

# As the Crow Flies

## Guidelines and legalities to consider for 'local' labeling

By MICHAEL ERDMAN

Visit your neighborhood grocery store or farmers' market and chances are you'll find a variety of fruits and vegetables labeled as "Locally Grown." Growers, wholesalers, retailers, and others are applying the designation to produce, mindful that many consumers now associate locally grown food with increased nutritional value, enhanced taste, and support for area farmers. And because, by some estimates, our food travels an average of 1,500 miles from farm to plate, locally grown is also considered environmentally-friendly, with a reduced carbon footprint.

There are certainly skeptics who question these claimed environmental advantages, pointing to the higher prices often charged for locally grown food, while others believe locally grown labels are misleading, marketing ploys, or fads.

Fad or not, today's consumers have shown remarkable interest in buying local, providing the industry with a strong incentive to label fruits and vegetables as locally grown. But what qualifies as locally grown food? Every strawberry and red pepper was grown somewhere, and in every case that 'somewhere' was local to some surrounding geographic area. While there's no disputing a hometown farmer's strawberries are locally grown, if those same berries are loaded on a trailer and shipped 3,000 miles, they cannot be considered 'local' when offered for sale at their destination. When it comes to produce, what's local to a Californian isn't local to a New Yorker. But at what point does labeling produce as "Locally Grown" expose producers, wholesalers, retailers, and others to potential legal liability?

### State & Federal Restrictions

Neither Congress, the courts, nor the federal Food and Drug Administration (FDA) have offered the industry any specific guidelines for labeling food as locally grown. Similarly, standards for applying a "Locally Grown" label to produce have not been established by legislatures or regulators in key production states such as California, Florida, or Michigan.

In a few cases, however, U.S. Department of Agriculture (USDA) regulations offer some insight. The USDA administers nutritional programs for seniors as well as the Women, Infants, and Children (WIC) initiative. While program rules don't relate to food labeling, they do offer some helpful definitions: "locally grown" for purposes of the Seniors Program stipulates "grown within state borders" but further provides that participating agencies may also choose produce "grown in areas of states



adjacent to that state, as long as such areas are part of the United States." The WIC program considers locally grown as "produce grown only within state borders" but again includes "areas in neighboring states adjacent to its borders."

Perhaps because of the lack of any definitive federal guidelines, several states have opted to address local food labeling themselves. Connecticut law provides that "farm products grown or produced in Connecticut may be advertised or sold in Connecticut as 'Native,' 'Native-Grown,' 'Local,' or 'Locally-Grown.'" The same goes for farm products "grown or produced within a ten-mile radius of the point of sale."

In 2010 Maryland's legislature unanimously passed, and the governor promptly signed, a bill authorizing the state's agriculture secretary to adopt standards regulating the use of "Locally Grown" and "Local" to advertise or identify agricultural products. The law took effect October 1, 2010 though the department has yet to announce or adopt specific rules.

### Key Elements

As the 'locally grown' debate rages on, there are a few labeling issues you should keep in mind:

- Congress, the courts, and the FDA have no official legal guidelines for locally grown labeling
- certain state laws, especially pertaining to branding programs, do have requirements and/or specifications
- some retailers are now clearly defining what 'locally grown' means in their stores
- most farmers' markets have rules governing what can be labeled as 'local' produce
- PACA and the FDCA have strict requirements about product misrepresentation.

To learn more about each key element, look for the symbols throughout the article.

## Retailers & Market Labeling

More often than not, food retailers acknowledge the benefits and availability of locally grown food, but refrain from publicly identifying what they consider to fall within the category. There are some exceptions: Whole Foods' website declares that "while only products that have traveled less than a day (seven or fewer hours by car or truck) can even be considered for 'local' designation, most [Whole Foods] stores have established even shorter maximum distances."

Michigan-based Meijer operates in five states and sources heavily from regional farmers. Meijer even features a seasonal growing chart on its website showing the months when particular commodities are available from area growers. Walmart, the nation's largest grocery retailer, planned to dramatically increase 'locally grown' produce, considering fruit and vegetables grown within the state borders of where a store is located as 'local.'

Other retailers have gotten creative, using highway signs to denote food miles while some have taken the sly route, using phrases like "harvested locally," when in reality, every fruit or vegetable is harvested locally—where it grows. Even fast food giant McDonald's cashed in on the locally grown craze with its "From Here" campaign in Washington, advertising potatoes and apples sourced from in-state growers and shippers.

Lastly, everyone equates 'fresh' with farmers' markets, yet even this designation has come under fire. Most farmers' markets do, however, have rules governing what participating vendors may sell to the public and how it can be labeled. Chicago's Green City Market requires all products be from "the local, Midwest region and reflect Midwest seasonality." Green City further defines 'local' as items produced in the collar states around Lake Michigan, i.e., Illinois, Indiana, Wisconsin, or Michigan, a broader standard than the intrastate definition employed by the USDA programs described above.

