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Local Menu Labeling and California State Law Preemption[1]

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SUMMARY

California localities can require that restaurants provide nutrition information on menus. Federal and state preemption and First Amendment commercial speech protections can be raised in challenge to local menu labeling laws, but the better legal view is that such challenges should fail, given the following:

- A New York district court recently ruled that the federal Nutrition Labeling and Education Act would not preempt state or local ordinances requiring that restaurants provide nutrition information on menus;
- The California Retail Food Code should not be read to preempt local menu labeling requirements because the Code's focus is on food safety and the prevention of foodborne disease; therefore, its scope does not encompass menu labeling;
- California's Sherman Food, Drug, and Cosmetic Law should not be read to preempt local menu labeling requirements because the Law's focus is on food adulteration, food advertising, and misbranding; therefore, its scope does not encompass menu labeling; and
- Though no court has directly ruled on the First Amendment implications of menu labeling requirements, a First Amendment challenge is not likely to succeed because the government can compel reasonable disclosure of factual information.

I. INTRODUCTION

This memorandum will address the question of whether a local ordinance requiring restaurants to provide nutrition information on menus or menu boards would be preempted by any current provision of California state law. There are two parts of California's Health and Safety Code that arguably could be interpreted as preempting local efforts to require nutrition labeling on menus. However, based on a plain but careful reading of the content of those parts, as well as on a critical analysis of their general purposes, the better conclusion is that they would not preempt a local ordinance requiring labeling of nutrition information on menus.

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This memorandum will begin with a discussion of the recent challenge to New York City's menu labeling regulations. New York's regulations were challenged on federal preemption and First Amendment grounds, and similar challenges to any local action on this matter in California are possible; thus, the New York court's ruling on these matters is instructive. The discussion will then turn to California specifically. It will address California preemption standards generally as well as the two possibly preemptive provisions of California's Health and Safety Code.

II. BACKGROUND INFORMATION AND FEDERAL PREEMPTION

In December 2006, the New York City Department of Health and Mental Hygiene adopted Regulation 81.50. This first-of-its-kind law required any restaurant that *already* made publicly available information about the calorie content of its menu items to post such information on its menus or menu boards. The posting had to conform to certain size and placement requirements. The regulation was to take effect on July 1, 2007, but was stayed pending a lawsuit filed by the New York State Restaurant Association. The lawsuit alleged that the regulation was preempted by the federal Nutrition Labeling and Education Act of 1990 (NLEA),[2] and that it violated the First Amendment rights of restaurant owners.

On September 11, 2007, Judge Richard J. Holwell of the Southern District of New York issued an opinion striking down the New York City regulation.[3] However, he did so on very narrow grounds. The sole reason why he found that the regulation was federally preempted was because it applied only to restaurants that already provided nutrition information *voluntarily*.[4] Because the *voluntary* provision of such information by restaurants is federally regulated, New York was preempted from requiring the information to appear in a specific form.[5] More importantly, however, Judge Holwell explicitly stated that local or state regulations that were not contingent on a voluntary claim, and that "simply require[d] restaurants to provide nutrition information" would *not* be preempted.[6]

There are two provisions of the NLEA that regulate nutrition labeling: Section 343(q) ("Section Q") and Section 343(r) ("Section R"). Section Q requires that all food intended for human consumption and offered for sale bear "certain required 'nutrition information.'"[7] The format and content of that information is regulated by the FDA.[8] The traditional nutrient panel that appears on packaged foods results from the implementation of this section.[9] However, food sold in restaurants is explicitly exempted from

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[2] 21 U.S.C. §§ 301, 343, 343-1 (2007).
[3] New York State Rest. Ass'n v. New York City Bd. of Health, No. 07 Civ. 5710 (S.D.N.Y. Sept. 11, 2007).
[4] *Id.* at 20-21.
[5] *Id.*
[6] *Id.* at 19.
[7] *Id.* at 8-9 (quoting 21 U.S.C. § 343(q)(1)).
[8] *Id.* at 9.
[9] *See* 21 C.F.R. § 101.9.

Section Q.[10] Moreover, the NLEA does not preclude state and local governments from establishing their own requirements for the mandatory labeling of restaurant foods.[11] Therefore, Section Q does not preempt local menu labeling requirements.

