PLEASE NOTE: Legislative Information *cannot* perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

An Act To Create the Children's Wireless Protection Act

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 22 MRSA c. 261-B is enacted to read:

CHAPTER 261-B

CHILDREN'S WIRELESS PROTECTION ACT

§ 1537. Short title

This chapter may be known and cited as "the Children's Wireless Protection Act."

§ 1538. Warning labels for cellular telephones

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Cellular telephone" means a device used to access a wireless telephone service.

2. Prominence of instructions. If a cellular telephone manufacturer includes guidelines or instructions or general information for reducing radiofrequency (rf) exposure in any literature distributed or made available to consumers in connection with its products, the cell phone manufacturer shall insure that :

A. The full language of the rf exposure reduction information is plainly visible on the outside of the product packaging; or

B. A label is plainly visible on the outside of the product packaging alerting customers to the rf exposure reduction information. The body of the notice must be in letters not less than 1/16 inch in height. The initial words REDUCING RF EXPOSURE" followed by "To reduce your radio frequency exposure, and comply with FCC use guidelines. Refer to information supplied by the manufacturer "must appear in capital letters and in bold type at least 1/8 inch in height, followed by: "For the Safety of You and Your Family, Please Read Guidance for Use" and language directing consumers to the page or pages of the owner's manual or other insert or location where the rf exposure reduction information may be found.

3. Label required. A retailer of cellular telephones may not sell at retail in this State a cellular telephone unless the cellular telephone bears a warning label that is at least the size of the manufacturer's label on the device, is legible, is located in a prominent place that is conspicuous and not obscured by other written matter and contains the following statement:

"This device emits rf electromagnetic fields. ."

4. Information label requirement. A retailer of cellular telephones may not sell at retail in this State a cellular telephone unless the requirements of subsections 2 and 3 are met.

5. Information bulletin. A retailer of cellular telephones shall provide to a purchaser of a cellular telephone printed information that is in the form of a separate bulletin in bold print that contrasts with the color of the bulletin and has a font size of a minimum of 16 point stating:

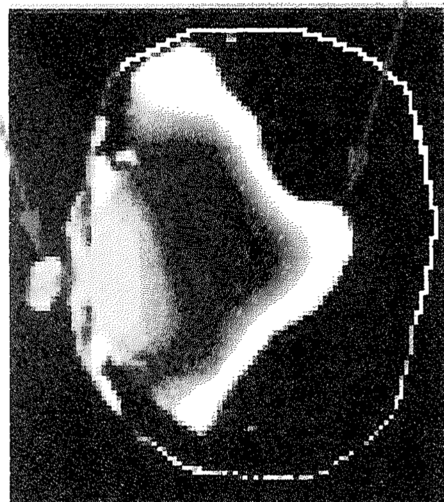
"MAINE REVISED STATUTES, Title 22, chapter 261-B requires that we notify you that: "The World Health Organization, International Agency for Research on Cancer has classified radiofrequency electromagnetic fields as possibly carcinogenic to humans (Group 2B), based on an increased risk for glioma, a malignant type of brain cancer, associated with wireless phone use... This has relevance for public health, particularly for users of mobile phones, as the number of users is large and growing, particularly among young adults and children." – per The World Health Organization press release of May 31, 2011

and that: Manufacturers' manuals provide best use guidance for distance from head and body when in use and commentary on ways to reduce excessive rf exposure, if you choose, such as:
A. Limiting use by children;
B. Keeping away from reproductive organs; and
C. Operating with a wired headset or using the speaker."

