
Can You Judge Your Food By Looking At Its Cover? How Courts' Application of Federal Preemption Allows Misleading Food Labeling To Slip Through the Regulatory Cracks

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**CAN YOU JUDGE YOUR FOOD BY
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LABELING TO SLIP THROUGH
THE REGULATORY CRACKS**

INTRODUCTION

Recent years have experienced a sharp influx of food labeling lawsuits in the form of nationwide class actions against large food manufacturers that have allegedly labeled their products in a deceitful manner.¹ As a result, the Northern District of California, being the most popular venue for such suits, has come to be nicknamed the “Food Court.”² The food labeling suits are typically brought by private plaintiffs who challenge the labeling³ of packaged food on the basis that they contain technical violations of the Food, Drug, and Cosmetic Act (FDCA) and its implementing regulations, or on the basis that they are otherwise misleading to consumers.⁴ Plaintiffs favor the forum because California law has been especially accommodating to these types of claims.⁵ California law has created broad causes of action, requiring plaintiffs to allege only that they had purchased a particular product and that the product’s label is “likely to deceive a reasonable consumer.”⁶ Courts have also declared that whether a label is misleading is rarely determined at the pleading stage.⁷

However, defendants in food labeling suits have found express federal preemption to provide a successful alternate avenue for dismissal.

1. *Trends in Food Labeling Class Action Litigation*, EDGEWORTH ECON. (Sept. 16, 2013), <http://www.edgeworththeconomics.com/experience-and-news/news-and-press-releases/article:09-10-2013-trends-in-food-labeling-class-action-litigation/>.

2. Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the “Food Court”: An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, 14 *Class Action Litig. Rep.* (BNA) No. 13, at 800 (July 12, 2013).

3. The FDCA defines “[l]abeling” to mean “all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.” 21 U.S.C. § 321(m) (2012).

4. Anscombe & Buckley, *supra* note 2, at 801.

5. *Id.* at 801–02.

6. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

7. *Id.*

A claim can be dismissed on the basis that it is barred by federal law, namely the FDCA and its implementing regulations promulgated by the Food and Drug Administration (FDA).⁸ The FDCA provides requirements that food products and their labels must meet in order to avoid being deemed “misbranded.”⁹ The Nutrition Labeling Education Act of 1990 (NLEA) amended the FDCA’s section on misbranding.¹⁰ In doing so, it added a preemption clause that expressly prohibits states from imposing labeling requirements that are not identical to those provided in certain subsections of the FDCA.¹¹ Courts have found deceptive food labeling claims to be barred under the NLEA’s preemption clause when the plaintiff’s claim sought to impose requirements different than or in addition to the preemptive FDCA requirements.¹²

The precise meaning and scope of the language of the NLEA’s preemption clause is somewhat uncertain. However, courts have begun to apply it in a broad manner that keeps meritorious consumer suits out of court.¹³ This Comment argues that courts should construe the NLEA’s preemption clause more narrowly, so as to allow more state law challenges to misleading labeling practices. Part II provides background information on the FDA’s authority to regulate food labels, the consumer-protection laws used to litigate most deceptive food labeling claims, and courts’ current application of express federal preemption to deceptive labeling claims.¹⁴ Part III explores the ambiguities of the language and scope of the NLEA’s preemption clause.¹⁵ It argues in favor of construing the language of the NLEA so as to reduce its preemptive scope.¹⁶ Part IV explores the impact of such an approach on the states’ role in protecting consumers from deceptive labeling.¹⁷

8. *E.g.*, *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, 475 F. App’x 113, 115 (9th Cir. 2012).

9. 21 U.S.C. § 343 (2012). A food will be deemed misbranded when it falls under one of the prohibitions or fails to meet one of the requirements provided in the subsections of § 343. *Id.*

10. Nutrition Labeling and Education Act (NLEA) of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

11. 21 U.S.C. § 343-1(a).

12. *See infra* notes 147–71 and accompanying text.

13. *See infra* notes 147–71 and accompanying text.

14. *See infra* notes 18–71 and accompanying text.

15. *See infra* notes 172–270 and accompanying text.

16. *See infra* notes 172–270 and accompanying text.

17. *See infra* notes 271–97 and accompanying text.

II. BACKGROUND

A. *The Food, Drug, and Cosmetic Act and the Nutrition Labeling and Education Act*

The Food, Drug, and Cosmetic Act (FDCA) and its implementing regulations set out detailed national standards for most food and beverage labeling.¹⁸ To do so, the FDCA provides certain requirements that a product and its label must meet in order to avoid being deemed “misbranded.”¹⁹ Then, it prohibits certain acts related to misbranded food.²⁰ However, before 1990, the regulations for nutritional information only applied to products that voluntarily included it or products that claimed to be a good source of a nutrient or to be generally nutritious.²¹ Congress amended the FDCA with the Nutrition Labeling and Education Act of 1990 (NLEA).²² One purpose of enacting the NLEA was to create uniform national standards regarding the labeling of food and to prevent states from adopting inconsistent requirements with respect to the labeling of nutrients.²³ Another purpose was “to ensure consumer access to information about food that is scientifically valid, truthful, reliable, understandable, and non-misleading, in order to foster more healthful food choices.”²⁴ Specifically, the NLEA aimed to “clarify and to strengthen the [FDA]’s legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods.”²⁵ It was enacted partially in response to pressure from the food industry, as state attorneys general were becoming increasingly involved in regulating food labeling through consumer-protection laws since the mid-1980s.²⁶ During this time, the FDA had also taken a more per-

18. 21 U.S.C. §§ 301–399 (2012); 21 C.F.R. §§ 101–199 (2014).

19. 21 U.S.C. § 343.

20. *Id.* § 331. Among these prohibited acts are (1) “[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is . . . misbranded”; (2) “[t]he . . . misbranding of any food . . . in interstate commerce”; (2) “[t]he receipt in interstate commerce of any food . . . that is . . . misbranded, and the delivery or proffered delivery thereof for pay or otherwise; and (3) “[t]he manufacture, within any Territory of any food . . . that is . . . misbranded.” *Id.* § 331(a), (b), (c), (g).

21. Nutrition Labeling, 38 Fed. Reg. 6951 (Mar. 14, 1973).

22. NLEA, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.).

23. 136 CONG. REC. H5840 (daily ed. July 30, 1990) (statement of Rep. Waxman).

24. Gail H. Javitt, *Supersizing the Pint-Sized: The Need for FDA-Mandated Child-Oriented Food Labeling*, 39 LOY. L.A. L. REV. 311, 311 (2006) (citing NLEA § 2(b)(1), 104 Stat. at 2356–57; 136 CONG. REC. 35,093, 35,096–97 (1990) (statement of Rep. Madigan)).

25. H.R. REP. NO. 101-538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 1336, 1337.

26. Michele M. Bradley, *The States’ Role in Regulating Food Labeling and Advertising: The Effect of the Nutrition Labeling and Education Act of 1990*, 49 FOOD & DRUG L.J. 649, 649 (1994) (citing FDA’s *Continuing Failure To Regulate Health Claims for Foods: Hearings Before*

missive approach in allowing a broad range of health and nutrition claims.²⁷ Food companies took advantage of this by rebranding old products and bombarding consumers with bold health claims.²⁸ For instance, food companies claimed margarine was so low in cholesterol that it reduced the risk of heart disease.²⁹

The NLEA amended the FDCA with six major changes.³⁰ First, the NLEA mandates that the FDA require and oversee nutrition labeling for all food products.³¹ Second, the NLEA directs the FDA to establish definitions for certain commonly used nutrient-content descriptors—such as “high” in dietary fiber, “low” in fat, and “lite”—to provide consumers with reliable information by which to base their purchases on.³² Third, the NLEA requires the FDA to review labels claiming disease prevention.³³ Fourth, the NLEA established requirements for packaged food labels, providing for the listing of additional ingredients, mandatory components of standardized food, certified color additives, and the percent of fruit or vegetable juice.³⁴ Fifth, the NLEA adds a clause to the FDCA that expressly preempts some state law pertaining to certain labeling aspects.³⁵ And sixth, the NLEA allows for cooperative enforcement between the FDA and state governments by granting state governments a right to bring actions enforcing the FDCA in federal courts, subject to certain limitations.³⁶

A notable aspect of the FDCA is that it does not provide a private right of action to enforce it.³⁷ Thus, to obtain the right to sue and obtain remedies for deceptive food labeling, private plaintiffs must invoke a state consumer-protection statute.

the Human Res. & Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations, 101st Cong. 30 (1989).

27. *Id.* at 652.

28. *Id.*

29. *Id.*

30. Tamara Schulman, Note, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 592 (2010).

31. *Id.* (citing NLEA § 2, sec. 403(q)(1), 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 343(q)(1))).

32. *Id.* (citing NLEA § 3(b)(1)(A)(iii), 104 Stat. at 2361 (codified at note following 21 U.S.C. § 343)).

33. *Id.* (citing NLEA § 3, sec. 403(r)(3)(B)(ii), 104 Stat. at 2359 (codified at 21 U.S.C. § 343(r)(3)(B)(ii))).

34. *Id.* (citing NLEA § 7, sec. 403(i), 104 Stat. at 2364 (codified as amended at 21 U.S.C. § 343(i))).

35. *Id.* (citing NLEA § 6, sec. 403A, 104 Stat. at 2362–63 (codified as amended at 21 U.S.C. § 343-1)).

