

WHAT'S IN THAT GUACAMOLE? HOW *BATES* AND THE
POWER OF PREEMPTION WILL AFFECT LITIGATION
AGAINST THE FOOD INDUSTRY

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INTRODUCTION

Americans have a love-hate relationship with food. On the one hand, Americans celebrate their gastronomic heritage of home-cooked barbecue and apple pie. On the other hand, Americans are spending less time preparing meals and are turning to calorie-dense prepared foods that offer convenience, but also lead to weight gain.¹ A 2005 survey by the Center for Disease Control estimates that 60.5% of Americans are overweight, 23.9% are obese, and 3.0% are extremely obese.² It is no wonder that the novel *Fast Food Nation* was a best seller³ and that the movie *Super Size Me*⁴ grossed \$12 million in box office profits.⁵ The popularity of *Fast Food Nation* and *Super Size Me* demonstrates Americans' increased interest and concern about the effects of food on health and weight. While medical science acknowledges that various factors contribute to weight gain,⁶ some consumers blame the food industry for misleading them about the properties of pre-

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¹ Americans' lifestyle and eating habits have contributed to escalating public health problems associated with weight gain and obesity. See Todd J. Zywicki et al., *Obesity and Advertising Policy*, 12 *GEO. MASON L. REV.* 979, 984-85 (2004).

² Ctrs. for Disease Control & Prevention, *State-Specific Prevalence of Obesity Among Adults—United States, 2005*, 55 *Morbidity & Mortality Wkly. Rep.* 985, 985 (2006), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5536.pdf>.

³ Martin Arnold, *Making Books: Food Beats Sex in Best Sellers*, *N.Y. TIMES*, May 24, 2001, at E3.

⁴ *Super Size Me* is a movie about eating food from McDonald's. *SUPER SIZE ME* (Kathbur Pictures 2004).

⁵ Christine Spines, *25 Years of Sundance; As the Filmmaking Institute Celebrates its Silver Anniversary, EW Looks Back At The Festival's 10 Most Influential Movies*, *ENTERTAINMENT WKLY.*, Feb. 3, 2006, at 32.

⁶ See, e.g., Zywicki, *supra* note 1, at 980 (stating that some factors that have contributed to increased obesity in Americans include a decrease in the relative cost of food and an increase in the relative cost of physical activity; technological innovations that make the convenience and affordability of fast food possible; increased amounts of women in the workplace prompting a greater demand for convenience food and fast food; and increased advertising for calorie dense food).

pared foods. Some consumers even contend that lawsuits can protect them from deceptive acts by the food industry. Others disagree and argue that consumers should not be allowed to pursue actions under state consumer protection laws for harm from obesity, because consumers should take personal responsibility for their food choices.⁷ This Comment will explore consumer lawsuits against the food industry for preparing false or misleading labels that contribute to obesity or other health problems and the role federal preemption plays in allowing suits to continue under state consumer protection acts.⁸

In the 2005 case *Bates v. Dow Agrosciences, LLC*,⁹ the Supreme Court held that a cause of action under state law was not preempted by federal law unless the conflicting federal statute explicitly barred all state causes of action.¹⁰ In fact, even if the state and the federal statute had congruent requirements, what the Court called “parallel requirements,” preemption was still not presumed.¹¹ Because the Federal Food, Drug, and Cosmetic Act does not explicitly forbid all state actions, *Bates* suggests that state statutes allowing recovery for misleading food labels are not preempted. Thus, food labeling lawsuits under state law could engender change in industry food labeling practices, ameliorating alleged misleading labels which some believe lead to weight gain.

Although *Bates* indicates that state-law litigation is not preempted by federal law, consumers still bear the burden of proving that the food industry caused their weight-related health problems. This is a high bar that should discourage frivolous claims and address the growing belief that consumers, and not the food industry, are responsible for their own weight gain. This Comment argues that if a state recognizes and allows for a viable cause of action that may change the way food industry advertises the health effects of their food, consumers should be able to proceed under state law to stimulate that change, and that *Bates* rightfully allows for this type of action to proceed.

To understand how *Bates* affects preemption in food labeling cases, Part I will explore the federal laws on false and misleading food labels and then examine the law’s evolution from a focus on informing the public about food ingredients to informing the consumer about nutrition. Part II will illustrate the effect of *Bates* on recent state food labeling cases which

⁷ Carmel Sileo, *Federal Judge Allows Obesity Lawsuit Alleging Deceptive Ads*, TRIAL, Dec. 2006, at 68, 68.

⁸ This debate is embodied in a recent news story about guacamole, in which a consumer sued Kraft foods for selling guacamole with only two percent avocado. See Jerry Hirsch, *Lawsuit Stirs up Guacamole Labeling Controversy*, L.A. TIMES, Nov. 30, 2006, at C1, available at 2006 WLNR 20649611. The guacamole story and case law on four other foods: water, milk, fries, and salmon will serve to illustrate a growing trend in food litigation.

⁹ 544 U.S. 431 (2005).

¹⁰ *Id.* at 447-48.

¹¹ *Id.*

establish precedent for future cases on deceptive food labeling practices. The implications of state lawsuits proceeding past federal preemption scrutiny will be discussed in Part III. This Comment concludes that the “parallel requirements” analysis in *Bates* allows legitimate claims against manufacturers to proceed under state law and that these lawsuits will be limited because it will be difficult for a plaintiff to establish that the manufacturer caused the harm related to their weight gain. Therefore, following the rule in *Bates* creates the most socially beneficial outcome in food labeling lawsuits because manufacturers with truly misleading labels will be discouraged from continuing their deceptive practices, while manufacturers who provide sufficient product information for consumers to make informed food choices will escape liability and, in these cases, consumers will maintain responsibility for their health.

I. A BRIEF HISTORY OF FOOD LABELING LAWS

The following background discusses Congress’s attempt to mitigate the federal government’s growing concern with deceptive labeling practices used by the food industry. The first federal food labeling laws did not address the health effects of food. However, the federal government’s stance on food labeling laws evolved to allow for state causes of action, recognizing that misleading labels could affect consumers’ food choices and ultimately have an effect on consumer health.

A. *The Food and Drug Act of 1906*

Congress’s first attempt to bar material deception by the food industry was the Food and Drug Act of 1906.¹² This act attempted to curb previously unchecked food manufacturing practices brought to light by Upton Sinclair’s poignant novel *The Jungle*, which highlighted the egregious practices of the meat packing industry.¹³ The act successfully thwarted some deceptive manufacturing practices, but because the act did not contain a provision for false or misleading claims, industries were able to continue using unsubstantiated claims to advertise their products despite various consumer lawsuits aimed at such statements.¹⁴ In 1911, the Food and Drug Administration’s (“FDA”) predecessor, the Bureau of Chemistry, proposed a “false and misleading” provision that would hold industry accountable for its statements about the “disease fighting” properties of a product (known

¹² MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 233 (2002).

¹³ UPTON SINCLAIR, *THE JUNGLE* (Penguin Classics 2006) (1906).

¹⁴ NESTLE, *supra* note 12, at 233.

as “disease claims”), which Congress adopted in 1912.¹⁵ However, it was not until 1930, when the Federal Food Drug and Cosmetic Act (“FFDCA”) was proposed, that Congress began earnest discussions to contend with a variety of false and misleading labels. This marked the beginning of the FDA’s concern about health claims, which would later prove important in *Bates* and other recent cases dealing with preemption under the FFDCA.

B. *Misleading Labels Under the FFDCA*

In 1938, Congress passed the FFDCA to address consumer protection issues not adequately addressed in the 1906 Food and Drug Act.¹⁶ Specifically, the FFDCA was intended to “prevent the adulteration, misbranding and false advertising of food . . . for the purposes of safeguarding the public health [and] preventing deceit upon the purchasing public.”¹⁷ A major component of the new law was to provide “informative labeling” to the public, especially for food items that would affect those who could not take care of themselves, such as infants.¹⁸

The act says in part:

[T]here should be taken into account (among other things) not only the representations made or suggested by statement, word, design, device, or any combination thereof, but also to the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.¹⁹

The definition of “label” under the FFDCA has historically been broad.²⁰ The original definition in the act says “[t]he term ‘label’ means a display of written, printed, or graphic matter upon the immediate container

¹⁵ *Id.* For example, in *Seven Cases of Eckman’s Alterative v. U.S.*, 239 U.S. 510 (1916), the United States sued a manufacturer who made false statements about their medicine being an effective cure against pneumonia and tuberculosis. The Court held that while the “false or fraudulent” standard was a difficult one, there was sufficient evidence to affirm that this type of misleading information was covered by the act and was a constitutional exercise of authority by Congress under the dormant commerce clause. *Id.* at 518-19.

¹⁶ NESTLE, *supra* note 12, at 233.

¹⁷ H.R. REP. NO. 75-2139, at 1 (1938).

¹⁸ *Id.* at 2. In fact, many lawsuits against industry have been brought by parents of minors because of health effects on their children, because their children often cannot make educated food decisions. Also, there has been a big push by Congress to ensure schools contain healthy food snacks in their vending machines. See Kathryn L. Plemmons, *The National School Lunch Program and USDA Dietary Guidelines: Is There Room For Reconciliation?* 33 J.L. & EDUC. 181, 203-04 (2004).

¹⁹ H.R. REP. NO. 75-2139, at 8.

