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A PRACTITIONER'S GUIDE TO DEFENDING "NATURAL" FOOD LABELING LITIGATION

*Lauren E. Handel**

I. INTRODUCTION

One of the most active areas of class action litigation involves consumer class actions based on allegedly deceptive labeling and advertising of food products.¹ Hundreds of such cases have been filed,² and new cases are being filed all the time. Most of the cases claim that manufacturers falsely and misleadingly labeled their products as "natural" despite allegedly containing artificial or highly processed ingredients or ingredients derived from genetically modified organisms ("GMOs"). Plaintiffs filed at least 100 such "natural" labeling cases between 2011 and 2013.³

The litigation appears to have impacted industry. For example, in response to threatened lawsuits from the Center for Science in the Public Interest ("CSPI"), Cadbury-Schweppes dropped the "natural" label from its 7UP beverages.⁴ Likewise, Kraft dropped the "natural" claim from its Capri Sun drinks and Nestle agreed to remove such claims from Edy's/Dreyer's ice creams after CSPI filed suit.⁵ Additionally, because of several lawsuits, Snapple no longer uses the "natural" claim on products containing high fructose corn syrup.⁶ Perhaps because of the litigation risk,

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¹ See Stephanie Strom, *After Tobacco, Lawyers Set Their Sights on Food Industry*, N.Y. TIMES, Aug. 19, 2012, at A1, available at http://www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html?pagewanted=all&_r=0.

² Rebecca Cross, BraunHagey & Borden LLP, Webinar, Regulatory Update: Are natural claims worth the legal headaches? (June 26, 2013), at <http://www.dairyreporter.com/smartlead/view/795742/4/Regulatory-update-Are-natural-claims-worth-the-legal-headaches?do=submit>.

³ Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, WALL ST. J. (Nov. 6, 2013, 12:07 AM), <http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084>.

⁴ *7UP Drops 'All Natural Claim'*, CTR. FOR SCI. IN THE PUB. INTEREST (Jan 12, 2007), <http://cspinet.org/new/200701121.html>.

⁵ *Litigation Project - Closed Cases*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/litigation/closed.html> (last visited Sept. 21, 2014).

⁶ See *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2011 WL 196930, at *1 (S.D.N.Y. Aug. 5, 2010).

the percentage of new food products introduced in the US making “natural” claims decreased from thirty-three percent in 2007 to twenty-two percent as of July 2014.⁷ Increasingly, manufacturers are replacing “natural” labels with “simple,” “wholesome,” “pure,” “fresh,” or “minimally processed” labels.

As “natural” labeling litigation is relatively new and no cases have yet gone to trial, it is unknown whether this type of litigation ultimately will prove fruitful for plaintiffs. However, given that new cases continue to be filed and that plaintiffs have obtained multi-million dollar settlements,⁸ it appears that the wave of “natural” claims litigation will not quickly come to an end. Therefore, food manufacturers and their attorneys are well advised to understand the regulatory background, claims, and defenses at issue in “natural” labeling cases.

This article addresses those issues. It is intended to be a resource for defense lawyers and food businesses to help prepare for possible “natural” labeling lawsuits and to minimize the risk of such litigation.

II. BACKGROUND

Consumer beliefs about natural foods combined with vague and lax regulation of “natural” claims have created perfect conditions for litigation.

A. Consumer (Mis)understanding of “Natural” Claims

“Natural” claims provide an attractive target for plaintiffs’ lawyers because consumers increasingly want to buy natural foods, but have little understanding of what the term “natural” means. In 2004, the National Marketing Institute reported that sixty-three percent of consumers have a preference for natural foods and beverages.⁹ Other surveys have shown that

⁷ Tom Vierhile, Webinar, *The Natural and Clean Label Market Opportunity* (June 26, 2013), <http://www.dairyreporter.com/smartlead/view/795736/4/The-natural-and-clean-label-market-opportunity>; Maggie Hennessy, *Slowdown in Natural Claims Inevitable* Say Market Researchers, FOODNAVIGATOR-USA.COM (Aug. 20, 2014 4:39 PM), <http://www.foodnavigator-usa.com/Markets/Mintel-Datamonitor-Slowdown-in-natural-claims-inevitable>.

⁸ F.sterl, *supra* note 3.

⁹ Letter from Andrew C. Briscoe III, President & CEO, Sugar Ass’n, to Division of Dockets

more consumers prefer products labeled "natural" to products labeled "organic." In one poll conducted in 2009, fifty percent of respondents "said the 'natural' label was either important or very important to them," while only thirty-five percent felt that way about the "organic" label.¹⁰ Another study conducted in 2009 found that "31 percent of consumers surveyed believed '100% natural' is the most desirable eco-friendly label claim, while only 14 percent selected '100% organic.'"¹¹ But even though consumers apparently prefer the "natural" label, they are likely to believe (incorrectly) that the term is largely synonymous with "organic." According to a 2010 study by Hartman Group, consumers largely associate both "organic" and "natural" with the "absence of pesticides, herbicides, growth hormones, antibiotics, and GMOs."¹² Yet, all of those things may be used in products labeled "natural."

B. Climate of Lax Regulatory Enforcement

Though evidence suggests that consumers are likely to be confused by food label claims, the government has done little to crack down on misleading labels. In a September 2009 speech to the National Food Policy Conference, Food and Drug Administration ("FDA") Commissioner Margaret Hamburg acknowledged that "[t]he public health importance of food labeling as an essential means for informing consumers about proper nutrition . . . has not been substantially addressed since the FDA implemented the Nutrition Labeling and Education Act, more than 16 years ago."¹³ On March 3, 2010, Commissioner Hamburg issued an "Open Letter to Industry,"¹⁴ announcing a new agency emphasis on food labeling

Management, FDA, at 3-4 (Feb. 28, 2006) (Docket No. FDA-2006-P-0206-0002), available at http://www.cspinet.org/new/pdf/sugar_fda_petition.pdf (citing E. A. Sloan, *Gourmet & Specialty Food Trends*, 58 FOOD TECH. 7, 26-38 (July 2004)).

¹⁰ CHARLOTTE VALLAeYS ET AL., CORNUCOPIA INST., CEREAL CRIMES: HOW "NATURAL" CLAIMS DECEIVE CONSUMERS AND UNDERMINE THE ORGANIC LABEL-A LOOK DOWN THE CEREAL AND GRANOLA AISLE 10 (Oct. 2011), available at http://cornucopia.org/cereal-scorecard/docs/Cornucopia_Cereal_Report.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ Dr. Margaret A. Hamburg, Comm'r of FDA, Keynote Address at National Food Policy Conference (Sept. 8, 2009), available at <http://www.fda.gov/NewsEvents/Speeches/ucm182061.htm>.

¹⁴ Open Letter from Margaret A. Hamburg, Comm'r of FDA, to food indus. (March 3, 2010),

claims, including a front-of-pack labeling initiative and a call to manufacturers to improve compliance with labeling rules.¹⁵ At about the same time, the FDA issued seventeen warning letters regarding misbranded foods.¹⁶ Despite these efforts, in January 2011, the U.S. Government Accountability Office issued a report finding that the “FDA may not be doing all it can to help ensure that food labels are free from false or misleading claims.”¹⁷

Under Commissioner Hamburg, the FDA has increased enforcement against misbranded foods, yet it has not done much specifically with regard to “natural” claims. In the ten years before 2011, the FDA issued only five warning letters asserting that labels containing “natural” claims were misbranded.¹⁸ In 2011 alone, the FDA issued four such letters, which may partially explain the significant increase in lawsuits over “natural” claims filed that year.¹⁹ Yet this enforcement trend did not continue in subsequent years. Since 2011, the FDA has taken only three actions regarding “natural” claims. In 2012, it issued an import alert regarding an Israeli berry juice product containing sulfur dioxide as a preservative, which the FDA said was misbranded as “natural.”²⁰ In 2013, the FDA issued a warning letter to Waterwheel Premium Foods Pty Limited finding that the company’s crackers, which contained artificial rye flavor, were misbranded because they were labeled as “All Natural.”²¹ And in 2014, the FDA issued a warning letter to Middle East Bakery, LLC, citing the company for improperly

available at <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202733.htm>.