7. Violation. A violation of this chapter is a violation of the Maine Unfair Trade Practices Act.

SUMMARY

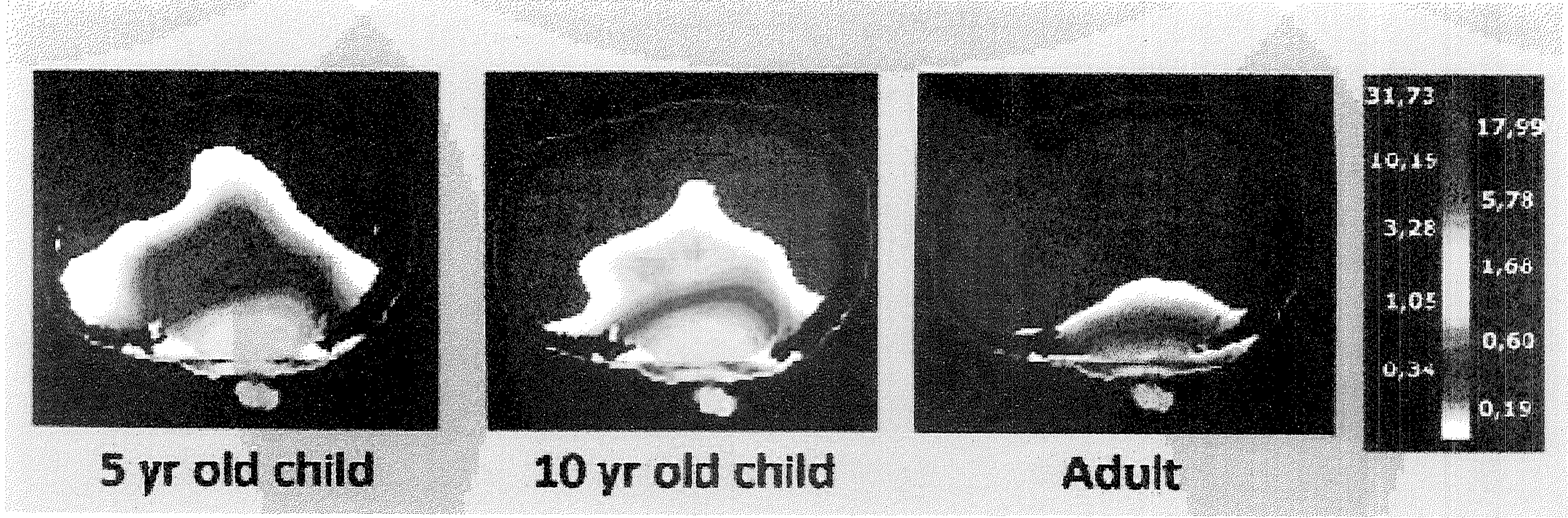
This bill provides that a retailer may not sell at retail in this State a cellular telephone unless the cellular telephone and its packaging bear a label relating tothe informationassociated with rf exposure. It requires the manufacturer of the cellular telephone to provide the warning labels to the retailer at no cost to the retailer. The bill also requires that any information relating to reducing rf exposure supplied by a cellular telephone manufacturer must have the language of the notification plainly visible on the outside of the product package or, if using a label, the label must be plainly visible on the outside of the package. This bill also requires the retailer to provide an information bulletin to the purchaser of a cellular telephone informing the purchaser of the World Health Organization's bulletin on classifying this rf as a class to be possible human carcinogen.. A violation of this provision is a violation of the Maine Unfair Trade Practices Act.



Brain of 5-year-old

WARNING

This device emits electromagnetic radiation, exposure to which may cause brain cancer. Users, especially children and pregnant women, should keep this device away from the head and body.



Source: Gandhi et al., IEEE Transactions on Microwave Theory and Techniques, 1996.

Figure 5: Estimation of the absorption of electromagnetic radiation from a cell phone based on age (Frequency GSM 900 MHz) (Color scale shows the Specific Absorption Rate in W/kg)

Studies in red are industry-funded, studies in yellow are university, etc.

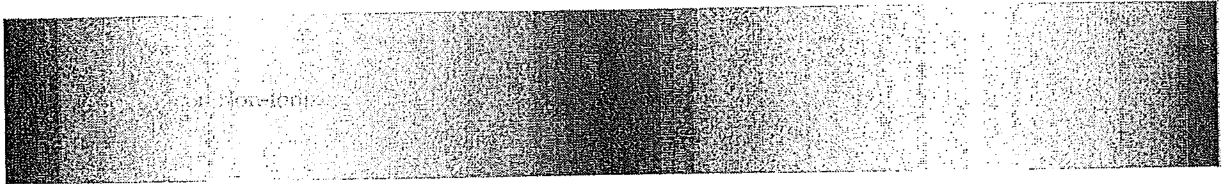
Studies on Wireless Communication-related Signals

Genetic Effects

Effect: Aitken (05); Belyaev (05, 06); Czyz (04); d'Ambrosio (02); Diem (05); Gadhia (03); Gandhi (05a,b); Goswami (99); Harvey & French (00); Ivaschuk (97); Maes (96, 97); Markova (05); Mashevich (03); Nikolova (05); Pacini (02); Sarimov (04); Sykes (01); Wang (05); Zotti-Martelli (05)

No Effect: Chang (05)
Chauhan (06a,b); Finnie (05); Gorlitz (05);
06
McNamee (02a,b, 03); Qutob
(06); Verschaeve
(06);

MICRO WAVE NEWS



IARC Publishes Rationale for RF as Possible Human Carcinogen

Two-Year Gestation

April 19, 2013

The International Agency for Research on Cancer (IARC) has released its detailed evaluation of the cancer risks associated with RF radiation, which serves as the rationale for designating RF as a possible human carcinogen.

The IARC monograph comes close to two years after an invited panel of experts from 14 countries reached this conclusion following an eight-day meeting at IARC headquarters in Lyon, France (see our report).

An electronic copy of the 430-page document is available at no cost from IARC. A paper copy will be available soon.

The basis for IARC designation of RF as a Class 2B carcinogen is summed up in one sentence: "Positive associations have been observed between exposure to radiofrequency radiation from wireless phones and glioma and acoustic neuroma" (p.421). Those associations with brain tumors and tumors of the acoustic nerve were observed by the Interphone study group and Lennart Hardell's team in Sweden.