²⁰ Sara A. Kornblat, Comment, *Fat America: The Need for Regulation Under the Food, Drug, and Cosmetic Act*, 49 ST. LOUIS U. L.J. 209, 231 (2004).

of any article.”²¹ Congress used the word “advertising” in the FFDCa cautiously, recognizing the overlapping responsibilities of the FDA and the Federal Trade Commission (“FTC”).²² Congress acknowledged that the FTC’s mission was to discourage unfair competitive practices and protect the consumer by discouraging inaccurate or deceptive statements.²³ However, Congress saw food advertising as an “extension[] of labeling” that was properly regulated by the FDA, not the FTC.²⁴

The majority of early cases initiated by the government under the FFDCa focused on false claims about ingredients rather than dietary claims. These cases included claims against manufacturers of apple cider vinegar made from dried apples instead of fresh apples,²⁵ a case against a producer of ice cream flavored with “imitation chocolate,”²⁶ and criminal proceedings against people selling packaged horse meat where labels indicating the type of meat—horse—were removed.²⁷ In these cases, federal courts were deliberate in pointing out that the purpose of the FFDCa was to inform and protect the consumer, but, as construed by the courts, consumer protection meant protection against false statements about ingredients rather than the implied health consequences of consuming it.²⁸ However, as illustrated below, after the 1940s, FFDCa underwent a statutory shift toward consumer health protection.

C. *Significant Additions to the FFDCa, Including the NLEA*

In 1946, 1970, and 1990, Congress passed major revisions to the FFDCa that pertained to nutrition, indicating a shift in focus from food content concerns to consumer protection. This change began subtly in 1946 when Congress passed the National Food Lunch Program, which provides safeguards for students eating school lunches.²⁹ By 1970, the FDA began to expand their focus from children to adults by encouraging manufactures to

²¹ Federal Food Drug and Cosmetic Act, Pub. L. No. 717, § 201(k), 52 Stat. 1040 (1938).

²² S. REP. NO. 75-91, at 3 (1938).

²³ Fed. Trade Comm’n, A Guide to the Federal Trade Commission, <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm> (last visited Aug. 18, 2007).

²⁴ S. REP. NO. 75-91, at 3. In contrast, any unfair methods of competition related to food was properly under the authority of the FTC, and Congress made sure to recognize that FTC’s powers in this arena were in no way thwarted by the FDA’s mandate under the FFDCa. *Id.* This note will only discuss food labeling lawsuits, and will therefore only focus on the FFDCa.

²⁵ U.S. v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar, 265 U.S. 438 (1924).

²⁶ U.S. v. 651 Cases, More or Less, of Chocolate Chil-Zert, 114 F. Supp. 430 (N.D.N.Y. 1953).

²⁷ U.S. v. Kocmond, 200 F.2d 370 (7th Cir. 1952).

²⁸ *See, e.g., id.*

²⁹ National School Lunch Act of 1946, ch. 281, Pub. L. No. 79-396, 60 Stat. 230 (codified as amended at 42 U.S.C. §§ 1751-1769 (2000)). For example, the Act states that school lunches must meet minimal nutrition requirements based on nutritional research approved by the Secretary of Agriculture. 42 U.S.C. § 1758(a)(1)(A).

provide more dietary information to help consumers make educated food choices.³⁰ However, it was not until 1984 that the FDA realized the urgent need to regulate health and nutrition claims to stop the food industry from using unsubstantiated statements that undermined the FDA's congressional mandate to regulate the safety and health of foods.³¹ The catalyst for this change occurred in 1984 when Kellogg's cereal began asserting that the fiber content in its products helped to reduce the risk of cancer, a claim unsupported by adequate scientific evidence.³² The FDA was concerned about these statements because the illusory claims were likely to influence consumer choices.³³

The Kellogg's "incident" marked the peak of FDA's fears that unsubstantiated health claims would go unchecked by federal regulations.³⁴ Following various unsuccessful attempts by the FDA to create a standard for valid health claims based on sound scientific research, impatient organizations petitioned the FDA to define its policy on health claims.³⁵

Spurred by the FDA's delays and the scientific community's numerous advances in science and nutrition studies, Congress began considering a national labeling act which would create laws based on emerging knowledge linking diet to health.³⁶ In 1990, Congress passed the NLEA, which amended the FFDCA³⁷ and directed the FDA to standardize and limit the terms manufacturers could use on labels.³⁸ The main focus of the act was to provide consumers with scientifically based information so they could make informed decisions based on sound nutritional information.³⁹

The NLEA brought various changes to the food industry and its labeling practices. Prior to the passage of the NLEA, manufacturers only had to provide detailed information about their foods if they made nutrition or health claims about their food products.⁴⁰ After NLEA's enactment, manufacturers had to provide detailed information about the product regardless of whether there was a health or nutrition statement on the product.⁴¹ Also

³⁰ Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?* 57 FOOD & DRUG L.J. 371, 397 (2002).

³¹ NESTLE, *supra* note 12, at 239-40.

³² *Id.*

³³ *Id.* at 242.

³⁴ Generally, health claims are a statement about the relationship between a food and the reduction in risk of a disease or condition. For example, "broccoli helps reduce the risk of cancer."

³⁵ NESTLE, *supra* note 12, at 243.

³⁶ *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995) [hereinafter *Impact of the NLEA*].

³⁷ Kornblat, *supra* note 20, at 233.

³⁸ Thomas B. Leary, *The Ongoing Dialogue Between the Food and Drug Administration and the Federal Trade Commission*, 59 FOOD & DRUG L.J. 209, 210 (2004).

³⁹ Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1187-88.

⁴⁰ Schaffer, *supra* note 30, at 404.

⁴¹ *Id.*

before the passage of the act, serving sizes could be determined by a manufacturer, as long as they used a reasonable estimation.⁴² After 1990, serving sizes had to be based on government-approved studies that reflect how much people normally consume.⁴³ These changes demonstrate Congress's growing belief that regardless of whether the food was bought for its dietary benefits or for mere gustatory purposes, people should be informed about the food's effect on their bodies. Generally speaking, the NLEA was well received by industry⁴⁴ because it realized consumers preferred to buy foods with health benefits.

One of the compromises reached in the NLEA had to do with the extent to which the new federal labeling law would preempt state law. Industry rigorously lobbied to ensure the NLEA allowed for a broad sweeping preemption provision.⁴⁵ It is less costly for the industry to comply with one federal law on food labeling than fifty state-specific laws.⁴⁶ State labeling laws tended to be more stringent than federal laws, and industry believed that as long as lawsuits would be preempted by the lesser standard, lawsuits would be less prevalent.⁴⁷ While they did get a preemption provision, it was not as strong as they had hoped.⁴⁸ However, industry also made a strong lobbying effort to exempt restaurants from labeling requirements, which proved successful.⁴⁹ As it currently stands, the NLEA does not apply to restaurants but does apply to retail food stores that sell packaged foods.⁵⁰ The effect of the preemption provision on the restaurant industry is one of the issues discussed in the McDonald's "fries" case below.⁵¹

At the time of the NLEA enactment, the Office of Management and Budget was particularly displeased because it believed the preemption provision contradicted principles of state sovereignty, running "counter to Republican principles of federalism and states rights."⁵² Others suggested that the preemption provision was not broad-sweeping enough and that there was nothing in the act that would prevent a state from taking a manufacturer to court for civil remedies and injunctions.⁵³ It was not until *Bates* that

⁴² *Impact of the NLEA*, *supra* note 36, at 611-12.

⁴³ Zywicki, *supra* note 1, at 1006.

⁴⁴ Kornblat, *supra* note 20, at 233.

⁴⁵ *Impact of the NLEA*, *supra* note 36, at 608.

⁴⁶ *Id.*

⁴⁷ NESTLE, *supra* note 12, at 251; Christine A. Beaupre, Comment, *Product Safety—Food and Drug Laws: How Bates Changed the Face of Preemption*, 82 N.D. L. REV. 579, 591-93 (2006).

⁴⁸ See discussion *infra* Part III.B.2.

⁴⁹ *Impact of the NLEA*, *supra* note 36, at 608.

⁵⁰ McCann, *supra* note 39, at 1187, 1191.

⁵¹ See discussion *infra* Part III.B.2.

⁵² *Impact of the NLEA*, *supra* note 36, at 608. Note that this was said in reference to then-president Bush's Republican Party, not principles of federalism.

⁵³ Bob Gatty, *Senator Hatch Lambasts Waxman Bill Supporters*, 25 BAKERY PROD. & MKTG. 2, 2 (1990).

the Supreme Court settled the debate and confirmed the right to pursue a cause of action despite some similarities between a state statute and the NLEA.⁵⁴

D. *State Consumer Protection Laws and Preemption*

Under the Supremacy Clause of the Constitution, if a state law conflicts with federal law, federal law preempts the state law.⁵⁵ Preemption can occur in three ways. Either: (1) there is an express preemption provision in federal law; (2) a court determines that Congress intended complete preemption; or (3) state and federal law conflict.⁵⁶ Most federal statutes address federal preemption directly. However, some statutes, including the NLEA, do not have a clear, sweeping preemption provision.⁵⁷ The result is a mishmash of conflicting judicial decisions from both state and federal courts deciding whether or not federal law preempts state law actions.⁵⁸ Preemption becomes important in obesity lawsuits because there is no cause of action under the FFDCA for private citizens. Consequently, preemption is an affirmative defense that decides conclusively whether or not citizens can proceed with their suits for misleading labels under state consumer laws.⁵⁹

State consumer protection acts were largely enacted in the 1960s to ensure consumers were not unfairly deceived by businesses.⁶⁰ Most acts were modeled after the Federal Trade Commission's ("FTC") Act, which prevents deceptive or unfair business acts.⁶¹ Generally, state consumer protection acts allow consumers to sue manufacturers if they can demonstrate

⁵⁴ See discussion *infra* Part III.

⁵⁵ Diane M. Allen, *Federal Pre-emption of State Food Labeling Legislation or Regulation*, 79 A.L.R. FED. 181 (2006).

⁵⁶ Beaupre, *supra* note 47, at 585.