¹⁵ See *Front-of-Package Labeling Initiative*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202726.htm> (last updated May, 17, 2013).

¹⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 14 (2011).

¹⁷ *Id.* at 27.

¹⁸ See Nicole E. Negowetti, *A National “Natural” Standard for Food Labeling*, 65 ME. L. REV. 581, 588-89 (2013); Nathan A. Beaver, *“Natural” Claims: The Current Legal and Regulatory Landscape*, *Aspatore*, 2012 WL 4971935, at *6 (2012).

¹⁹ Beaver, *supra* note 18, at *6.

²⁰ U.S. FOOD & DRUG ADMIN., IMPORT ALERT 99-20 (Apr. 3, 2012), http://www.accessdata.fda.gov/cms_ia/importalert_264.html.

²¹ Warning Letter from Roberta F. Wagner, Dir. Office Compliance, U.S. Food & Drug Admin. to John Stanger, Technical Manager, Waterwheel Premium Foods Pty Ltd. (July 26, 2013), <http://www.fda.gov/iceci/enforcementactions/warningletters/2013/ucm364729.htm>.

claiming its blueberry pancakes were “All Natural” when they contained sodium acid pyrophosphate, a synthetic substance.²²

C. The Regulatory Framework Governing “Natural” Claims

The absence of clear regulatory standards for the use of “natural” labels is another significant factor that has spurred litigation. Apart from the general requirement not to misbrand foods, there is no binding legal standard for the use of the term “natural” in food labeling.²³

1. Misbranding

Under the federal Food, Drug, and Cosmetic Act (“FDCA”), food in interstate commerce may not be labeled in any way that is “false or misleading.”²⁴ Likewise, the Federal Meat Inspection Act (“FMIA”) and the Poultry Products Inspection Act (“PPIA”) prohibit the misbranding of

²² Warning Letter from Mutahar S. Shamsi, Dist. Dir., U.S. Food & Drug Admin. to Leopoldo Guggenheim, President and Co-owner, Middle East Bakery, LLC (Sept. 18, 2014), <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2014/ucm415564.htm>.

²³ As discussed in Section II.C.2.a. *infra*, there is no federal statute or regulation regarding the use of the term “natural” to describe foods or ingredients other than “natural flavors.” Connecticut, Massachusetts, and Vermont are the only states with laws on the use of “natural” in general food labeling. See CONN. GEN. STAT. ANN. § 21a-92 (2014) (“Natural food” means food (A) which has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring or artificial coloring and (B) which has not been processed in a manner that makes such food significantly less nutritive. Processing of food by extracting, purifying, heating, fermenting, concentrating, dehydrating, cooling or freezing shall not, of itself, prevent the designation of such food as “natural food.”) *amended by* 2013 Conn. Acts 13-183 (Reg. Sess.) (to add “which has not been genetically engineered”); 105 MASS. CODE REGS. 520.116 (2014) (“Natural food” means food which in its processing has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring, artificial coloring, or has been processed in such a manner so that it become significantly less nutritive. Natural foods may only be processed by extracting, purifying, heating, fermenting, concentrating, dehydrating, cooling, or freezing.”); VT. STAT. ANN. tit. 9, § 3043(c) (2014) (prohibiting “natural” labeling of foods made with genetic engineering). Several states regulate the use of the term “natural” with regard to bottled water. *E.g.*, GA. COMP. R. & REGS. 40-7-6-.01 (1996) (“Natural Water” means bottled spring, mineral, artesian, or well water which is derived from an underground formation, which is not altered, and is not derived from a municipal system or public water supply.”); see also CAL. HEALTH & SAFETY CODE § 111190 (West 2014); D.C. MUN. REGS. tit. 25-B, § 1004 (2014); FLA. STAT. ANN. § 500.11 (West 2014); HAW. REV. STAT. § 328D-1 (2014); LA. REV. STAT. ANN. § 40:737 (2013); 10-144-235 ME. CODE R. § 2 (LexisNexis 2014); MD. CODE ANN., HEALTH-GEN. § 21-336 (West 2014); MO. CODE REGS. ANN. tit. 19, § 20-1.050(2)(C)3.(E) (2013); OHIO REV. CODE ANN. § 913.24 (West 2014); OKLA. ADMIN. CODE § 310:225-1-2 (2014); S.C. CODE ANN. REGS. 61-32 (2014); WASH. REV. CODE ANN. § 69.07.180 (West 2014); 010-004 WYO. CODE R. § 8 (LexisNexis 2014).

²⁴ 21 U.S.C. § 331 (2012) (prohibiting misbranded food); 21 U.S.C. § 343(a) (2012) (defining “misbranded”).

meat and poultry products, respectively.²⁵ Under the FMIA and the PPIA, the US Department of Agriculture's ("USDA") Food Safety Inspection Service ("FSIS") has primary authority for regulating labeling of meat and poultry products,²⁶ which are products containing more than three percent raw meat, at least two percent cooked meat or poultry, or at least ten percent cooked poultry skins, giblets or fat.²⁷ All other food products fall within the jurisdiction of the FDA pursuant to its authority under the FDCA.²⁸ The FSIS must preapprove labels for meat and poultry to ensure that they are not false or misleading and that they comply with other requirements before the products may enter commerce.²⁹ The FDA does not preapprove labels for foods within its jurisdiction. But it may take enforcement action against producers or others responsible for misbranded foods by issuing warning letters, ordering administrative detention,³⁰ or referring cases to the US Department of Justice to bring civil actions in federal court for seizure³¹ or injunction.³²

2. FDA And USDA Policies on "Natural" Claims

The FDCA, FMIA, and PPIA do not define or set limits on the use of the term "natural" to describe foods or ingredients. Nor has the FDA or the USDA issued any regulation defining "natural" for purposes of food labeling, except to the extent that they distinguish between natural and

²⁵ 21 U.S.C. § 458(a)(2) (2012) (poultry); 21 U.S.C. § 610(d) (2012) (meat).

²⁶ 21 U.S.C. §§ 451, 607 (2012).

²⁷ 9 C.F.R. § 381.15(a) (2012) (poultry); U. S. DEPT. OF AGRIC., FOOD SAFETY & INSPECTION SERV., FOOD STANDARDS AND LABELING POLICY BOOK 10 (2005). http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (discussing "amenability").

²⁸ See 21 U.S.C. § 341 (2012).

²⁹ The FMIA and PPIA both provide that no food article "shall be sold or offered for sale by any person in commerce, under any name or other marking or labeling . . . but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary." 21 U.S.C. § 457(c) (2012) (PPIA); see 21 U.S.C. § 607(d) (2012) (substantially similar language in FMIA); see also Labeling Approval, 9 C.F.R. § 317.4(a) (2014); False or Misleading Labeling Practices Generally, 9 C.F.R. § 317.8(a) (2014).

³⁰ 21 U.S.C. § 334(h)(1)(A) (2012).

³¹ 21 U.S.C. § 334 (2012).

³² 21 U.S.C. § 332 (2012).

artificial flavors and coloring.³³ Both agencies, however, have informal policies on the use of the term "natural" in food labeling.