The panel's decision was close to unanimous. One strong dissent came from Peter Inskip of the U.S. National Cancer Institute, who walked out of the IARC meeting before the final vote. One or two others, including Maria Blettner of the University of Mainz in Germany, were reported to have also disagreed with the majority opinion. There was talk that the dissenters would file a minority opinion, but no signed statement appears in the IARC monograph. Instead, their view is included in the final paragraph of the report: The available evidence does not support a "conclusion about a causal association" due to "inconsistencies" between the Interphone and Hardell studies and the lack of an exposure-response relationship.

The dissenters also point to a lack of association in a large Danish study —though this effort has been widely criticized (see our take). Finally, the dissenters argue that, "up to now, reported time trends in incidence rates of glioma have not shown a trend parallel to time trends in mobile-phone use." That last argument was punctured in November when the Danish Cancer Society reported a spike in aggressive brain tumors over the last ten years. At the time, an insider called the increase a "frightening development," though no link to cell phones was made.

Category:
IARC, RF, cancer, Interphone, Lennart Hardell, Danish Cancer Society, Peter Inskip, Maria Blettner,

What about Federal Agencies and their Roles?
From their websites and the Verizon manual for LG VX8360:

The FCC:

The Federal Communications Commission has stressed repeatedly that it is not a health and safety agency and would defer to the judgment of these expert agencies with respect to determining appropriate levels of safe exposure to RF energy.

The FCC relies on the FDA and other health agencies for safety questions about wireless phones.

The FDA:

Under the law **FDA does not review the safety of radiation emitting consumer products such as mobile phones** before they can be sold, as they do with new drugs or medical devices.

The FCC:

There is no federally developed national standard for safe levels of exposure to radiofrequency (RF) energy. . .

CTIA – the wireless industry association:

"We don't say cell phones are safe. The FCC says cell phones are safe."

EFFECTS OF CELLULAR TELEPHONE WARNING LABELS (LD 1706) ON MAINE RETAILERS

SOE Staff Paper 584
February 2010

Todd Gabe (Associate Professor) and Mario Teisl (Professor) *
School of Economics, University of Maine

Executive Summary:
The purpose of this report is to provide research-based information from published academic studies on the potential effects of a proposed cellular telephone warning label program on Maine retailers. Our qualitative analysis centers around the questions of (1) will Maine consumers "give up" their cellular telephones due to the warning labels; and (2) will higher prices as a (potential) result of the warning label program reduce sales in Maine? With respect to the first question, we feel that it is unlikely that substantial numbers of Maine residents would give up their cellular telephones because of the warning labels. Past studies show that people will engage in safe behavior suggested by a product warning, but compliance tends to be higher if the costs of doing so are low. The estimated costs of "giving up" a cellular telephone are about 18-times higher than the costs of using a hands-free device, which suggest that the latter is the more likely response to the warning labels. With respect to the second question, we feel that higher retail prices (if they occur) are unlikely to lead to a substantial reduction in the number of cellular telephones sold in Maine. The price elasticity of demand for cellular telephones is quite low, which means that people are not likely to respond very much to a price change. This report considers only one of the issues related to LD 1706 –namely, how it might impact Maine retailers. Thus, additional information is needed to determine –one way or another –whether the benefits of LD 1706 outweigh the costs.

* We gratefully acknowledge the helpful comments provided by Mark Anderson, James McConnon and Sharon Tisher.

EFFECTS OF CELLULAR TELEPHONE WARNING LABELS (LD 1706) ON MAINE RETAILERS

1. INTRODUCTION

The proposed Maine Children's Wireless Protection Act (LD 1706) seeks to require that cellular telephones sold in the state display a product label that reads, "WARNING, THIS DEVICE EMITS ELECTROMAGNETIC RADIATION, EXPOSURE TO WHICH MAY CAUSE BRAIN CANCER. USERS, ESPECIALLY CHILDREN AND PREGNANT WOMEN, SHOULD KEEP THIS DEVICE AWAY FROM THE HEAD AND BODY." LD 1706 stipulates that cellular telephone manufacturers pay for the production and placement of the warning labels, and that the program "may not result in a cost to the retailer or distributor of cellular telephones."

The purpose of this report is to provide research-based information about the potential effects of LD 1706 on Maine cellular telephone retailers. Although LD 1706 requires that manufacturers cover the costs of program implementation, the warning labels may impact retailers by influencing the market for cellular telephones and/or protective devices. In our analysis, we focus on the following issues. First, we are interested in the extent to which consumers might change their behavior as a result of the warning labels. In other words, will people "give up" their cellular telephones or take less dramatic precautions such as the use of a headset or another "hands-free" protective device? Second, we are interested in how people might respond to an increase in the price of cellular telephones. If manufacturers pass the costs of program compliance forward to consumers in the form of higher prices, might it lead to a reduction in the amount of cellular telephones sold in Maine?

The following caveats should be considered when thinking about the information presented in this report. First, we do not take a position on whether LD 1706 should or should not be passed. This study focuses on one aspect of the warning label program – namely, how it might impact retailers in Maine –yet there are issues related to health effects and other considerations (e.g., reduction in "distracted driving," impacts on the cellular telephone industry) that we do not address. Thus, our analysis alone does not determine –one way or another –whether the benefits of LD 1706 outweigh the costs.