36. Schulman, *supra* note 30, at 592 (citing NLEA § 4, sec. 307, 104 Stat. at 2362 (codified at 21 U.S.C. § 337)).

37. See 21 U.S.C. § 337(a) (“[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.”).

B. State Consumer-Protection Statutes

Every state has a consumer-protection statute, or set of statutes, that contains broad prohibitions similar to those of the Federal Trade Commission Act (FTC Act), which prohibits “unlawful,” “unfair,” or “deceptive” business acts or practices.³⁸ Most of these “little FCT Acts” provide consumers with a private right of action for violations of these prohibitions.³⁹

California has particularly broad consumer-protection laws, which are provided in its Unfair Competition Law (UCL),⁴⁰ False Advertising Law (FAL),⁴¹ and Consumer Legal Remedies Act (CLRA).⁴² The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.”⁴³ It also prohibits “unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.”⁴⁴ Thus, the UCL prohibitions incorporate all of the prohibitions of the FAL, which makes it unlawful for a business to make any statement that is “untrue or misleading” and that is “known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”⁴⁵ The CLRA lists certain “unfair methods of competition and unfair or deceptive acts or practices” and declares them unlawful.⁴⁶ The UCL, FAL, and CLRA are all used in consumer suits for deceptive food labeling.⁴⁷ Importantly, they provide consumers with private rights of action to obtain remedy under them.⁴⁸

California’s UCL is arguably the broadest of all the state consumer-protection statutes.⁴⁹ It prohibits “any unlawful, unfair or fraudulent business act or practice,” while many other states’ consumer-protec-

38. Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903, 1903, 1909, 1910 (2013); *see also id.* at 1928–49 (surveying the consumer-protection acts in each state).

39. *Id.* at 1911 n.37, 1928–49.

40. *CAL. BUS. & PROF. CODE* §§ 17200–17210 (West 2012).

41. *Id.* §§ 17500–17509.

42. *CAL. CIV. CODE* §§ 1750–1785 (West 2012).

43. *BUS. & PROF. §* 17200.

44. *Id.*

45. *See id.* §§ 17200, 17500.

46. *CIV. §* 1770.

47. Anscombe & Buckley, *supra* note 2.

48. *BUS. & PROF. §* 17204 (allowing suits by “any person who has suffered injury in fact and has lost money or property as a result of the unfair competition”); *id.* § 17535 (allowing suits by “any person who has suffered injury in fact and has lost money or property as a result of a violation of [the FAL]”); *CIV. §* 1780(a) (allowing suits by “[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by [the CLRA]”).

49. Morris, *supra* note 38, at 1905 n.3.

tion statutes have more specific “laundry lists” of prohibited acts or practices.⁵⁰

The “unlawful” prong of the UCL makes violations of other laws independently actionable.⁵¹ Under the unlawful prong of the UCL, plaintiffs can bring claims based on violations of California’s Health and Safety Code.⁵² The Health and Safety Code, in turn, incorporates by reference the FDCA and the regulations promulgated under it.⁵³

As for consumer claims under the “unfair” prong, California appellate courts are split and have been using three different definitions for what constitutes an “unfair” business act or practice.⁵⁴ The first test requires the court to “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”⁵⁵ The second test defines an unfair business act or practice as one that is “forbidden by any law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made”⁵⁶ or that “offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.”⁵⁷ The third test adopts the elements that define unfairness under section 5 of the Federal Trade Commission Act: “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to con-

50. *Id.* (quoting BUS. & PROF. § 17200). Illinois’ Consumer Fraud and Deceptive Practices Act, for example, prohibits a slightly more limited scope of acts and practices:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the “Uniform Deceptive Trade Practices Act”, approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful . . .

See 815 ILL. COMP. STAT. 505/2.

51. *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 878 (Cal. 2013).

52. *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1174 (Cal. 2008).

53. CAL. HEALTH & SAFETY CODE § 110100(a) (West 2012) (incorporating “[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the [FDCA]” as “the food labeling regulations of this state”).

54. Alexander N. Cross, Comment, *Federalizing “Unfair Business Practice Claims” Under California’s Unfair Competition Law*, 2013 U. CHI. LEGAL F. 489, 490 (citing *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 2d 399 (Ct. App. 2001); *Gregory v. Albertson’s, Inc.*, 128 Cal. Rptr. 2d 389 (Ct. App. 2002); *Camacho v. Auto. Club S. Cal.*, 48 Cal. Rptr. 3d 770 (Ct. App. 2006)).

55. *E.g.*, *Smith*, 113 Cal. Rptr. 2d at 415.

56. *E.g.*, *Gregory*, 128 Cal. Rptr. 2d at 394 (quoting *Saunders v. Superior Court*, 33 Cal. Rptr. 2d 438, 441 (Ct. App. 1994)) (internal quotation marks omitted).

57. *E.g.*, *id.* (alteration in original) (quoting *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Ct. App. 1996)).

sumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.”⁵⁸

Under the “fraudulent” prong, a plaintiff must show that “members of the public are likely to be deceived,”⁵⁹ A plaintiff must also allege “that the defendant’s misrepresentations were an immediate cause of the injury-causing conduct,” but the plaintiff need not allege “that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct.”⁶⁰

Thus, a consumer can use the “unlawful” prong of the UCL to sue for a specific violation of the FDCA requirements by alleging a violation of the identical requirements in the California Health and Safety Code.⁶¹ Alternatively, when the food label at hand has complied with the specific requirements of the FDCA, a consumer can use the “unfair” and “fraudulent” prongs to bring claims that the food label is otherwise unfair or deceptive.⁶²

California courts generally find a plaintiff’s allegations that she either “purchased, purchased more of[,] or paid more for” the defendant’s product as a result of the defendant’s conduct to be sufficient to establish Article III standing to state a claim under the California consumer-protection statutes.⁶³

C. *Pleading a Deceptive Food Labeling Claim Under California Law: Williams v. Gerber Products Co.*

*Williams v. Gerber Products Co.*⁶⁴ established an application of the plausibility pleading standard of *Bell Atlantic Corp. v. Twombly*⁶⁵ that is permissive to plaintiffs bringing deceptive labeling claims under California consumer-protection laws.⁶⁶

Williams involved a class action challenge to the labeling of Gerber’s “Fruit Juice Snacks,” part of the “Graduates for Toddlers”

58. *E.g.*, *Camacho*, 48 Cal. Rptr. 3d at 777 (citing 15 U.S.C. § 45(n)).

59. *In re Tobacco II Cases*, 207 P.3d 20, 29 (Cal. 2009) (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002)) (internal quotation marks omitted).

60. *Id.* at 40.

61. *In re Farm Raised Salmon*, 175 P.3d at 1175.

62. *See, e.g.*, Second Amended Complaint for Violations of: Unfair Competition Law; False Advertising Law; & Consumer Legal Remedies Act at paras. 167–68, *Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137 (C.D. Cal. 2010) (No. CV 10–1028–GW(AGRx)), 2010 WL 4771437.

63. *Red*, 754 F. Supp. 2d at 1145; *see also* *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1078–79 (E.D. Cal. 2010); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124–26 (N.D. Cal. 2010).

64. 552 F.3d 934 (9th Cir. 2008).

65. 550 U.S. 544 (2007).

66. *Williams*, 552 F.3d at 938–39.

food products line.⁶⁷ The plaintiffs sued under California's UCL, FAL, and CLRA, alleging deceptive labeling.⁶⁸ The plaintiffs challenged several features of the product's packaging.⁶⁹ First, the words "fruit juice" were juxtaposed alongside images of fruits, including oranges, peaches, strawberries, and cherries.⁷⁰ The plaintiffs argued that this was deceptive because the product contained only white grape juice from concentrate and no juice from the fruits depicted.⁷¹ Next, a statement on the side panel of the package said that the product was made "with real fruit juice and other all natural ingredients," while the two most prominent ingredients were corn syrup and sugar.⁷² Another statement on the side panel declared the product to be "one of a variety of nutritious Gerber Graduates foods and juices."⁷³ The plaintiffs objected to the use of the word "nutritious" to describe the sugary product.⁷⁴ Finally, the product was labeled as a "snack," while the plaintiffs contended that it should be labeled a "candy," "sweet," or "treat," and that the words "'naturally flavored' allegedly did not comply with the applicable text size requirements."⁷⁵

The district court granted Gerber's motion to dismiss, finding that Gerber's statements were "not likely to deceive a reasonable consumer as a matter of law."⁷⁶ The decision was supported by the fact that the ingredients were listed on the side of the box and the finding that the product's "nutritious" claim was nonactionable puffery.⁷⁷

The Ninth Circuit reversed the district court's dismissal of the plaintiffs' claims.⁷⁸ The court applied the "reasonable consumer test" as the substantive standard governing the claims under the California consumer-protection statutes used.⁷⁹ Under the reasonable consumer test, plaintiffs "must show that 'members of the public are likely to be deceived.'"⁸⁰ The court also applied the procedural federal pleading standard, which, under *Twombly*, requires that a plaintiff plead "enough facts to state a claim to relief that is plausible on its face" and

67. *Id.* at 936.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Williams*, 552 F.3d at 936.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 936, 938.

77. *Id.* at 937.

78. *Williams*, 552 F.3d at 940.

79. *Id.* at 938.

80. *Id.* (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).

that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”⁸¹ However, the court then stated that “California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer.”⁸²

The court distinguished the facts of *Williams* from those of *Freeman v. Time, Inc.*,⁸³ a Ninth Circuit precedent, in which the court upheld the dismissal of a claim challenging a mailer that allegedly suggested that the plaintiff had won a million dollar sweepstakes.⁸⁴ In *Freeman*, the court found that it was impossible for the mailer to be misleading because it explicitly stated multiple times that the plaintiff needed to acquire a winning sweepstakes number in order to win.⁸⁵ Because the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer would likely be deceived, it was not necessary for the court to evaluate additional evidence.⁸⁶

In *Williams*, however, the court held that the facts did not constitute the rare situation in which it would be appropriate to grant a motion to dismiss.⁸⁷ It found that reasonable consumers could be misled by the juxtaposition of “fruit juice” and images of fruit to believe that the product contained juices from particular fruits that it did not actually contain.⁸⁸ It also found that the statement “made with fruit juice and other all natural ingredients” could easily be interpreted by reasonable consumers as a statement that all of the product’s ingredients were natural, which was allegedly false.⁸⁹ The court acknowledged that the “nutritious” claim “could arguably constitute puffery,” which would not be actionable in itself because the term “nutritious” would be “difficult to measure concretely.”⁹⁰ However, the court allowed that allegation to stand, stating that it contributed to the predominant deceptive message conveyed by the other label representations.⁹¹

81. *Id.* at 938 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 547 (2007)).

82. *Id.* at 938–39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 236 (Ct. App. 2007) (“Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires ‘consideration and weighing of evidence from both sides’ and which usually cannot be made on demurrer.”)).