(a) FDA

FDA policy defines "natural" as "meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food."³⁴ The FDA considers its "policy" to be an advisory opinion³⁵ and will not "recommend legal action against a person or product" that complies with its policy.³⁶ Yet, the policy does not establish legal requirements regarding the use of "natural" claims.³⁷

The FDA has repeatedly declined to formally define "natural." In 1991, the FDA requested comments on whether it should define "natural" for purposes of food labeling and how it might do that.³⁸ After receiving thousands of comments, the agency decided that, due to resource constraints and competing priorities, it would not undertake the rulemaking necessary to define "natural."³⁹ Then, in February 2006, the Sugar Association petitioned the FDA to establish regulations governing the use of "natural" for food and beverages and, specifically, to adopt the USDA's

³³ "Natural flavor" or "natural flavoring" are defined in federal regulations as "the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional." 21 C.F.R. § 101.22(a)(3) (2014) (FDA definition); *see also* 9 C.F.R. § 317.2(f)(1)(i)(B) (2014) (USDA definition of same). "Natural color" or "natural coloring" is not "artificial coloring," as defined in 21 C.F.R. § 101.22(a)(4) (2014) (referencing definition of "color additive" in 21 C.F.R. § 70.3(f) (2014)).

³⁴ Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101).

³⁵ 21 C.F.R. § 10.85(e) (2014).

³⁶ 21 C.F.R. § 10.85(d) (2014).

³⁷ 21 C.F.R. § 10.85(j) (2014).

³⁸ Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105).

³⁹ Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. at 2302, 2407.

informal definition (discussed below).⁴⁰ The petition remains pending, and the FDA has taken no official action on it. More recently, several courts have stayed “natural” labeling cases and asked the FDA to decide the meaning of “natural.”⁴¹ The FDA has not accepted the invitation. Instead, it has responded that such a determination would require rulemaking that the agency cannot undertake due to resource constraints and higher priorities.⁴²

The FDA has not provided guidance on whether “natural” labeling is appropriate for foods produced by genetic engineering. It has determined that foods produced through genetic engineering are safe and effectively no different than their traditional counterparts.⁴³ Accordingly, in guidance to the food industry, the FDA has taken the position that the use of genetic engineering in the production of food is not material information that must be disclosed in products’ labeling.⁴⁴ Yet, the FDA’s guidance says nothing about whether it would be misleading to label foods produced with GMOs as “natural.”

⁴⁰ This petition was joined by Center for Science in the Public Interest. Letter from Stephen Gardner, Dir. of Lit., Ctr. for Sci. in the Pub. Interest, to Division of Dockets Management, FDA, (Mar. 12, 2006) (Docket No. FDA-2006-P-0206-0007), available at http://www.cspinet.org/new/pdf/fda_natural.pdf.

⁴¹ See discussion of primary jurisdiction defense *infra* Part IV(D); see also *In re Gen. Mills, Inc. Kix Cereal Lit.*, No. 12-249 (KM), 2013 WL 5943972, at *1-2 (D.N.J. Nov. 1, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013); *Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013); *Coyle v. Hornell Brewing Co.*, No. 08-2797 (JBS), 2010 WL 2539386, at *1 (D.N.J. June 15, 2011); *Holk v. Snapple Beverage Corp.*, No. 07-3018 (MLC), 2010 WL 4065390, at *1 (D.N.J. Oct. 15, 2010); *Ries v. Hornell Brewing Co., Inc.*, No. 10-1139-JF (PVT), 2010 WL 2943860, at *6 (N.D. Cal. July 23, 2010).

⁴² See Letter from Leslie Kux, Assistant Comm’r for Policy, U.S. Dep’t of Health and Human Serv., to Hon. Yvonne Gonzalez Rogers, et al. (Jan. 6, 2014), available at <http://www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf>; Letter from Michael M. Landa, Acting Dir., Center for Food Safety and Applied Nutrition, to Hon. Jerome B. Simandle, U.S. Dist. Judge, U.S. Dist. Court for the Dist. of N.J. (Sept. 16, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2008cv02797/215633/119/>.

⁴³ See Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Availability, 66 Fed. Reg. 4,839, 4,839 (Jan. 18, 2001) (announcing availability of Draft Guidance and restating a 1992 policy that the FDA “ha[s] no basis for concluding that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, food developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding” (citing 57 Fed. Reg. 22,984) (May 29, 1992)).

⁴⁴ *Id.* at 4,840.

(b) USDA

The USDA's policy on "natural" claims is more detailed than the FDA's. The FSIS permits the term "natural" to be used in meat and poultry product labeling if:

- (1) The product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 CFR 101.22), or any other artificial or synthetic ingredient; and
- (2) the product and its ingredients are not more than minimally processed.⁴⁵

Minimal processing includes (1) traditional processes used to make food edible, preserve it, or make it safe, such as smoking, freezing, and drying; or (2) physical processes that do not fundamentally alter the raw product or that only separate a whole food into component parts, such as, grinding meat.⁴⁶ When a "natural" claim is made on a USDA-regulated label, it must be linked to a brief statement explaining its meaning—e.g., "no more than minimally processed and contains no artificial ingredients."⁴⁷ The FSIS may grant exceptions to this general policy on a case-by-case basis and approve a "natural" claim for a product with an ingredient that has been more than minimally processed if both of the following conditions are met: (1) the use of such ingredient would not significantly change the character of the product to the point that it could no longer be considered a natural product; and (2) the natural claim is qualified to identify the ingredient—e.g., "all natural or all natural ingredients except dextrose, modified food starch, etc."⁴⁸ Ingredients having a preservative effect, including sodium lactate, potassium lactate, and calcium lactate, are not considered "natural," even if not more than minimally processed.⁴⁹

Like the FDA, the USDA has repeatedly declined to formalize its definition of "natural." USDA's policy dates back to its November 22, 1982,

⁴⁵ U.S. DEP'T OF AGRIC., *supra* note 27, at 116.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 117.

⁴⁹ *Id.*

Policy Memo 055 on “natural” claims.⁵⁰ In October 2006, Hormel petitioned the FSIS to codify its nonbinding definition of “natural” and to prohibit exceptions for specific chemical preservatives and synthetic ingredients.⁵¹ In December 2006, the USDA requested public comment on the petition and received over 12,000 comments.⁵² Finding that “the comments demonstrate that there is a lack of industry and public consensus on the meaning of ‘natural,’” the FSIS stated that it was not prepared to issue a proposed rule.⁵³ Instead, in September 2009, it published an advance notice of proposed rulemaking seeking additional public input.⁵⁴ The FSIS has taken no further action on the rulemaking.

III. CLAIMS ASSERTED IN “NATURAL” LABELING LAWSUITS

The complaints filed in “natural” labeling litigation tend to be very similar, if not cookie-cutter. This section provides an overview of the claims most frequently asserted by plaintiffs in these actions.

A. State Consumer Protection Statutes

1. California

The vast majority of “natural” labeling lawsuits have been brought in California courts in large part because California’s consumer protection laws are considered plaintiff friendly. Plaintiffs in these actions invoke the protection of California’s consumer protection trinity: (1) the Unfair

⁵⁰ Product Labeling: Definition of the Term “Natural,” 71 Fed. Reg. 70,503, 70,504 (Dec. 5, 2006).

⁵¹ *See id.*; *see also* Hormel Foods Corp. v. U.S. Dep’t of Agric., 808 F. Supp. 2d 234 (D.D.C. 2011) (seeking a permanent injunction preventing USDA from approving the “natural” label for meat and poultry products containing potassium lactate or sodium lactate without disclosure of that fact. The court dismissed the case because USDA had not yet finished its rulemaking for natural foods and, therefore, there was no final agency action subject to review under the Administrative Procedure Act).

⁵² Product Labeling: Definition of the Term “Natural,” 71 Fed. Reg. at 70,504; Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products, 74 Fed. Reg. 46,951, 46,953 (Dec. 5, 2006) (to be codified at 9 C.F.R. pts. 317, 381).

⁵³ Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products, 74 Fed. Reg. at 46,956.

⁵⁴ *Id.* at 46,956-57.