Second, the analysis is based on published academic studies that were conducted in places outside of Maine, using data collected from different periods, and focusing on products other than cellular telephones. As an example, we use information from two "meta-analysis" studies on the impacts of product warnings to determine how Maine consumers might respond to the proposed cellular telephone warning labels. An advantage of this approach is that these studies incorporate information from a variety of cases that look at different types of products (e.g., cigarettes, alcohol, hazardous chemicals, all-terrain vehicles) and different types of suggested "safe" behaviors (e.g., wearing gloves, wearing a helmet). Thus, our analysis does not rely on the results from a single study, but rather we can interpret findings from these meta-analysis studies as the "average" response to a product warning. Furthermore, since one of the meta-analysis studies includes suggested safe behaviors that vary in terms of compliance costs, we can determine how the likelihood of a response differs between high-cost behaviors (e.g., "giving up" a cellular telephone) and lower-cost precautions (e.g., using a hands-free device). A disadvantage of our approach –that is, using secondary information from

other studies –is that it does not say for certain how Maine consumers might respond to the cellular telephone warning labels.[1]

Finally, a third limitation of our analysis is that we do not come up with exact quantitative (i.e., numerical) figures regarding changes in revenues (and associated employment) received by cellular telephone retailers in Maine. Data limitations prevent us from arriving at such precise estimates. However, we are able to come up with some qualitative statements about how retailers might be impacted by the proposed Maine Children's Wireless Protection Act.

2. WILL MAINE RESIDENTS "GIVE UP" THEIR CELLULAR TELEPHONES?

One of the biggest factors that will determine the effects of the cellular telephone warning labels on Maine retailers is the extent to which consumers might change their purchasing behavior. Nationally, according to information available at www.ctia.org, the total number of wireless subscribers (276.6 million) as of June 2009 was equivalent to 89 percent of the total U.S. population, up from a 66 percent wireless penetration rate in June 2005. These same statistics show that the U.S. wireless industry generated $151.2 billion in annual revenues in 2009, which represents a 39 percent increase over a four-year period. Clearly, the cellular telephone "industry" is large nationally (as is likely the case in Maine).

As noted above, we use information from two meta-analysis studies on product warnings to gauge how Maine consumers might respond to the proposed labels on cellular telephones. A meta-analysis study by Cox et al. (1997) found that the percentage

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[1] A survey of Maine consumers would likely provide us with information that is more specific to the issue at hand.

of subjects exposed to the warning labels who exhibited safe behavior (i.e., following the instruction on a label) exceeded the response observed in the control group by between 15.7 and 31.1 percentage points.[2] Applying this information to the question at hand, these results suggest that between 16 and 31 percent of cellular telephone users in Maine will practice some sort of safe behavior as a result of the warning labels.

Based on the information presented above, we can gain a sense of the percentage of cellular telephone users in Maine who might change their behavior in response to the warning labels. However, this does not mean that 16 to 31 percent of the people will "give up" their cellular telephones. A meta-analysis study by Argo and Main (2004) investigates how various consumer and product attributes (e.g., participant age, familiarity with product) might influence the effects of a warning label. Particularly relevant to our analysis, they examine the relationship between behavioral compliance (i.e., whether or not a person follows the advice on a label) and the cost of compliance. Results from the meta-analysis show that "as the cost to comply increases, the likelihood that consumers will follow the warning label decreases" (Argo and Main 2004, p.204).

To gain a better sense of how cellular telephone users might change their behavior, we examine the costs of two possible ways to comply with the warning labels. A study by Hahn, Tetlock and Burnett (2000) conducted a cost-benefit analysis of a ban on cellular telephone use by drivers. They found that, based on information from 1999, U.S. consumers would need to receive $41 billion to compensate them for the "costs" of giving up their cellular telephones. Focusing only on cellular telephone use while driving, Hahn, Tetlock and Burnett (2000) found that the costs of a cellular telephone

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2 The marginal compliance rates, estimated in the studies included in the meta-analysis, ranged from -21.4 (indicating that fewer people exposed to the warning practiced safe behavior) to 60 percentage points (Cox et al. 1997).

ban, estimated at $25 billion, substantially exceed the costs associated with the use of a hands-free device (estimated at $1.4 billion). This suggests that the costs of "giving up" a cellular telephone are about 18-times larger than the costs of using a hands-free device. Taken together, these results lead us to believe that cellular telephone users would be more likely to use a hands-free device (or other low cost measure) than to give up their cellular telephones completely. Bottom line – the warning label is not likely to decrease cellular telephone purchases, but it may lead to an increase in the purchase and use of hands-free devices.