83. 68 F.3d 285.

84. *Williams*, 552 F.3d at 939; *Freeman*, 68 F.3d at 285.

85. *Williams*, 552 F.3d at 939.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 939 n.3.

91. *Williams*, 552 F.3d at 939 n.3.

The court rejected the district court's approach of looking at the package as a whole when applying the reasonable consumer test.⁹² It held that reasonable consumers should not be expected to "look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."⁹³ The court also stated that the FDA-regulated ingredient list is not intended to serve as a shield from liability for manufacturers who make misleading statements elsewhere on the package.⁹⁴ The court therefore held that the plaintiffs stated a plausible deceptive labeling claim.⁹⁵

Williams demonstrates that it is difficult to get a deceptive labeling suit dismissed on the ground that it is not plausible that the labeling at issue is likely to mislead a reasonable consumer. However, express preemption has emerged as an alternative avenue by which a defendant food manufacturer might attempt to dismiss these suits.

D. Preemption

"Preemption is a doctrine of American constitutional law under which state and local governments are deprived of their power to act in a given area, whether or not the state or local law, rule or action is in direct conflict with federal law."⁹⁶ The doctrine arises from the Supremacy Clause of the United States Constitution, which grants Congress the power to preempt state law.⁹⁷ The Supremacy Clause provides that the laws enacted by the U.S. legislature to carry out the Constitution are the "supreme Law of the Land" that binds all state courts, state laws "to the [c]ontrary notwithstanding."⁹⁸ Thus, Congress is "empowered to pre[]empt state law by so stating in express terms."⁹⁹ That is, Congress may include a preemption clause in a federal statute that "explicitly withdraw[s] specified powers from the

92. *Id.* at 939.

93. *Id.*

94. *Id.*

95. *Id.* at 940.

96. JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* § 1.1, at 1 (2006) (citing Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994)).

97. THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 45–46 (2008).

98. *Id.* (quoting U.S. CONST. art. VI, cl. 2). The Supreme Court has repeatedly held that federal regulations can preempt state law just as federal statutes can. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (collecting cases).

99. MCGARITY, *supra* note 97, at 46 (quoting *Hillsborough Cnty.*, 471 U.S. at 713).

states.”¹⁰⁰ This type of preemption is accordingly known as “express preemption.”¹⁰¹

The U.S. Supreme Court has also created “implied preemption” (or “field preemption”), a “separate body of [preemption] . . . in which courts divine congressional intent not by interpreting an express preemption clause but by comparing the federal statute’s overall language and purpose to the operative aspects of the applicable state law.”¹⁰² Implied preemption occurs when a court finds that a federal regulatory scheme is “so pervasive” it implies “that Congress left no room for the States to supplement it,”¹⁰³ or when the “federal interest” in the particular field governed by a statute is “so dominant” that federal law “will be assumed to preclude enforcement of state laws on the same subject.”¹⁰⁴ Additionally, even in the absence of express or implied preemption, “conflict preemption” occurs when state law “actually conflicts” with federal law.¹⁰⁵ Such a conflict arises either when compliance with both the state and federal law is “a physical impossibility,” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁶ The analysis in this Comment, however, focuses primarily on express preemption.¹⁰⁷

Because Congress’ power to preempt state law in a particular area is “well established,” courts deciding preemption cases seek only to determine whether Congress has in fact exercised its preemption power.¹⁰⁸ In deciding an issue of express preemption, a court must ascertain what the text of the applicable preemption clause means.¹⁰⁹ The Supreme Court has directed judges to apply a presumption against preemption when determining the existence and scope of pre-

100. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

101. *Id.*

102. MCGARITY, *supra* note 97, at 46.

103. Nelson, *supra* note 100, at 227 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

104. *Id.* (quoting *Rice*, 331 U.S. at 230).

105. *Id.* at 228 (quoting *English*, 496 U.S. at 79).

106. *Id.* at 228 & n.14 (noting that courts typically cite to *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963), in articulating the “physical impossibility” prong of the test, and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), in articulating the “obstacle” prong of the test).

107. Implied preemption likely does not apply under the NLEA and FDCA. See *infra* notes 130–33 and accompanying text.

108. Gardbaum, *supra* note 96, at 767 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983)).

109. Nelson, *supra* note 100, at 226–27.

emption.¹¹⁰ This means that when dealing with “areas of traditional state regulation,” the court is to “assume that a federal statute has not supplanted state law unless Congress has made such intention ‘clear and manifest.’”¹¹¹ Thus, if there are two equally plausible readings of a preemption clause, the court must choose the one that disfavors preemption.¹¹²

In *Bates v. Dow Agrosciences LLC*,¹¹³ the Supreme Court examined a preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹¹⁴ Like that of the NLEA, the FIFRA preemption clause prohibited state-imposed “requirements.”¹¹⁵ The Court interpreted the term “requirement” to encompass not only state statutes and regulations, but also common-law duties and judge-made rules imposed on defendants facing possible liability under a state law cause of action.¹¹⁶ The Court also specified that as long as a state law claim imposes obligations that are parallel to the federal law, the state is effecting identical requirements, and the claim will not be preempted.¹¹⁷

In the food labeling class action context, express preemption is used as an affirmative defense by which the defendant food manufacturer attempts to dismiss the complaint.¹¹⁸ The food manufacturer argues that imposing liability based on the plaintiff’s claim of deceptive labeling would impose labeling “requirements” that are different from or additional to the requirements of the applicable provisions of the FDCA or its implementing regulations.¹¹⁹ Such state action is expressly prohibited, as to certain FDCA provisions, by the preemption clause of the NLEA.¹²⁰

110. *Id.* at 227 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 518 (1992) (plurality opinion)).

111. McGARITY, *supra* note 97, at 46 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

112. *Bates*, 544 U.S. at 449. “[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” *Id.* (quoting *Medtronic*, 518 U.S. at 485) (alteration in original).

113. 544 U.S. 431.

114. *Id.* at 434, 435–36.

115. The FIFRA preemption clause provided, “[States] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” *Id.* at 436 (quoting 7 U.S.C. § 136v(b)).

116. *Id.* at 443.

117. *Id.* at 447.

118. *See, e.g.*, *Samet v. Proctor & Gamble Co.*, No. 5:12–CV–01891 PSG, 2013 WL 3124647, at *6 (N.D. Cal. June 18, 2013).

119. *Id.*

120. 21 U.S.C. § 343-1(a) (2012).

The logic behind the affirmative defense is that by seeking to impose liability on a food manufacturer for labeling its product in a certain manner, a plaintiff is effectively using the state consumer-protection law to compel the food manufacturer to change a certain aspect of its label. This arguably forces the food manufacturer to comply with a sort of “requirement” that is not contained in the FDCA or the regulations promulgated under it by the FDA.

Before delving further into the way courts apply express preemption under the NLEA, it is necessary to take a closer look at the NLEA’s preemption clause.

1. Section 343-1. National Uniform Nutrition Labeling

In addition to providing federal standards for food labeling in § 343, the NLEA added § 343-1, titled “National uniform nutrition labeling.”¹²¹ Subsection 343-1(a) contains a preemption clause with language that expressly prohibits states from establishing certain “requirements” for food labeling.¹²² It provides in relevant part:

(a) [N]o 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 . . . ,

(2) any requirement for the labeling of food of the type required by section 343(c), 343(e), 343(i)(2), 343(w), or 343(x) of this title that is not identical to the requirement of such section . . . ,

(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 . . . ,

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title . . . ,

(5) any requirement respecting any claim of the type described in section 343(r)(1) of this title, made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title¹²³

121. NLEA, Pub. L. No. 101-535, § 6, sec. 403A, 104 Stat. 2353, 2362–64 (1990) (codified at 21 U.S.C. § 343-1(a)).

122. 21 U.S.C. § 343-1(a).

123. *Id.*

The enumerated subsections that are given preemptive effect are various provisions of the “Misbranded food” section. These provisions include § 343(i)(2), which addresses ingredient listing;¹²⁴ § 343(k), which addresses the disclosure of artificial flavoring, coloring, and preservatives;¹²⁵ § 343(q), which provides specifications for the required nutrition-facts panel;¹²⁶ and § 343(r), which imposes requirements for and defines “nutrient content claims” and “health claims” that might be contained on the label, typically on the front of the product’s package.¹²⁷ “Labeling” is defined as “all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.”¹²⁸ The FDA has interpreted the phrase “not identical” to mean state requirements that impose obligations not found in the applicable federal statutory provision or implementing regulation, or that differ from those imposed by the applicable provision or regulation.¹²⁹

The NLEA also contains an uncodified savings clause that limits the general preemptive effect of the NLEA, declaring that the NLEA “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1(a)].”¹³⁰ Two provisions following the savings clause provide that the NLEA also does not preempt any label statement that serves as a “warning concerning the safety of the food or component of the food,” and that it does not give preemptive effect to parts of the FDCA not amended by § 343-1(a).¹³¹ Courts have relied on the savings clause, in part, to determine that state law regarding food labeling is not impliedly preempted by the NLEA or FDCA, even though both extensively regulate the field.¹³² Thus, the preemptive effect of the federal labeling standards imposed by the FDCA is likely limited to the scope of the § 343-1(a) express preemption clause.¹³³

124. *Id.* §§ 343(i)(2), 343-1(a)(2).

125. *Id.* §§ 343(k), 343-1(a)(3).

126. *Id.* §§ 343(q), 343-1(a)(4).

127. *Id.* §§ 343(r), 343-1(a)(5).

128. 21 U.S.C. § 321(m).

129. 21 C.F.R. § 100.1(c)(4) (2014).

130. NLEA, Pub. L. No. 101-535, § 6(c)(1), sec. 403(A), 104 Stat. 2353, 2364 (1990).

131. *Id.* § 6(c)(2)–(3).

132. *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1179 (Cal. 2008).