Competition Law (“UCL”),⁵⁵ (2) the False Advertising Law (“FAL”),⁵⁶ and (3) the Consumer Legal Remedies Act (“CLRA”).⁵⁷ The UCL prohibits any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”⁵⁸ The FAL makes it unlawful for a business to disseminate any statement “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”⁵⁹ Any violation of the FAL also constitutes a violation of the UCL.⁶⁰ The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices.”⁶¹ A defendant may be held liable under the CLRA for deceptive sales practices, including: representing the goods have ingredients they do not have; representing the goods are of a particular standard, quality, or grade, if they are not; and advertising goods with the intent not to sell them as advertised.⁶²

Claims brought under the UCL, FAL, and CLRA are grounded in fraud and governed by the “reasonable consumer” test.⁶³ That test requires plaintiffs to “show that members of the public are likely to be deceived.”⁶⁴ To prove that consumers are “likely to be deceived,” plaintiffs must prove that the allegedly deceptive statement “is such that it is probable that a significant portion of the consuming public or of targeted consumers, acting reasonably under the circumstances, could be misled.”⁶⁵ A plaintiff must have “extrinsic evidence, such as consumer survey data,” and cannot rely on merely anecdotal evidence to prove that a claim is likely to deceive consumers.⁶⁶

⁵⁵ CAL. BUS. & PROF. CODE § 17200 (West 2014).

⁵⁶ CAL. BUS. & PROF. CODE § 17500 (West 2014).

⁵⁷ CAL. CIV. CODE § 1770 (West 2014).

⁵⁸ CAL. BUS. & PROF. CODE § 17200 (West 2014).

⁵⁹ CAL. BUS. & PROF. CODE § 17500 (West 2014).

⁶⁰ *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

⁶¹ CAL. CIV. CODE § 1770 (West 2014).

⁶² *Nagel v. Twin Labs., Inc.*, 109 Cal. App. 4th 39, 51–52 (Cal. Ct. App. 2003) (citing CAL. CIV. CODE § 1770 (a)(5), (7) & (9) (2014)).

⁶³ *See Williams*, 552 F.3d at 938.

⁶⁴ *Id.*

⁶⁵ *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003).

⁶⁶ *Ries v. Ariz. Beverages USA LLC*, No. 10-01139 RS, 2013 WL 1287416, at *6 (N.D. Cal. Mar. 28, 2013) (citing *Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1407 (E.D. Cal. 1997)).

Under all three acts, private litigants may be awarded restitution,⁶⁷ the purpose of which is “to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.”⁶⁸ The proper measure of restitution in such cases is “[t]he difference between what the plaintiff paid and the value of what the plaintiff received.”⁶⁹ In a food labeling case, the measure is the “amount necessary to compensate the purchaser for the difference between a produce as labeled and the product as received.”⁷⁰ While the amount of restitution “need not be determined with exact precision,”⁷¹ the plaintiff must establish the price premium attributable to the deceptive labeling claim.⁷²

2. New York

A significant number of “natural” labeling suits have arisen in New York and have asserted claims under New York General Business Law Section 349 (“GBL § 349”). This statute prohibits “[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service.”⁷³ A cause of action under GBL § 349 is generally “available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising.”⁷⁴ The cause of action is available only to persons who were deceived in transactions occurring within the State of New York.⁷⁵

⁶⁷ CAL. BUS. & PROF. CODE §§ 17203, 17535 (West 2004); CAL. CIV. CODE § 1780(A)(3) (West 2010).

⁶⁸ *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 US Dist. LEXIS 173789, *27 (N.D. Cal. Dec. 15, 2014) (quoting *Kor. Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003)).

⁶⁹ *Ries*, 2013 WL 1287416 at *7 (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (Cal. Ct. App. 2010)).

⁷⁰ *Werdebaugh*, 2014 US Dist. LEXIS 173789, *27.

⁷¹ *Ries*, 2013 WL 1287416 at *7 (citing *In re Google AdWords Litig.*, No. 5:08-CV-3369 EJD, 2012 WL 28068, at *15 (N.D. Cal. Jan. 5, 2012)).

⁷² *Werdebaugh*, 2014 US Dist. LEXIS 173789, *27.

⁷³ N.Y. GEN. BUS. LAW § 349 (McKinney 2014).

⁷⁴ *Small v. Lorillard Tobacco Co., Inc.*, 720 N.E.2d 892, 897 (N.Y. 1999) (citing *Genesco Entm't v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984)).

⁷⁵ *Rapinsky v. Skinnygirl Cocktails, L.L.C.*, No. 11 Civ. 6546(JPO), 2013 WL 93636, at *4 (S.D.N.Y. Jan. 9, 2013); *Chiste v. Hotels.com, L.P.*, 756 F. Supp. 2d 382, 402 (S.D.N.Y. 2010) (quoting *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 325 (N.Y. 2002)).

A plaintiff asserting a GBL § 349 claim must establish that: "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result."⁷⁶ A statement is misleading, for purposes of a GBL § 349 claim, if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances."⁷⁷ It is not necessary for a plaintiff to prove that he or she actually relied on the alleged misrepresentation, but the plaintiff "must show that defendant's material deceptive act caused the injury."⁷⁸ The fact that a plaintiff paid a price premium because of a misrepresentation satisfies the injury requirement.⁷⁹

3. Florida

The US District Court for the Southern District of Florida is becoming an increasingly popular venue for food labeling cases. Under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"),⁸⁰ a consumer seeking damages must prove: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."⁸¹ The plaintiff need not establish that he or she relied on the deceptive act or unfair practice.⁸²

B. Unjust Enrichment

In some states, plaintiffs may recover for unjust enrichment if the defendant received a benefit at the plaintiff's expense and retention of the benefit would be unjust.⁸³ In California, unjust enrichment is not an independent cause of action; it is only a basis for obtaining restitution in

⁷⁶ *Spagniola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *accord Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000).

⁷⁷ *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 745 (N.Y. 1995)).

⁷⁸ *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000).

⁷⁹ *Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 416 (S.D.N.Y. 2004).

⁸⁰ Fla. Stat. § 501.201 et seq.

⁸¹ *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006).

⁸² *Fitzpatrick v. Gen. Mills, Inc.* 635 F.3d 1279, 1282-83 (11th Cir. 2011).

⁸³ *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 509 (2d Cir. 2009) (describing elements plaintiff must meet under New York law); *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 522 (N.J. 1994) (concluding that unjust enrichment may constitute grounds for an equitable lien under New Jersey law).

quasi-contract.⁸⁴ In jurisdictions where unjust enrichment is recognized as a cause of action, plaintiffs must show that the benefit received was “less than what they bargained for.”⁸⁵ Such a claim may be asserted against a manufacturer, even if the plaintiff bought the product from a third-party retailer.⁸⁶ For example, one court held that a plaintiff adequately stated a claim for unjust enrichment under Florida law where the plaintiff alleged that the defendant launched a deceptive marketing campaign and capitalized on (i.e., benefited from) consumer demand for natural products.⁸⁷

C. Warranty Claims

1. Breach of Express Warranty

Under the Uniform Commercial Code, an express warranty is any affirmation of fact or promise that relates to the goods or any description of the goods that becomes part of the basis of the bargain.⁸⁸ To prove a breach of express warranty, a plaintiff must show that there was an “affirmation of fact or promise by the seller, the natural tendency of which was to induce the buyer to purchase and that the warranty was relied upon to the plaintiff’s detriment.”⁸⁹ As breach of express warranty is a breach of contract, the injured party is entitled to the benefit of the bargain, which is measured as the difference between the value of the product received and value of the product as warranted.⁹⁰

⁸⁴ *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 965 (N.D. Cal. 2013); *Levine v. Blue Shield of Cal.*, 117 Cal. Rptr. 3d 262, 279 (Ct. App. 2010).

⁸⁵ *Vigiletti v. Sears, Roebuck & Co.*, 838 N.Y.S.2d 785 (App. Div. 2007).

⁸⁶ *Stewart v. Beam Global Spirits & Wine, Inc.*, 877 F. Supp. 2d 192, 194 (D.N.J. 2012).

⁸⁷ *Lynch v. Tropicana Prods., Inc.*, No. 2:11-cv-07382 (DMC) (JAD), 2013 WL 2645050, at *10 (D.N.J. June 12, 2013).

