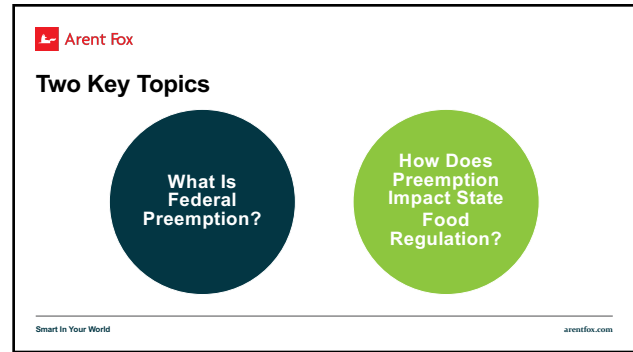
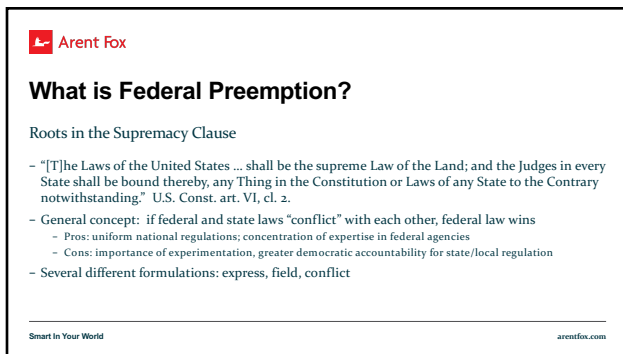




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Preemption and State Efforts to Regulate Food

Congress has often been explicit in its intent to exclusively regulate food

- Federal Meat Inspection Act/Poultry Products Inspection Act:
 - Requirements within the scope of the acts re premises, facilities, and operations of any establishment at which inspection is provided "which in addition to, or different than those made under this [Act] may not be imposed by any State."
 - 21 U.S.C. §678-3; 21 U.S.C. 467e (with exceptions).
- Nutrition Labeling and Education Act:
 - "[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce" nutrition labeling of food, or with respect to nutritional or health-related claims.
 - 21 U.S.C. § 343-1.

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Preemption and State Efforts to Regulate Food

Congress has often been explicit in its intent to exclusively regulate food

- National Bioengineered Food Disclosure Law:
 - 7 U.S.C. § 1639b(e). "[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement relating to the labeling or disclosure of whether a food is bioengineered that is not identical to the mandatory disclosure requirement under that standard.
- 7 U.S.C. § 1609i. "No State or a political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food or seed is genetically engineered or was developed or produced using genetic engineering..."

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8



Preemption As Shield

- Often used as a shield to defend against consumer protection lawsuits
- Examples:
 - *Brower v. Campbell Soup* (S.D. Cal., 2017).
 - Consumer class action re "healthy" labels on soup. FSIS had signed off on labels under FMIA and PMIA and plaintiffs' claims would impose additional or different labeling requirements.
 - Legal claims were preempted.



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9



Preemption As Shield

- Examples:
 - *Chocoma v. The Quaker Oats Company* (C.D. Cal., 2010).
 - Consumer class action re "0 grams trans fat" granola bars containing trans fats. Claims were permissible under NLEA and plaintiff's claims would have imposed a non-identical burden.
 - Legal claims were preempted.



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10



Preemption As Shield

- Examples:
 - *Kao v. Abbott Labs.* (N.D. Cal., 2017).
 - Consumer class action re "non-GMO" label on baby food that had allegedly tested positive for trace amounts of GE soy.
 - Defendants argued NBFDL preempted state law claims by giving USDA sole responsibility for "GMO" claims.
 - Court held that the state law claims only required that the manufacturer be truthful, which did not establish a "requirement" in addition to the NBFDL.
 - Claims not preempted.



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Preemption As Shield


- Examples:
 - *Painter v. Blue Diamond Growers* (9th Cir., 2018).
 - Class action alleging that Blue Diamond should have labeled "almond milk" as "imitation milk" because of nutritional inferiority.
 - Plaintiff's requested labeling would have required more (almond/dairy nutritional comparison or cease use of "milk") than FDCA required ("imitation milk").
 - Appeals court affirmed dismissal of "mislabeling" claims.