⁵⁷ *Id.*

⁵⁸ See, e.g., Erica LaPlante, Comment, *Preemption Under the MDA: Can Bates Mend the Wound?* 3 SETON HALL CIR. REV. 231 (2006) (discussing circuit splits on preemption of the Medical Device Amendment of 1976 after the *Bates* decision).

⁵⁹ Preemption ends a cause of action because the FFDCA universally rejects private causes of action. See *National Women's Health Network, Inc. v. A. H. Robins Co.*, 545 F. Supp. 1177, 1178-79 (D. Mass. 1982). Also, the FFDCA states that "[a]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." 21 U.S.C. § 337(a) (2000). See also Robert S. Hogan, *Tamping the Ballast—Refining the Factual Aspect of Federal Pre-emption*, 2 ASS'N TRIAL LAW. AM. 2505 (2006).

⁶⁰ Michelle L. Evans, Annotation, *Who is a "Consumer" Entitled to Protection of State Deceptive Trade Practices and Consumer Protection Acts*, 63 A.L.R. 5th 1 (2006).

⁶¹ Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006). As discussed previously, while the FTC is capable of handling misleading advertisement claims, Congress vested jurisdiction for false labeling in the FDA, as an extension of FDA's jurisdiction over food labeling. See discussion *supra* Part I.B.

an injury in fact.⁶² Accordingly, a plaintiff claiming that a food manufacturer breached its statutory duty must also prove that the resulting damage was proximately caused by the breach of duty.⁶³ Because obesity can be caused by a variety of factors, including diet, genetics, and lifestyle, it no trivial feat for a consumer to prove this element under state consumer protection laws.⁶⁴

The most publicized obesity lawsuit which began before the *Bates* decision is *Pelman v. McDonald's Corporation*.⁶⁵ In *Pelman*, parents of two minors sued McDonald's under New York's consumer safety statute alleging that McDonald's deceptive food advertising had caused the minors to become obese.⁶⁶ While the NLEA exempts restaurants from federal food labeling requirements, it expressly allows states to impose labeling requirements on restaurants.⁶⁷ The New York Consumer Protection Act makes it unlawful for businesses to engage in "[d]eceptive acts or practices" that could harm consumers.⁶⁸ Because the complaint in *Pelman I* did not establish the causal connection between McDonald's alleged deceptions and the plaintiffs' obesity required by the statute, the plaintiffs were granted leave to amend the complaint.⁶⁹ In *Pelman II*, the Southern District of New York again noted that "[t]he most formidable hurdle for the plaintiffs is to demonstrate that they suffered injury as a result of . . . deceptive act[s]"⁷⁰ and the case was dismissed for failure to demonstrate a causal relationship between the deceptive advertisements and the children's obesity.⁷¹ On appeal in *Pelman III*, the Second Circuit remanded the case, concluding that there was adequate support in the pleadings to demonstrate causation and that the information necessary to prove causation would be further fleshed

⁶² Allen, *supra* note 55.

⁶³ Matthew Walker, Note, *Low-Fat Foods or Big Fat Lies? The Role of Deceptive Marketing in Obesity Lawsuits*, 22 GA. ST. U. L. REV. 689, 705 (2006).

⁶⁴ Adam Benforado et al., *Broken Scales, Obesity and Justice in America*, 53 EMORY L.J. 1645, 1652 (2004).

⁶⁵ See Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 862 (2005).

⁶⁶ *Pelman v. McDonald's Corp. (Pelman I)*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *vacated*, 396 F.3d 508 (2d Cir. 2005).

⁶⁷ 21 U.S.C. § 343(q)(5)(A)(i) (2006).

⁶⁸ N.Y. GEN. BUS. LAW § 349(a) (McKinney 2004).

⁶⁹ *Pelman I*, 237 F. Supp. 2d at 512, 543.

⁷⁰ *Pelman v. McDonald's Corp. (Pelman II)*, No. 02 Civ. 7821, 2003 WL 22052778, at *9 (S.D.N.Y. Sept. 3, 2003) (internal quotation marks and citation omitted), *vacated*, 396 F.3d 508 (2d Cir. 2005).

⁷¹ *Id.* at *14-15.

out in the discovery stage.⁷² As it currently stands, the plaintiffs have been allowed to proceed under New York's consumer safety statute.⁷³

After 2003, consumers took their cue from the *Pelman* lawsuit and filed actions against various fast food restaurants for alleged deceptive acts.⁷⁴ While many cases settled before reaching trial, states were encountering claims filed under state consumer protection acts because the NLEA did not establish a private right of action.⁷⁵ When Congress realized that private actions under consumer protection acts could flood the courthouses, the House passed a bill commonly called the "Personal Responsibility in Food Consumption Act"⁷⁶ intended to curb lawsuits against industry for causing a person to become overweight.⁷⁷ The act is still pending before the Senate. In the meantime, states have begun passing acts to limit restaurant liability to ensure that consumers take personal responsibility for their food choices.⁷⁸ Louisiana enacted a limited liability act in 2003, followed by Colorado, Florida, Georgia, Utah, and Washington, among others, in 2004.⁷⁹ However, these limited liability acts are not to be confused with statutes creating restaurant liability. Illinois and New York have Consumer Protection Acts with provisions allowing consumers to pursue causes of action for deceptive labeling in restaurants, which is why consumers in the cases discussed below have been able to bring suit under state law. While it would appear that Illinois and New York are currently the only states that allow for a cause of action for misleading statements by statute, other states have followed suit in allowing for some causes of action to proceed if the manufacturer has violated a state statute or common law duty.⁸⁰

II. CASES DEALING WITH FFDCa PREEMPTION

Supreme Court and appellate case law that explores the relationship between the FFDCa and state consumer protection acts is relatively scarce.

⁷² *Pelman v. McDonald's Corp.* (*Pelman III*), 396 F.3d 508, 511-12 (2d Cir. 2005). In *Pelman IV*, 396 F. Supp. 2d 439 (S.D.N.Y. 2005), McDonald's filed a motion for a more definite statement under Fed. R. Civ. P. 12(e), which was granted in part.

⁷³ *Pelman v. McDonald's Corp.* (*Pelman V*), 452 F. Supp. 2d 320 (S.D.N.Y. 2006).

⁷⁴ Kersh & Morone, *supra* note 65, at 862-63.

⁷⁵ *Id.* at 863-64.

⁷⁶ H.R. 339, 108th Cong. (2003).

⁷⁷ Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1.

⁷⁸ MICHELE SIMON, APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK 274-75 (2006).

⁷⁹ TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA 41-42 (2004), <http://healthyamericans.org/reports/obesity/ObesityReport.pdf>. Note that most of these acts protect manufacturers, packagers, distributors, carriers, marketers, and sellers of foods from lawsuits.

⁸⁰ See discussion *infra* Part II and *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006).

To analyze preemption under the NLEA, this Part will begin with background on Supreme Court cases discussing preemption and will then turn to four cases dealing with preemption after *Bates*.

A. *Medtronic v. Lohr*

The most recent Supreme Court case dealing with preemption under the FFDCA was *Medtronic, Inc. v. Lohr*.⁸¹ There, a woman sued a company for making a pacemaker that did not comport with FFDCA requirements.⁸² The pacemaker had been approved by the FDA using a process that required less strict scrutiny than the normal approval process, because the manufacturer claimed it was “substantially equivalent” to other pacemakers in the market.⁸³ After this pacemaker model failed, the plaintiff had to have emergency surgery.⁸⁴ Plaintiff sued in Florida under state law negligence and strict liability theories.⁸⁵ The District Court denied Medtronic’s motion for summary judgment based on federal preemption, but the 11th Circuit Court of Appeals reversed in part.⁸⁶ The Supreme Court then granted certiorari.⁸⁷

In holding for the plaintiff, the Supreme Court noted that while they need not go further than the text to determine whether state law was preempted, in order to determine the “scope of the statute’s preemption” they should review the act’s legislative history to determine Congress’s objective in passing the act.⁸⁸ Since Congress was considered the “ultimate touchstone” in a preemption case, the Court looked at Congress’s intent in enacting the preemptive language in the applicable section in FFDCA.⁸⁹

The Court found that Congress enacted the preemption provision for medical devices to address conflicting state regulations that imposed additional duties on manufacturers to comply with state requirements, not to preempt general common law duties.⁹⁰ Thus, the standard the Court used to

⁸¹ 518 U.S. 470 (1996). For ease of memory, this case will sometimes be referred to as the “pacemaker” case. The Supreme Court recently granted certiorari in *Riegel v. Medtronic*, which discusses preemption under the FFDCA. *Riegel v. Medtronic*, 451 F.3d 104 (2d Cir. 2006), cert. granted, 75 U.S.L.W. 3690 (U.S. June 25, 2007) (No. 06-179). In his opinion, Judge Katzmann noted that the case dealt narrowly with preemption in the medical device field, but it has yet to be seen how the Supreme Court will address the issue.

⁸² *Medtronic*, 518 U.S. at 481-82.

⁸³ *Id.* at 480.

⁸⁴ *Id.* at 480-81.

⁸⁵ *Id.*

⁸⁶ *Id.* at 482-83.

⁸⁷ *Medtronic*, 518 U.S. at 484.