In contrast, Section R does apply to food sold in restaurants.[12] However, it governs only the content and form of *voluntary* claims that "'expressly or by implication … characterize[] the level of any nutrient.'"[13] Section R is primarily meant to address claims such as "lite," "low fat," "high in fiber," "low in calories," and the like. However, the court in the New York case found that even a factual statement of calories may be a "claim" as defined by Section R, as long as that statement of calories is not part of the nutrient panel required by Section Q.[14] Such voluntary claims may only be made if they comply with FDA regulations.[15] Though any restaurant making such a claim must provide, upon request, the "'nutrient amounts' of the particular food or meal 'that are the basis for the claim,'"[16] the federal government has not prescribed any specific manner of display of such information.[17]

Based on the above-outlined provisions of the NLEA, the court found that the New York City regulation was preempted by federal law.[18] As stated above, this finding was based solely on the fact that the regulation applied only to New York restaurants that already voluntarily provided nutrition information. Because the nutrition information was provided voluntarily, Section R governed, and New York was not free to impose its own requirements specifying the manner in which it should be displayed.[19] The court did emphasize, however, that a state or local law mandating that *all*—or some reasonable subgroup of—restaurants post nutrition information would *not* be preempted by the NLEA.[20]

Under the analysis conducted by Judge Holwell in the New York case, local or state menu labeling legislation would not be preempted by the NLEA, as long as the labeling requirement was not in any way contingent upon the voluntary provision of nutrition information as regulated by Section R. It should be noted that the court did not reach the potential First Amendment implications of the New York regulation, and that therefore the decision does not provide guidance on how a court would rule were labeling legislation to be challenged on constitutional grounds. However, the First Amendment challenge is not likely to be particularly strong because compelled disclosure of purely factual information need only have a reasonable relationship to an appropriate state

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[10] 21 U.S.C. § 343(q)(5)(A)(i) (2007).
[11] *New York State Rest. Ass'n* at 10-11 (citing 21 U.S.C. § 343-1(a)(4); 21 U.S.C. § 343(q)(5)(a)).
[12] *Id.* at 10 (citing 21 U.S.C. § 343(r)(5)(B)).
[13] *Id.* at 9 (quoting 21 U.S.C. § 343(r)(1)(A)).
[14] *Id.* at 15-16.
[15] *See* 21 C.F.R. § 101.13(q)(5).
[16] *New York State Rest. Ass'n* at 10 (citing 21 C.F.R. § 101.10).
[17] *Id.*
[18] *Id.* at 20-21.
[19] *Id.* at 20-21.
[20] *Id.* at 17, 19.

interest.[21] In the context of commercial speech, the Supreme Court has said that the "constitutionally protected interest in *not* providing any particular factual information … is minimal."[22]

Even if local action is not federally preempted or subject to a First Amendment challenge, further analysis is needed before local action can be taken in California. The remainder of this memorandum will analyze whether local laws requiring restaurants to provide nutrition labeling on menus would be preempted by any existing provision of state law.

III. STATE PREEMPTION DISCUSSION

There are two parts of the California Health and Safety Code that arguably could be interpreted as preempting local laws requiring nutrition labeling on menus. This discussion will address each in turn, after briefly outlining the standards for state preemption of local law in California.

A. CALIFORNIA PREEMPTION STANDARDS

In California, the party claiming that a state law preempts a local law bears the burden of demonstrating preemption.[23] Courts are "particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another."[24] "[W]hen local government regulates in an area over which it traditionally has exercised control … California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute."[25] Under the California Constitution, local governments retain police power over issues of health, welfare, and safety.[26] Local governments also traditionally retain authority over local business operations insofar as such regulations are for the benefit of the community in general.[27] Moreover, "it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."[28]

