Vermont's tail (state GMO law) might wag the national dog

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It's tough to come up with something novel to say about the saga of Vermont's new law to require foods with genetically modified ingredients to reveal that fact on their labels.

The bare facts are easy enough to summarize:

Foods would need to be labeled if they are "entirely or partially produced with genetic engineering," says Vermont's Act 120. The law provides for a variety of label statements for different situations. Monetary penalties apply for violations.

This is a small state, but a big deal, because Vermont's law becomes effective July 1 of this year. They will give packagers a 6-month grace period and won't start enforcement until January 1, 2017 for foods packaged before July 1, 2016, but anything packaged and distributed after that date would need to be compliant with the label requirements.

Some companies have said they are going to start voluntarily putting the statement on their labels anyway. From what I hear, some food companies may start Internet-only sales into Vermont, because those are exempt from the law's requirements, and some retailers might protest by stopping all sales in the state. We shall see.

We last checked-in on the GMO labeling saga in the June 2015 column (pwgo.to/2160). What wisdom, if any, does one glean from these recent Vermont-related developments?

Well, for one thing, this is an excellent example of what I used to call "publicity trumping science." (I don't want to call it that anymore.) The syndrome is discouragingly common, in which public pressure mounts against a substance or a practice because people think it's unsafe even though it's safe. Sorry, science, you're not the boss of regulatory decisions—it's public preference and perceptions. Public preferences may be OK for issues like the number of tissues in a box. But I say we should leave the decisions about ingredients, packaging, and what's worthy of a safety warning to the realm of facts. Do we? Sigh. Not always.

Second, this situation is like a laboratory experiment for the natural tensions that arise under our system of government. Remember, we have national, federal laws, and we also have 50 states who can make laws, too. Sometimes the state's laws are plainly overridden, or preempted, by federal law on the same topic, sometimes not, and sometimes that's a topic that can be the subject of a fight in court.

Even if the state law isn't preempted, though, there are usually a long list of good reasons to have a federal law on a topic instead of state laws, not least of which is that one state's law might not match another's. When that happens, no single label or product complies in every state in the nation, and all of a sudden it can be tough if not impossible to market a product nationally.

That is why it's not uncommon to hear businesses resist and lament the idea of any federal law on a topic until the states start imposing requirements on that topic, because when that day comes, the businesses see clearly that they would be better off with a single federal requirement (a reasonable and appropriate one, that is) than having to contend with multiple state requirements.

Here we have a law requiring disclosure of a fact for no apparent good reason. Does it make sense to require a label statement about GMOs when scientists say they are safe?

There have been efforts in other states to impose similar requirements, most notably in California in 2012, but this is the first one to succeed. And the Vermont measure has even survived an industry lawsuit, as least so far. The Grocery Manufacturers Association and other groups have filed a federal lawsuit claiming the law is unconstitutional in several ways. The case is still pending, though the associations' request to have the law halted via a preliminary injunction was denied last year, clearing the path for effectiveness this year.

The lawsuit's claims include arguments that the Vermont law creates an undue burden on interstate commerce in violation of the US Constitution, and should be found to be preempted by federal law. It also argues, interestingly, that the law violates packagers' constitutional right of free speech by mandating that, by having to disclose the presence of GMOs in their foods, the manufacturers are compelled "to convey an opinion with which they disagree, namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant."

They also note that the law requires disclosure of the presence of GMOs but does not require disclosure of their absence, and the law exempts many foods and manufacturers from its requirements. Because the law "imposes a burden on protected speech based upon its content, and the identity and viewpoint of the speaker," they argue, it should be reviewed carefully, under what is called "heightened judicial scrutiny." In short, they say the benefit of the doubt should favor the speech, not the restriction on the speech. The court wasn't convinced enough to impose a preliminary injunction on the law's effectiveness, but the manufacturers might still win the case when it is ultimately tried or decided on future motions.

Efforts then turned to Congress, to try to get a new law passed that would for sure preempt the Vermont act. The Safe and Accurate Food Labeling (SAFE) Act would give FDA sole authority to require mandatory labeling on such foods and it would have prevented states from passing or enacting their own laws to label GMOs. The bill passed the House in 2015 but hasn't passed the Senate. Yet. Stay tuned, the bill isn't dead yet. **PW**

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