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Preemption As Sword

- Can be used as a sword to strike down state efforts to regulate:
 - National Meat Association v. Harris* (SCOTUS 2012): FMIA preempted California law attempting to strengthen its laws governing nonambulatory animals and to apply that statute to slaughterhouses regulated under the FMIA.
 - GMA v. Sorrell* (D. Vt., 2015): Vermont's GE labeling requirements not preempted under NLEA, but possibly preempted under FMIA and PPIA.



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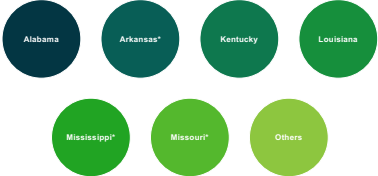
13

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Emerging Issue: States' "Real Meat" Laws

Various efforts to impose meat-related requirements

* In litigation, facing challenge by plant-based food companies on First Amendment grounds



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14

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State "Real Meat" Labeling Laws

Examples abound

- Alabama:** a food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived may not be labeled as meat or a meat food product. (Ala. Code § 2-17-10)
- Arkansas:** Prohibits "[r]epresenting the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids...[or] is not derived from a domesticated bovine...[or] is not derived from a domesticated swine..." (Ark. Code Ann. § 2-1-305)
- Missouri:** Prohibits "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." (Mo. Rev. Stat. § 265.494(7))

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State "Real Meat" Labeling Laws

Examples abound

- Mississippi:** Provides that "[a] food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived shall not be labeled as meat or a meat food product. A plant-based or insect-based food product shall not be labeled as meat or a meat food product." (Miss. Code Ann. § 75-35-15).
 - Amended in late 2019: "a plant-based food product will not be considered to be labeled as a "meat" or "meat food product" if one or more of the following terms, or a comparable qualifier, is prominently displayed on the front of the package: "meat free," "meatless," "plant-based," "veggie-based," "made from plants," "vegetarian," or "vegan."
- Kentucky; Louisiana; Montana; North Dakota; Oklahoma; South Carolina; South Dakota; Wyoming**

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16

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Case Studies: Missouri


Turtle Island Foods v. Richardson (W.D. Mo.):

- GFI/Tofurky challenged on First Amendment, other grounds. Unreasonable restriction on speech, will inhibit truthful marketing.
- Court denied PI, finding law only prohibits misleading speech, i.e., labels suggesting that plant-based or cultured meat is meat from an animal carcass.
- Per guidance issued by Mo. Dept. of Ag, labels containing a qualifier, such as "plant-based" or "veggie", etc., are not in violation. Currently on appeal to 8th Cir.



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17

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Other Cases

Upton's Naturals and PFBA v. Bryant, Case No. 3:19-cv-00462 (S.D. Miss).

- Law prevented plant-based foods from being called "meat."
- Plant Based Foods Association (PFBA) *et al.* sued state re labeling law on First Amendment grounds, asserting that use of the term "vegan" on their labels ("vegan burgers", "vegan bacon", etc.) dispelled any customer confusion.
- Law was amended to allow qualifying terms like "vegan" on labels, and in November 2019, plaintiffs dropped lawsuit.



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18

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Other Cases

Turtle Island Foods v. Soman, (E.D. Ark.)

- Tofurky challenge to state law prohibition on use of "meat", "burger", "sausage" to describe products not originating from slaughtered carcass.
- Court granted PI in December 2019, finding law to be unconstitutional restriction on commercial speech because use of meat descriptors on plant-based products not inherently misleading because the labels also contained other phrases like "white quinoa", "all vegan", and "wheat gluten and tofu sausage."
- Law enjoined.



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"Real Meat" laws vs. Federal Preemption?

- Cell-cultured meat
- Under USDA/FDA formal agreement, at production/harvest stage jurisdiction moves to USDA under FMIA/PPIA authority
- Seafood, plant-based foods regulated by FDA, closer question



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20


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Wrap-Up

- Federal preemption is powerful tool
- Congress has often expressly preempted state/local efforts to regulate in the area of food labeling
- Effect is stronger with certain foods
- Preemption = sword and shield
- "Food court" lawsuits will continue to test limits of shielding ability
- "Real meat" laws will be one of the next proving grounds for offensive use of preemption

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21

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Questions?

Contact
 Karen Carr
 Partner
 202.715.8531
karen.carr@arentfox.com

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22



23