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[21] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985). *See also* Brief of Jennifer L. Pomerantz of the Rudd Center for Food Policy and Obesity at Yale University and Robert Post of Yale Law School and Kelly D. Brownell of the Rudd Center for Food Policy and Obesity at Yale University as Amicus Curiae in Support of Defendants, New York State Restaurant Ass'n v. New York City Board of Health, No. 07 Civ. 5710 (S.D.N.Y. Sept. 11, 2007).
[22] *Zauderer*, 471 U.S. at 651.
[23] Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139, 1149 (2006) (internal citation omitted).
[24] *Id.* (internal citations omitted).
[25] O'Connell v. City of Stockton, 41 Cal. 4th 1061, 1069 (2007) (internal citation omitted).
[26] *See* CAL. CONST. art. XI, § 7; *see also* Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140 (1976).
[27] Justesen's Food Stores v. City of Tulare, 12 Cal. 2d 324, 328 (1938); Grumbach v. Lelande, 154 Cal. 679, 683-84 (1909).
[28] *Big Creek Lumber Co.*, 38 Cal. 4th at 1149-50 (internal citations omitted).

A conflict between state and local law exists when local law "duplicates, contradicts, or enters an area" that is fully occupied, either expressly or impliedly, by state law.[29] Local ordinances are thus invalid if they "attempt to impose additional requirements" in a field that is occupied by state law.[30] This is referred to as *field preemption*. A determination of whether a field has been preempted often involves an analysis of the following factors: whether "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality."[31] In some instances, a statute may *expressly* state that a field is preempted, in which case the relevant issue becomes the scope of the field.[32]

Bravo Vending v. Rancho Mirage[33] offers more specific guidance in determining the scope of a field that has been fully occupied by state law. *Bravo Vending* is a California Court of Appeals case in which the court refused to find that a local cigarette vending machine ordinance was preempted by a state law regarding the sale of tobacco to minors.[34] In *Bravo Vending*, the court faced the task of defining the "relevant field occupied by … preemptive state legislation … ."[35] In determining the scope of the preempted field, the court cited a California Supreme Court case: "A potentially preemptive 'field' of state regulation is 'an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject.'"[36]

Using that definition as guidance, the court analyzed Penal Code Section 308, which expressly preempts local regulations regarding the sale of tobacco products to minors. There is one sentence in Section 308 that specifically refers to cigarette vending machines, and that sentence identifies the person liable when the sale to a minor occurs through a vending machine.[37] The court found that this "solitary reference" was not enough to establish a "pattern of regulation" with respect to vending machines.[38] Instead, the court considered the overall purpose of Section 308, as well as the purpose of the reference to vending machines, in coming to the conclusion that the preempted field constituted only the "penal … aspects of the sale of cigarettes to minors."[39] Therefore, local regulations regarding the location and placement of cigarette vending machines

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[29] Lancaster v. Municipal Court, 6 Cal. 3d 805, 807-08 (1972) (internal citations omitted).
[30] *Id.* at 807 (internal citations omitted).
[31] Bamboo Brothers v. Carpenter, 133 Cal. App. 3d 116, 124 (1982) (internal citation omitted).
[32] *See* Bravo Vending v. Rancho Mirage, 16 Cal. App. 4th 383, 400 (1993).
[33] *Bravo Vending*, 16 Cal. App. 4th 383.
[34] *Id.*
[35] *Id.* at 400 (internal quotation omitted).
[36] *Id.* (quoting Fisher v. City of Berkeley, 37 Cal. 3d 644, 707-08 (1984) (internal quotations omitted)).
[37] *Id.* at 400.
[38] *Id.* at 400-01.
[39] *Id.* at 403.

were not preempted because such regulations were not contradictory to Section 308 and because their subject matter fell outside the scope of the preempted field.[40]

B. THE CALIFORNIA RETAIL FOOD CODE

The California Retail Food Code,[41] formerly the California Uniform Retail Food Facilities Law (CURFFL), governs the "health and sanitation standards for retail food facilities [in California],"[42] and should be understood as a *food safety law*, rather than a law dealing with the provision of *consumer information*. Based on this perspective, the Retail Food Code does not preempt local menu labeling requirements. The Retail Food Code addresses such topics as food safety certification; employee health and hygiene; general food safety requirements (such as protection from contamination and food service/storage temperature); consumer information about *prepackaged* foods; cleaning and sanitizing of equipment; use and storage of equipment, linens, and utensils; water, plumbing, and waste; and physical facilities (including vermin control, lighting, and toilet facilities).[43] The statute states that "it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities."[44]