## PACA & COOL Labeling

While these definitions offer some guidance, perhaps the most important generally applicable standards come from federal law. Of course the Food, Drug, and Cosmetics Act's (FDCA) most widely known food labeling provisions relate to contents, nutritional levels, and health-related claims. But the FDCA also

classifies food as misbranded if, among other things, its labeling is "false or misleading." Misbranding is a major violation under the FDCA, and can be actionable under state consumer fraud laws, yet no private litigation or FDA enforcement activity (recalls, field corrections, Warning Letters, etc.) has come to light related to foods labeled as 'locally grown.'

The Perishable Agricultural Commodities Act (PACA) makes it unlawful "for any commission merchant, dealer, or broker to misrepresent the state, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in

interstate or foreign commerce." On its face this provision would appear to prohibit, for example, marketing Wisconsin apples as Michigan apples.

Similarly, labeling strawberries grown in Watsonville, CA and sold in Cleveland, OH as "Locally Grown" suggests the berries were grown in or around Cleveland or perhaps within Ohio or a nearby state—certainly not California. Such a practice could constitute a misrepresentation of the state of origin and thus a violation of the statute.

Federal law also provides for country of origin labeling (COOL), requiring retailers to



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disclose the source of certain foods, especially perishable agricultural commodities. The law does not, however, expressly address locally grown labels. Other countries have adopted COOL laws as well: an Australian produce company was recently prosecuted for removing COOL tags from asparagus imported from Peru and labeling it as Australian produce.

### State & Geographic Labeling

Of course you needn't limit geographic labeling to locally grown. A Watsonville (Santa

Cruz County), California grower can label produce as "Grown in Watsonville, CA," "Grown in Santa Cruz County, CA," or simply "Grown in California." This is telling consumers precisely where the food was grown, which does not change regardless of where the food is ultimately sold.

Many state agriculture departments administer branding programs intended to showcase state-grown foods. For example, New Jersey's Department of Agriculture licenses use of the "Jersey Fresh" logo for a lengthy list of agricultural commodities produced and packed at an in-state site approved by the department. In California, a public-

### Local or Nonlocal?

Can produce be both local and nonlocal at the same time? Yes, it can, depending on how 'local' is defined. For example, take the plight of the fictitious Junior's Blueberries. Junior grows his berries near Pemberton, New Jersey and sells to a national grocery chain with stores located throughout the East Coast.

After harvest, Junior's blueberries are packed and shipped to the retailer's regional distribution center in Baltimore, about 150 miles away. The berries are then trucked to stores in the Washington DC, New York, Delaware, Maryland, and New Jersey areas. If 'locally grown' is all about food travel miles, are Junior's blueberries still local? Are they still local to New Jersey? What about upstate New York? Or are the berries considered regional produce, and local to the entire area? Without definitive guidelines to clarify what can legitimately be called 'local,' the conundrum will continue.



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private partnership created the Buy California Marketing Agreement, which licenses several “CA Grown” marks and phrases. “Arizona Grown” promotes any food or agricultural item grown, raised, or processed in Arizona, just as “Fresh from Florida” markets Florida commodities.

The costs and conditions for participating in various state programs vary. At least one program appears to be in jeopardy: the Michigan Department of Agriculture’s website explains that the state’s “ongoing fiscal

crisis and subsequent reductions in funding...has caused the Select Michigan program to be severely curtailed. The department will temporarily discontinue signing Memorandums of Understanding for the use of the Select Michigan logo.”

Additional benefits of expressly labeling produce as grown in a particular state, county, city, etc. and/or participating in a state-sanctioned branding program include the cost efficiencies of uniform geographic labeling, and freedom from sorting produce for local versus nonlocal distribution.


## Truth in Labeling

So where does this leave growers or wholesalers hoping to capitalize on consumer interest in locally grown produce without becoming a test case for the FDA or other government agency? For starters, commit to truthfulness. It’s hard to imagine a regulator or anyone else would object to labeling as “Locally Grown” intrastate produce harvested three miles from its point of sale.

