be drawn when conducting a narrow review of just *In re Farm Raised Salmon Cases* and *Pom Wonderful LLC*, deeper examination of the relevant caselaw reveals courts have difficulty in applying these same legal concepts.<sup>139</sup> For instance, in *Williams v. Gerber Products Co.*, the court reviewed a class action lawsuit filed against the manufacturer of fruit juice snacks for toddlers.<sup>140</sup> The product label contained pictures of fruit allegedly not present in the juice.<sup>141</sup> The plaintiffs stated that the product violated the UCL, CLRA, and the FAL.<sup>142</sup> The district court dismissed the suit on grounds that the label would not deceive a “reasonable consumer.”<sup>143</sup> Subsequently, the Ninth Circuit held that although the product complied with FDA regulations regarding juice products labeling, the product could nevertheless be considered deceptive to consumers under the UCL and remanded the case for further proceedings.<sup>144</sup>

Several months prior to the *In re Farm Raised Salmon Cases* decision, a federal court in California issued a conflicting opinion.<sup>145</sup> In *Fraker v. KFC*

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139. See Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision, 55 Fed. Reg. 29487, 29509 (July 19, 1990) (explaining that, “[t]he preemption issue is complex and divisive: whether a uniform, national label is necessary for consumers and manufacturers to function in the marketplace versus whether States should be permitted to require additional information for their residents,” and noting that state and consumer input is “essential”).

140. 552 F.3d 934, 936 (9th Cir. 2008).

141. *Id.* at 936. The product in question was fruit juice snacks targeted towards toddlers aged 2–3. *Id.* at 936. The package label contained pictures of oranges, peaches, strawberries, and cherries. *Id.* The label also stated the product was made with “real fruit juice and natural ingredients.” *Id.* In actuality, the product contained only white grape juice from concentrate. *Id.*

142. *Id.*

143. *Williams v. Gerber Prods. Co.*, 439 F. Supp. 2d 1112, 1116 (S.D. Cal. 2006).

144. *Williams*, 552 F.3d at 940 (rejecting the defendant’s claim that the product complied with the FFDCa and therefore shielded the defendants from liability under the California state statutes). It appears that the *Williams* court’s holding was based, at least in part, on the defendants’ failure to properly make the “shielding” argument before the District Court and their failure to show how an FFDCa compliant label might shield the defendants from liability under the California state statutes. *Id.* In *Holk v. Snapple Beverage Corp.*, the Third Circuit reviewed a similar case in which a consumer brought suit under a New Jersey consumer protection fraud statute against a beverage manufacturer that claimed that the beverage was “natural.” 575 F.3d 329, 332–33 (3d Cir. 2009). FDA guidance established an informal policy for such a claim based in part on the product’s ingredient content and manufacturing process. *Id.* at 340. The court found the FFDCa and other pertinent regulations did not expressly or impliedly preempt the state statute because the FDA had only issued a “policy statement” on the use of the word “natural,” which could not overcome the presumption against federal preemption of state statutes enforcing police powers. *Id.* at 342.

145. *Fraker v. KFC Corp.*, No. 06-CV-01284-JM (WMC), 2007 WL 1296571, at \*4–5 (S.D. Cal. Apr. 30, 2007).

*Corp.*, the court considered a consumer class action suit initiated against a large restaurant chain.<sup>146</sup> The plaintiffs alleged that the defendants violated the UCL, FAL, and CLRA.<sup>147</sup> The complaint also alleged that the defendant misbranded food in violation of the Sherman Law and FFDCFA.<sup>148</sup> The court found that allowing the state tort claim to proceed, despite the fact that the matter was within the jurisdiction of the FFDCFA, “would significantly increase the burdens on the FDA to ensure uniform enforcement of its administrative duties,” and held that “such claims are impliedly preempted by the FFDCFA.”<sup>149</sup>