Given this explicit preemption language, one could argue that local jurisdictions would not be free to enact laws requiring nutrition labeling on menus. However, under the California field preemption standards outlined above, that argument relies on the assumption that menu labeling falls within the scope of the field of "health and sanitation standards for retail food facilities." The preemption language is immediately preceded by the Legislature's declaration that "the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that the food will be pure, safe, and unadulterated."[45] This declaration emphasizes that the preempted "field" as it was understood by the legislature relates to purity, safety, and adulteration of food, none of which has to do with nutrient disclosures for otherwise "safe" food or enabling consumer choice about food consumed outside of the home.

In addition to the Legislature's declaration, an examination of the content of the Code as a whole also suggests that "health and sanitation standards" in the context of the Retail Food Code refers to standards related to food safety and foodborne illness, rather than to the provision of nutrition information to consumers. For example, *imminent health hazard* is defined by the Code as "a significant threat or danger to health" that results from a "situation that can cause food infection, food intoxication, disease transmission, vermin infestation, or hazardous condition that requires immediate correction or cessation

[40] *Id.* at 412-13.
[41] CAL. HEALTH & SAFETY CODE §§ 113700 *et seq.* (2007).
[42] CAL. HEALTH & SAFETY CODE § 113705 (2007).
[43] CAL. HEALTH & SAFETY CODE §§ 113700-114371 (2007).
[44] CAL. HEALTH & SAFETY CODE § 113705 (2007).
[45] *Id.*

of operation to prevent injury, illness, or death."[46] There is no reference to the chronic health issues related to poor nutrition, nor is there any indication that such health hazards are contemplated by the Code.

The only article of the Code that addresses food labeling—the "consumer information" article—also deals primarily with food safety issues, rather than with nutrition issues.[47] For instance, Section 114090 states that consumer warning labels must be provided if otherwise required by law, and prohibits interfering with manufacturers' dating information on food packages.[48] The sole reference in the Code to the labeling of nutrition information occurs in Section 114089, and is applicable only to food "prepackaged in a food facility."[49] With respect to such food, Section 114089 incorporates by reference the regulations promulgated in accordance with the Federal Food, Drug, and Cosmetic Act.[50] It also incorporates the exemptions in Section Q, which exempt restaurants.[51] The argument that this mention of nutrition labeling is enough to illustrate that the Legislature meant to include nutrition information in the definition of *health and sanitation standards* is weak. The analysis in *Bravo Vending* suggests that a sole reference is not enough to show that the referenced topic is within the scope of the preempted "field" or overall purpose of a statute. The determinative fact remains that the overwhelming focus of the so-called "consumer information" article, and of the Code as a whole, is on food *safety*.

The Governor's message to the Senate upon his signing of the Retail Food Code provides further support for the interpretation of the Code as a comprehensive food safety law, but not more. "Protecting the *safety* of California's retail food is critical to ensuring the health of California's consumers,"[52] he wrote. "[T]his new law was crafted to ensure that consumers are protected when they eat at retail food facilities."[53] Moreover, the Code's statement of purpose is as follows: "The purpose of this part is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented through adoption of science-based standards."[54] This clear statement of intent further illustrates that the Code is meant to address issues of food safety and foodborne illness, rather than the public health problems resulting from poor nutrition or a lack of nutrition labeling.

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[46] CAL. HEALTH & SAFETY CODE § 113810 (2007).
[47] *See* CAL. HEALTH & SAFETY CODE §§ 114087-114093.1 (2007).
[48] *Id.*
[49] CAL. HEALTH & SAFETY CODE § 114089(a) (2007).
[50] CAL. HEALTH & SAFETY CODE § 114089(b)(5) (2007). One section of the Code of Federal regulations incorporated by the Retail Food Code—21 C.F.R. 101—was promulgated in accordance with the NLEA. The other—9 C.F.R. 317, Subpart B—has to do with the labeling of packaged meat products.
[51] *Id. See also* 21 U.S.C. § 343(q)(5)(A)(i) (2007).
[52] Governor's Message to Senate upon Signing of Stats. 2006, c. 23 (SB 144) (2006) (emphasis added).
[53] *Id.*
[54] CAL. HEALTH & SAFETY CODE § 113703 (2007).