133. *Id.*

2. *Types of Deceptive Food Labeling Claims Not Subject to NLEA Preemption*

Certain types of private deceptive food labeling claims have been found to escape the preemptive power of § 343-1(a). These include (1) claims that implicate FDCA provisions not enumerated in § 343-1(a);¹³⁴ (2) claims that impose requirements identical to those of the FDCA provisions enumerated in § 343-1(a);¹³⁵ and (3) claims that involve unregulated label features.¹³⁶

It is important to note that § 343-1(a) does not apply to all of the FDCA provisions governing food labeling.¹³⁷ For example, the provision addressing the disclosure of the geographic location in which the food was made is one of the provisions that are not enumerated in the preemption clause. So, a consumer suit based on a misleading representation about a food's origin would not be subject to express preemption.¹³⁸ Also among the provisions not included is § 343(a)(1), which contains a general prohibition against misleading labeling, deeming a food to be “misbranded” when its labeling “is false or misleading in any particular.”¹³⁹ The significance of this exclusion will be discussed in more depth in Part III.A.¹⁴⁰

Additionally, state law claims that impose requirements that are *identical* to the requirements of the enumerated provisions are not preempted under this clause.¹⁴¹ This arises when the plaintiff alleges that a food label is deceptive because of some feature that is specifically in violation of a provision of the FDCA or its implementing regulations.¹⁴² This Comment focuses on cases in which the food label complies with the applicable FDCA provisions but is nevertheless alleged to be misleading,¹⁴³ as those are the cases in which the claims are subject to preemption.

Other claims that avoid preemption are those that concern labeling aspects that are unregulated, such as a statement that a product is “natural.” There have been several consumer suits containing claims

134. See *infra* notes 137–39 and accompanying text.

135. See *infra* notes 141–43 and accompanying text.

136. See *infra* notes 144–46 and accompanying text.

137. See 21 U.S.C. § 343-1(a) (2012).

138. See *Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 361–62 (9th Cir. 2009).

139. 21 U.S.C. § 343(a)(1).

140. See *infra* notes 179–213 and accompanying text.

141. See, e.g., *Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662, 664–65 (9th Cir. 2014).

142. See *id.*; see also *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442–44 (2005).

143. Because there is a separate provision, § 343(a)(1), that prohibits labeling that is “false or misleading in any particular,” any labeling that is misleading is arguably in violation of the FDCA unless the allegedly misleading feature is specifically required by it. See *infra* notes 179–213 and accompanying text.

that the use of the term “natural” on a food label was misleading when the food contained allegedly unnatural components, such as ingredients from genetically modified organisms or artificially manufactured ingredients like high fructose corn syrup.¹⁴⁴ Courts have found these claims not to be preempted because they did not implicate any of the provisions listed in the preemption clause.¹⁴⁵ Similarly, deceptive labeling claims based on other unregulated statements, such as “wholesome” and those based on front-of-the-label pictures, which are generally not regulated under the FDCA, are not found to be expressly preempted.¹⁴⁶

3. *Deceptive Food Labeling Claims Barred Under the NLEA Preemption Clause*

As discussed above, whether or not the FDCA’s preemption clause renders a deceptive labeling claim preempted depends on whether the plaintiff is effectively seeking to impose a food labeling “requirement” that is not contained in the FDCA.¹⁴⁷ Preemption can apply in cases where the plaintiff alleges that some feature or features of the label make it misleading, even though the label complies with the FDCA requirements regarding those specific features. The following examples illustrate the different scenarios in which courts have held deceptive labeling claims to be preempted.

In some cases, the plaintiff takes issue with a statement on a food label that is technically true and is not itself violative of the FDCA, but that is allegedly misleading because of other facts that are not disclosed on the label. In *Turek v. General Mills, Inc.*,¹⁴⁸ the maker of a “chewy bar” product touted its fiber content by calling it “Fiber Plus” and including a circled statement on the front of its label: “35% of your daily fiber.”¹⁴⁹ The plaintiff alleged not that this information was false, but that it was misleading because of the manufacturer’s failure to disclose to consumers certain information about the type of fiber the product contained.¹⁵⁰ According to the plaintiff, the product principally contained a type of extracted and processed fiber called

144. See, e.g., *Briseno v. ConAgra Foods, Inc.*, No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750, at *13–16 (C.D. Cal. Nov. 23, 2011) (order granting the defendant’s motion to dismiss); *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d 1028, 1031 (N.D. Cal. 2009).

145. *Id.*

146. See, e.g., *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2010).

147. See *supra* notes 121–23 and accompanying text.

148. 662 F.3d 423 (7th Cir. 2011).

149. *Id.* at 425.

150. *Id.* at 425–26.

“inulin” fiber.¹⁵¹ Inulin fiber, allegedly, does not provide the full benefits that naturally occurring fiber has come to be known for—namely, promoting regular bowel movements, lowering cholesterol, and helping avoid weight gain.¹⁵² The plaintiff further alleged that inulin fiber causes stomach problems in some people and is harmful to women who are pregnant or breast feeding.¹⁵³

The Seventh Circuit held that the plaintiff’s claim, brought under Illinois consumer-protection statutes, was preempted by the FDCA.¹⁵⁴ First, the court examined the FDCA provisions covered by the preemption clause that address information about fiber and the one provision that mentions inulin.¹⁵⁵ It found that because the FDCA does not require disclosures about the particular type of fiber that a product contains, the plaintiff was attempting to impose requirements that are not identical to those of the FDCA.¹⁵⁶ Writing for the court, Judge Richard Posner stated: “Even if the disclaimers . . . would be consistent with the requirements imposed by the [FDCA], consistency is not the test; identity is. Maybe such disclaimers would be a good thing . . . and the FDA should require them, but that is irrelevant to this appeal.”¹⁵⁷

There are also cases in which the labeling feature at issue is specifically allowed by FDA regulations, but the plaintiff alleges that it is misleading in context. *Samet v. Proctor & Gamble Co.*¹⁵⁸ is such a case. In *Samet*, the plaintiff claimed that the product labeling for a “Fruity Snack” was misleading because it displayed pictures of strawberries, blueberries, and raspberries next to the statement “made with real fruit.”¹⁵⁹ The plaintiff alleged that this implied that the product contained all of the pictured fruits.¹⁶⁰ The only fruit ingredient in the product was apple puree concentrate.¹⁶¹ An FDA regulation promulgated under § 343(k), which pertains to artificially flavored foods, expressly allows the use of words or vignettes (including depictions of the fruit) to characterize the product’s flavor, even if none of the depicted fruits are contained in the product and no flavor is derived from those fruits, as long as it contains the phrase “artifi-

151. *Id.*

152. *Id.* at 426.

153. *Id.*

154. *Turek*, 662 F.3d at 424, 427.

155. *Id.* at 426–27.

156. *Id.* at 427.

157. *Id.*

158. No. 5:12–CV–01891 PSG, 2013 WL 3124647 (N.D. Cal. June 18, 2013).

159. *Id.* at *6.

160. *Id.*

161. *Id.*

cially flavored.”¹⁶² Because the label contained the statement “artificially flavored,” the court found the claim to be preempted under § 343-1(a).¹⁶³ The plaintiff argued that the label was nonetheless misleading because of the inclusion of the phrase “made with real fruit.”¹⁶⁴ The court held that allowing the claim to proceed based on the “made with real fruit” statement would impose a requirement that “goes beyond what is required in the FDCA,” and that this kind of claim is expressly preempted.¹⁶⁵

In yet another type of deceptive food labeling case, the alleged deception stems from a label statement that was required by the FDCA, but the food manufacturer went beyond what was required and made that statement more prominent. This scenario is represented by *Carrea v. Dreyer’s Grand Ice Cream, Inc.*¹⁶⁶ In *Carrea*, the plaintiff took issue with a label statement that announced “0 grams trans fat” on the front of the label of an ice cream product, alleging that it was misleading because the product actually did contain some trans fat, as indicated by the fact that it contained partially hydrogenated oil, as well as high overall levels of fat.¹⁶⁷ The Ninth Circuit affirmed the district court’s finding that the claim was expressly preempted by the NLEA.¹⁶⁸ The applicable regulation required that if the product contained less than 0.5 grams of trans fat per serving, the amount must be rounded down and expressed as zero in the nutrition-facts panel.¹⁶⁹ Another regulation expressly permitted the product to display the “0 grams trans fat” statement on the front as a nutrient content claim, which the FDA suggests should be consistent with the information in the nutrition-facts panel.¹⁷⁰ Because this statement constituted a “nutrient content claim,” which is regulated under § 343(r), one of the preemptive provisions in § 343-1(a), the claim was preempted because it imposed a requirement “not identical” to the requirements for nutrient content claims under the NLEA.¹⁷¹

162. *Id.*

163. *Id.*

164. *Samet*, 2013 WL 3124647, at *6.

165. *Id.*

166. 475 F. App’x 113 (9th Cir. 2012).

167. *Id.* at 115.

168. *Id.*

169. *Id.* (citing 21 C.F.R. § 101.9(c)(2)(ii) (2012)).

170. *Id.* (citing Food Labeling, 58 Fed. Reg. 44,020, 44,024–25 (Aug. 18, 1993)).

171. *Id.*

III. ANALYSIS

In the example cases described above, the courts should not have held the claims to be preempted by the NLEA. The courts have applied the NLEA's preemption clause too broadly, and, as a result, have barred claims that challenge labeling conduct that is highly likely to mislead consumers. Courts have found consumer deceptive labeling claims preempted when the allegedly deceptive label features were in compliance with the FDCA provisions that addressed those specific features.¹⁷² However, this approach overlooks the fact that a deceptive labeling claim, at its core, is simply a means to impose a state requirement not to be deceptive—a requirement “identical” to the FDCA requirement not to be “false or misleading in any particular.”¹⁷³ Courts should interpret the NLEA's preemption clause more narrowly, so as to mean that a state requirement that a food label cannot be deceptive does not come within its preemptive scope, and, thus, is not prohibited. The result would be that more consumer deceptive labeling claims would avoid preemption, allowing states a greater, and much needed, hand in protecting consumers from deceptive food labeling.