⁸⁸ U.C.C. § 2-313 (2014); N.Y. U.C.C. §2-313 (McKinney 1962); N.J. STAT. ANN. § 12A:2-313 (West 1961).

⁸⁹ *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 689 F. Supp. 2d 585, 604 (S.D.N.Y. 2010) (NY law); *see also Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Ct. App. 1986) (Under California law, to adequately plead a cause of action for breach of express warranty, “one must allege the exact terms of the warranty, plaintiff’s reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury.”).

⁹⁰ *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 184-85 (2d Cir. 2007) (NY law).

2. Breach of Implied Warranty of Merchantability

Under the UCC, as adopted in state law, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."⁹¹ Goods are merchantable if they:

(a) Pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.⁹²

To establish an implied warranty of merchantability claim, the plaintiff must show that the product "did not possess even the most basic degree of fitness for ordinary use."⁹³ However, no implied warranty exists unless the plaintiff and defendant entered into a contract for the sale of the product at issue or the plaintiff was the direct purchaser of the product.⁹⁴

3. Violation of Magnuson–Moss Warranty Act ("MMWA")

The federal MMWA, 15 U.S.C. § 2301, *et seq.*, provides a private cause of action for "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [15

⁹¹ U.C.C. § 2-314 (2014); N.J. STAT. ANN. § 12A:2-314(1) (West 1961); N.Y. U.C.C. § 2-314(1) (McKinney 1962).

⁹² U.C.C. § 2-314(2) (2014); N.J. STAT. ANN. § 12A:2-314(2) (West 1961); N.Y. U.C.C. § 2-314(2) (McKinney 1962).

⁹³ *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 896 (C.D. Cal. 2013) (citing *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003)).

⁹⁴ *Chin v. Gen. Mills, Inc.*, No. 12-2150 (MJD/TNL), 2013 WL 2420455, at *6 (D. Minn. June 3, 2013).

U.S.C. Chapter 50], or under a written warranty, implied warranty, or service contract.”⁹⁵ The MMWA defines a “written warranty” as:

Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time.⁹⁶

Therefore, to constitute a written warranty, a statement must affirm or promise that such material or workmanship (1) is defect free or (2) will meet a specified level of performance over a specified period of time.⁹⁷ According to the Federal Trade Commission’s interpretation of the statute, representations that may qualify as express warranties under the Uniform Commercial Code are not necessarily written warranties under the MMWA.⁹⁸

The MMWA defines an “implied warranty” as “an implied warranty arising under state law.”⁹⁹ Therefore, state law supplies the elements of and defenses to a claim for breach of implied warranty under the MMWA.¹⁰⁰

D. Promissory Estoppel

In some “natural” labeling cases, plaintiffs have asserted promissory estoppel claims. Promissory estoppel is a “legal fiction,” which acts as a “substitute for contractual consideration where one party relied on another’s promise without having entered into an enforceable contract.”¹⁰¹ Under New York law, a claim for promissory estoppel requires proof of: (1) “a clear and unambiguous promise,” (2) “a reasonable and foreseeable reliance by

⁹⁵ 15 U.S.C. § 2310(d)(1) (2014).

⁹⁶ 15 U.S.C. § 2301(6)(A).

⁹⁷ *Id.*

⁹⁸ 16 C.F.R. § 700.3(a) (2014).

⁹⁹ 15 U.S.C. § 2301(7).

¹⁰⁰ *See Chin*, 2013 WL 2420455, at *6.

¹⁰¹ *Bader v. Wells Fargo Home Mortg., Inc.*, 773 F. Supp. 2d 397, 414 (S.D.N.Y. 2011) (internal quotation marks omitted).

the party to whom the promise is made,” and (3) “an injury sustained by the party asserting the estoppel by reason of the reliance.”¹⁰² In some states, promissory estoppel requires the additional element of “[i]njustice [which] can be avoided only by the enforcement of the promise.”¹⁰³

IV. POSSIBLE DEFENSES

The defenses discussed below are commonly asserted in “natural” food labeling litigation. Because this type of litigation is still relatively new and very few appellate decisions exist, any conclusions about the strengths of these defenses are necessarily subject to change. However, some clear patterns of rulings have emerged in the decisions to date.

A. Failure To State A Claim

Given the liberal pleading standard in federal court, motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim are difficult to win. However, some defendants in “natural” food labeling class actions have succeeded in having certain claims dismissed. Defendants have been particularly successful in having courts dismiss MMWA violation claims at the pleading stage. In *Bates v. Kashi*, the court dismissed MMWA violation claims based on its finding that the Act did not apply to food labeling.¹⁰⁴ Rather, the court found that Congress intended the Act to cover products like automobiles and home appliances to protect consumers’ right to have defective products repaired.¹⁰⁵ Other courts have routinely found that the representation that a product is “natural” is a product description, not a written warranty under the MMWA.¹⁰⁶ Courts also have dismissed

¹⁰² *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 44 (2d Cir. 1995) (internal quotation marks omitted).

¹⁰³ *Hurwitz v. Prime Commc’ns., Inc.*, No. 91-006694, 1994 WL 561834, at *3 (Mass. Super. Ct. Apr. 4, 1994), *aff’d*, *Hurwitz v. Bocian*, No. 94-P-1890, 670 N.E.2d 408 (Mass. App. Ct. 1996).

¹⁰⁴ *See Bates v. Kashi Co.*, No. 11-CV-1967-H (BGS), slip op. at 15 (S.D. Cal. July 16, 2012).

¹⁰⁵ *Id.* at 14-15.

¹⁰⁶ *E.g., Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 898 (C.D. Cal. 2013); *Chin v. Gen. Mills, Inc.*, No. 0:12-CV-02150 (MJD/TNL), 2013 WL 2420455, at *6 (D. Minn. June 3, 2013) (dismissing MMWA written warranty claim); *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 903-04 (N.D. Cal. 2012) (holding that “100% natural” descriptions on PAM cooking spray, Hunt’s canned

claims for implied warranty of merchantability under the MMWA and state law because the plaintiffs did not purchase the products at issue directly from the defendant manufacturers.¹⁰⁷

With regard to express warranties, some defendants have successfully argued that the disclosure of allegedly unnatural ingredients on the product label limited the scope of the alleged warranty. Under the UCC, warranties are “construed as consistent with each other and as cumulative,” and “[e]xact or technical specifications displace an inconsistent sample or model or general language of description.”¹⁰⁸ Thus, in *Chin v. General Mills, Inc.*, the court dismissed an express warranty claim holding that the “100% Natural” statement on the product label “must be read in the context of the entire package, including the ingredient panel.”¹⁰⁹ The court held that the “specific terms determine the scope of the express warranty.”¹¹⁰

In contrast to warranty claims, claims brought under California’s consumer protection laws are rarely dismissed at the pleading stage because “California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer.”¹¹¹ Moreover, under the California consumer protection statutes, the fact that a product’s ingredients were disclosed on the package does not preclude a finding that the plaintiffs relied on allegedly deceptive “natural” claims.¹¹² Thus, it is a “rare situation” for courts to dismiss claims alleging violations of California consumer protection laws.¹¹³ However, in a few

tomato products, and Swiss Miss cocoa did not constitute written warranties under MMWA); *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1004 (N.D. Cal. 2012) (“‘All Natural’ is a general product description rather than a promise that the product is defect free Therefore the language ‘All Natural’ on the smoothie kits’ labels did not create a written warranty within the meaning of the MMWA.”); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at *3 (N.D. Cal. July 20, 2012) (dismissing MMWA claim holding that “all natural” statement on ice cream products is a product description and does not constitute a written warranty); *Bates*, slip op. at 14.

¹⁰⁷ *Chin*, 2013 WL 2420455, at *7 (dismissing implied warranty claims under MMWA and state law based on finding that “Plaintiffs have not pled that a contract or agreement existed between themselves and General Mills and the Court finds that Plaintiffs were not direct purchasers.”).

¹⁰⁸ U.C.C. § 2-317 (2013).