⁸⁸ *Id.*

⁸⁹ *Id.* at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

⁹⁰ *Id.* at 491.

determine preemption was “equivalence,” that is, the state law is preempted only when it imposed a requirement different from or inconsistent with a federal requirement.⁹¹ Because there was nothing that “denie[d] Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements,” the Court concluded that the plaintiff was not preempted and could pursue her court action, notwithstanding the preemption provision of the FFDCA.⁹²

B. *The Bates Decision*

While *Medtronic* is the latest Supreme Court case pertaining to preemption under the FFDCA, the most recent Supreme Court case discussing the Court’s philosophy on preemption is *Bates v. Dow Agrosciences*.⁹³ In *Bates*, Texas peanut farmers claimed Dow’s pesticide Strongarm caused severe crop damage.⁹⁴ The label on the pesticide contained the statement “[u]se of Strongarm is recommended in all areas where peanuts are grown.”⁹⁵ The farmers claimed that Dow knew or should have known that Strongarm could stunt the peanut plant’s growth in soils with a pH above 7.0.⁹⁶ Because the plaintiff farmers’ soil had a pH above 7.0, the peanut plants were severely damaged and the Texas farmers brought suit, claiming negligence, violation of a Texas consumer protection statute, strict liability, fraud, and breach of warranty.⁹⁷

While *Bates* discusses preemption using the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), the Court broadens its analysis to encompass preemption in general.⁹⁸ Like the FFDCA, FIFRA contains a clause prohibiting “false or misleading” statements on pesticides.⁹⁹ Thus, the Court had to evaluate whether common the law duties and the Texas

⁹¹ *Id.* at 496-97.

⁹² *Id.* at 495.

⁹³ 544 U.S. 431 (2005). Since *Bates*, the Supreme Court has discussed preemption in the banking context in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). However, *Watters* used precedent dealing exclusively with preemption in the banking field. *Id.* at 1566. See also *supra* text accompanying note 81 discussing *Riegel v. Medtronic*, 451 F.3d 104 (2d Cir. 2006), *cert. granted*, 75 U.S.L.W. 3690 (U.S. June 25, 2007) (No. 06-179).

⁹⁴ *Bates*, 544 U.S. 431.

⁹⁵ *Id.* at 435.

⁹⁶ *Id.*

⁹⁷ *Id.* at 435-36.

⁹⁸ *Id.* at 447.

⁹⁹ The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(q)(1)(a) (1996), states that a pesticide is misbranded if “its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.” Similarly, in the congressional record of the food labeling laws, “in any particular” was held to be too broad a standard and was renamed. S. REP. NO. 75-91, at 3 (1937).

statute were preempted by FIFRA.¹⁰⁰ Dow argued that FIFRA preempted all of the farmers' claims because the state common law requirements had the same effect as FIFRA on the manufacturer.¹⁰¹ The Court carefully examined the preemption provision of FIFRA, which stated: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."¹⁰² The Court interpreted the preemption clause to only apply to the "requirements" provision.¹⁰³ Thus, to be preempted, a state rule had to: (1) be a requirement for labeling and packaging; and (2) impose a labeling or packaging requirement that was different from or in addition to requirements imposed by FIFRA.¹⁰⁴ Justice Stevens, speaking for the majority, concluded that "a state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to 'requirements under federal law'" and is, thus, not preempted per se.¹⁰⁵ Since the common law claims and the Texas statute did not impose a requirement different than the federal law, the Court remanded so that the Texas farmers could proceed in the Fifth Circuit.¹⁰⁶

In its decision, the Court elaborated on the policy rationale behind its holding. The Court reasoned that common law claims would "further, rather than hinder, the functioning of [FIFRA]" because it would bring more information to pesticide labels as more information about pesticide use was brought to light in lawsuits.¹⁰⁷ Additionally, while FIFRA did not allow a remedy for the farmers, state law did, which the Court found favorable considering the incentives it would give manufacturers to comply with state laws.¹⁰⁸

The Court considered and rejected Dow's argument that unless state law was preempted, the ruling would allow for a "crazy quilt of anti-misbranding requirements."¹⁰⁹ First, state law remedies that create additional requirements to those required by federal law are preempted, which prevents Dow's concern that it will have to comply with fifty state-law requirements.

Second, the Court referenced constitutional principles of state sovereignty and case law, establishing that state law is not preempted unless

¹⁰⁰ *Bates*, 544 U.S. at 442-43.

¹⁰¹ *Id.* at 448-49.

¹⁰² 7 U.S.C. § 136v(b).

¹⁰³ *Bates*, 544 U.S. at 443.

¹⁰⁴ *Id.* at 444.

¹⁰⁵ *Id.* at 448 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 513 (1996) (O'Connor, J., concurring in part and dissenting in part)).

¹⁰⁶ *Id.* at 453.

¹⁰⁷ *Vt. Pure Holdings, Ltd. v. Nestle Waters N. Am., Inc.*, No. 03-11465-DPW, 2006 U.S. Dist. LEXIS 13683, at *9 (D. Mass. Mar. 28, 2006) (quoting *Bates*, 544 U.S. at 451).

¹⁰⁸ *Bates*, 544 U.S. at 448.

¹⁰⁹ *Id.*

Congress has made a “clear and manifest” intention of preempting state law. The Court noted that there cannot be a “cavalier” preemption for all state law causes of action.¹¹⁰ In his concurrence, Justice Breyer stressed “the practical importance of the Court’s statement that state-law requirements must ‘be measured against’ relevant Environmental Protection Agency (EPA) regulations”¹¹¹ He also referenced his opinion in the *Medtronic* pacemaker case where he held that where the FDA had authority to promulgate rules and “determine the pre-emptive effect of those rules in light of the agency’s special understanding of ‘whether (or the extent to which) state requirements may interfere with federal objectives.’”¹¹²

Finally, the Court noted that state tort law had a long history of suits against manufacturers, and that these suits “[e]mphasize[] the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items.”¹¹³

C. *The Water Case: Vermont Pure*

Before the Supreme Court issued its opinion in *Bates*, a water bottling company sued a competitor in *Vermont Pure Holdings, Ltd. v. Nestle Waters North America, Inc.* (“*Vermont Pure*”) claiming the competitor violated Massachusetts competition and advertising statutes by labeling bottled water pumped from the ground as “spring water.”¹¹⁴ Massachusetts District Court Judge Woodlock held that the state statute pertaining to false advertising was preempted by the FFDCFA and dismissed the case, because the FFDCFA does not grant citizens a private right of action to sue under the statute.¹¹⁵ However, in light of *Bates*, the plaintiff requested that the judge reconsider his dismissal.¹¹⁶ Because *Bates* indicated that statutes without express preemption provisions may not bar state claims, Judge Woodlock, cognizant of the FFDCFA’s vague preemption provisions, reevaluated Vermont Pure’s claims. First, he began by looking at FFDCFA section 343-1:

¹¹⁰ *Id.* at 449 (quoting analysis advanced in *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

¹¹¹ *Id.* at 454.

¹¹² *Id.* at 454 (quoting *Medtronic*, 518 U.S. at 506 (Breyer, J., concurring)).

¹¹³ *Id.* at 450. Also note that while Justices Thomas and Scalia dissented, they agreed with the majority’s analysis of the preemption provision of FIFRA and that state law was not preempted so long as it did not impose conflicting or different “requirements” than those enumerated in FIFRA. *Bates*, 544 U.S. at 455.

¹¹⁴ *Vt. Pure Holdings, Ltd. v. Nestle Waters N. Am., Inc.*, No. 03-11465-DPW, 2006 U.S. Dist. LEXIS 13683, at *3 (D. Mass. Mar. 28, 2006).

¹¹⁵ *Id.* at *6.

¹¹⁶ *Id.* at *7.

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(a) No 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--

(1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 343(g) of this title.¹¹⁷

Applying *Bates*, Judge Woodlock noted that the preemption provision in FFDCFA also has the term “requirements” which he believed incorporated what *Bates* called “positive enactments, such as statutes and regulations, as well as common law duties.”¹¹⁸ Reading further into section 343-1, he noted that the preemption provision only applies to section 341, which controls “standard[s] of identity,” such as spring water.¹¹⁹ Reaching this conclusion, he then reasoned that if the state’s statute on standards of identity for spring water was identical to the FFDCFA’s regulation of spring water, under section 343-1(a)(1), it was not preempted.¹²⁰ In this case there was no conflict between the federal and state laws, because the state law under which Vermont Pure brought the suit adopted the FDA’s definition of “spring water.”¹²¹

After reviewing the spirit in which the NLEA was enacted, Judge Woodlock held that state law could regulate bottled water “so long as the state standards employed are identical to those adopted by FDA.”¹²² He based this conclusion on the purpose of the NLEA, which was to prevent states from enacting incongruous nutrient labeling requirements.¹²³ True to Justice Breyer’s concurrence in *Bates*, Judge Woodlock reviewed FDA regulations to determine the agency’s opinion on the preemptive power of the NLEA.¹²⁴ To that effect, Judge Woodlock cited a FDA Federal Register Notice in which the FDA stated that “[t]he only State requirements that are subject to preemption are those that are affirmatively different from the Federal requirements.”¹²⁵ This statement by the FDA indicates the agency is in agreement that the NLEA does not sweepingly preempt all state law.¹²⁶

¹¹⁷ 21 U.S.C. § 343-1 (2006).

¹¹⁸ *Vt. Pure Holdings, Ltd.*, 2006 U.S. Dist. LEXIS 13683, at *14 (quoting *Bates*, 544 U.S. at 443).

¹¹⁹ *Id.*

¹²⁰ *Id.* at *15.

¹²¹ *Id.* at *16-17.

¹²² *Id.* at *21.

¹²³ *Id.*

¹²⁴ See discussion *supra* Part II.B.

¹²⁵ *Vt. Pure Holdings, Ltd.*, 2006 U.S. Dist. LEXIS 13683, at *19 (quoting *Beverages: Bottled Water*, 60 Fed. Reg. 57,076, 57,120 (Nov. 13, 1995)).

¹²⁶ See Howard L. Dorfman et al., *Presumption of Innocence: FDA’s Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585, 593 (2006) (stating that in a more formal statement of its position on preemption in drug labeling regulations, FDA noted there were specific instances in which preemption was warranted, but it did not completely preempt all causes of action).

Concluding that, under the *Bates* precedent, the Massachusetts state law claims were not preempted, Judge Woodlock denied the motion to dismiss and allowed the case to continue.