The District of Columbia District Court reached a similar result in *Mills v. Giant of Maryland, LLC* where lactose intolerant plaintiffs filed suit against a grocery store because milk sold in the grocery store did not contain a warning that the product contained lactose.<sup>150</sup> The plaintiffs alleged that the grocery store’s failure to warn consumers that milk contained lactose resulted in personal injury.<sup>151</sup> The court took note of the express preemption provisions of the FFDCFA and noted that milk was subject to a standard of identity defined by FDA regulations.<sup>152</sup> The court also noted that the FDA reserves the right to determine which additives pose safety concerns and thereby require product labeling.<sup>153</sup> As such, the court applied the FFDCFA’s preemption provisions broadly, precluding the plaintiffs’ claims.<sup>154</sup>

In *Chacanaca v. Quaker Oats Co.*, a federal court in California considered several claims by a class of California consumers against a food manufacturer on the basis that labels and promotional material appearing on the packaging of the manufacturer’s snack bars violated the FAL, UCL, CLRA, and Lanham Act.<sup>155</sup> The packaging material at issue made several nutrient content and

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146. *Id.* at \*1.

147. *Id.* at \*1–2.

148. *Id.* at \*3. The plaintiffs specifically alleged the defendant’s food was high in trans fats and that trans fats were not safe. *Id.* at \*1. The plaintiffs also challenged the veracity of the defendant’s advertising statements. *Id.* at \*1–2. Those advertisements included phrases such as “KFC . . . provides the ‘best food’” and “[t]he good news is that all foods can fit into a balanced eating plan. . . . [y]ou can enjoy ‘fast food’ as part of a sensible balanced diet.”

149. *Id.* at \*4.

150. 441 F. Supp. 2d 104, 105 (D.D.C. 2006), *aff’d*, 508 F.3d 11 (D.C. Cir. 2007).

151. *Id.* at 105.

152. *Id.* at 106–07.

153. *Id.* at 110; *see also* FFDCFA § 403(q)(1), 21 U.S.C. § 343(q)(1) (2006 & Supp. 2012) (specifying what nutritional information must be contained on a food product label and allowing the Secretary of the FDA to require certain labels to contain certain information or to require that certain information on labels be highlighted).

154. *Mills*, 441 F. Supp. 2d at 108 (stating that “a warning label of the nature requested by plaintiffs would far exceed the labeling requirements mandated by the standard of identity established by [FDA regulation]” and rejecting “the contention that a label with either of the warnings suggested by plaintiffs is ‘identical’ to a label without these warnings”).

155. 752 F. Supp. 2d 1111, 1114 (N.D. Cal. 2010) (noting that the consumers argued that statements made by the defendant on its packaging were misleading and untrue).

health claims.<sup>156</sup> The court noted that the defendant's health and nutrient content claims were subject to FDA regulation under the NLEA amendments to the FFDCFA.<sup>157</sup> Furthermore, the court took note of the NLEA preemption provisions that are applicable to such claims.<sup>158</sup> The court dismissed the consumers' claims on the grounds that the manufacturer's packaging was subject to FDA regulation and was compliant with the FFDCFA.<sup>159</sup>

The *Williams* decision may be narrowly viewed as consistent with the *In re Farm Raised Salmon Cases* court's decision because the *Williams* court allowed the plaintiff's claims to proceed. However, the *Williams* court was not addressing any claims by the plaintiff that the fruit snack manufacturer violated the Sherman Law.<sup>160</sup> Hence, section 310's preemptive purview was not before the court in the same manner as it was in *In re Farm Raised Salmon Cases*.<sup>161</sup> The *Fraker*, *Mills*, and *Chacanaca* decisions are harder to reconcile with *In re Farm Raised Salmon Cases* and *Pom Wonderful*. Like the plaintiffs in the *In re Farm Raised Salmon Cases* litigation, the *Fraker* and *Chacanaca* court considered claims brought under the UCL, FAL, CLRA and Sherman Law.<sup>162</sup> Applying virtually the same positive law as the court in *In re Farm Raised Salmon Cases*, the *Fraker* court determined that the state law claims were impliedly preempted under the doctrine of field preemption.<sup>163</sup> The *Chacanaca* court found that the FFDCFA expressly preempted the state law claims because the state claims were based on food labels and corresponding