This narrower interpretation of the NLEA's preemption clause is supported by the fact that the FDCA provides a catchall provision in § 343(a)(1), which requires that a food label cannot be “false or misleading in any particular.”¹⁷⁴ This catchall provision is properly interpreted as encompassing all the other, more specific requirements contained in the FDCA; in other words, every food label feature is subject to the requirement not to be misleading, whether or not it complies with other FDCA requirements.¹⁷⁵

The interpretation that the NLEA's preemption clause does not prohibit state requirements not to be deceptive is also supported by the reasoning in Supreme Court cases, in which the Court has interpreted similar preemption language in analogous contexts, including pesticide labeling and tobacco labeling.¹⁷⁶ In these cases, the Court employed tests for determining when a state law requirement is different or additional to a federal requirement for the purposes of express preemption.¹⁷⁷ Under these tests, a state requirement not to be de-

172. See *supra* notes 147–71 and accompanying text.

173. 21 U.S.C. § 343(a)(1) (2012).

174. See *infra* notes 179–213 and accompanying text.

175. See *infra* notes 179–213 and accompanying text.

176. See *infra* notes 214–57 and accompanying text.

177. See *infra* notes 214–57 and accompanying text.

ceptive would not come within the preemptive scope of the NLEA's preemption clause.¹⁷⁸

A. *Section 343(a)(1), the FDCA's Catchall Provision Prohibiting Misleading Labeling*

Viewing the NLEA's preemption clause in conjunction with the misbranding provisions reveals that the provision that generally prohibits misleading labeling is not included among the misbranding provisions given preemptive effect in the preemption clause.¹⁷⁹ Thus, it can be interpreted that the NLEA was not intended to preempt state law claims that may impose liability for a misleading label.

The precise meaning of the term "requirement" under the NLEA's preemption clause must be interpreted in light of its statutory context.¹⁸⁰ The NLEA was enacted in order to create uniform federal food labeling standards and to educate and inform consumers.¹⁸¹ The NLEA, in turn, amends the FDCA, the purpose of which is "to prevent the adulteration, misbranding, and false advertising of food . . . for the purposes of safeguarding the public health [and] preventing deceit upon the purchasing public."¹⁸² The preemption clause prohibits states from establishing "requirements" that are "of the type" of those provided in the applicable provisions of the "Misbranded food" section of the FDCA, but that are "not identical to" those requirements.¹⁸³ The "Misbranded food" section declares that "[a] food shall be deemed misbranded [if] . . ." and then lists labeling conduct that renders a food misbranded, provided in different subsections categorized by the type of labeling feature.¹⁸⁴ Some of these sections give mandatory label requirements, such as the requirements concerning the nutrition-facts panel,¹⁸⁵ and others give requirements that are only required as conditions of some voluntary addition to the label, such as nutrient content claims on the front of the package.¹⁸⁶ Another example is subsection (k), titled "Artificial flavoring, artificial coloring, or chemical preservatives." It provides that a food shall be deemed mis-

178. *See infra* notes 214–57 and accompanying text.

179. *See* 21 U.S.C. §§ 343(a)(1), 343-1(a) (2012).

180. *See generally* YULE KIM, CONG. RESEARCH SERV., 97-989, REPORT FOR CONGRESS, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008), available at <http://fas.org/spp/crs/misc/97-589.pdf>.

181. *See supra* notes 24–25 and accompanying text.

182. H.R. REP. NO. 75-2139, at 1 (1938).

183. 21 U.S.C. § 343-1(a) (2012).

184. *Id.* § 343.

185. *See id.* § 343(q).

186. *See id.* § 343(r).

branded if “it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact, except that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary [of Health and Human Services].”¹⁸⁷ The implementing regulations promulgated by the Secretary provide more detailed lists of prohibitions, conditions, and allowances.¹⁸⁸ Thus, the term “requirements” can be understood to mean the conditions that the food manufacturer must comply with in order to avoid its food product being deemed misbranded.

Subsection (a) of the “Misbranded food” section is titled “False or misleading label”; it reads: “A food shall be deemed misbranded [if] its labeling is false or misleading in any particular.”¹⁸⁹ It does not provide specific requirements for a label to meet in order to avoid being misleading; it is a simple prohibition of false or misleading labeling.¹⁹⁰ This suggests that under the FDCA, a food manufacturer cannot avoid its product from being deemed misbranded just by complying with the requirements relating to specific labeling features. It must also ensure that the label is not “misleading in any particular.”¹⁹¹

Notably, this subsection is not included among those enumerated in the preemption clause and, therefore, it was not given preemptive effect by the drafters.¹⁹² This indicates that states are not expressly preempted from making laws that provide rules for when a food label is misleading in some way. This is already evident from the fact that courts have found deceptive labeling claims involving unregulated terms not to be preempted because none of the misbranding provisions given preemptive effect were being implicated.¹⁹³ However, even when consumer deceptive labeling suits implicate the preemptive provisions, they are not necessarily imposing different or additional requirements. The fact that not being misleading is, in itself, a separate requirement for a label to avoid being deemed misbranded means that all the specific conditions provided under the preemptive provi-

187. *Id.* §§ 343(k), 321(d).

188. *E.g.*, 21 C.F.R. § 101.22(i) (2014).

189. 21 U.S.C. § 343(a)(1).

190. *See id.*

191. *Id.*

192. *See id.* § 343-1(a).

193. *See supra* notes 144–46 and accompanying text.

sions carry with them the more general “requirement” that the label cannot be misleading in any way.¹⁹⁴

For example, the regulations promulgated under the “artificial flavoring” section, given preemptive effect, specifically allow a manufacturer of fruit juice to use depictions (or vignettes) of fruit that is not contained in the product to indicate its flavor, as long as it also includes that the product is “artificially flavored.”¹⁹⁵ As a defendant, the food manufacturer would argue that a deceptive labeling claim could not be used to impose liability for this conduct because doing so would establish a requirement different than those of the regulation’s artificial flavoring provision. However, this argument would be flawed when reading the preemptive provision in context. This is because the food manufacturer is only allowed to use vignettes of fruit if it does not make the label “misleading in any particular.”¹⁹⁶ Thus, the consumer suit attempts only to enforce a nonpreempted or identical requirement and would not be preempted under *Bates*.¹⁹⁷

Action by the FDA has been consistent with this interpretation of § 343(a)(1). A 2009 enforcement letter to Nestlé USA (Nestlé) is an example of the FDA’s acknowledgement that a label that complies with other specific requirements can still be misleading under § 343(a)(1).¹⁹⁸ The FDA warned Nestlé that the labeling on its Juicy Juice products was misleading, in violation of § 343(a)(1).¹⁹⁹ The products were labeled “All Natural 100% Juice Orange Tangerine” and “All Natural 100% Juice Grape” and featured vignettes of oranges and grapes, but orange and tangerine juice and grape juice were not the predominant juices in the products.²⁰⁰ The labels also con-

194. The definition of “misleading” given in the FDCA supports this interpretation, as it acknowledges that misleading labeling can arise from a combination of multiple representations and omissions and encompass several different label features. 21 U.S.C. § 321(n). The general definitions section provides:

If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations . . .

Id. (emphasis added).

195. 21 C.F.R. § 101.22(i) (2014).

196. 21 U.S.C. § 343(a)(1).

197. *Bates v. Dow Agrosiences LLC*, 544 U.S. 431 (2005).

198. Letter from Roberta F. Wagner, Dir., Office of Compliance, Ctr. for Food Safety & Applied Nutrition, FDA, to Brad Alford, Chairman & CEO, Nestle U.S.A. (Dec. 4, 2009) [hereinafter Letter from Roberta F. Wagner], available at <http://www.fda.gov/iceci/enforcementactions/warningletters/2009/ucm194122.htm>.

199. *Id.* ¶ 2.

200. *Id.* ¶ 4.

tained the disclaimer: “Flavored juice blend from concentrate with other natural flavors & added ingredients.”²⁰¹ The labels were in compliance with the FDA regulations addressing juice name and flavor labeling, which specifically allow a juice blend to be named by a juice that is not the predominant juice in the blend if the label also indicates that the named juice refers to the flavor.²⁰² A label is also expressly allowed to use vignettes to indicate the flavor of a juice.²⁰³ Nevertheless, the FDA concluded that the use of the words “All Natural 100% Juice” in close proximity to “Orange Tangerine” and “Grape” could lead consumers to believe that these products consisted of 100% orange tangerine and grape juice.²⁰⁴ The use of the vignettes and the reduced visibility of the disclaimer also contributed to this potential deception.²⁰⁵

The misleading labeling described in the letter is very similar to the alleged deception in *Samet*.²⁰⁶ The *Samet* court barred a deceptive labeling claim based on the combination of pictures of certain fruit and the statement “made with real fruit,” when the product contained none of the depicted fruits.²⁰⁷ However, the FDA found a similar design to be misleading under § 343(a)(1) despite the fact that the labeling at issue was expressly allowed.²⁰⁸

Also supporting the interpretation that § 343(a)(1) effectively encompasses all the other, more specific requirements for food labeling is the argument that the drafters of the preemption clause likely did not have consumer-protection suits in mind. The use of state consumer-protection suits to challenge deceptive labeling practices is a relatively recent phenomenon.²⁰⁹ Because such suits were rare when the NLEA was enacted, the drafters likely had in mind state statutes, regulations, or policies that specifically addressed food labeling. Deceptive labeling claims brought under consumer-protection statutes can be distinguished from state statutes or regulations that specifically

201. *Id.*

202. 21 C.F.R. § 102.33(d)(1) (2015).

203. *Id.* § 101.22(i).

204. Letter from Roberta F. Wagner, *supra* note 198, ¶ 4.

205. *Id.*

206. *See supra* notes 158–65 and accompanying text.

207. *See supra* notes 158–65 and accompanying text.