3. WILL HIGHER CELLULAR TELEPHONE PRICES REDUCE SALES?

Along with the potential effects associated with a consumer response to the warning labels, discussed above, Maine retailers might also be impacted by a reduction in cellular telephone sales due to higher product prices. The Maine Children's Wireless Protection Act requires that cellular telephone manufacturers cover the costs of warning label production and placement (i.e., the program "may not result in a cost to the retailer or distributor of cellular telephones"). The extent to which this increase in manufacturing costs would translate into a reduction in retail sales depends on (1) whether or not the manufacturer "passes along" the labeling costs to consumers by raising the price, and (2) how consumers respond to the higher prices (if they occur).

The question of whether the costs of warning label implementation would lead to higher retail prices depends on, among other things, the relative elasticities of supply and demand.[3] A 1997 study by Jerry Hausman found that the price elasticity of demand for

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[3] In this analysis, we are treating the costs of warning label production and placement similar to a product excise tax.

cellular telephone services is -0.506, meaning that for any (percentage) increase in price, the corresponding (percentage) reduction in the number of wireless subscribers is about one-half of the magnitude (of the percentage increase in price).[4] That is, consumers are not sensitive to a change in the price of cellular telephone services.

We could not locate any published studies that examined the price elasticity of supply for cellular telephones, but it is likely that (given the very low marginal cost of production) it is highly elastic. If this is the case (i.e., if the price elasticity of supply is greater than the price elasticity of demand), then we would expect manufacturers to increase the retail price of cellular telephones in response to the warning label program. Since the warning labels should be inexpensive to produce and place on the cellular telephones, we expect a very modest increase in price (if any), which would result in a very small reduction in the quantity of units sold in Maine.

4. SUMMARY

The purpose of this report was to provide research-based information from other published academic studies about the potential effects of LD 1706 on Maine cellular telephone retailers. Our qualitative analysis centered around two questions. First, will Maine consumers "give up" their cellular telephones due to the warning labels? Second, will higher prices as a result of the warning label program reduce sales in Maine?

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[4] Hausman's (1997) study accounted for differences in the price of usage, which varied across the metropolitan areas included in the analysis, and also incorporated the price of a cellular telephone. Thus, the elasticity estimate of -0.506 does not correspond solely to the market for cellular telephones. However, given that cellular telephones are a very strong complement to wireless service plans, we would expect the elasticities to be similar. If anything, the response to a price change might be smaller for cellular telephones than for service plans because the cost of purchasing a cellular telephone is relatively lower than the cost of its use (e.g., a service plan).

Based on the published academic literature on the effects of product warnings, our answer to the first question is that it is unlikely that substantial numbers of Maine residents would give up their cellular telephones as a result of the warning labels. Past studies show that people will engage in safe behavior suggested by a product warning, but compliance tends to be higher if the costs of doing so are low. The estimated costs of "giving up" a cellular telephone are about 18-times higher than the costs of using a hands-free device, which suggest that the latter is the more likely response to the warning labels. This change in behavior could result in an increase in retail sales of telephone headsets and other approved safety devices.

Our answer to the second question posed above is that higher retail prices (if they occur) as a result of the warning label program are unlikely to lead to a substantial reduction in the number of cellular telephones sold in Maine. The price elasticity of demand for cellular telephones is quite low, which means that people are not likely to respond very much to a price change. Thus, the relatively small additional costs associated with the production and placement of the warning labels should not result in a substantial reduction in cellular phone retail sales but, as mentioned above, LD 1706 may lead to an increase in the sales of hands-free devices.

References

Argo, Jennifer and Kelley Main. 2004. "Meta-Analyses of the Effectiveness of Warning Labels," *Journal of Public Policy and Marketing*, 23, 193-208.

Cox, Eli III, Michael Wogalter, Sara Stokes, and Elizabeth Murff. 1997. "Do Product Warnings Increase Safe Behavior? A Meta-Analysis," *Journal of Public Policy and Marketing*, 16, 195-204.

Hahn, Robert, Paul Tetlock, and Jason Burnett. 2000. "Should You Be Allowed to Use Your Cellular Phone While Driving?" *Regulation*, 23, 46-55.

Hausman, Jerry. 1997. "Valuing the Effect of Regulation on New Services in Telecommunications," *Brookings Papers on Economic Activity. Microeconomics*, 1997, 1-48.

Ms. Andrea Boland
22 Kent St
Sanford, ME 04073

May 1, 2013

Dear Andrea:

Radio Frequency (RF) concerns, whether from remote credit card theft, smart utility meters, or cell phones has become a very real market consideration.

While industry continues to downplay any risk factors related to RF, notable experts and scientific panels on a global basis are voicing
these both from a health and a security perspective.

Rogue Industries is a Maine based design company specializing in fashion forward small leather goods. Many of our designs now offer RF shielding as part of the overall product design.

With expanded awareness, more consumers have a better understanding of the potential risks at hand, so we naturally support your product labeling bill now before the Maine State Legislature. We would embrace the opportunity of designing cell phone cases which could help to shield the human body from continuous RF exposure through cell phone transmission.

We now employ twelve people in a challenging economy. As awareness expands, product demand could increase employment opportunities at our company and throughout our entire supply chain.

