



ACI FORUM ON ADVERTISING DISPUTES:

Vermont and Genetically
Engineered Foods
Grocery Manufacturers v. Sorrell

ATTORNEY GENERAL
WILLIAM SORRELL

MARCH 13, 2015

The STATUTE

9VSAss. 3041-3048

- Effective Date: July 1, 2016
- Requires labeling of food products containing genetically engineered ingredients
- “Produced with genetic engineering”
- “May be produced with genetic engineering”
- “Partially produced with genetic engineering”
- Prohibition: Use of the term - “Natural” to describe foods containing genetically engineered ingredients
- Manufacturers rather than retailers primarily responsible for compliance
- Exceptions apply, e.g. food for immediate consumption

Grocery Manufacturers et al. v. Sorrell et al.

- Filed June 2014
- 1ST Amendment Violations: Compelled Speech and Prohibited Speech
- Commerce Clause Violations
- Federal Preemption

Motion to Dismiss

Compelled Speech – Labeling Requirement

- Legitimate environmental and public health concerns and desire to accommodate religious considerations
- Disclosure is purely factual – not hazardous warnings, e.g. tobacco and alcohol
- Akin to calories, fat, sugar and salt content
- Standard of review – rational basis – Zauderer, 471 U.S. 626 (1985)
- Country-of-origin meat labeling requirement – applied Zauderer and upheld requirement - American Meat Institute v. FDA, DC Circuit (July, 2014)

Prohibited Speech – “Natural” Prohibition

- No 1st Amendment right to misleading speech
- Monsanto Website: GMOs are “plants or animals that have had their genetic makeup altered to exhibit traits that are not naturally theirs.”

Dormant Commerce Clause

- Not economic protectionism favoring Vermont companies
- Applies equally to Vermont and out of state companies
- No undue burden to comply – effective date July 1, 2016
- Burden is not demonstrably greater than public interests advanced
- 60 other countries require GMO labeling
- Maine and Connecticut GMO labeling statutes)

Preemption Allegations

- Heightened presumption against preemption
- Health and safety regulation traditionally within state authority
- No express preemption
- No conflict preemption: No inability to comply with state and federal requirement
- FDA has not required nor prohibited GMO labeling
- Plaintiffs free to add truthful information to labels

Rulemaking

- AGO statutorily authorized to promulgate
- Rule published for formal comments - December, 2014
- Submitted to the Legislature - March, 2015
- Final adoption (planned) by July, 2015
- Examples of provisions:
 - Font size
 - Location
 - Unpackaged foods
 - Vermont retail location sales

Examples of Provisions:

- Disclosures on packaged, processed foods required by section 121.02(b) shall be located on the package so as to be easily found by consumers when viewing the outside of the package. Such disclosures shall be in a font size no smaller than the size of the words “Serving Size” on the Nutrition Facts label.
- A disclosure that satisfies the font and color requirements of this rule and is located on the same panel as the Nutrition Facts Label or Ingredient List shall be presumed to satisfy the “easily found” requirement.

Labeling Example

Nutrition Facts	
Serving Size 2/3 cup (55g) Servings Per Container About 8	
Amount Per Serving	
Calories 230	Calories from Fat 40
% Daily Value*	
Total Fat 8g	12%
Saturated Fat 1g	5%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 160mg	7%
Total Carbohydrate 37g	12%
Dietary Fiber 4g	16%
Sugars 1g	
Protein 3g	
Vitamin A	10%
Vitamin C	8%
Calcium	20%
Iron	45%
* Percent Daily Values are based on a 2,000 calorie diet. Your daily value may be higher or lower depending on your calorie needs.	
	Calories: 2,000 2,500
Total Fat	Less than 65g 80g
Sat Fat	Less than 20g 25g
Cholesterol	Less than 300mg 300mg
Sodium	Less than 2,400mg 2,400mg
Total Carbohydrate	300g 375g
Dietary Fiber	25g 30g