208. Letter from Roberta F. Wagner, *supra* note 198, ¶ 4.

209. *See* NICOLE E. NEGOWETTI, BROOKINGS INST., FOOD LABELING LITIGATION: EXPOSING GAPS IN THE FDA’S RESOURCES AND REGULATORY AUTHORITY 1 (2014) (noting that “the number of [food labeling] consumer protection class actions brought in federal court climbed from 19 cases in 2008 to more than 102 in 2012”), available at http://www.brookings.edu/~/media/research/files/papers/2014/06/26%20food%20labeling%20litigation/negowetti_food%20labeling%20litigation.pdf.

set out different or additional food labeling requirements. Consumer-protection suits will only be successful if the plaintiff can show that the labeling is likely to deceive a reasonable consumer, and can thus be seen as enforcing the nonpreempted requirement that a label cannot be “misleading in any particular.”²¹⁰ On the other hand, if states were to make their own statutes and regulations creating specific requirements for food labeling that are different from or additional to the federal requirements, liability could be imposed on a food manufacturer simply based on a violation of those laws, regardless of whether or not it has the potential to actually mislead the reasonable consumer.

Of course, food manufacturers can assert a different interpretation of how the general prohibition of misleading labeling fits into the statutory structure. They could argue that when the FDCA or implementing regulations provide conditions for a label to avoid being deemed misbranded or specifically allow certain labeling conduct, the legislature and FDA have determined that compliance with those conditions is enough to prevent the label from being misleading. In practical effect, compliance with the federal requirements does not come close to guaranteeing that a food label will not be misleading.²¹¹ However, even if this alternate interpretation is an equally reasonable one, the presumption against preemption dictates that courts are to choose the interpretation that “disfavors preemption.”²¹² The interpretation that § 343(a)(1) provides a requirement that a label must not be misleading in any way, which serves as an overarching condition to all the more specific requirements about particular labeling features, should win out.

In other words, not to be misleading is always a requirement for food labels, regardless of the other requirements that may apply to the particular label features at hand.²¹³ Consumer actions to enforce this requirement, which is not covered by the preemption clause, should not be subject to express preemption.

210. 21 U.S.C. § 343(a)(1) (2012).

211. See *supra* notes 147–71, *infra* notes 271–97, and accompanying text.

212. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

213. See *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). *POM Wonderful* involved a claim brought under the Landham Act for the deceptive labeling of fruit juice as “pomegranate blueberry” when it contained only 0.3% pomegranate juice and 0.2% blueberry juice. *Id.* at 2233. The Supreme Court held that the claim was not precluded by the fact that the juice label complied with the FDCA requirements applicable to fruit juice labeling. *Id.* at 2236–41. Although *POM Wonderful* does not apply to the issue of preemption, as it involved two federal statutes, *id.* at 2236, it does acknowledge that a label feature can be deceptive even if it complies with the FDCA provisions applicable to that particular feature.

B. Supreme Court Interpretations of Similar Preemption Clauses

The above conception of the state requirements that consumer deceptive labeling claims impose comports with the reasoning of Supreme Court cases interpreting preemption clauses similar to the NLEA's preemption clause.

1. "Requirements" Under Bates v. Dow Agrosciences LLC

The *Bates* decision involved an express preemption clause worded similarly to that of § 343-1(a). The *Bates* court interpreted § 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which provided that, for pesticides, "[states] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."²¹⁴ For comparison, § 343-1(a) of the NLEA prohibits states from establishing "any requirement" for a food or food labeling that is "not identical to" the requirements of certain subsections of the misbranding section.²¹⁵ The *Bates* court established that state common-law duties and judge-made rules can constitute "requirements" for the purpose of express preemption.²¹⁶ However, it admitted that "requirements" may not always carry that meaning within a preemption clause.²¹⁷ The court also specified that

[a] requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue, not for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action.²¹⁸

The court went on to explain how to determine whether a common-law duty is preempted by a provision prohibiting state requirements that are "in addition to or different from" federal requirements.²¹⁹ The proper analysis requires looking at the common-law duty on which the state law claim is predicated and comparing it to the duties imposed by the federal statute.²²⁰ The state common-law claim will be preempted as imposing a "different or additional" requirement only when the common-law duty imposes a broader obligation than the du-

214. *Id.* at 439, 441–42 (quoting 7 U.S.C. § 136v (2004)).

215. 21 U.S.C. § 343-1(a).

216. *Bates*, 544 U.S. at 443.

217. *Id.*

218. *Id.* at 445.

219. *Id.* at 444.

220. *Id.* at 445.

ties imposed by the federal standards.²²¹ This analysis comes from an earlier Supreme Court plurality decision in *Cipollone v. Liggett Group, Inc.*²²² In *Cipollone*, the Court compared general duties imposed on cigarette advertisers by various tort claims with the duties imposed by the standards in the Federal Cigarette Labeling and Advertising Act.²²³ While the *Bates* court found that the plaintiff's fraud and failure-to-warn claims may impose a labeling requirement subject to preemption by FIFRA's preemption clause, it did not apply the *Cipollone* analysis.²²⁴ It framed the question of preemption as whether the duty imposed by the state failure-to-warn and fraud torts imposed a broader obligation than FIFRA's labeling requirements, which prohibited misleading labeling.²²⁵ It then remanded the matter to the Court of Appeals for the Fifth Circuit.²²⁶

Because the *Bates* court declined to analyze whether the requirement would actually be different or additional to the requirements in FIFRA, it leaves some uncertainty as to how to make such a determination. However, following the analysis proposed in *Bates* and demonstrated in *Cipollone*, it appears that the common-law duty imposed by a deceptive labeling claim establishes an obligation that is narrower, not broader, than the obligations established in the misbranding provisions of the FDCA.

The FDCA prohibits the introduction of "misbranded" food into interstate commerce.²²⁷ One of the ways a food can be deemed misbranded is if "its labeling is false or misleading in any particular."²²⁸ In determining whether the labeling is false or misleading, "there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations."²²⁹

Under the California consumer-protection statutes, to state a claim for a deceptive or misleading business practice, the plaintiff must show that "reasonable consumers" are "likely to be deceived."²³⁰ Both the state duty and federal duty are conduct based and do not require that

221. *Id.* at 453.

222. 505 U.S. 504, 521 (1992) (plurality opinion).

223. *Id.* at 525-30.

224. *Bates*, 544 U.S. at 453.

225. *Id.*

226. *Id.*

227. 21 U.S.C. § 331(a) (2012).

228. *Id.* § 343(a)(1).

229. *Id.* § 321(n).

230. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

the food manufacturer intended to mislead anyone.²³¹ However, the meaning of “misleading” under the FDCA has been interpreted to be based on the effect of the label on “the ignorant, the unthinking[,] and the credulous” consumer, rather than a reasonable consumer, as under California law.²³² This interpretation was guided by the remedial purpose of the FDCA, which calls for a broad interpretation of “misleading” that extends beyond experienced consumers to the public as a whole.²³³ Under this interpretation, the federal statute appears to impose a duty not to mislead that covers a broader class of people than does California law, which is based on what would likely deceive a reasonable consumer.²³⁴ Also, the FDCA’s list of the labeling aspects to be considered when making a finding that a label is misleading does not expressly limit the factors that might make a label misleading, but leaves it open-ended with the phrase “among other things.”²³⁵ Thus, under the *Bates-Cipollone* analysis, it appears that the duty imposed by California consumer-protection law is at least equivalent to, if not narrower than, the duties imposed by the FDCA misbranding requirements.²³⁶

Because California’s narrower obligation not to mislead fits within the FDCA’s broader obligation not to mislead, consumer suits that challenge misleading labeling only impose state requirements equivalent the federal requirements.²³⁷ Therefore, such consumer suits should not be found preempted.

While California’s duty not to mislead is narrower than the federal duty in terms of the extent of the obligation imposed, it is broader in terms of the subject matter encompasses. For this reason, it can be argued that it falls outside the scope of the NLEA’s preemptive effect, which is limited to the text of its preemption clause.²³⁸

231. *United States v. An Article of Food . . . “Manischewitz . . . Diet Thins,”* 377 F. Supp. 746, 749 (E.D.N.Y. 1974) (finding that for a food to be misbranded as misleading “[i]t is not necessary to show that anyone was actually misled or deceived, or that there was any intent to deceive”); accord *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir. 1993).

232. *Strauss*, 999 F.2d at 696 (quoting *United States v. An Article . . . Consisting of 216 Individually Cartoned Bottles, More or Less, of an Article Labeled in Part: Sudden Change (Sudden Change)*, 409 F.2d 734, 740 (2d Cir. 1969)).

233. See *Sudden Change*, 409 F.2d at 740 n.8.

234. *Williams*, 552 F.3d at 938.

235. 21 U.S.C. § 321(n) (2012).

236. Because the California’s consumer-protection laws are the most expansive consumer-protection laws, the outcome for other states’ consumer-protection laws will likely be the same, as the duties they impose would be even narrower in comparison with the federally imposed duty. See *supra* notes 49–50 and accompanying text.

237. See *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 445, 453 (2005).

238. See *infra* notes 239–57 and accompanying text.

2. *Type of “Requirements” Under Altria Group, Inc. v. Good*

Altria Group, Inc. v. Good,²³⁹ a 2008 Supreme Court case that also drew from *Cipollone*, provides another source of guidance for assessing the scope of the NLEA’s express preemption clause. Like *Cipollone*, *Altria* involved the express preemption clause of the Federal Cigarette Labeling and Advertising Act (FCLAA).²⁴⁰ The plaintiff brought a claim under the Maine Unfair Trade Practices Act, alleging that a cigarette manufacturer fraudulently conveyed through advertisement that its “light” cigarettes delivered less tar and nicotine than other brands to consumers, while knowing that the message was untrue.²⁴¹ The express preemption clause of the FCLAA stated that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”²⁴²

In an opinion by Justice John Paul Stevens, the Court held 5–4 that the fraud claim was not preempted under the FCLAA’s preemption clause.²⁴³ It held that the language “based on smoking and health” narrows the scope of the preemption clause such that it does not encompass the “more general duty not to make fraudulent statements.”²⁴⁴ The Court distinguished the language “based on” as being narrower than language like “related to” because it requires a relatively direct connection between “requirements and prohibitions” and “smoking and health.”²⁴⁵ The Court reasoned that although the plaintiffs’ alleged harm from the fraudulent ad was related to smoking and health, the preemption clause only prohibits “requirements or prohibitions” that are “based on smoking and health.”²⁴⁶ Because the Maine Unfair Trade Practices Act did not mention smoking or health, it did not impose “requirements or prohibitions” that were “based on smoking or health.”²⁴⁷ Instead, it imposed a more general rule that established a duty not to deceive—a duty which was not “based on smoking and health.”²⁴⁸ The Court also noted that fraud claims do not conflict with the Act’s stated purpose of protecting the national

239. 555 U.S. 70 (2008).