Respectfully yours,

Michael Lyons
www.Rogue-Industries.com

H

United States District Court,
N.D. California.
CTIA—THE WIRELESS ASSOCIATION, Plaintiff,
v.
The CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, Defendant.

No. C 10–03224 WHA.
Oct. 27, 2011.

Background: Industry trade group representing wireless telecommunications industry brought action challenging city and county ordinance requiring cell phone retailers to inform customers about issues pertaining to radiofrequency (RF) energy emissions and precautions to minimize exposure to RF energy. Plaintiff moved for preliminary injunction.

Holdings: The District Court, William Alsup, J., held that:
(1) ordinance was not preempted by Federal Communications Commission (FCC) regulations;
(2) provision of ordinance requiring cell phone retailers to distribute fact sheet to customers violated First Amendment unless corrected;
(3) provision requiring cell phone retailers to display poster violated First Amendment; and
(4) provision requiring cell phone retailers to place stickers on their display materials violated First Amendment.

Motion granted in part and denied in part.

West Headnotes

[1] Counties 104 ⚷21.5

104 Counties
104II Government
104II(A) Organization and Powers in General
104k21.5 k. Governmental powers in general. Most Cited Cases

Municipal Corporations 268 ⚷53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In general. Most Cited Cases

Telecommunications 372 ⚷1033

372 Telecommunications
372IV Wireless and Mobile Communications
372k1033 k. Preemption; interplay of federal, state and local laws. Most Cited Cases

City and county ordinance requiring cell phone retailers to inform customers about issues pertaining to radiofrequency (RF) energy emissions and precautions to minimize exposure to RF energy was not preempted by Federal Communications Commission (FCC) regulations; FCC had never found cell phones to be absolutely safe, and city and county did not set its own emission standards or impose liability for compliance with FCC standard, but only sought to warn consumers of perceived public health risk and to inform consumers how to mitigate perceived risk.

[2] Constitutional Law 92 ⚷1600

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(C) Trade or Business
92k1600 k. In general. Most Cited Cases

In commercial marketplace, First Amend-

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ment permits government to require businesses to disclose accurate and uncontroversial facts as long as disclosures are reasonably related to governmental interest in preventing deception or in protecting public health and safety, among other allowable objectives, and government may do so without meeting any least restrictive means test. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿2144

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2143 Telephones
92k2144 k. In general. Most Cited Cases

Telecommunications 372 ⚿1026

372 Telecommunications
372IV Wireless and Mobile Communications
372k1026 k. Regulation in general. Most Cited Cases

Provision of city and county ordinance requiring cell phone retailers to distribute to customers fact sheet about potential risks arising from exposure to radiofrequency (RF) energy emissions and precautions to minimize exposure to RF energy was misleading, and thus violated retailers' First Amendment rights unless corrected to state that all cell phones sold in United States had to comply with RF safety limits set by Federal Communications Commission (FCC) and that RF energy was not known or probable carcinogen, even though each statement in fact sheet was literally true, where overall impression left by fact sheet was that cell phones were dangerous and had somehow escaped regulatory process. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚿2144

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2143 Telephones
92k2144 k. In general. Most Cited Cases

Telecommunications 372 ⚿1026

372 Telecommunications
372IV Wireless and Mobile Communications
372k1026 k. Regulation in general. Most Cited Cases

Provision of city and county ordinance requiring cell phone retailers to display poster about potential risks arising from exposure to radiofrequency (RF) energy emissions and precautions to minimize exposure to RF energy was not reasonably necessary and unduly intruded on retailers' wall space, and thus infringed retailers' First Amendment rights, where all consumers who actually purchased cell phone would receive handout providing same information. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿2144

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2143 Telephones
92k2144 k. In general. Most Cited Cases

Telecommunications 372 ⚿1026

372 Telecommunications
372IV Wireless and Mobile Communications

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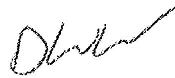
PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC
Bedminster, NJ
Salem, MA

MEMORANDUM

TO: **Attorney General Janet Mills**



FROM: **Severin M. Beliveau and Daniel W. Walker, Preti Flaherty, on behalf of the Maine Organic Farmers and Growers Association**

DATE: March 28, 2013

RE: Constitutionality of LD 718, An Act To Protect Maine Food Consumers' Right To Know about Genetically Engineered Food and Seed Stock

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This memo addresses constitutional issues surrounding Legislature Document No. 718, An Act to Protect Maine Food Consumers' Right To Know about Genetically Engineered Food and Seed Stock (the "Act"). The Act could be subject to challenge under the First Amendment, the Supremacy Clause (federal preemption), and the Dormant Commerce Clause. Each of these challenges would be without merit.

I. First Amendment

A. "Produced with Genetic Engineering"

The Act requires that "any food or seed stock offered for retail sale that is genetically engineering must be accompanied by a conspicuous disclosure that states 'Produced with Genetic Engineering.'" We expect this provision to be challenged on the ground that it compels speech in violation of the First Amendment. While such a challenge would not be frivolous, there are solid grounds for concluding that the Act is constitutional.