¹⁰⁹ *Chin*, 2013 WL 2420455, at *7.

¹¹⁰ *Id.*

¹¹¹ *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

¹¹² *See id.* at 939 (“We disagree . . . that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.”).

¹¹³ *See id.*

cases, California courts have found allegations of deceptive food labeling to be so implausible that they were deemed not deceptive as a matter of law. For example, courts found that no reasonable consumer could be misled to believe that “Froot Loops” and “Cap’n Crunch’s Crunch Berries” cereals contained real fruit.¹¹⁴ In a case alleging that Nestle violated California’s consumer protection laws by labeling its Buitoni pasta products “all natural,” the court held that the plaintiff failed to state a claim because she did not offer a plausible definition of “all natural” and because, in the context in which the phrase was used on the packaging (immediately above the list of ingredients), no reasonable consumer could have been deceived.¹¹⁵

B. Failure To Plead Fraud With Specificity

Rule 9(b) of the Federal Rules of Civil Procedure requires, “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”¹¹⁶ This rule applies not only to claims of common law fraud, but also to causes of action that “sound in fraud,” including unjust enrichment and claims under state consumer protection statutes.¹¹⁷ The heightened pleading standard is meant to give defendants “notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements.”¹¹⁸ It requires the plaintiff to allege the “the who, what, when, where, and how of the events

¹¹⁴ See *Werbel ex rel. v. Pepsico, Inc.*, No. C 09-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010); *Sugawara v. PepsiCo, Inc.*, No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115, at *3-4 (E.D. Cal. May 21, 2009) (same); *McKinnis v. Kellogg USA*, No. CV 07-2611, 2007 WL 4766060, at 31 (C.D. Cal. Sept. 19, 2007); *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086, at *4 (E.D. Cal. May 21, 2009).

¹¹⁵ *Pelayo v. Neste USA, Inc.*, 989 F. Supp. 2d 973, 980 (C.D. Cal. 2013).

¹¹⁶ Fed. R. Civ. P. 9.

¹¹⁷ *Chin*, 2013 WL 2420455, at *8; *Janney v. Gen. Mills*, 944 F. Supp. 2d 806, 817 (N.D. Cal. 2013) (“When claims under the CLRA, UCL, and FAL are based on a manufacturer’s alleged misrepresentations about a product’s characteristics, those claims sound in fraud and Rule 9(b) applies.”).

¹¹⁸ *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997).

at issue.”¹¹⁹ In addition, the plaintiff must “set forth what is false or misleading about a statement and why it is false.”¹²⁰

Courts considering motions to dismiss “natural” labeling suits for failure to plead fraud with the required specificity have reached inconsistent results. Some courts have found that plaintiffs satisfy the Rule 9(b) standard even when the plaintiffs’ complaints include only vague allegations about the exact products at issue or the reasons why the defendants’ “natural” claims were deceptive, or when they have omitted allegations about the specific dates of their purchases.¹²¹ For example, in *Astiana v. Ben & Jerry’s Homemade, Inc.*, the court held the plaintiffs adequately pled their claims under Rule 9(b) because the court could discern:

The “who” is [defendants] Ben & Jerry’s, Breyers, and Unilever. The “what” is the statement that ice cream containing alkalized cocoa is “all natural.” The “when” is alleged as “since at least 2006,” and “throughout the class period.” The “where” is on the ice cream package labels. The “how the statements were misleading” is the allegation that defendants did not disclose that the alkalizing agent in the alkalized cocoa was potassium carbonate, which plaintiffs allege is a “synthetic.”¹²²

¹¹⁹ *Hemy v. Perdue Farms, Inc.*, No. 11-888 (FLW), 2011 WL 6002463, at *13 (D.N.J. Nov. 30, 2011); see also *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997).

¹²⁰ *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994).

¹²¹ See *Lynch v. Tropicana Prods., Inc.*, No. 2:11-cv-07382 (DMC) (JAD), 2013 WL 2645050, at *7 (D.N.J. June 12, 2013); *Janney*, 944 F. Supp. 2d at 817-18 (explaining that Rule 9(b) is satisfied where plaintiffs alleged the terms “Natural” or “100% Natural” were deceptively used on the packaging or advertising because those products contain HFCS, HMCS, and/or Maltodextrin as ingredients; that during the class period, plaintiffs purchased specific Nature Valley products; that plaintiffs purchased “certain varieties” of Nature Valley bars “relying on the claims that they were “Natural”; and that General Mills represented products were “natural” in order to “capitalize on” “all-natural foods”); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1126 (N.D. Cal. 2010) (stating that Rule 9(b) is met where plaintiff identifies particular statements alleged to be misleading, the basis for contention, where the statements appear, and the relevant time period in which statements were used); *Astiana v. Ben & Jerry’s Homemade, Inc.*, Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 WL 2111796, at *6 (N.D. Cal. May 26, 2011); but cf. *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 964-65 (N.D. Cal. 2013) (explaining the standard is not met where plaintiff fails to specifically identify the products at issue in the case, fails to identify the specific federal regulations allegedly violated, and does not clearly identify the alleged misrepresentations on which plaintiff relied).

¹²² *Astiana*, 2011 WL 2111796, at *6.

Other courts have applied more rigorous standards. For example, in *Chin v. General Mills, Inc.*, the court held that the plaintiffs did not satisfy Rule 9(b) because they failed to plead how the “100% Natural” statement deceived them and did not allege with specificity what they believed “100% Natural” to mean.¹²³ Similarly, in *Briseno v. Conagra Foods, Inc.*, the court held that the plaintiff failed to comply with Rule 9(b) because the plaintiff failed to allege the dates of purchases when he saw or heard the alleged misrepresentations, the dates when the defendant made the allegedly deceptive statements, and how often he was exposed to the allegedly deceptive statements.¹²⁴

C. Federal Preemption

The federal preemption doctrine, which is based on the Supremacy Clause of the US Constitution,¹²⁵ invalidates state laws that “interfere with, or are contrary to, federal law.”¹²⁶ There are three types of federal preemption: (1) express preemption stated in a federal statute; (2) implied preemption where federal law fully occupies a regulatory field leaving no room for state regulation;¹²⁷ and (3) implied conflict preemption where it would be impossible for a private party to comply with both the state and federal requirements¹²⁸ or, alternatively, where state “law stands as an obstacle to the accomplishment and execution” of Congress’s objectives.¹²⁹ Federal law preempts state law requirements codified in statutes or regulations as well as court-imposed requirements arising from state law causes of action.¹³⁰ Other formal agency actions that have the force of law,

¹²³ *Chin v. Gen. Mills, Inc.*, No. 0:12-CV-02150 (MJD/TNL), 2013 WL 2420455, at *9 (D. Minn. June 3, 2013); see also *Bates v. Kashi Co.*, No. 11-CV-1967-H (BGS), slip op. at 18 (S.D. Cal. July 16, 2012) (holding plaintiffs failed to plead common law fraud claim with required specificity).

¹²⁴ See *Briseno v. Conagra Foods, Inc.*, No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750, at *36-38 (C.D. Cal. Nov. 23, 2011).

¹²⁵ See U.S. CONST. art. VI, cl. 2.

¹²⁶ *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

¹²⁷ See *United States v. Locke*, 529 U.S. 89, 111 (2000) (applying field preemption).

¹²⁸ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¹²⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹³⁰ *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 443 (2005).

such as agency adjudications, also have a preemptive effect.¹³¹ A state law requirement may be preempted whether it imposes an affirmative obligation or prohibits certain conduct.¹³²

In determining whether federal law preempts state law, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹³³ Where the federal government regulates an area traditionally within the states’ police powers, the presumption against preemption requires a narrow reading of express preemption statutes.¹³⁴ Regulation of food marketing and labeling historically has been the province of the states, and therefore, courts assume such regulation is not to be preempted unless Congress clearly intended otherwise.¹³⁵

1. *Express Preemption*

“Natural” labeling cases have focused almost exclusively on food and beverages within the FDA’s jurisdiction, as opposed to meat and poultry products within the USDA’s jurisdiction,¹³⁶ likely because express preemption under the FMIA and PPIA provides such a strong defense.¹³⁷ Those acts state, in relevant part, “Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State”¹³⁸ In deciding whether state law imposes a requirement for meat or poultry product labeling “in addition to, or different than” federal law, courts have found that federal law preempt state requirements even when the subject matter of the state requirements is not addressed in any FMIA or PPIA provisions or in any

¹³¹ *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 340 (3d Cir. 2009).

