

LAW REVIEW

By: Jim Porter

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SUPREME COURT RULES ON ARTIFICIALLY COLORED FARM RAISED SALMON

The California Supreme Court just ruled that consumer groups may continue their lawsuits against big supermarkets like Albertson's, Safeway, Trader Joe's, Costco, Whole Foods and others—based on their claims that farm raised salmon sold in their stores must be labeled “artificially colored”.

Salmon Cases

You may recall two years ago we wrote about the so-called consolidated Salmon Cases—suits against supermarkets for selling farm raised salmon without labeling they were artificially colored. The plaintiffs claim the practice is misleading to the public and a violation of federal and state law.

I was surprised by the Court of Appeal decision. Apparently, the California Supreme Court was too, as it unanimously overturned the lower court—ruling supermarkets must label farm raised salmon as “artificially colored” because fish farmers add astaxanthin and canthaxanthin in food pellets to obtain a color of flesh resembling wild salmon. Wild salmon get their color from eating crustaceans and other ocean creatures. Without the color additive the farm salmon would appear grayish. Yuck.

Federal Law

The federal Food, Drug, and Cosmetic Act requires the use of a phrase like “artificial coloring” when color additives are used. Not doing so is considered “false and misleading” and “misbranding” under the federal law. Seems pretty clear to me.

However, only the federal government may enforce the federal Food Drug and Cosmetic Act.

To date the FDA has chosen not to enforce the federal food coloring law, which I assume is a direct result of our sitting President. Per “W”, big business always trumps consumers.

Sherman Act

The California Sherman Act is essentially identical to the federal Food Drug and Cosmetic Act. So the question in the case became whether California could enforce its own food coloring law or whether the federal law preempted the area governing misbranding of food, meaning California would not be able to enforce the California Sherman Act.

The Court of Appeal found preemption—federal law controlled, the FDA chooses not to enforce the law, end result: No labeling of artificially colored salmon required.

Supreme Court

The California Supreme Court reversed, concluded that neither state nor federal law precludes Californians and California courts from enforcing California law, in this case, the California Sherman Act mandating disclosure of food coloring.

Unless this case is appealed to the U.S. Supreme Court, which the supermarket attorneys may do, we will soon see farm raised salmon with labels like “artificially colored” or “color added”.

While I eat both wild and farm raised salmon, federal and state law clearly require disclosure of artificially colored foods. We all want to know what we are eating. I support this decision.

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