D. *The Mills Milk Case*

Five months after the *Vermont Pure* case, the District Court of the District of Columbia faced a similar preemption problem, but instead of water, it dealt with milk. District of Columbia residents sued various grocery stores because they failed to place warnings on milk, which some people lack a digestive enzyme to process, causing gastrointestinal discomfort.¹²⁷

The defendants claimed that D.C.'s law was preempted because milk was subject to a "standard of identity" as enumerated in 21 U.S.C. section 343-1(a)(1).¹²⁸ Plaintiffs contended that *Bates* held that common law claims were not always preempted by federal laws, so long as the state law mirrored the federal law.¹²⁹ Judge Kennedy distinguished *Bates* on the grounds that it discussed FIFRA and not the FFDCa or NLEA.¹³⁰ Judge Kennedy also acknowledged the two part test¹³¹ in *Bates* and noted that "[n]othing in *Bates* categorically defeats defendants' argument that plaintiffs' claims are precluded by FDCA's preemption clause."¹³²

Next, Judge Kennedy discussed the interplay between the standard of identity provision of the FFDCa as defined in regulations¹³³ and the misbranding provision of section 343(g).¹³⁴ He noted that nothing in the standard of identity provisions requires that a lactose warning be given, and thus, what the plaintiffs were trying to do was to add to the existing requirements rather than enforce compliance with existing requirements.¹³⁵ Thus, unlike *Bates* and *Vermont Pure*, this was an additional requirement preempted by the FFDCa. Judge Kennedy also rejected plaintiff's argument that the lactose warning fit within an exception to the FFDCa for

¹²⁷ *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 105 (D.D.C. 2006).

¹²⁸ *Id.* at 106-07.

¹²⁹ *Id.* at 107.

¹³⁰ *Id.*

¹³¹ Kennedy first determined whether a state claim involved "labeling or packaging." *Id.* If the claim did not involve labeling, it was not preempted and went onto the second part of the test. *Id.* There, if the duties imposed by the common law claim expanded those established under FIFRA, they needed to be analyzed by the lower court to determine whether preemption was warranted. *Mills*, 441 F. Supp 2d at 107.

¹³² *Id.*

¹³³ *Id.* at 108 (citing 21 C.F.R. § 131 (2006)).

¹³⁴ *Id.*

¹³⁵ *Id.* at 107 n.5.

warnings about the safety of food, because lactose intolerance is not a dangerous disease that consumers need to be warned about.¹³⁶

To quell any doubt about the outcome of the case, Judge Kennedy concluded that even if there was no preemption by the FFDCFA, the plaintiffs failed to state a claim under D.C. law because they relied on common law torts of negligence and strict liability.¹³⁷ Judge Kennedy concluded that the grocers were not negligent and that milk is not considered “unreasonably dangerous” so as to evoke a heightened standard of care.¹³⁸ However, Judge Kennedy noted that there could be an instance in which a danger could occur because of a severe allergic reaction that was not adequately warned about on labels.¹³⁹ If, for example, it was common for people to go into anaphylactic shock from drinking milk because of allergies, plaintiffs might have had a viable claim for failure to adequately warn against safety concerns.¹⁴⁰

E. *The Reyes “Fries” Case and the Farm Raised Salmon Case*

Following the milk and water cases, two recent cases dealing with preemption under the NLEA are *Reyes v. McDonald’s Corporation* (“*Reyes*”)¹⁴¹ and the *In re Farm Raised Salmon Cases* (“*Salmon*”).¹⁴² In *Reyes*, a mother filed suit on behalf of herself and her son because they relied upon McDonald’s statements about the amount of fat and calories in their fries and consequently ate McDonald’s fries three to four times a month.¹⁴³ The Reyes family claimed that had they known the true amount of fat and calories in fries, they would have eaten the fries less frequently.¹⁴⁴

The Reyes’ complaint against McDonald’s included a claim for violation of the Illinois Consumer Fraud and Deceptive Practices Act and breach of implied and express warranties about McDonald’s french fries.¹⁴⁵ The Illinois District Court found that Judge Woodlock in the *Vermont Pure* case was correct in applying *Bates*’ “parallel requirements” analysis.¹⁴⁶ However, it also cautioned that broadening labeling requirements could effec-

¹³⁶ Lactose intolerance results in flatulence, bloating, cramps and diarrhea, which Kennedy notes, “does not rise to the level of a safety concern.” *Id.* at 109.

¹³⁷ *Mills*, 441 F. Supp. 2d at 110.

¹³⁸ *Id.* at 110 n.9.

¹³⁹ *Id.* at 111.

¹⁴⁰ *Id.*

¹⁴¹ Nos. 06 C 1604, 06 C 2813, 2006 WL 3253579 (N.D. Ill Nov. 8, 2006).

¹⁴² 48 Cal. Rptr. 3d 449 (Cal. App.), *review granted*, 149 P.3d 473 (Cal. 2006).

¹⁴³ *Reyes*, 2006 WL 3253579 at *1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *6.

tively change the purpose of the NLEA.¹⁴⁷ For example, the claims for breach against express and implied warranty were similar to a NLEA regulation, which states that a deviation more than 20% from the true value of the food's nutrient content is false or misleading.¹⁴⁸ Because the warranty claims were broader than the NLEA claims, they were effectively imposing inconsistent requirements, and as such, they were preempted by the NLEA.¹⁴⁹ The court allowed the Illinois Consumer Protection claim to continue because it did not conflict with the NLEA nor cause a broadening of the act.¹⁵⁰ Echoing language from the *Pelman* suit against McDonald's, the court postulated that it would be tenuous for the Reyes' to prove that the misrepresentation of fat and calories in the fries caused them harm.¹⁵¹

In contrast, the *Salmon* case indicates that citizens are returning to a style of misrepresentation case similar to those filed in the early 1900s based on an industry's misrepresentation about a food's ingredients.¹⁵² In *Salmon*, consumers sued grocery stores in March of 2004 for selling farmed salmon without mentioning that the salmon had been injected with coloring to make it look similar to wild salmon.¹⁵³ The consumers claimed there were potential health risks from consuming the chemicals injected into the fish and that the failure to inform consumers about the artificial coloring constituted false and misleading advertising.¹⁵⁴ After granting leave to amend the complaint, the district court dismissed the case and the plaintiffs appealed.¹⁵⁵ One month before *Bates* was decided, the Second District affirmed the trial court's holding that the FFDCFA preempts all state law causes of action because it does not allow for a private cause of action.¹⁵⁶ Presumably in light of *Bates*, the *Salmon* case's opinion was superseded in December of 2006.¹⁵⁷

While it is too early to tell if other state courts will follow the *Vermont Pure* precedent or the *Mills* precedent, at least one court has followed the precedent in *Vermont Pure*. After these four cases, it appears that Judge Woodlock's analysis under *Bates* was proper and that Judge Kennedy should not have dismissed *Bates* so promptly simply because it was based on FIFRA. This conclusion is supported by the fact that *Reyes* followed the *Vermont Pure* "parallel requirements" analysis and that the *Salmon* case,

¹⁴⁷ *Id.* at *7.

¹⁴⁸ *Id.* (citing 21 C.F.R. § 101.9(g)(5) (2006)).

¹⁴⁹ *Reyes*, 2006 WL 3253579 at *3.

¹⁵⁰ *Id.* at *8.

¹⁵¹ *Id.* at *7.

¹⁵² As discussed in Part I.A, *supra*, these misrepresentations led to the Food and Drug Act of 1906.

¹⁵³ *Farm Raised Salmon Cases*, 48 Cal. Rptr. 3d 449, 451 (Cal. App.), *review granted*, 149 P.3d 473 (Cal. 2006).

¹⁵⁴ *Id.* at 451-52.

¹⁵⁵ *Id.* at 452.

¹⁵⁶ *Id.* at 456.

¹⁵⁷ *Id.* at 449.

which concluded that the FFDCa did sweepingly preempt state law, was recently overruled.

III. WATER, MILK, FRIES AND SALMON: DID THE COURTS GET IT RIGHT?

Using these four food labeling cases as examples, we can predict legal arguments that would occur if a consumer were to bring a claim under NLEA using a state consumer protection law or common law tort claim. The milk and water cases contain the strongest legal analysis to apply to future misleading food labeling claims, and hence deserve a brief discussion before discussing the implication of *Bates* in future lawsuits.¹⁵⁸ While Judge Kennedy and Judge Woodlock approached *Bates* differently, ultimately these cases demonstrate that after a *Bates* “parallel requirements” analysis, certain suits for misleading labels can continue under state law.

A. *Following the Bates Analysis*

Bates begins with a historical analysis of the United States pre-1910 when states were in charge of pesticide issues and contrasts this with the adoption of the first pesticide statute, the Insecticide Act of 1910.¹⁵⁹ The Court reviews significant amendments to the statute, including a 1972 amendment that changed FIFRA from a labeling-driven statute to a comprehensive regulatory statute aimed at setting a uniform process for approving pesticides.¹⁶⁰ After analyzing the text of the statute, the Court concludes that, consistent with its historical background, FIFRA was never intended to preempt all state authority over pesticide laws.¹⁶¹

In contrast, instead of addressing the history of the NLEA and the FFDCa in depth, Judge Woodlock concludes that his previous decision was inconsistent with *Bates*’ “parallel requirements” proposition.¹⁶² Thus, he quickly reviews the history of the NLEA and the preemption provision, looking at the Agency’s interpretation of the preemption provision before turning to the *Bates* decision.¹⁶³ Interestingly, Woodlock does not review Congress’ intent in adopting the preemption provision.¹⁶⁴ Perhaps this is because he looked to Breyer’s concurring opinion in *Bates*, which notes the

¹⁵⁸ In contrast, the *Reyes* case depends largely on the *Vermont Pure* water case and the *Salmon* case merely has been overturned, providing little legal analysis or precedent.