The leading case on compelled commercial speech is *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1986). As explained by the Supreme Court in 2010, a required disclosure passes muster under *Zauderer* if it is (1) purely factual and uncontroversial, and (2) reasonably related to the State's interest in preventing deception of consumers." *Milavetz v. U.S.*, 130 S. Ct. 1324, 1339-40 (2010). While statutes that *ban or restrict* commercial speech are subject to heightened scrutiny (*see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'r*, 447 U.S. 557 (1980)), disclosure requirements need only be supported by "a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose. . . ." *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2nd Cir. 2001). The Courts of Appeals have made clear that a compelled disclosure statute need not be "intended to prevent consumer confusion or deception per se," if its objective is 'to better inform consumers about the products they purchase.'" *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2nd Cir. 2001) (noting that statutory goal of "reduc[ing] the amount of mercury released into the environment" was "inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products. "); *see also Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429

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F.3d 294, 310 n.8 (1st Cir. 2005) (rejecting the notion that *Zauderer* test "is limited to potentially deceptive advertising directed at consumers.") (quotation marks omitted).

The "purely factual and uncontroversial" element of the *Zauderer* test is easily met by the Act, which only requires disclosure of an indisputable fact—that the product in question was produced with genetic engineering. The required disclosure does *not* say that genetic engineering is harmful to the consumer—a statement that would no doubt be controversial—but simply that genetic engineering has occurred. With respect to the foods and seed stocks that are subject to the Act, that is a fact about which there can be no reasonable dispute.

The "reasonably related to the State's interest in preventing deception of consumers" prong of *Zauderer* is also met, for two reasons. First, there is evidence that consumers are confused about the prevalence of GMO ingredients in the food they eat. Employees of Maine's food co-ops are expected to testify that their customers assume that food sold in health food stores, and food promoted as "natural" in general, does not contain genetically engineered ingredients, and that this assumption is very often incorrect. See *New York State Restaurant Assoc. v. New York City Board of Health*, 2008 U.S. Dist. LEXIS 31451 (S.D.N.Y. April 16, 2008) at *39, *affirmed* 556 F.3d 114 (2nd Cir. 2009) (upholding under *Zauderer* requirement that restaurants display caloric content of menu items based (in part) on "evidence indicating that consumers tend to underestimate the calorie content of restaurant meals, sometimes significantly.").

Second, *Sorrell* and *Rowe* make clear that, independent of consumer confusion *per se*, the Act is justified as a means to better inform Mainers about the presence of potentially harmful ingredients in their food. *See Sorrell*, 272 F.3d at 115; *Rowe*, 429 F.3d at 310 n. 8. Scientists are expected to testify that there are grounds for concern, based on studies conducted with laboratory animals and the absence of long-term human studies, about the health effects of long-term human consumption of food made with genetically engineered ingredients.

The Second Circuit's decision in *International Dairy Foods Assn. v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996) poses no obstacle to the constitutionality of the Act. In that case a Vermont statute required that milk derived from cows treated with Bovine Growth Hormone disclose that fact on the package. Retailers were also required to display signs indicating that the products contained milk from treated cows. *Id.* at 70. The Second Circuit found these requirements unconstitutional. But unlike the Act, the Vermont statute had not been justified based on preventing deception of consumers or on health concerns; the state interest offered by the Vermont legislature was simply "strong consumer interest and the public's right to know . . . ." *Id.* at 73 (quotation marks omitted); *see also id.* at n. 1 ("Vermont's sole expressed interest was . . . 'consumer curiosity.'"). The Second Circuit held that "[t]hese interests are insufficient to justify compromising protected constitutional rights." *Id.* at 73. Here, however, in clear contrast to *Amestoy*, the legislature is animated by articulated concerns about public health and consumer deception that go far beyond mere consumer interest or curiosity.

The *Amestoy* court also found it significant that it was "undisputed that neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an

untreated cow." *Id* at 73. Because the record was devoid of any "evidence from which an objective observer could conclude that rBST has any impact at all on dairy products," the Second Circuit concluded that "Vermont could not justify the statute on the basis of 'real' harms." Here, in contrast, it *is* possible to distinguish foods and seed covered by the Act from those that do not contain GMOs, and the Maine legislature *has* identified real harms these differences may cause.[1]

B. "Natural"

The Act also provides that a food or seed stock that has been produced with genetic engineering "may not be described on the label or by similar identification as 'natural.'" This is a provision that bans speech, rather than compelling it, so it is subject to heightened scrutiny under *Central Hudson*. There are four prongs to the *Central Hudson* analysis:

(1) whether the expression concerns lawful activity and is not misleading;

(2) whether the government's interest is substantial;

(3) whether the labeling law directly serves the asserted interest; and

(4) whether the labeling law is no more extensive than necessary.

447 U.S. at 566. For present purposes, only the first prong is relevant, because if the first prong is not met—that is, if the speech in question is unlawful or misleading—the remaining prongs need not be considered, as unlawful or misleading speech is not entitled to heightened First Amendment protection. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) ("Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading.").