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156. The manufacturer labeled its product as containing no trans fats, and claimed that its Chewy Bars were "wholesome," "a good source of calcium and fiber," and contained "no high fructose corn syrup." *Id.* at 1115. The packaging also contained images of "oats, nuts, and children in soccer uniforms." *Id.*

157. FFDCFA section 403 specifies the information that must be disclosed on a food label. FFDCFA § 403, 21 U.S.C. § 343. Corresponding regulations mandate disclosure of trans fat content only if the trans fat is present in an amount greater than 0.5 grams per serving. 21 C.F.R. § 101.9(c)(2)(ii) (2012). FFDCFA section 343(r) specifies the requirements for making health and nutrient content claims. FFDCFA § 403(r), 21 U.S.C. § 343(r). The relevant regulations are located at 21 C.F.R. § 101.13 for nutrient content claims and at 21 C.F.R. § 101.14 for health claims. 21 C.F.R. § 101.13–14 (2012).

158. *Chacanaca*, 752 F. Supp. 2d at 1118 (referring to FFDCFA § 403A(a)(4)–(5), 21 U.S.C. 343–1(a)(4)–(5) (2006 & Supp. 2012)).

159. *Chacanaca*, 752 F. Supp. 2d at 1127. The court noted that claims regarding promotional material on the front of the product's packaging that was not subject to FDA regulations were not preempted by the FFDCFA. *Id.* at 1123–24. The court also dismissed the Lanham Act claim on the grounds that the consumers did not have standing to bring such a claim because they were not competitors with the defendant. *Id.* at 1126–27.

160. See *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 936 (9th Cir. 2008).

161. See *id.* at 940 (explaining that the defendant did not argue how it would be shielded from liability under California law by complying with FDA regulations).

162. *Chacanaca*, 752 F. Supp. 2d at 1114; *Fraker v. KFC Corp.*, No. 06-CV-01284-JM (WMC), 2007 WL 1296571, at \*3 (S.D. Cal. Apr. 30, 2007).

163. *Fraker*, 2007 WL 1296571 at \*4.

promotional materials that were compliant with federal law.<sup>164</sup> Similarly, like the court in *In re Farm Raised Salmon Cases*, the *Mills* court considered a state-labeling requirement for a food product subject to a standard of identity under federal law.<sup>165</sup> Yet the *Mills* court reached a contrary decision, determining that the FFDCA broadly preempted state labeling claims.<sup>166</sup> The *Fraker*, *Chacanaca*, and *Mills* decisions suggest that the nature of the statute in question—whether it is a state statute or a competing federal statute—cannot justify the divergent holdings in *In re Farm Raised Salmon Cases* and *Pom Wonderful*.

*C. Too Many Cooks in the Kitchen: Uniformity is Needed to Foster a Predictable Legal Environment for Consumers and Manufacturers*

The current enforcement paradigm features a host of players whose oversight roles overlap.<sup>167</sup> The FDA is aware of the states' authority to enact their own labeling and advertising statutes, but has not clarified the scope of its regulations.<sup>168</sup> Concurrently, state courts are willing to facilitate litigation filed by consumers with causes of action inherently predicated on food and beverage labeling violations.<sup>169</sup> State and federal courts are stuck with the unenviable task of squaring these somewhat divergent interests when lawsuits invoke issues that are addressed by the FFDCA but are facially pled on other grounds.

To date, the judicial system has struggled with this task.<sup>170</sup> Can a non-FFDCA based claim be preempted by the FFDCA if the pleadings give rise to an FFDCA violation? Is implied field preemption of the FFDCA ever applicable to state law claims? The existing legal environment offers

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164. *Chacanaca*, 752 F. Supp. 2d at 1127. Notably, the court stated the “plaintiffs’ deception claims may only go forward if they can show that the statements would also be ‘misbranded’ under the terms of the [FFDCA].” *Id.* at 1119.