¹⁵⁹ 544 U.S. 431, 437 (2005).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 440-41.

¹⁶² *Vt. Pure Holdings, Ltd. v. Nestle Waters N. Am., Inc.*, No. 03-11465-DPW, 2006 U.S. Dist. LEXIS 13683, at *12-13.

¹⁶³ *Id.* at *18.

¹⁶⁴ *Id.*

agencies themselves know best whether state statutes will interfere with the purpose of the statute at hand.¹⁶⁵

Judge Kennedy begins his analysis by emphasizing *Bates* is about FIFRA and cannot correlate entirely to a different statute with a different history and Congressional objectives.¹⁶⁶ He distinguishes *Bates* by noting it dealt with a specific preemption clause and, thus, concludes that *Bates* merely alerts judges that they should pay close attention to preemption provisions in light of the “parallel requirements” test.¹⁶⁷ Unlike Judge Woodlock who focused on the similarities in FIFRA and FFDCA’s language (namely, the fact that the preemption clause begins with a limitation on state power and then has the word “requirements”), Judge Kennedy finds the FFDCA to be a broader preemption provision.¹⁶⁸ According to Judge Kennedy, the FIFRA preemption provision applies only to labeling requirements whereas the FFDCA preemption provision applies to all requirements.¹⁶⁹

Judge Kennedy fails to consider some of the similarities between FIFRA and FFDCA. First, both statutes were enacted in the early 1900s and both acts initially focused on false labeling before evolving into more expansive regulatory statutes.¹⁷⁰ Second, like FIFRA, the FFDCA has been significantly supplemented with provisions such as the National Food Lunch Program and the NLEA. Third, the preemption provision discussed by both judges, 21 U.S.C. section 343-1, is in the NLEA section, which only deals with labeling.¹⁷¹ Considering these similarities, it appears that the FFDCA provision is just as narrow as FIFRA’s provision on preemption and should be analyzed under *Bates*. Judge Kennedy’s own discomfort with his conclusion that *Bates* does not apply is apparent in that he justified the outcome both under a *Bates* analysis and on the merits of the state law claims themselves.

Judge Kennedy also deals with a different type of claim than Judge Woodlock. Unlike the plaintiffs in the *Vermont Pure* case who sued because of the presence of the word “spring water,” the plaintiffs in *Mills* were suing for the lack of a warning label.¹⁷² Thus, as Judge Kennedy determined when applying *Bates*, their claim was not truly a “standard of identity” dispute because the FFDCA does not require grocers to warn consumers that milk contains lactose, an ingredient that may bother lactose intolerant citizens.¹⁷³

¹⁶⁵ See discussion *supra* Part II.A.

¹⁶⁶ *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 107 (D.D.C. 2006).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 108.

¹⁶⁹ *Id.*

¹⁷⁰ See discussion *supra* Part I.

¹⁷¹ See discussion *supra* Part I.C.

¹⁷² *Mills*, 441 F. Supp. 2d at 105.

¹⁷³ *Id.* at 108.

While Judge Kennedy and Judge Woodlock applied *Bates* differently, both cases contain correct outcomes. Following the *Vermont Pure* water case, manufacturers will be discouraged from using deceptive advertising because the lawsuit was able to move forward. In contrast, the plaintiffs in the *Mills* milk case could not proceed, because no statute or tort action could redress the harm they suffered.¹⁷⁴ The *Mills* milk case is an example of a situation in which consumers should take personal responsibility for their food choices. In that case, consumers wanted a warning that an ingredient in milk—lactose—could be harmful to those with a sensitivity to it. Such a rule would essentially require grocers, manufacturers, and producers to warn customers not to purchase and consume products to which they are sensitive, which is not the intent of either the FFDCRA nor state law consumer acts or the common law of torts. Instead, after drawing a connection between drinking milk and ensuing unwanted side effects, consumers should independently decide whether they should or should not buy milk. As consumers increasingly realize that claims such as the *Mills* milk claim will fail, they will be discouraged from paying attorney fees for a case that will likely be dismissed.

B. *Implications for Future False or Misleading Food Label Claims*

Although each state has different consumer protection laws, the threshold question is whether consumers will be allowed to proceed under state law considering the inevitable preemption defense available to manufacturers. Using the cases discussed above as examples, we can anticipate future claims for and against preemption, draw public policy implications for allowing preemption, and discuss the role of tort reform in food labeling law.

1. Tort Reform and Obesity

While lawsuits are designed to rectify harm after the fact,¹⁷⁵ litigation can spur change as parties alter behavior to avoid future lawsuits. Lawsuits can also bring media attention to product risks, which may encourage defendants to rectify problems quickly to avoid market loss.¹⁷⁶ Some scholars argue that the legislature rather than the judiciary is better equipped to han-

¹⁷⁴ *Id.* at 110.

¹⁷⁵ Rob Ammons & David George, *Tort Reform By Regulation: The National Highway Traffic Safety Administration Attempts to Preempt State-Tort Lawsuits With its Proposed Roof-Strength Regulation*, 58 ADMIN. L. REV. 709, 725-26 (2006).

¹⁷⁶ *Id.* at 733.

dle reform in the food litigation arena.¹⁷⁷ However, the fact remains that there are an increasing number of lawsuits in this area that the judiciary is forced to resolve and the way in which these cases are resolved will affect consumers and industry alike.

The cases discussed above indicate that both consumers and industry are adjusting their arguments in light of *Bates*. Industry appears to be more apt to change labels in light of impending litigation as illustrated in the guacamole story below.¹⁷⁸ In contrast, consumers are beginning to focus their claims on specific omissions by food manufacturers that may have an effect on health. Consumers may have taken to heart the idea that “it is not the place of the law to protect [the consumers] from their own excesses . . . [.]” but “if a consumer exercises free choice with appropriate knowledge,” then the manufacturer should not intentionally “mask[] . . . information necessary to make the choice.”¹⁷⁹

Scholars often analogize obesity litigation to tobacco litigation because both involve lawsuits against large industries who might be deceptively enticing consumers to purchase their products without disclosing that their product is not entirely safe.¹⁸⁰ Because tobacco litigation has been occurring for more than ten years, scholars have examined the progression of tobacco litigation to understand its effects on tort reform. Similar to the litigation occurring in obesity lawsuits, consumers initially did not believe they could sue tobacco companies. Once consumers realized state laws might allow for private causes of action, tobacco litigation mushroomed.¹⁸¹ Food labeling appears to be following the same progression in that there is now increasing litigation against food industries for deceptive advertisements.¹⁸²

In contrast to tobacco litigation, where the harm from cigarettes and the deceptive practices of manufacturers became easier to establish, consumers are realizing how difficult it is to prove causation in obesity cases and are adjusting their claims accordingly. An emerging trend in current food labeling lawsuits is to focus on the inadequacies of representations about a food’s properties, rather than the long term health effects from the food, such as weight gain.¹⁸³ Whereas in *Pelman* the harm was related to

¹⁷⁷ Joseph M. Price & Rachel F. Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277, 290 (2006).

¹⁷⁸ See discussion *infra* Part III.B.1.a.

¹⁷⁹ *Pelman I*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *vacated*, 396 F.3d 508, 533 (2d Cir. 2005).

¹⁸⁰ Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned From Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 67-68 (2006).

¹⁸¹ See generally Jonathan S. Goldman, *Take that Tobacco Settlement and Super-Size It! The Deep Frying of the Fast Food Industry?* 13 TEMP. POL. & CIV. RTS. L. REV. 113, 123 (2003).

¹⁸² *Id.* at 120.

¹⁸³ Compare *Pelman I*, 237 F. Supp. 2d 512 with *Vt. Pure Holdings, Ltd. v. Nestle Waters N. Am., Inc.*, No. 03-11465-DPW, 2006 U.S. Dist. LEXIS 13683 (D. Mass. Mar. 28, 2006) and *Farm Raised Salmon Cases*, 48 Cal. Rptr. 3d 449 (Cal. App.), *review granted*, 149 P.3d 473 (Cal. 2006).

health problems stemming from obesity, in the *Mills* milk case and the *Salmon* case, the asserted harm to human health was based on specific misrepresentations, creating a narrower correlation in causation that may pass scrutiny under state consumer protection acts.¹⁸⁴ This signals a return to a trend experienced years before the passage of the NLEA when consumers brought suit for misrepresentations about food products instead of arguing health claims.¹⁸⁵ The embodiment of this proposition can be found in recent anecdotal reports involving guacamole.

a. *The Guacamole Story*

Ms. Brenda Lifsey (“Ms. Lifsey”) was making a Mexican three-layer dip and decided to add Kraft Foods, Inc.’s guacamole.¹⁸⁶ The dip, however, did not taste much like avocado, and she later learned that it only contained 2% avocado.¹⁸⁷ Ms. Lifsey sued Kraft, claiming that calling their product “guacamole” was fraudulent.¹⁸⁸ In response, Kraft noted that it had never misrepresented the ingredients in the guacamole—they were clearly written on the food nutrition label.¹⁸⁹ Nonetheless, in light of Ms. Lifsey’s suit, Kraft revised the label.¹⁹⁰

Kraft and other manufacturers had been selling guacamole with little to no avocado for years and had received bad press from groups and individuals advocating consumer awareness.¹⁹¹ But it was not until Ms. Lifsey’s lawsuit and the impending media coverage that Kraft decided to change its labels.¹⁹² This story illustrates a common trend noted by tort reform advo-

¹⁸⁴ For a discussion on causation hurdles commonly experienced in obesity litigation, see Adam Benforado et al., *Broken Scales, Obesity and Justice in America*, 53 EMORY L.J. 1645, 1652 (2004) (discussing problems with proving causation because there is a complex interplay of “genetic, behavioral, and environmental factors that have a direct impact on body weight”).