240. *Id.* at 73.

241. *Id.* at 72–73.

242. *Id.* at 78–79 (alteration in original) (quoting 15 U.S.C. § 1334(b) (2008)).

243. *Id.* at 87.

244. *Id.*

245. *Altria*, 555 U.S. at 84–86.

246. *Id.* at 84.

247. *Id.* at 80–81.

248. *Id.* at 87.

economy from nonuniform cigarette labeling and advertising regulations pertaining to smoking and health.²⁴⁹ Fraud claims, whether challenging statements that are inherently false or statements that are misleading, only impose a single uniform standard—that of falsity.²⁵⁰

The “based on health” language qualifying “requirements and prohibitions” in the preemption clause of the FCLAA could be analogized to the “of the type” language qualifying “requirements” in § 343-1(a) of the NLEA under the analysis of *Altria*. Section § 343-1(a) prohibits states from establishing “any requirement . . . for the labeling of food” that is “of the type” of the requirements imposed in certain subsections of the misbranding provisions, but that is not identical to those requirements.²⁵¹ Following the reasoning in *Altria*, the deceptive labeling claims predicated on a general duty not to deceive may not constitute a requirement that is “of the type” of requirements imposed in the enumerated misbranding subsections. The misbranding subsections generally provide label requirements for information that food labels must include in order for the food to avoid being deemed “misbranded.”²⁵² For example, under § 343(k), a food that contains artificial flavoring, artificial coloring, or chemical preservatives is required to bear a label stating that fact.²⁵³ Under § 343(q)(1)(C), barring some exemptions, a food that is intended for human consumption and is offered for sale is required to bear a label providing the total number of calories derived from any source and derived from the total fat in each serving size or other unit of measure of the food.²⁵⁴ These requirements impose duties on a category of food products to disclose specific pieces of information on the label.

On the other hand, the consumer-protection laws under which deceptive labeling claims are brought, like the state law in *Altria*, impose general duties not to deceive or mislead.²⁵⁵ They do not impose rules or duties that are “of the type” imposed in the misbranding subsection because they do not provide specific label disclosures or prohibitions. In fact, these duties do not require anything specific of a defendant but, to the contrary, simply prohibit a defendant from engaging in conduct that is likely to have a certain effect on consumers. In accordance with *Altria*, the uniform standard imposed by fraud claims would not impede the NLEA’s purpose of preventing states from

249. *Id.* at 79.

250. *Id.* at 80.

251. 21 U.S.C. § 343-1(a) (2012).

252. *Id.* § 343.

253. *Id.* § 343(k).

254. *Id.* § 343(q)(1)(C).

255. *See, e.g.,* CAL. BUS. & PROF. CODE § 17500 (West 2008).

adopting inconsistent standards for nutrient labeling.²⁵⁶ Consumer fraud claims may actually help spur progress in the regulation of nutritional information under the NLEA.²⁵⁷

*D. Proper Express Preemption Analysis for
Deceptive Labeling Claims*

Under a proper preemption analysis, the majority of deceptive labeling claims, including those that have been found to be expressly preempted under the NLEA,²⁵⁸ would not be preempted. Courts' analyses have generally focused on the particular ingredients or label features involved in the alleged deception to determine whether any of those aspects are expressly regulated under the preemptive provisions listed in the preemption clause.²⁵⁹ Generally, if they are regulated, and the label complies with the FDCA requirements applicable to those ingredients or features, the claims are preempted; if the claims involve ingredients or features that are not regulated, the claims may proceed in court.²⁶⁰ However, this analysis that focuses on the particular ingredients or label features skips the step of determining what type of requirement is being imposed by the deceptive labeling claim. When making this determination, courts should look to the gravamen of the complaint, or what constitutes the heart of the plaintiff's grievance with the food label.²⁶¹ As explained above, deceptive labeling claims generally impose only the requirement not to be false or misleading.²⁶² Preemption would occur only when the only way for

256. See *supra* note 23 and accompanying text.

257. See *infra* notes 271–97 and accompanying text.

258. E.g., *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012); *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 425–26 (7th Cir. 2011); *Samet v. Proctor & Gamble Co.*, No. 5:12-CV-01891 PSG, 2013 WL 3124647, at *6 (N.D. Cal. June 18, 2013).

259. See *supra* notes 147–71 and accompanying text.

260. See *supra* notes 147–71 and accompanying text.

261. See *Briseno v. ConAgra Foods, Inc.*, No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750, at *9–27 (C.D. Cal. Nov. 23, 2011). In *Briseno*, the plaintiff sued the manufacturer of a canola oil product with a label stating that it was “100% Natural.” *Id.* at *4. The plaintiff alleged that this was misleading because the product contained plants grown from genetically modified seeds and asked the court to order ConAgra “to adopt and enforce a policy that requires appropriate disclosure of [genetically modified] ingredients.” *Id.* at *4–6. The court found this particular request for relief to be preempted as it would impose a requirement different or additional to those of the FDCA. *Id.* at *26–27. However, the court allowed the claim itself proceed, finding that the plaintiff's “central argument” was simply that the label statement was misleading, rather than the argument that the defendant needed to take specific action, such as indicating genetically modified ingredients in the ingredient listing or refraining from using the common name of canola oil. *Id.* at *17. Thus, it did not invoke the preemptive provisions of the FDCA. *Id.*

262. See *supra* notes 251–57 and accompanying text. There is a caveat to this analysis in that it is likely not applicable to health claims that are preapproved by the FDA. Cf. *Riegel v. Med-*

a defendant food manufacturer to avoid the potential liability under the claim is to take action that would violate federal labeling requirements, but it would be under conflict preemption, rather than express preemption.²⁶³

Applying this analysis to the facts in *Samet*,²⁶⁴ the plaintiff's claim would not be preempted. In *Samet*, the alleged deception was that the product label contained vignettes of various berries, along with the statement "made with real fruit," while the product did not contain berries, but only apple juice from concentrate.²⁶⁵ Applying this refined interpretation, the court would determine that the gravamen of the plaintiff's complaint to be that this combination of label features is misleading in light of the fact that the product contains no berries. If the plaintiff's complaint asks for the court to order the defendant food manufacturer to fix this product label by taking a certain action, the court may disregard that as possibly preempted under the NLEA because it might impose a different or additional requirement; but the court should not bar the plaintiff's entire claim on this basis. The potential liability that the defendant faced in *Samet* only requires the defendant food manufacturer to cure its product label of the misleading representation it bears. It could do so either by changing its label to clearly indicate that the fruits depicted are not actually contained in the product, or forgoing its voluntary statements and designs, or altering them to make them unlikely to mislead. Thus, the claim only imposes a requirement that is not covered by the preemption clause—that a food label must not be misleading.²⁶⁶ Or framed alternatively, the claim imposes identical requirements to those contained in the applicable preemptive provisions because the requirement not to be misleading encompasses all of the other more specific requirements provided in the FDCA.²⁶⁷

However, when the only way that a defendant food manufacturer can avoid potential liability under the plaintiff's claim is to violate the FDCA or FDA, then the "impossibility" prong of conflict preemption would likely apply.²⁶⁸ Because it would be impossible for a food man-

tronic, Inc., 552 U.S. 312 (2008) (holding that the term "requirement," used in a separate FDCA preemption clause regarding the regulation of medical devices, indicated intent to preempt tort claims based on defects of medical devices that were pre-approved by the FDA).

263. See *supra* notes 105–06, *infra* notes 268–70, and accompanying text.

264. See *supra* notes 158–65 and accompanying text.

265. *Samet v. Proctor & Gamble Co.*, No. 5:12–CV–01891 PSG, 2013 WL 3124647, at *6 (N.D. Cal. June 18, 2013).

266. See *supra* notes 179–213 and accompanying text.

267. See *supra* notes 179–213 and accompanying text.

268. Cf. *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (holding that because generic drug manufacturers were federally required to use the exact same labels as their name-brand

ufacturer to both comply with the federal law and avoid liability under state law, the state law claim would be preempted as actually conflicting with federal law.²⁶⁹ For example, if the claim in *Carrea* was based on the rounding down of trans fat to zero in the nutrition-facts panel, it would conflict with federal law, which requires trans fat to be represented as such in the nutrition-facts panel,²⁷⁰ and would therefore be preempted. A claim of deception based on a “0 grams trans fat” statement on the front of a label would still be actionable. This comports with the statement’s increased potential for misleading consumers. While a statement in the nutrition-facts panel serves more as a factor to compare products, a statement on the front of the package functions more as an advertisement designed to draw in consumers. Moreover, the statement on the front of the package is voluntary, and while allowed, is subject to the requirement not to be false or misleading.

IV. IMPACT

Properly limiting the applicability of the NLEA preemption clause to consumer deceptive labeling claims would allow states a greater role in effecting the FDCA’s main goal of preventing false and misleading food labeling.²⁷¹ The regulatory enforcement efforts of the FDA alone have been insufficient to realize the goals of the statute it is charged with implementing.²⁷² And the way that courts are applying the NLEA preemption clause prevents consumer suits from enforcing the FDCA’s general prohibition against misleading labeling when the label otherwise complies with the federal regulations.²⁷³ This is problematic because, as illustrated in the cases discussed above,²⁷⁴ aspects of a food label that comply with the applicable federal regulations are often used in conjunction with other unregulated aspects to mislead consumers.

It cannot be denied that some of the very conduct that the FDA permits, or even requires, still has obvious potential to mislead the public.²⁷⁵ The rounding down of trans fat content at issue in *Carrea*

counterparts, a plaintiff’s tort claim based on the manufacturer’s failure to warn about the life-threatening health risks associated with the drug was preempted as conflicting with federal law).

269. *Id.*

270. 21 U.S.C. § 343(q)(1)(E) (2012); 2 C.F.R. § 101.9(c)(2)(ii) (2015).

