Client Alert

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California Supreme Court Opens the Door to Organic Mislabeling Claims

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Last week, the California Supreme Court issued a long awaited ruling on organic labeling in *Quesada v. Herb Thyme Farms, Inc.*, No. S216305, 2015 WL 7770635 (Cal. Dec. 3, 2015). At issue in *Quesada* was whether consumers may bring state law fraud and misrepresentation claims to challenge herb products allegedly mislabeled as "certified organic." The defendant, Herb Thyme Farms Inc., argued that plaintiff's claims were preempted by the federal Organic Foods Production Act of 1990 (OFPA).

In a unanimous decision, the California Supreme Court disagreed, holding instead that private enforcement of national organic standards *enhances*, rather than inhibits, federal organic regulations. In reaching this decision, the California Supreme Court may have opened the floodgates for "organic" claims, permitting anyone to stand in the shoes of a regulator to police (and demand payouts) for technical violations of this complex and developing area of law.

BACKGROUND

Herb Thyme, a large California herb-growing operation, uses both conventional and organic methods to grow its herbs. Herb Thyme's organic operations are federally certified, and the company has federal approval to label organically grown herbs as "USDA Organic." Plaintiff Michelle Quesada, on behalf of herself and a putative class, alleged that Herb Thyme mislabeled its products as "Fresh Organic" and misused the "USDA Organic" seal by mixing organically and conventionally grown herbs. Quesada also alleged that Herb Thyme sold some products under the "Fresh Organic" label that were grown entirely using conventional methods. Plaintiff stated California's consumer protection claims, and requested both injunctive and monetary relief.

The district court dismissed plaintiff's action on federal preemption grounds, finding Quesada's suit barred under both the doctrines of express and implied preemption. Plaintiff appealed, and the Second District Court of Appeals affirmed. Although it held that OFPA did not expressly preempt plaintiff's state law claims, it agreed that the law impliedly preempted her private action. Plaintiff again appealed.

CALIFORNIA SUPREME COURT REVERSES THE APPELLATE COURT

In considering Herb Thyme's express and implied preemption arguments, the Court held that neither doctrine applied. Plaintiff's state law claims were not barred.

First, the Court found that OFPA did not expressly preempt Plaintiff's claims. As an initial matter, the Court acknowledged that OFPA explicitly displaces state organic regulations in two respects. First, the law preempts state definitions of "organic." Second, OFPA federalizes organic certification. A state may establish its own organic certification program, but only with the United States Department of Agriculture's (USDA) approval. The

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Act is silent, however, as to state sanctions for *misuse* of the organic label. Accordingly, the Court found that OFPA does not expressly preempt state consumer protection claims challenging organic mislabeling, rather than organic certification. Absent statutory text to the contrary, such claims are not barred.

Second, the Court found that Plaintiff's claims were also not impliedly preempted. The Court considered Herb Thyme's argument that private organic mislabeling actions undermine Congress' intent for federal and/or state regulators to occupy the organic labeling field, and are thus impliedly preempted. The Court first emphasized the presumption against implied preemption, especially in areas, such as food labeling, traditionally regulated by states. The Court then reviewed OFPA's explicit goals: to (1) establish national standards for organically marketed products; (2) assure consumers that organic products meet a consistent standard; and (3) facilitate interstate commerce of organic goods. 7 U.S.C. § 6501.

Permitting state consumer fraud actions would advance, not impair, these goals, the Court held, by ensuring that USDA's organic seal was not misused. The Court also emphasized that, because OFPA explicitly precludes private rights of action, barring state law claims would immunize organic producers from deliberate mislabeling challenges—exactly what Congress intended to prevent in enacting OFPA in the first place.

The Court rejected Herb Thyme's reliance on the Eighth Circuit's decision in *In re Aurora Dairy Corp. Organic Milk Marketing*, 621 F.3d 781 (8th Cir. 2010), that OFPA impliedly preempted a plaintiff's state law claims. While the plaintiff in *Aurora Dairy* challenged the validity of the defendant's organic certification, here, the Court explained, plaintiff claims that defendant misrepresented nonorganic, noncertified products as certified organic. Plaintiff's claims do not undermine federal certification, the Court concluded; they ensure certification is properly used.

Concluding that Plaintiff's claims were not barred, the Court reversed and remanded.

THE CALIFORNIA SUPREME COURT JOINS OTHER COURTS IN REJECTING PREEMPTION FOR ORGANIC LABELING

The California Supreme Court joins two district courts—*Brown v. Hain Celestial Group, Inc.*, No. C-11-03082, 2012 U.S. Dist. LEXIS 108561 (N.D. Cal. Aug. 1, 2012) and *Segedie v. Hain Celestial Group, Inc.*, No. 14-cv-5029, 2015 U.S. Dist. LEXIS 60739 (S.D.N.Y. May 7, 2015)—in finding that OFPA does not preempt private "organic" mislabeling actions. But how can this be reconciled with USDA's jurisdiction over organic labeling? As the Supreme Court in *Quesada* acknowledges, USDA expressly prohibits private enforcement of its regulations. Nor does California's organic program, the California Organic Products Act, permit private enforcement. Instead, both programs require consumers to file complaints to challenge noncompliance so that the appropriate regulator can investigate potential violations. Permitting direct private enforcement arguably renders this existing complaint procedure irrelevant.

Moreover, the line between "organic certification" and "organic mislabeling" is unclear. As the Appellate Court noted, "compliance and certification are interrelated." *Quesada v. Herb Thyme Farms, Inc.*, 222 Cal. App. 4th 642, 660 (2013). To prove her case, plaintiff necessarily must present facts that call into question Herb Thyme's certification. Private enforcement renders USDA's stamp of approval meaningless.

Finally, USDA's final rule-making under OFPA, the National Organic Program (NOP), suggests that noncompliance—and the concomitant grant or revocation of organic certification—must be determined by

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certifying agents on a case-by-case basis. Indeed, NOP confirms that the "unintentional presence of [] products of excluded methods should not affect the status of an organic product or operation," 65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000), and that the regulations do not establish a "zero tolerance" standard. *Id.* at 80,632. In more nuanced cases than at issue in *Quesada*, certifying experts—not lay consumers or judges—should be the ultimate arbiters of noncompliance.

IMPLICATIONS OF *QUESADA* DECISION

The implications of *Quesada* are far reaching. By greenlighting Plaintiff's action, *Quesada* opens the door to private enforcement of technical federal and state organic regulations. "Organic" may become the new "GMO": any contamination—no matter how small—will draw litigation. Indeed, while a USDA organics seal was previously unassailable, now, no organics label is safe. *Quesada* permits anyone (i.e., any attorney with a stock complaint and a filing fee) to allege "noncompliance" or "substitution fraud," calling into question USDA certification. With more litigation targeting deeper-pocketed agribusinesses, the organics industry may become more niche, centering on small family farms. Moreover, the cost of disposing of such frivolous lawsuits will be passed along to consumers in the form of higher prices.

This is exactly what happened when courts rejected FDA preemption of the definition of "natural" five years earlier. A swell of litigation ensued in the wake of these decisions, and copycat actions followed thereafter. The *Quesada* decision may spawn the same surge and duplicative litigation as well.

Producers of "organic" products beware. "Organic" labels may now be challenged by any consumer, regardless of whether the product is USDA certified. And any variation of the word "organic" may be attacked.

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