¹³² *See Nat’l Broiler Council v. Voss*, 44 F.3d 740, 743-45 (9th Cir. 1994).

¹³³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).

¹³⁴ *Id.*

¹³⁵ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963); *Holk*, 575 F.3d at 334-35; *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008).

¹³⁶ *See Krzykwa v. Campbell Soup Co.*, 946 F. Supp. 2d 1370, 1373-74 (S.D. Fla. 2013) (mentioning that plaintiff amended complaint to drop allegations about soups containing poultry).

¹³⁷ *See Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) (holding that claims as to chicken soup products were preempted by FMIA and PPIA).

¹³⁸ 21 U.S.C. § 678 (2014); *id.* § 467c (substantially identical).

USDA regulations.¹³⁹ The rationale for federal preemption of state labeling requirements for meat and poultry products is especially strong because USDA must preapprove labels for such products.¹⁴⁰ Because the labels must be USDA approved, courts have found that state law claims challenging the labels are necessarily preempted.¹⁴¹ In particular, "[b]ecause the [USDA] pre-approval process includes a determination of whether the labeling is false and misleading," state law claims alleging that USDA-approved labels are false or misleading are preempted.¹⁴² The USDA's pre-approval of labels is a significant difference in the federal labeling regime for meat and poultry products compared to other food products, for which no approval is required.

In contrast to the FMIA and PPIA, the FDCA likely does not expressly preempt state law claims regarding "natural" labeling. The Nutrition Labeling and Education Act of 1990 ("NLEA") amended the FDCA with the intent to "establish uniform national standards for the nutritional claims and the required nutrient information displayed on food labels."¹⁴³ The NLEA added an express preemption provision, codified at 21 U.S.C. § 343-1, prohibiting state requirements that are "not identical

¹³⁹ See *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994) (holding state requirement limiting use of "fresh" in poultry labeling was preempted by PPIA even though USDA regulations did not address the definition of "fresh"); *Am. Meat Inst. v. Leeman*, 102 Cal. Rptr. 3d 759, 784-85 n.38 (Cal. Ct. App. 2009) (holding that FMIA preempted plaintiff's claim to enforce Proposition 65 warning requirements for dioxins and PCBs with regard to beef products where no federal rule addressed the issue); *Boulahanis v. Prevo's Family Mkt., Inc.*, 583 N.W.2d 509, 512 (Mich. Ct. App. 1998) (rejecting plaintiff's argument that state law claim was not preempted by FMIA because USDA had not regulated *E. coli* as an adulterant at the relevant time based on the finding that USDA's intentional decision not to regulate had preemptive force).

¹⁴⁰ 21 U.S.C. § 457(c) (stating that FMIA and PPIA both provide that no food article "shall be sold or offered for sale by any person in commerce, under any name or other marking or labeling . . . but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary."); see *id.* § 607(d) (substantially similar language in FMIA); see also 9 C.F.R. § 317.8(a) (2013).

¹⁴¹ *E.g.*, *Meaurit v. ConAgra Foods Inc.*, No. C 09-02220 CRB, 2010 WL 2867393, at *7 (N.D. Cal. July 20, 2010) (distinguishing USDA pre-approved labels from labeling requirements under the jurisdiction of the FDA, which does not require pre-approval, and reasoning that "the USDA and FSIS pre-approved ConAgra's labeling, which means that any liability Plaintiff seeks to attach based on a state law would impose requirements on ConAgra additional to, or different than federal law"); *Meaurit v. Pinnacle Foods Grp., LLC*, No. C 09-04555 CW, 2010 WL 1838715, at *7 (N.D. Cal. May 5, 2010) ("To allow a jury to pass judgment on Defendant's labels, notwithstanding the USDA's approval, would disrupt the federal regulatory scheme.").

¹⁴² *Meaurit*, 2010 WL 2867393, at *7.

¹⁴³ H.R. REP. NO. 101-538, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3342.

to” several enumerated labeling provisions of the FDCA.¹⁴⁴ Thus, where state law requirements *are* identical to the FDCA—for example, when a plaintiff’s claim effectively seeks to enforce the FDCA—courts find no preemption.¹⁴⁵

Courts have found the NLEA’s preemption language to apply only where (1) the FDCA or its implementing regulations address the issue and (2) state law would require different labeling than that which federal law specifically permitted or prohibited.¹⁴⁶ For example, in *Turek v. General*

¹⁴⁴ 21 C.F.R. § 100.1(c)(4) (1991) (regulating the following: “Not identical to’ does not refer to the specific words in the requirement but instead means that the State requirement directly or indirectly imposes obligations or contains provisions concerning the composition or labeling of food, or concerning a food container, that: (i) Are not imposed by or contained in the applicable provision (including any implementing regulation) of [21 USC § 341, definitions and standards for food] or [21 USC § 343, misbranded food] of the act; or (ii) Differ from those specifically imposed by or contained in the applicable provision (including any implementing regulation) of [21 USC § 341, definitions and standards for food] or [21 USC § 343, misbranded food] of the act.”).

¹⁴⁵ *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011) (“The state thus can impose the identical requirement or requirements, and by doing so be enabled, because of the narrow scope of the preemption provision in the Nutrition Labeling and Education Act, to enforce a violation of the Act as a violation of state law.”); *Lynch v. Tropicana Prods., Inc.*, No. 2:11-cv-07382 (DMC) (JAD), 2013 WL 2645050, at *5 (D.N.J. June 12, 2013) (holding plaintiffs’ claims are not preempted where they enforce requirements identical to federal law regarding standard of identity and ingredients labeling); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at *8 (N.D. Cal. July 20, 2012) (holding that a state law claim predicated on violation of the federal labeling law was not preempted because “Plaintiffs do not seek to impose a higher standard of conduct”); *Stewart v. Smart Balance, Inc.*, No. 11-6174 (JLL), 2012 WL 4168584, at *6 (D.N.J. June 26, 2012) (holding plaintiffs’ claims regarding “fat free” labeling were not preempted where the “gravamen of Plaintiffs’ complaint is precisely that Defendants’ products are misleading because they fail to comply [with the FDCA and regulations.]”); *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 97 (D.N.J. 2011) (holding plaintiffs’ arguments that “less sodium” claims were misleading was not preempted because they mirrored federal requirements, but claims that labels omitted material information were preempted because they would impose a requirement inconsistent with federal regulations); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1119 (N.D. Cal. 2010); *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1175 (Cal. 2008) (“[S]tates may establish their own requirements pertaining to the labeling of artificially colored food so long as their requirements are identical to those contained in the FDCA”); *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005) (holding, in pesticide labeling case, state law labeling is not preempted “if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions”); *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 896-97 (N.D. Cal. 2012) (holding claims not preempted where state law requirements “are effectively the same” or “substantially the same” as federal law).