Produced with Genetic Engineering

Labeling Example



CP 121.03 Exemptions and Exceptions

Section 121.02 of this rule does not apply to the following:

Animal Products and Foods Bearing USDA Approved Labels

- Foods consisting entirely of or derived entirely from an animal that is itself not produced with genetic engineering, regardless of whether the animal has been fed or injected with any food, drug, or other substance produced with genetic engineering.
- Packaged, processed food containing meat or poultry, the label of which requires approval by the United States Department of Agriculture, under 21 U.S.C. §§ 451-472, 601-695, or the state equivalent, under 6 V.S.A. §§ 3301-3318.

CP 121.03 Exemptions and Exceptions (cont.)

Section 121.02 of this rule does not apply to the following:

Foods Certified as Not Produced with Genetic Engineering

- Food for which the person otherwise responsible for complying with section 121.02 of this rule obtains a sworn statement from whomever sold the food to that person. The sworn statement must affirm that the food (1) was made or grown from food or seed that has not been knowingly or intentionally produced with genetic engineering and (2) has been segregated from and has not been knowingly or intentionally commingled with food or seed that may have been produced with genetic engineering.

CP 121.03 Exemptions and Exceptions (cont.)

Section 121.02 of this rule does not apply to the following:

- When providing a sworn statement under this rule, a person may rely solely on a sworn statement that contains the above affirmation by whomever sold the food to that person.

Alcoholic Beverages

- Beverages regulated under the provisions of Title 7 of the Vermont Statutes.

Foods with Minimal Genetically Engineered Content

- Processed foods that would otherwise be required to be labeled under section 121.02 of this rule, if the (cont.)

CP 121.03 Exemptions and Exceptions (cont.)

Section 121.02 of this rule does not apply to the following:

aggregate weight of the genetically engineered materials in the food is no more than 0.9 percent of the total weight of the food.

Foods Verified by a Qualifying Organization

- Food that has been certified as “organic” under 7 C.F.R. § 205.301 by an organization accredited to make such certifications under the USDA National Organic Program.
- Food that has been verified as not having been produced with genetic engineering by an organization that the Attorney General has authorized to make such verification.

CP 121.03 Exemptions and Exceptions (cont.)

Section 121.02 of this rule does not apply to the following:

- “Know” means (1) to have actual knowledge of the information; or (2) to act in deliberate ignorance or reckless disregard of the truth or falsity of the information.
- “Knowingly” means (1) having actual knowledge of the information; or (2) acting in deliberate ignorance or reckless disregard of the truth or falsity of the information.
- “Retail sale” means offering food for sale from a retail premises to a consumer for any purpose other than for resale.

CP 121.03 Exemptions and Exceptions (cont.)

Section 121.02 of this rule does not apply to the following:

- “Retail Premises” means the physical location in Vermont where a retailer offers food for retail sale to consumers.
- “Retailer” means a person located in Vermont offering any raw agricultural commodity or processed food for retail sale.

Judge Reiss “Musings”

- The Court is not going to decide whether GE foods are safe
- There are many possible definitions of “natural”. What about use of fertilizer, hydroponics and the like?
- State: No matter how many different definitions, “natural” does not include GE foods
- Won’t manufacturers just label “May contain” GE ingredients and thereby not really provide useful information to consumers and thereby defeat the state’s interest?
- State: Manufacturers may not turn a blind eye to the truth, but even “may” provides useful information.

Status of Case

- Motions to Dismiss and for Injunctive Relief under advisement
- Likely ruling March-May
- Trial court final decision by end of 2015 or early 2016
- 2nd Circuit appeal likely
- Potential cert petition

Court Filings and Proposed Rule

- Major filings and orders of the Court are available at: <http://www.ago.vermont.gov/>
- AGO Home page under Hot Topics see: GE Food Litigation and separately - GE Food Labeling Rule
- Proposed rule also available at - <https://www.sec.state.vt.us/>