

Food for Thought: Food Industry Decisions with Bite

Food for Thought: Ninth Circuit Holds California's Nonfunctional Slack Fill Regulations for Meat and Poultry Are Preempted by Federal Law

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Del Real, LLC v. Harris, 636 Fed. Appx. 956 (9th Cir. Feb. 12, 2016)

California enacted statutory prohibitions against nonfunctional slack fill, which is the empty space between a product and its packaging that serves no specified purpose. The California Attorney General appealed a permanent injunction banning enforcement of that prohibition against a producer of heat-and-serve meat and poultry products.

The Ninth Circuit affirmed the detailed decision of the district court in *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047 (E.D. Cal. 2013). In a brief, not-for publication decision, the Ninth Circuit held that, "as applied to meat and poultry products, California's nonfunctional slack fill provisions are expressly preempted by the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) because they are 'in addition to, or different than' 21 U.S.C. §§ 467e, 678, the federal statutes' general prohibitions against containers 'filled as to be misleading'...."

The court rejected California's argument that it prohibited only a subset of conduct already prohibited by the FMIA or PPIA. First, Congress intended to create uniform national labeling standards, which "counsels against allowing the states to develop variant standards." Second, Congress allowed meat and poultry packaging to be subject to "a lesser level of regulation" than other products.

The court's decision emphasized in conclusion that "[n]othing in this disposition should be read to prevent California from exercising its concurrent authority under both the FMIA and PPIA to address misleading packaging of meat and poultry products."