271. H.R. REP. NO. 75-2139, at 1 (1938).

272. *See infra* notes 275–81 and accompanying text.

273. *See supra* notes 147–71 and accompanying text.

274. *See supra* notes 147–71 and accompanying text.

275. For a compilation of misleading labeling tactics that food manufacturers have been using in recent years, see generally CTR. FOR SCI. IN THE PUB. INTEREST, FOOD LABELING CHAOS:

may not seem very concerning at first glance. However, the underlying consumer concern—that even trace amounts of trans fats cause significant adverse health effects²⁷⁶—has since been substantiated by research and acknowledged by the FDA itself. In November 2013, the FDA released a tentative determination that partially hydrogenated oils, the main dietary source of trans fat, are no longer generally recognized as safe.²⁷⁷ If finalized, the decision would mean that food manufacturers will no longer be allowed to sell partially hydrogenated oils without approval from the FDA as a food additive.²⁷⁸ The determination was prompted by scientific evidence that led health experts to unanimously conclude that there is no safe minimum level for industrially produced trans fat that would not increase an individual's risk of chronic heart disease or have adverse effects on risk factors for chronic heart disease.²⁷⁹

The fact that the FDA has been requiring manufacturers of products containing ingredients that may no longer be considered safe to represent that they were free of that ingredient gives insight into the constantly evolving nature of nutrition regulation. Decisions like this bring to light the practical reality that the FDA determinations and resulting regulations do not always end up providing consumers with label information that is not misleading. While a consumer suit based solely on the rounding down of trans fat in the nutrition-facts panel would likely be preempted under conflict preemption,²⁸⁰ consumers should still be able to challenge voluntary labeling that takes advantages of requirements that may produce misleading labeling.²⁸¹

Like traditional tort litigation, consumer-protection suits can provide a “safety net” and help fill in the gaps left by regulatory agencies by deterring industry risk taking and compensating injured consumers.²⁸² This role is particularly important in the regulation of food la-

THE CASE FOR REFORM (2010), available at http://www.cspinet.org/new/pdf/food_labeling_chaos_report.pdf.

276. See *supra* notes 166–71 and accompanying text; see also *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1115 (N.D. Cal. 2010) (discussing scientific research incorporated into the plaintiff's complaint on the health risks associated with trans fats).

277. Tentative Determination Regarding Partially Hydrogenated Oils; Request for Comments and for Scientific Data and Information, 78 Fed. Reg. 67,169 (Nov. 8, 2013).

278. *Id.*

279. *Id.*

280. See *supra* notes 105–06, 268–70, and accompanying text.

281. See *supra* notes 268–70 and accompanying text.

282. David C. Vladeck, *Preemption and Regulatory Failure Risks*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 54, 56 (William W. Buzbee ed., 2009) [hereinafter *PREEMPTION CHOICE*].

In a perfect world, a regulatory agency would never lack the information, personnel, statutory power, technical expertise, or other resources needed to deal with emerging

belonging, as part of the saga of the rise of food labeling litigation is the FDA's futile struggle to control misleading and violative food labeling among the growing number of food producers.²⁸³ In 2010, FDA Deputy Commissioner for Foods Michael R. Taylor admitted that it was unlikely that the FDA would "eradicat[e] questionable claims . . . any time soon."²⁸⁴ He went on:

We're also conscious of the cleverness of marketing folks, who, once we prove today's claim is misleading, can readily come up with another one tomorrow. Going after them one-by-one with the legal and resource restraints we work under is a little like playing Whac-a-Mole, with one hand tied behind your back.²⁸⁵

Consumer deceptive labeling suits have the potential to be an effective mechanism to allow consumer-protection groups and plaintiff's attorneys to compel food manufacturers to cure their misleading labeling. The Center for Science in the Public Interest (CSPI) began to monitor food labels for deceptive practices and established a litigation department in 2004.²⁸⁶ Through lawsuits and threats to sue, it has convinced several large food manufacturers to change their misleading labeling to be more truthful to consumers.²⁸⁷ A threat to sue Aunt Jemima Mills Company's parent company, Pinnacle Foods Corporation (Pinnacle Foods), induced it to change the labeling of its "blueberry waffles," which were labeled as such despite the fact that they contained only "artificially flavored blueberry bits" made of sugar, dextrose, partially hydrogenated soybean oil, soy protein concentrate, and food dyes such as Blue 2 Lake and Red 40 Lake.²⁸⁸ Pinnacle Foods agreed to change the label to more clearly indicate that the blueberries were imitation and artificially flavored.²⁸⁹ It also convinced Sara Lee Corporation to change the label for its "Soft & Smooth Made With Whole Grain White Bread" to disclose that it only contained 30% whole grains and remove its representation that the

hazards. In the real world, however, agencies are often confronted with information gaps, bureaucratic inertia, intransigent companies, resource constraints, political interference, and other handicaps that limit the capacity of the agency to act in the public interest.

Id.

283. See Negowetti, *supra* note 209, at 7–10 (tracking the FDA's unsuccessful attempts to reduce misleading labeling since 2005).

284. *Id.* at 9 (quoting Michael Taylor, *How the FDA Is Picking Its Food Label Battles*, ATLANTIC (July 19, 2010, 9:00 AM), <http://www.theatlantic.com/health/archive/2010/07/how-the-fda-is-picking-its-food-label-battles/59927/>).

285. *Id.* (quoting Taylor, *supra* note 284).

286. *Id.* at 7.

287. *Id.*

288. *Id.*

289. Negowetti, *supra* note 209, at 7.

product was nutritionally equivalent to 100% whole wheat bread.²⁹⁰ Similarly, the threat of litigation convinced Cadbury Schweppes Americas Beverages to stop labeling 7UP, which is made with high-fructose corn syrup, as “All Natural.”²⁹¹ However, the use of consumer class actions to curb the deceptive tactics of food manufacturers is threatened by an overbroad application of the NLEA’s express preemption clause, which courts have used to bar meritorious misleading label claims simply because the labels complied with some regulations²⁹² and needlessly complicating food labeling litigation.²⁹³

In the *Bates* opinion, the Supreme Court briefly discussed the policy considerations in determining the scope of preemption of state tort claims by FIFRA.²⁹⁴ The Court remarked that FIFRA contemplates that pesticide labels will evolve over time.²⁹⁵ It then highlighted some of the benefits of allowing state tort claims to operate within FIFRA’s regulatory regime: “[the] EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common-law suits.”²⁹⁶ And, as one preemption commentator noted, “[P]rivate plaintiffs and their lawyers have incentives to ferret out neglected information, and the different discovery procedures of civil litigation can elicit information never considered in the regulatory process.”²⁹⁷ These types of considerations, involving growing bodies of scientific evidence and evolving information systems, resonate as especially relevant and analogous to the concerns currently surrounding food labeling. By drawing attention to ways in

290. *Id.*

291. *Id.*

292. *See supra* notes 147–71 and accompanying text.

293. *See* Diana R. H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815, 850 (2015) (describing the analysis in a food labeling preemption case as “intensive, time-consuming, and disputable” and stating that “[b]ecause . . . of the complexity of the regulatory scheme and the level of specificity at which preemption must be determined, a large amount of judicial resources are being expended in the determination of these preliminary issues”). The current preemption analysis leads judges down a path that requires them to interpret ambiguous and technical FDA regulations and make tedious factual determinations. *See, e.g.,* *Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662 (9th Cir. 2014) (in which the court had to determine whether the flavored coating on sunflower seeds was meant to be ingested in order to determine whether the FDCA required its sodium content to be disclosed); *Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137 (C.D. Cal. 2010) (in which the court had to determine whether or not the label statements “made with real vegetables” and “made with real ginger and molasses” could be conceived as referring to the product flavor or nutrient content).

294. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005).

295. *Id.*

296. *Id.* (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir. 1984)).

297. William W. Buzbee, *Conclusion, to PREEMPTION CHOICE*, *supra* note 282, at 301, 303–04 (summing up a point made by Thomas O. McGarity, *The Regulation–Common Law Feedback Loop in Nonpreemptive Regimes*, in *PREEMPTION CHOICE*, *supra* note 282, at 235, 235–36).

which food labeling can deceive despite otherwise complying with the applicable federal labeling requirements, deceptive food labeling suits brought by consumers can play an important role in the evolution and advancement of food labeling regulation. For this reason, courts should be careful not to give the NLEA's preemption clause a greater scope than Congress intended.

V. CONCLUSION

The NLEA's preemption clause expressly prohibits states from imposing labeling requirements that are not identical to the federal requirements provided in certain subsections of the FDCA.²⁹⁸ Courts have allowed defendants to use this preemption clause to successfully dismiss deceptive food labeling claims brought under state consumer-protection laws, when the particular label features at issue comply with the applicable federal requirements. However, these courts have used an overbroad conception and improper applications of the preemption clause to bar meritorious deceptive labeling claims. Courts should interpret the NLEA's preemption clause more narrowly, so as to mean that a state "requirement" that a food label cannot be deceptive does not come within its preemptive scope, and, thus, is not prohibited. Such an interpretation would allow deceptive food labeling claims to avoid express preemption, even if the labeling features involved invoked and complied with specific FDCA provisions given preemptive effect.

The use of lawsuits against food manufacturers that engage in misleading labeling can be a useful tool for consumers to help ensure that the overwhelming packages they are exposed to in the grocery store are truthful and informative as to the product's ingredients and its health implications. While there has been a large influx of consumer food labeling suits, courts should not misuse the federal preemption clause of the NLEA as a tool to curb these suits.

Federal preemption case law makes it clear that the use of this doctrine should be carefully limited, especially when it comes to areas traditionally regulated by the states, such as food labeling.²⁹⁹ By keeping the inquiry focused on the facts and merits of the case, the judicial system can serve to facilitate and supplement the FDA's mission of preventing misleading food labeling. While consumer class ac-

298. 21 U.S.C. § 343-1(a).

299. See *supra* notes 96-117, 214-57, and accompanying text.

tions may not be the ideal manner in which to regulate food labels, it has promise as a helpful tool in curbing the deceptive labeling, at least until the inevitable regulatory overhaul comes about.

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