It is indisputable that it would be misleading to characterize genetically modified seeds or food containing GMOs—which, by definition, do not occur in nature—as "natural." That being so, the *Central Hudson* analysis ends with the first prong, and the Act's provision regulating the use of the designation "natural" passes First Amendment muster with ease.

II. Federal Preemption

A. The Food, Drug & Cosmetic Act

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[1] In *Amestoy*, the Second Circuit applied the *Central Hudson* test, rather than the less exacting *Zauderer* test. But as the same court explained five years later in a decision applying *Zauderer* to a compelled disclosure requirement, "[a]lthough we applied the *Central Hudson* test in [*Amestoy*] . . . our decision was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" 272 F.3d at 115. Because the Act is supported by interests other than the gratification of consumer curiosity, *Zauderer*, not *Central Hudson*, is the standard under which courts will weigh its compelled disclosure requirement.

The federal government regulates food labels. But the Food Drug & Cosmetic Act, as amended by the Nutrition Labeling and Education Act of 1990, expressly provides that it "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A of the Federal Food, Drug, and Cosmetic Act." P.L. 101-535, § 6(c)(1), 104 Stat. 2364 (21 U.S.C. § 343-1 note).

The Food Drug & Cosmetic Act expressly preempts states from imposing requirements "of the type" provided for under federal law that are not identical to the federal requirements. 21 U.S.C. § 343-1. But the requirements Maine would impose are *not* covered by section 343-1, as the Maine requirements are not of the type provided for under federal law. Federal law precludes states from imposing requirements that would diverge from the federal "standard of identity" for a food (that is, the definition of what constitutes that food) (§ 343-1(1)); or from federal standards on imitation foods, weight/measure labeling, "common name" labeling, and "major food allergen" labeling (§ 343-1(2)); or on offers for sale under another name, misleading containers, conspicuousness of information required by federal law, representations as to quality and fill of container, and labeling of artificial flavoring, coloring, or preservatives (§ 343-1(3)); or nutrition information or levels or health-related claims (§ 343-1(4)-(5)).

Federal law expressly bars states from enacting requirements of these specific types that are "not identical" to federal requirements (21 U.S.C. § 343-1), but it does not bar states from imposing other labeling requirements that are not expressly preempted. *See* P.L. 101-535, § 6(c)(1), 104 Stat. 2364 (21 U.S.C. ¶ 343-1 note). As the Third Circuit has observed, "Congress was cognizant of the operation of state law and state regulation in the food and beverage field, and it therefore enacted limited exceptions in [the Food Drug & Cosmetic Act." *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 337 (3rd Cir. 2009). "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Id.* (quoting *Wyeth v. Levine*, 129 S.Ct. 1187, 1200 (2009)).

Federal law does not impose any requirements with respect to GMO labeling or the designation "natural." Thus the disclosures Maine would require are not "of the type" that are preempted by federal law.

B. The Federal Insecticide, Fungicide, and Rodenticide Act

With respect to seeds, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") provides that states "shall not impose or continue in effect any requirements for labeling or packaging [of a federally registered pesticide or device] in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). The potential relevance of FIFRA is that in certain genetically modified seeds, the genetic modification functions as a pesticide (rather than enhancing the quality or performance of the plant).

The Act, however, regulates seeds, not pesticides. It simply requires that seeds that were produced with genetic engineering be labeled as such. The objective of the disclosure requirement is to reveal genetic engineering in all of its forms. One form genetic engineering may sometimes take is to make plants function as pesticides, but the point of the legislation is to regulate seed labels, not pesticide labels. While certain seeds may have genetically engineered characteristics that function as pesticides, a seed is still a seed, and FIFRA does not prohibit states from requiring disclosure of a general characteristic of certain seeds—that they were produced with genetic engineering—found in pest-resistant and non-pest-resistant seeds alike.

III. <u>Dormant Commerce Clause</u>

The Act makes no distinction between in-state and out-of-state foods and seeds; it does not discriminate in any way against out-of-state products. As such, it is valid under the Dormant Commerce Clause unless the "incidental" burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The incidental burden imposed on interstate commerce by the "Produced With Genetic Engineering" requirement is small, as this disclosure requirement is not onerous and applies to in-state and out-of-state sellers alike. The burden on out-of-state sellers who would be required to conform their packaging to the Maine requirement would be no greater than the burden imposed on out-of-state milk producers in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 442 (1981), where the Supreme Court upheld a Minnesota law restricting the sale of milk in non-refillable/non-returnable plastic containers with the observation that "the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight." This slight incidental impact on interstate commerce cannot be said to be clearly excessive in relation to the local benefits of reducing consumer confusion about the prevalence of GMO in Maine food and informing Mainers of the presence of potentially harmful ingredients. *Maine v. Taylor*, 477 U.S. 131, 149 (1986) ("Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible."). Any interest Maine has that is sufficient to withstand a First Amendment challenge (*see supra*) would easily be enough to prevent the incidental burden of the Act's labeling requirements from being clearly excessive in relation to the local benefits.

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