C. THE SHERMAN FOOD, DRUG, AND COSMETIC LAW

The Sherman Food, Drug, and Cosmetic Law[55] ("Sherman") governs the manufacturing, packaging, labeling, and advertising of food, drugs, devices, and cosmetics in California. With respect to food, Sherman's requirements seek to ensure that food is what its packaging and advertising claims it to be;[56] that is, the law bars food adulteration, false advertising, and misbranding—essentially consumer fraud. Because Sherman specifically addresses the labeling of food products, it arguably could be interpreted as preempting local laws requiring menu labeling. However, a plain but careful reading of the content of Sherman reveals that its primary purpose is to prevent mislabeling or misbranding of *prepackaged* items. Based on this perspective, Sherman does not preempt local menu labeling requirements.

There are several provisions of Sherman that refer directly to the labeling or advertising of food. For instance, Section 110385 states that "[i]t is unlawful for any person to distribute in commerce any food … if its packaging or labeling does not conform to the provisions of this article or to regulations adopted pursuant to this article. This section does not apply to persons engaged in business as wholesale or retail distributors of food … , except to the extent that they are engaged in the packaging or labeling of the commodities or they prescribe or specify the manner in which the commodities are packaged or labeled."[57] One could argue that restaurants that label menu items are "engaged in the packaging or labeling" of the food they sell, and that local menu labeling laws would therefore be preempted. However, almost all of the provisions related to labeling refer to the label that appears on the *outside package* of food,[58] or to such issues as forging or counterfeiting.[59] The only direct references to nutrition labeling appear in Sections 110665 and 100670, which state that foods not labeled in accordance with the NLEA are deemed misbranded.[60] Therefore, Sherman explicitly incorporates the same federal law that the court in the New York case found *not* to preempt local menu labeling requirements for restaurants, as long as the local law in question does not attempt to regulate voluntary nutrition claims.

IV. CONCLUSION AND RECOMMENDATIONS

There are arguments under the Retail Food Code and the Sherman Food, Drug, and Cosmetic Law that California state law would preempt local menu labeling laws. However, the overall purpose of the two state laws strongly suggests that the scope of each is not so broad as to preempt local action. Whether or not a court would find that local action is preempted would depend on the court's interpretation of the meaning of and legislative intent behind the Retail Food Code and Sherman. Such an interpretation would rely on the plain language of the statutes, as well as on additional information such

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[55] CAL. HEALTH & SAFETY CODE §§ 109875 *et seq.* (2007).
[56] *See* CAL. HEALTH & SAFETY CODE §§ 110290-111220 (2007).
[57] CAL. HEALTH & SAFETY CODE § 110385 (2007).
[58] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 110295, 110320, 110340, 110360 (2007).
[59] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 110300, 110320 (2007).
[60] CAL. HEALTH & SAFETY CODE § 110665, 110670 (2007).

as the legislative history, public policy, and the statutory scheme of which the laws are a part.[61] In addition, the federal preemption and First Amendment issues have not been conclusively resolved. However, for the reasons outlined in Part II above, neither challenge is likely to be particularly strong as long as local laws are not in any way tied to voluntary disclosure.

There are several things that local governments can do to increase the likelihood that a local law would be upheld in the face of a state preemption challenge. First, the drafters of such local laws should make an effort to emphasize the differing purposes of the local law and existing state law. For example, because the Retail Food Code focuses on food safety and the prevention of communicable disease, local drafters should clearly state that nutrition labeling is for the purposes of providing consumer information and of chronic disease prevention.

In addition, local government officials involved in the drafting of any *state* law on this subject should be sure to include language indicating that the state law would serve as a floor, rather than a ceiling, and that more restrictive local action would not be preempted. Alternatively, local governments should pay particular attention to any state action on this matter, and should advocate for the inclusion of provisions that match their needs and goals in the event that future state legislation on this topic does preempt local action.

[61] *See* Catholic Mut. Relief Soc'y v. Superior Court, 64 Cal. Rptr. 3d 434, 443 (2007) (citing Wilcox v. Birtwhistle, 21 Cal. 4th 973, 977 (1999)).