FEDERAL COURT DENIES MEAT INDUSTRY REQUEST TO STOP USDA's NEW COUNTRY OF ORIGIN LABELING (COOL) REGULATION

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The U.S. District Court for the District of Columbia has denied a meat industry coalition's request for a preliminary injunction to prohibit enforcement of the U.S. Department of Agriculture's revised mandatory country-of-origin labeling ("COOL") regulation. In a decision issued on September 11, 2013, U.S. District Judge Ketanji Brown Jackson determined that enforcement of the new regulation would not result in the kind of irreparable injury that is required for injunctive relief.

The American Meat Institute, the North American Meat Association, the National Cattlemen's Beef Association, among other industry groups, filed their lawsuit, *American Meat Institute, et al. v. USDA, et al.*, Civil Action No. 2013-1033 (D.C. Dist. Ct.), on July 8, 2013, seeking a preliminary injunction to block implementation and enforcement of the new COOL regulation that was issued by the USDA on May 23rd of this year. Following the meat industry's initial filing, other industry groups that support the new COOL rule intervened as defendants in the case. The U.S. Cattlemen's Association, for example, filed papers in the lawsuit as an intervenor supporting the revised COOL regulation.

The court's ruling does not end the case. However, because the request for an injunction was denied, the USDA can proceed with implementation and enforcement of its new COOL regulation.

Country Of Origin Labeling Laws

Back in 2002, Congress adopted food legislation that ultimately led the USDA in 2009 to promulgate the original COOL Rule.[1] The COOL laws require retailers to provide consumers

[1] The legislation underlying the original 2009 COOL regulation promulgated by the USDA was enacted initially in 2002 as an amendment to the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 *et seq*. *See* Pub. L. No. 110-171, 121 Stat. 2467 (2002). As originally written, the 2002 country-of-origin statute required retailers of "covered commodities" to inform consumers of the country of origin of such commodities. *Id*. at sec. 282(a)(1). In addition, the statute provided criteria establishing when a retailer was permitted to designate a covered commodity as having a United States country of origin. *Id*. at sec. 282(a)(2). In the case of beef, lamb, and pork, the 2002 statute provided that retailers could use a U.S. designation only for meat derived from "an animal that is exclusively born, raised, and slaughtered in the United States." *Id*. The statute further instructed the Secretary of Agriculture to "promulgate such regulations as are necessary to implement" the statute no later than September 30, 2004. Id. sec. 284(b). After enacting the statute, however, Congress twice delayed its regulatory implementation, first until 2006 (Consolidated Appropriations Act, Pub. L. No. 108¬199, 118 Stat. 3, sec. 749 (2004)), and then until 2008 (Agricultural & Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120 sec. 792 (2005)).

In 2008, the relevant provisions of the statute were amended as a part of The Food, Conservation, and Energy Act of 2008 (also known as "the 2008 Farm Bill"), Pub. L. No. 110-234, 122 Stat. 923, sec. 11002, and codified at 7 U.S.C. § 1638a (2008) (the "COOL statute"). As amended in 2008 (and as it exists today), the COOL statute requires

with country-of-origin information and also set forth a detailed categorization system that pertains to the manner in which covered commodities derived from certain livestock are to be designated for COOL purposes.[2] These laws first instruct that "a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity."[3] Different requirements are established for the designation of muscle cut meats that largely depend upon an animal's geographic history relative to its processing stages.[4] The first four designations relate to (A) an animal that has a United States country of origin, *e.g.*, an animal that was "born, raised, and slaughtered" in the U.S.; (B) an animal that has multiple countries of origin, *e.g.*, born and weaned in one country, but raised and fattened in another country; (C) an animal that is imported into the United States for immediate slaughter; and (D) an animal that has a foreign country of origin.[5]

Based on the statutory authority granted by Congress, the USDA in 2009 published a rule setting forth four possible COOL designations for retailers to use when marketing muscle cut meats.[6] The 2009 COOL Rule provides examples of approved labels that corresponded to the four designation categories laid out in the statute: for Category A, "Product of the United States;" for Category B, "Product of the United States, Country X, and (as applicable) Country Y;" for Category C, "Product of Country X and the United States;" and for Category D, "Product of Country X."[7]

The 2009 COOL Rule also explicitly acknowledged that meat processors sometimes engage in "commingling"—the practice of processing multiple animals with varying countries of origin together during a single production day for slaughter and packaging—and directed that muscle cuts produced through this process should be labeled in the same way as Category B covered commodities, regardless of whether the commingled animals would each otherwise fall into

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retailers to provide consumers with country-of-origin information and also sets forth a detailed categorization system that pertains to the manner in which covered commodities derived from certain livestock are to be designated for COOL purposes. *See* 7 U.S.C. § 1638a (2010).

[2] *See* 7 U.S.C. § 1638a (2010).

[3] *Id.* § 1638a(a)(1). This provision applies to all covered commodities except those that are sold or served in food service establishments. *See* 7 U.S.C. § 1638a(b). A "food service establishment" is defined in the statute as "a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public." 7 U.S.C. § 1638(4).

[4] *See id.* § 1638a(a)(2)(A)-(E).

[5] Ground meat products are governed by a fifth designation that is not directly at issue in these proceedings. *See* 7 U.S.C. § 1638a(2)(E) ("The notice of country of origin for ground beef, ground pork, ground lamb, ground chicken, or ground goat shall include— (i) a list of all countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat; or (ii) a list of all reasonably possible countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat.").

[6] *See* 74 Fed. Reg. 2658-01 (Jan. 15, 2009).