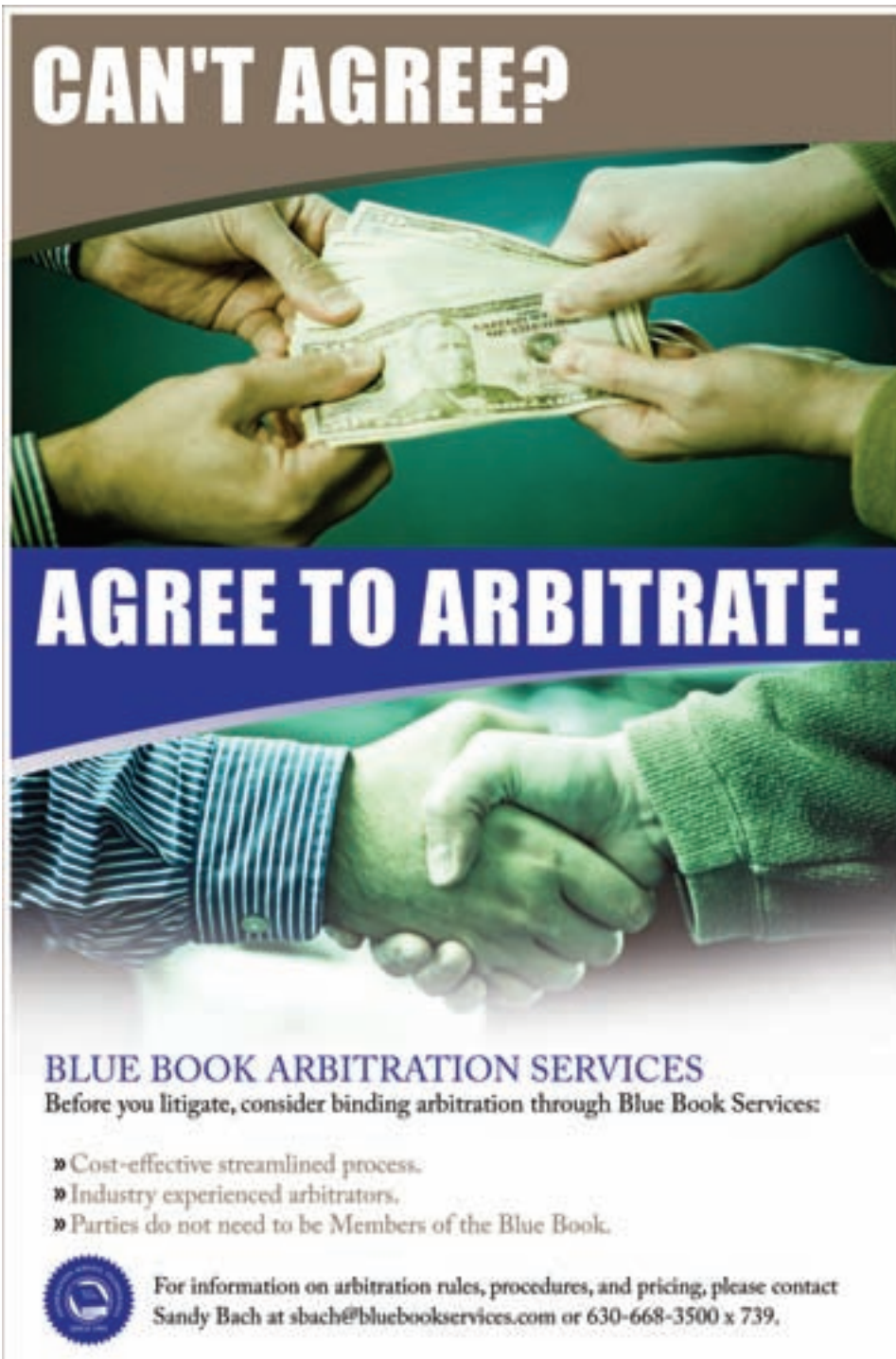
But on the other end of the continuum, fruits and vegetables grown then shipped 3,000 miles for public sale as ‘local’ is blatantly false and exposes growers, wholesalers, and others to civil litigation and administrative action. Product labeled as “Locally Grown” should indeed be locally grown, factoring in the place of origin and ultimate point(s) of sale.

Unfortunately there is no magical cutoff point. While it is tempting to simply draw the line at state borders and adjacent areas, remember that U.S. states vary significantly in size and shape. Think of produce grown in Redding (northern), CA and sold in Oceanside (southern), CA, a distance of well over 500 miles. Blindly relying on state borders ignores actual distances food may travel between farm and point of sale. In the future, a time and/or distance criteria will probably be in order.

In the meantime, to help reduce exposure to liability when using a “Locally Grown” label, consider supplementing your labels with precise geographic information, such as “Locally Grown – Salinas, CA.” Alternatively, consider participating in your state’s branding program, which usually includes a unique logo identifying where the produce was grown.

Finally, before using a generic “Locally Grown” label, seek legal advice tailored to your particular situation. Laws and regulations in the state(s) where your produce is sold may provide additional guidance. 

Michael H. Erdman is a partner at Chicago’s Teeple Leonard & Erdman ([www.teeplelaw.com](http://www.teeplelaw.com)) law firm. He concentrates his practice on business litigation including antitrust, commercial, agriculture, real estate, copyright and trademark infringement, and other matters before federal and state courts, administrative bodies, and arbitration panels.




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