¹⁸⁵ See discussion *supra* Part I.B.

¹⁸⁶ Posting of Peter Lattman, *Wholly Guacamole?*, to WSJ.com Law Blog, <http://blogs.wsj.com/law/2006/11/30/wholly-guacamole/trackback/> (Nov. 30, 2006, 10:54 PST).

¹⁸⁷ Hirsch, *supra* note 8.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ For example, Mike Adams, a self proclaimed “Health Ranger” dedicated to exposing the harmful properties of certain foods, wrote about Kraft’s guacamole in 2004. See Mike Adams, *Kraft Sells Avocado-Free Guacamole Dip Product Made with Hydrogenated Oils*, NEWSTARGET, Dec. 5, 2004, <http://www.newstarget.com/002702.html>. For additional information about Mike Adams and his work, see About Mike Adams, the Health Ranger, <http://www.healthranger.org> (last visited Aug. 18, 2007). The Center for Science in the Public Interest wrote about “substitute guacamole” in 2003. See Press Release, Center for Science in the Public Interest, *Introducing Avocado-Free Guacamole? Guacamole Dips from Kraft, Others Have Precious Little Avocado* (Apr. 25, 2003), <http://www.cspinet.org/new/200304251.html> [hereinafter *Introducing Avocado-Free Guacamole?*].

¹⁹² Hirsch, *supra* note 8.

cates: impending lawsuits can spur change before the suit has even fully developed.¹⁹³

Judge Kennedy's dictum in the *Mills* milk case contains some analysis in line with tort reform propositions. Judge Kennedy forecasted instances in which there should be adequate warnings about the properties of food absent NLEA requirements.¹⁹⁴ He noted that if milk had dangerous properties for allergic consumers such as causing anaphylactic shock, there should be a warning label indicating that lactose is present in milk.¹⁹⁵ Similarly, if "guacamole" producers knew the substitutes they used for avocados, such as avocado powder, could cause severe allergic reactions,¹⁹⁶ consumers might have a viable cause of action under state law.¹⁹⁷ The same analysis would apply if the salmon industry knew that the color additives in farmed salmon could cause severe allergic reactions.¹⁹⁸ The *Salmon* case and the guacamole story demonstrate the evolution of viable claims that will be able to proceed under state law post-*Bates* despite the high bar for proving causation. Only if a consumer can demonstrate an ingredient in a food product harmed them and that the manufacturer failed to inform them that such an ingredient was present, can the consumer proceed.¹⁹⁹

2. Limiting Preemption

In *Bates*, the Supreme Court noted that additional causes of action above and beyond those provided in a federal statute may serve the greater good because they ensure that manufacturers are held to a high standard of care.²⁰⁰ However, the Court was speaking about pesticides, which are con-

¹⁹³ Goldman, *supra* note 181, at 146.

¹⁹⁴ *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 111 (D.D.C. 2006).

¹⁹⁵ *Id.*

¹⁹⁶ Herr's guacamole contains avocado powder. See *Introducing Avocado-Free Guacamole?*, *supra* note 191.

¹⁹⁷ Turning this analogy around, if a consumer is mildly allergic to latex, they may know about a connection between their allergy to latex and avocado but still think it is safe to eat guacamole from manufacturers that sell guacamole using avocado substitutes. However, avocado powder may still contain the Class I endochitinase protein the consumer is allergic to, causing allergic reactions. For a discussion about the connection between latex and avocado allergies, see generally A. Posch et al., *Class I Endochitinase Containing a Hevein Domain Is the Causative Allergen in Latex-Associated Avocado Allergy*, 29 CLINICAL & EXPERIMENTAL ALLERGY 667 (1999).

¹⁹⁸ See discussion *supra* Part II.D.

¹⁹⁹ The ability to prove causation when a specific ingredient is at stake should be distinguished from the difficulties in proving causation in obesity lawsuits. Weight gain is caused by a significant interplay between exercise, diet, and genetics. Richard A. Epstein, *What (Not) to do about Obesity: A Moderate Aristotelian Answer*, 93 GEO L. J. 1361, 1382 (2005). Because of the difficulties in this arena, scholars such as Richard Epstein have advocated for the complete defense of assumption of the risk. *Id.* at 1384.

²⁰⁰ *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 451 (2005).

sidered inherently dangerous substances under the Restatement of Torts, and often are subject to strict liability.²⁰¹ It remains to be determined whether the Supreme Court believes the same public policy rationale applies to food lawsuits. But the Court's decision in *Medtronic*, allowing the state law tort action for the defective pacemaker, suggests that the outcome should be the same in other contexts. For now, Supreme Court precedent suggests that in these limited circumstances states suits should proceed, because: (1) the NLEA's language appears to contemplate stricter state regulations on food labeling, particularly in the restaurant field; (2) the Supreme Court historically allows state action when Congress has not explicitly spoken about preemption;²⁰² and (3) historically, citizens' health and safety issues have been under the purview of a state's police powers.²⁰³

Defendants arguing that the NLEA contains a sweeping federal preemption provision may assert that because the purpose of the NLEA is to protect the consumer, responsibility for public welfare has shifted from the courts applying state laws to the responsible federal agency, which is more effective at safeguarding the public.²⁰⁴ They may also argue that to the extent that an agency is in charge of safeguarding the public, state consumer protection acts that impose different requirements than the NLEA are preempted. Such arguments mirror the dissents by Justices Thomas and Scalia in *Bates*.²⁰⁵ This broad reading of the NLEA is unwarranted, especially because the text of the NLEA does not support the conclusion that it is a sweeping preemption of state law in the same area, because it specifically provides for stricter regulations of restaurants. Thus, the NLEA did not anticipate that all consumer protection in the area of food would be left to the FDA. For example, while restaurants are exempt from the NLEA, the statute's preemption provision explicitly notes that states could have additional labeling requirements that a restaurant would have to comport with.²⁰⁶ Also, to a certain extent, litigation relieves the burden on agencies such as the FDA, which already have little time to devote to such claims.²⁰⁷ Litigation may also indirectly aid the FDA in fulfilling its mandate to "prevent the adulteration, misbranding and false advertising in food" under the NLEA.²⁰⁸

²⁰¹ RESTATEMENT (THIRD) OF TORTS § 20 (2006).

²⁰² See discussion *supra* Part I.D.

²⁰³ See *infra* text accompanying note 214.

²⁰⁴ H. Bishop Dansby, *Bates v. Dow Agrosiences: U.S. Supreme Court Restores Sanity to Products Liability Law*, 25 PESTICIDES & YOU 9, 9 (2005), available at <http://www.beyondpesticides.org/dow/media/Bates-Dansby.pdf>.

²⁰⁵ See discussion *supra* Part II.A.

²⁰⁶ *Pelman I*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *vacated*, 396 F.3d 508, 526 (2d Cir. 2005).

²⁰⁷ LaPlante, *supra* note 58, at 266.

²⁰⁸ See H.R. REP. NO. 75-2139, at 1 (1938) and discussion *supra* Part I.C. See also Dorfman et al., *supra* note 126, at 591-92.

Supporters of narrow preemption would argue that federal laws do not always adequately address the concerns of citizens in each state and that state statutes imposing additional requirements on restaurants address a state's local concerns.²⁰⁹ This argument was utilized in the *Reyes* and *Pelman* cases against McDonald's because Illinois and New York impose additional labeling requirements on restaurants.²¹⁰ Thus, even though the NLEA is focused on protecting the consumer, it recognizes that it cannot do so in a comprehensive manner and that states should be allowed to fill in the gaps only if they so desire. Supporters of narrow preemption argue that instead of viewing state lawsuits as a burden on manufacturers, it should be framed as allowing states to provide their citizens with the ability to redress their harm.²¹¹

In both *Medtronic* and *Bates*, the Supreme Court articulated the conclusion that statutes will not be read to preempt state laws unless Congress clearly articulates an intent to preempt state law.²¹² In *Medtronic*, the Court noted that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."²¹³ This is because states have historic police powers that are to be treated with deference, especially in the field of health and safety.²¹⁴ As a result, even if certain provisions of a state statute are preempted, they are preempted only to the extent necessary to affect the purpose of the federal statute.²¹⁵ Thus, courts following Supreme Court precedent should preserve state law actions to the extent possible,²¹⁶ and, as a result, should do so for misleading labels in the circumstances outlined above.

Consumers have been forced to be more thoughtful when preparing their claims to indicate how a specific compound in a food may cause deleterious health effects, because many states have enacted statutes banning obesity litigation. Similarly, when consumers started bringing lawsuits against tobacco companies under state consumer laws, some states responded by enacting statutes limiting liability under consumer protection

²⁰⁹ *Federal Nutritional Regulations Limit CFA Attack on McDonald's Fat Notice*, 91 Antitrust Trade & Reg. Rep. (BNA) 661 (Dec. 22, 2006).

²¹⁰ See discussion *supra* Parts I.D. and II.D.

²¹¹ See, e.g., LaPlante, *supra* note 58, at 267.

²¹² Ammons & George, *supra* note 175, at 722-23.

²¹³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

²¹⁴ Ammons & George, *supra* note 175, at 722-23. See also Susan L. Thomas, 61 CAL. JUR. 3D *Unfair Competition* § 8 (2007) (summarizing the California Supreme Court's decision in *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004), which held that a state statute restricting wine labels was not impliedly preempted by a similar, less restrictive federal statute because a state's traditional police power includes the power to shield against misleading food labeling).

²¹⁵ Dorfman et al., *supra* note 126, at 595.