[7] *Id*.

Category A, B, or C.[8] Finally, the 2009 COOL Rule permitted muscle cuts produced through commingling to list in any order the various countries of origin present in the commingled products.[9]

The *American Meat Institute, et al.* litigation came about because foreign competitors objected to the 2009 COOL Rule. In October of that year, Canada (later joined by Mexico) requested that the World Trade Organization take up the legality of the original COOL regulation. In 2012, the WTO's Appellate Body confirmed a dispute panel's finding that the COOL law accorded less favorable treatment to foreign livestock and therefore violated international trade law. The WTO subsequently required the United States to revise its COOL laws by May 23, 2013.

The revised 2013 COOL Rule currently under attack by the meat industry's lawsuit was promulgated by the USDA to address the concerns raised before the WTO. According to the Agricultural Marketing Service, the proposed changes resulting in the 2013 COOL Rule were designed both to provide consumers with additional country-of-origin information and also to bring the United States into compliance with the WTO's ruling on the 2009 COOL Rule.

Changes Effected by the 2013 COOL Rule

The 2013 COOL Rule generally modifies the 2009 COOL Rule in two respects. First, the 2013 Rule requires COOL labels for muscle cut meats to specify where the "production steps" for each such product took place, *i.e.*, where the animal from which the commodity was derived was born, raised, and slaughtered.[10] As with the 2009 COOL Rule, the 2013 Rule provides examples of acceptable labels: for Category A, "Born, raised, and slaughtered in the United States;" for Category B, "Born in Country X, raised and slaughtered in the United States;" for Category C, "Born and raised in Country X, slaughtered in the United States;" and for Category D, "Product of Country X."[11]

Second, the 2013 COOL Rule states that "this final rule eliminates the allowance for commingling of muscle cut covered commodities of different origins" in order to "let[] consumers benefit from more specific labels."[12] The elimination of commingling was at the heart of the *American Meat Institute, et al.* plaintiffs' claims alleging irreparable injury

The 2013 COOL Rule also recognizes that, because of the new labeling requirements and the commingling ban, "it may not be possible for all of the affected entities to achieve 100%

[8] *Id.*

[9] *Id.*

[10] This new labeling system applies to covered commodities from each Category A-C. Category D, which applies to muscle cuts from an animal slaughtered outside of the United States, requires a label that only identifies the country from which the meat was imported.

[11] *See* Final Rule, 78 Fed. Reg. 31,385 (May 24, 2013).

[12] *Id.* at 31,369.

compliance immediately."[13] The 2013 Rule therefore provides that, during a six-month period following its effective date, regulators will "conduct an industry outreach and education program concerning the provisions and requirements of this rule."[14] That grace period remains ongoing.

The Ensuing Court Challenge

The *American Meat Institute, et al.* plaintiffs argued that the 2013 COOL Rule would cause their constituents irreparable harm because complying with country of origin labeling requirements would inflict "crippling" financial and operational burdens the meat industry members at all stages of the production. As an example, the plaintiffs' cited the new rule's ban on commingling *i.e.,* processing multiple animals with varying countries of origin together during a single production day. The plaintiffs' lawsuit argued that implementation of the 2013 COOL Rule will force them to build new facilities for handling and storing segregated animals.

The plaintiffs' also argued that the 2013 COOL Rule was an undue infringement on their commercial free speech rights under the First Amendment to the U.S. Constitution. In summary, their argument was that the 2013 COOL Rule violates the First Amendment by compelling industry members to speak, *i.e.,* disclose certain country-of-origin information, when they would rather not undertake such communications.

In his opinion rejecting the plaintiffs' request for an injunction to prevent the USDA from implementing the new regulation, U.S. District Judge Brown Jackson determined that the plaintiffs' argument on commingling amounted to speculation about the potential impacts and costs of the rule. According to Judge Brown Jackson's decision, such arguments were speculative: "*Indeed, none of the Plaintiffs' declarations adequately alleges and substantiates the kind of immediate and irreparable monetary injury that is required to sustain Plaintiffs' assertions regarding the Final Rule's dire financial effects or the lack of recoverability of the added expenditures*."

As for the plaintiffs' First Amendment arguments, the federal court held that, where a law compels disclosure of "purely factual and uncontroversial information," the law need only be "reasonably related to the [government's] interest in preventing deception of consumers" to pass muster under the First Amendment. As Judge Brown Jackson's opinion notes:

> Prior to the enactment of the [2013 COOL] Rule, the allowance for commingling all but ensured that certain muscle cut commodities would carry misleading labels. As the agency points out, under the 2009 COOL program, if ninety-nine cows that were born, raised, and slaughtered in the U.S. were commingled with one cow that was born in Mexico and raised and slaughtered in the U.S., all resulting muscle cuts would be labeled "Product of the United States and Mexico." Moreover, retailers had no obligation to provide any of the details regarding which steps of the production process happened where, and for muscle cuts from animals with multiple countries of origin, retailers were permitted to list the countries in any order. Under these circumstances,

[13] *Id.*

[14] *Id.*

> the Court has no trouble concluding that experience and common sense dictates that there was a likelihood of consumer confusion under the prior COOL program.

In response to the court's ruling, the North American Meat Association and American Meat Institute said the plaintiffs would appeal. In contrast, The U.S. Cattlemen's Association, an intervenor in the case, issued a statement praising the court's decision.

A copy of the federal court's decision denying the motion for injunction in *American Meat Institute, et al. v. USDA, et al.,* is accessible via GrayRobinson by clicking here.