165. *Mills v. Giant of Md.*, 441 F. Supp. 2d at 106–07 (D.D.C. 2006), *aff’d*, 508 F.3d 11 (D.C. Cir. 2007).

166. *Id.* at 108.

167. *See* Fortin, *supra* note 5, at 4 (identifying the various government entities charged with enforcement oversight of food and beverage labeling and advertising including state legislatures and regulatory agencies, Congress, the FDA, and the courts); *see also* Schaffer, *supra* note 11, at 371–72 (discussing the complex and disjointed regulation of the food industry).

168. *See* Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision, 55 Fed. Reg. 29487, 29509 (July 19, 1990) (admitting that the preemption of state laws touching upon food and beverage labels is a confusing subject).

169. *See supra* note 117 (noting several cases where courts have considered private litigant claims facially pleaded under consumer protection statutes but dependent on food labeling violations subject to enforcement solely by the government).

170. *Compare* Red v. Kraft Foods, Inc., 754 F. Supp. 2d 1137, 1142–44 (C.D. Cal. 2010) (treating statements made about vegetables as ingredient claims on a label and not impliedly preempted under the FDCA) *with* Dvora v. Gen. Mills, Inc., No. CV 11-1074-GW (PLAx), 2011 WL 1897349, at \*5–6 (C.D. Cal. May 16, 2011) (distinguishing the *Kraft Foods, Inc.* holding by treating statements made about particular fruits as flavor claims on a label, which are impliedly preempted under the FDCA).

insufficient guidance on these questions and many more.<sup>171</sup> Therefore, Congress should develop a workable statutory scheme that expands the FFDCAs' preemption provisions.

Specifically, the FFDCAs should prohibit all private entity lawsuits if the underlying facts supporting the claim rely on information contained on the product's label that is subject to the FFDCAs' preemption provisions. It is possible that this course of action would generate more litigation; however, it is necessary to clarify the current conflicting state and federal laws so that manufacturers can know what regulations they are subject to and potential consumer litigants can understand when they can bring a private suit. This approach will also enable states to continue to enforce FFDCAs' violations under section 310 thereby preserving their traditional police power functions. It will also prevent private parties from bringing lawsuits inherently predicated on food labeling violations but facially pleaded on other grounds.<sup>172</sup> However, given the creativity the plaintiff's bar has shown to date, the suggested approach may offer only temporary and limited benefits.<sup>173</sup>

#### IV. CONCLUSION

Ultimately, the status quo is unacceptable because it creates hardships for both consumers and food manufacturers. Consumers are left unsure of their rights to take issue with perceived food and beverage labeling violations and businesses are forced to operate in an uncertain legal environment and face high costs to defend litigation. Although a product's labeling may be compliant with the FFDCAs, it may nevertheless be subject to legal action in some states, forcing manufacturers to be hyper-vigilant and misdirect valuable resources. Therefore, Congress should act to prohibit all private entity lawsuits if the underlying facts supporting the claim rely on information contained on the product's label that is subject to the FFDCAs' preemption provisions.

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171. See *supra* note 169.

172. However, court battles will likely be waged following enactment of such a provision. The scope of a new provision prohibiting private litigants from bringing suit will need to be either carefully expressed in the new statute or in subsequent regulations enacted by FDA. For instance, courts may struggle to determine when the underlying facts supporting a private litigant's claim sufficiently rely on information contained on the product's label such that it should be prohibited. In addition, some court challenges would likely be focused on the Constitutional authority of Congress to pass a law which expands federal oversight of an area arguably within the police powers authority of the states. See *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894) (noting that the regulation of food products is a core police power belonging to the states).

173. Food and beverage manufacturers under the proposed paradigm will only enjoy prohibition of private litigant suits subject to express preemption under FFDCAs' section 403A. See FFDCAs' § 403A(a)(1)–(5), 21 U.S.C. § 343–1(a)(1)–(5) (2006 & Supp. 2012). Private litigants would likely pursue litigation strategies with claims predicated on food label information not subject to preemption under FFDCAs' section 403A. Regardless, this approach would still provide at least some additional clarity to industry and consumers about their legal rights.