²¹⁶ See generally *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005); *Medtronic*, 518 U.S. at 496.

acts.²¹⁷ Thus, states have demonstrated a willingness to amend statutes to prevent obesity litigation to the extent they deem a person should take personal responsibility for their diet and food choices. Likewise, where states feel a cause of action against misleading food statements is warranted, they allow state causes of action. Accordingly, the initial outcome in the *Reyes* fries case is correct, because Illinois has decided that labeling in restaurants warrants a higher level of scrutiny under state consumer protection acts than that provided by the federal statute.²¹⁸ Allowing states to set their own limits on consumer protection acts accords states their status as sovereign entities and permits states to individually determine a manufacturer's responsibility to its citizens.

Although allowing states to establish their own standards for state actions under consumer protection acts resurrects the food industry's fear of having to comply with fifty different labeling requirements quelled by the NLEA, the implications of *Bates* are not unduly harsh to industry.²¹⁹ Because *Bates* does not allow a cause of action that is broader than the FFDCFA and the burden of proving harm is high, frivolous lawsuits are discouraged.²²⁰ If a claim is frivolous, regardless of the lack of preemption, it will not impose an excessive burden on manufacturers because it will be dismissed in the beginning stages of a lawsuit, or settled quickly. Similarly, many states have enacted statutes to diminish potential lawsuits and Congress continues to develop the Personal Responsibility in Food Consumption Act prohibiting certain obesity lawsuits.²²¹

Inevitably, a manufacturer needs to know about state laws to sell its products in a particular state. While it would be burdensome to learn and comply with each state's consumer protection act, after *Bates*, states cannot impose different requirements, only different liability for "parallel" requirements. Thus, a manufacturer doesn't have to learn subtle nuances between state statutes, but it will have to know the differences in consequences for not adhering to the state requirements.²²² Law firms writing about *Bates* have subtly indicated that preemption was a means by which industry was able to escape consumer litigation in the past and perhaps not comport with a standard of care to which they should have.²²³ Some con-

²¹⁷ See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

²¹⁸ See discussion *supra* Part II.E.

²¹⁹ *Impact of the NLEA*, *supra* note 36.

²²⁰ See discussion *supra* Part II.C.

²²¹ See discussion *supra* Part I.D.

²²² However, the NLEA does allow for more stringent restaurant standards in each state, which could require significant research by national restaurant chains.

²²³ See, e.g., Lawrence S. Ebner, *FIFRA Preemption After Bates v. Dow Agrosciences*, 20 *Toxics L. Rep.* (BNA) 541 (June 9, 2005) (indicating that in light of *Bates*, companies should "[do] everything possible to prevent product liability"). In other words, in the past, companies only formulated a pesticide with federal regulations in mind. Now that they are held to state product liability standards, they will have to make sure their products are more than just adequate; they must be "bulletproof." While they

sumer advocacy groups claim that the food industry has done extensive testing on the addictive properties of foods and has used that information to their advantage to target potential customers.²²⁴ By giving states the ability to redress these wrongs, the Supreme Court is effectively giving consumers the tools to prevent the food industry from engaging in certain misleading practices.

3. Potential Future Claims

As long as advertising food properties is profitable, it is likely we will continue to see consumer suits against manufacturers for misleading labels. Studies indicate that labels about the health properties of a food are more likely to increase sales, despite the costs associated with complying with labeling regulations.²²⁵ Thus, manufacturers will likely continue creating labels boasting of the health properties of their food and consumers are likely to continue suing manufacturers for their claims. News on lawsuits in this area indicates a trend toward specified cases instead of broad sweeping obesity litigation. For example, McDonald's faces new litigation in California by allergic consumers for its February 2006 announcement that it uses wheat and dairy ingredients to flavor fries.²²⁶ Parents of autistic children are suing, alleging that the gluten in wheat cause their children to exhibit increased aggressive tendencies.²²⁷ Similarly, in September 2006, the public interest group Physicians Committee for Responsible Medicine filed suit against multiple fast food restaurant chains, including McDonald's, for selling grilled chicken seasoned with PhIP, a chemical thought to cause cancer or reproductive toxicity.²²⁸ Plaintiffs claimed the fast food restaurants had violated California's Proposition 65, which requires businesses to warn consumers about possible chemical exposure.²²⁹

Since litigation in this area is not going away, it is important for industry to anticipate those claims that will not be preempted by the NLEA.²³⁰ The food industry is particularly worried about potential plaintiffs learning about the industry's marketing efforts during the discovery stage of litigation.

should have already been making sure their product was "bulletproof," the lack of preemption now makes the imperative for safe products much more pressing.

²²⁴ SIMON, *supra* note 78, at 283.

²²⁵ Kristen N. Nichols, *Nutraceuticals: In the Realm Of Consumer Protection, Is The United States' Regulation Too Much Or Not Enough?* 9 MICH. ST. U. J. MED. & L. 369, 378 (2005).

²²⁶ See *McDonald's Fries Harm Autistic Children, Another Suit Alleges*, 4 No. 2 Andrews Franchise and Distrib. Litig. Rep. 5 (Nov. 3, 2006), available at 4 No. 2 ANFRANLR 5 (Westlaw).

²²⁷ *Brown v. McDonalds*, No. BC359951, 2006 WL 3037645 (Cal Super. Ct. Oct. 6, 2006).

²²⁸ *Physicians Comm. Responsible Med. v. McDonald's Corp.*, No. BC359267, 2006 WL 2920541 (Cal. Super. Ct. Sept. 27, 2006).

²²⁹ *Id.*

²³⁰ Sileo, *supra* note 7, at 68.

tion. Food advocacy groups posit that discovery may harm the food industry because industry could be researching ways of deceiving the public to increase sales.²³¹ For example, if an industry has conducted extensive tests on a food and discovered its deleterious effects, documentation to that effect could significantly aid the plaintiff's position.²³² This could be another way in which obesity litigation follows the same track as tobacco litigation.

Consumer awareness issues also cross into other areas of the law dealing with social responsibility, including food standards, animal welfare, and fair trade. These issues will only be touched upon briefly here. The organic market presents the potential for future lawsuits based upon misleading statements on which food standards the food complies with. Organic manufacturers are increasingly faced with the need to order organic produce from abroad in order to meet consumers' demand.²³³ While the USDA has set standards for organic foods which foreign manufacturers must meet, the USDA cannot test every imported product.²³⁴ This means that products could later be found to not be organic, spurring a claim against false or misleading advertising, especially by a plaintiff that may have unusual sensitivities to pesticides or other chemicals that are not to be used in organic produce under the USDA standards.²³⁵

Consumers may also pursue state actions against manufacturers for misleading labels based on purely social concerns, which fit more squarely within the FTC's jurisdiction. For example, an animal welfare group filed suit with the FDA regarding egg companies purporting to sell "cage-free" eggs.²³⁶ The lawsuit spurred the FDA to revisit its standards for labels on eggs.²³⁷ Ben & Jerry's ice cream company is now committed to only buying cage-free eggs, which they undoubtedly will advertise on their labels.²³⁸

²³¹ SIMON, *supra* note 78, at 283.

²³² Another post-*Bates* issue is the ability to forum shop. Because *Bates* allows for recovery under state consumer protection acts and common law, plaintiffs in class action suits might attempt to find the state with a law most beneficial to their case. For a discussion of the issue of forum shopping, see Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1 (2005).

²³³ Diane Brady, *The Organic Myth*, BUS. WK., Oct. 16, 2006 at 50.

²³⁴ *Id.* at 55.

²³⁵ *Id.* Brady notes that companies such as Stonyfield Farm, which produces yoghurt, have had to order "strawberries from China, apple puree from Turkey, blueberries from Canada, and bananas from Ecuador." *Id.* There is a growing concern about the truthfulness of the organic label on produce from China. *Id.* Also, consumers are cautious about buying produce from countries that still use DDT. *Id.* To quell concerns about the truthfulness of the organic label, Stonyfield Farm hired a social auditor to check on worker conditions and Costco requires certifiers to check the organic peanuts and produce it imports from China. Brady, *supra* note 233, at 55.

²³⁶ Compassion Over Killing, "Animal Care Certified" Eggs, <http://www.cok.net/camp/acc/> (last visited Aug. 18, 2007).

²³⁷ *Id.*

²³⁸ Press Release, Humane Soc'y of the U.S., Campaign Victory! Ben & Jerry's Adopts a Cage Free Egg Policy (Sept. 26, 2006), http://www.hsus.org/farm/news/ournews/ben_jerrys_victory.html.

However, it is yet to be seen if after *Bates*, a consumer can sue under consumer protection acts if they were to find out an egg producer was not comporting with the cage-free label and therefore causing harm, albeit no physical harm, to the consumer.

CONCLUSION

The Supreme Court's "parallel requirements" preemption analysis in *Bates* effectively allows legitimate private causes of action to continue under state law, giving deference to a state's power to regulate matters of health and safety. *Bates* gives individual states the responsibility to determine whether a consumer should be able to proceed with a viable cause of action that may affect the way a food industry advertises its product. As evidenced in the *Mills* milk case, if a state has no redress for a consumer's alleged harm, the case will still face dismissal.

While the Personal Responsibility in Food Consumption Act has yet to be enacted, state statutes limiting liability against food manufacturers have effectively stopped some consumers from pursuing frivolous claims against the food industry. As illustrated by the *Reyes* "fries" case and the *Salmon* case, lawsuits against food manufacturers have developed into narrower arguments better crafted to effectively prove causation.

The guacamole story demonstrates that, in light of *Bates*, defendants have accepted the possibility that cases will continue past FFDC preemption. Consequently, defendants appear more apt to change representations on food that consumers believe are misleading. The future of food labeling litigation continues to develop. As these cases move forward, the debate on the role of causation, discovery, and personal responsibility will continue. However, in the end, because of *Bates*, consumers may learn more about what is in their guacamole, which is probably not a bad thing.

For a discussion on Ben & Jerry's attempts to be socially responsible, see Michele Simon, *Can Food Companies Be Trusted To Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169, 234 (2006).