¹⁴⁶ *Lam v. Gen. Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012) (holding that state law claims that “fruit flavored” and “naturally flavored” labels are false and misleading were preempted by 21 U.S.C. § 343(k) and 21 C.F.R. § 101.22(i), which expressly permitted the labeling at issue); *Yumul v. Smart Balance, Inc.*, No. CV 10-00927 MMM (AJWx), 2011 WL 1045555, at *9-10 (C.D. Cal. Mar. 14, 2011) (holding state law claims to enjoin “no cholesterol” and “healthy” labeling were preempted because such labeling is “permitted by the NLEA and its accompanying regulations”); *In re PepsiCo, Inc.*, 588 F. Supp. 2d 527, 537 (S.D.N.Y. 2008) (finding preemption of state law claims that Aquafina bottled water was labeled to mislead consumers into believing the water came from a source other than a municipal water supply because “(1) federal law is not silent on the subject of implied labeling misrepresentations regarding the municipal source of bottled water; and (2) given that the *Aquafina* label

Mills, the plaintiffs challenged statements in the “Nutrition Facts” box of Kellogg’s Fiber Plus bars declaring that the product contained nine grams of dietary fiber and other label claims that the product contained “35% of your daily fiber.”¹⁴⁷ The plaintiffs alleged that such claims were deceptive because the product labeling did not disclose that the principal source of fiber in the product was unnatural inulin processed from chicory root (a product which is also allegedly inferior and harmful).¹⁴⁸ The court found that the defendants’ products complied with FDA regulations regarding labeling of dietary fiber, which are incorporated in the NLEA’s express preemption provision for nutrient content claims.¹⁴⁹ Because the disclaimers plaintiffs sought to require on the labeling of defendants’ products were not identical to federal requirements, they were preempted.¹⁵⁰

Likewise, courts have held that state law claims regarding “natural flavor” labels are expressly preempted.¹⁵¹ In *Viggiano v. Hansen Natural Corp.*, plaintiffs alleged that the “all natural flavors” label on defendant’s Hansen’s Diet Premium Sodas was deceptive because the products contained the allegedly synthetic sweeteners and flavor enhancers acesulfame potassium (“ace-k”) and sucralose.¹⁵² The defendant argued that the NLEA provision regarding labeling “of the type required by section [§ 343(k)],” the provision of FDCA regarding labeling of artificial flavoring, expressly preempted the plaintiffs’ claims.¹⁵³ FDA regulations allow the phrase “natural flavor” to be used even when a product contains artificial flavors, so long as the “characterizing flavor” is natural.¹⁵⁴ The court held that Hansen’s Diet Premium Sodas complied with federal regulations, and, therefore, plaintiffs’ claims were expressly preempted.¹⁵⁵ The court

fits within the exception for purified water and thus complies with the FDCA’s requirements, Plaintiff’s state law claims by necessity are premised on requirements that are not parallel to those imposed by federal law.”).

¹⁴⁷ *Turek*, 662 F.3d at 425.

¹⁴⁸ *Id.* at 425-26.

¹⁴⁹ *Id.* at 427.

¹⁵⁰ *Id.*

¹⁵¹ *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 888 (C.D. Cal. 2013); see also *Lam*, 859 F. Supp. 2d at 1102-03; *Ivie v. Kraft Foods Global, Inc.*, 961 F. Supp. 2d 1033, 1042 (N.D. Cal. 2013).

¹⁵² *Viggiano*, 944 F. Supp. 2d at 881-82.

¹⁵³ *Id.* at 890 n. 35 (quoting 21 U.S.C. § 343-1(a)(3)).

¹⁵⁴ *Id.* at 888 (citing 21 C.F.R. § 101.22(i)(l)).

¹⁵⁵ *Id.* at 889-90.

reasoned, “[a]s FDA regulations explicitly authorized Hansen to label the product as it did, any state law requiring Hansen to use additional or different labeling would not be . . . identical to FDA regulations and would be preempted by the FDCA.”¹⁵⁶

Conversely, courts have held that state law is not preempted when no provision in the FDCA or FDA regulations addresses the subject matter of a state law requirement.¹⁵⁷ It is for this reason that courts have held that state law causes of action challenging general “natural” claims are not expressly preempted. There is no provision of FDCA or FDA regulation governing the use of “natural” claims. Moreover, the FDCA’s general prohibition on “false or misleading” labeling, 21 U.S.C. § 343(a), is not included in the list of provisions that preempt non-identical state law. Therefore, courts have held that the NLEA’s express preemption provision “does not preempt the claims arising from false or misleading labels regulated by section 343(a).”¹⁵⁸

¹⁵⁶ *Id.* at 890.

¹⁵⁷ *E.g.*, *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 255-56 (3d Cir. 2008) (holding that a state law claim that would require mercury warnings was not preempted because the FDA had not taken formal action regarding mercury warnings); *Astiana v. Ben & Jerry’s Homemade, Inc.*, Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 WL 2111796, at *10 (N.D. Cal. May 26, 2011) (holding that a state law claim alleging that an “all natural” label was deceptive was not preempted because there is no federal regulation about the word “natural”); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1123-24 (N.D. Cal. 2010) (finding that a claim that labeling a product as “wholesome” was misleading was not preempted because the “wholesome” label is not regulated by FDA); *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009) (finding no federal field preemption in the context of labeling foods as “natural”); *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1360-61 (S.D. Fla. 2012) (holding that a state law deceptive trade practices claim for labeling products as “honey” that did not comply with Florida Honey Standard was not preempted by the FDCA because there is no federal standard of identity for honey); *cf. In re Pepsico, Inc.*, 588 F. Supp. 2d 527, 538 (S.D.N.Y. 2008) (stating “where federal requirements address the subject matter that is being challenged through state law claims, such state law claims are preempted to the extent they do not impose identical requirements.”); *see Perea v. Walgreen Co.*, 939 F. Supp. 2d 1026, 1038-39 (C.D. Cal. 2013) (holding that California’s honey standard was expressly preempted even though there is no federal standard of identity for honey).

¹⁵⁸ *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 370 (N.D. Cal. 2010); *see also Ries v. Hornell Brewing Co.*, No. 10-1139-JF (PVT), 2010 WL 2943860, at *4 (N.D. Cal. July 23, 2010) (finding that “because Section 343(a) is not enumerated among the preemption provisions of 21 U.S.C. § 343-1(a), states are free to set their own standards as to whether ‘labeling is false or misleading in any particular,’ . . .”); *Thurston v. Bear Naked, Inc.*, No. 11-CV-02890, slip op. 1, 6-7 (S.D. Cal. July 16, 2012) (holding that “because Defendant does not specify which subsection of § 343 would be violated, and because there is no subsection of § 343 listed under § 343-1(a) that addresses labeling food items as ‘natural,’ the Court concludes that Defendant’s express preemption argument fails.”); *Bates v. Kashi Co.*, No. 11-CV-1967-H (BGS), slip op. at 6-7 (same).

2. *Implied Preemption*

The NLEA provides that it “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section [343-1(a)].”¹⁵⁹ Courts have interpreted this language to mean that, “courts may not find implied preemption based on any provision of NLEA”; however, other parts of the FDCA may impliedly preempt state law.¹⁶⁰ Nevertheless, at least since the Third Circuit’s decision in *Holk v. Snapple Beverage Corp.*, courts have consistently held that “natural” labeling lawsuits are not impliedly preempted.¹⁶¹ In *Holk*, the court held that neither implied field preemption nor conflict preemption barred the plaintiff’s challenge to Snapple’s “natural” label on beverages containing high fructose corn syrup.¹⁶²

(a) *Implied Field Preemption*

Several factors support the view that the FDCA and FDA regulations do not fill the field of regulation with regard to “natural” claims. First, Congress added only limited express preemption provisions to the FDCA, which shows that it is aware of state regulation of food labeling and has decided not to fully occupy that field.¹⁶³ Second, the fact that Congress did not provide a private right of action in the FDCA shows that Congress views state actions as providing “appropriate relief for injured consumers.”¹⁶⁴ Third, the existence of extensive FDA regulations regarding food labeling is insufficient to show that the federal government fully

¹⁵⁹ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 6(c)(1), 104 Stat. 2353, 2364 (1990).

¹⁶⁰ *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009).

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *Holk*, 575 F.3d at 338; *see also* *Wright v. Gen. Mills, Inc.*, Civ. No. 08-CV-1532-L (NLS), 2009 WL 3247148, at *2 (S.D. Cal. Sept. 30, 2009) (stating “although the FDA has promulgated several food-labeling requirements, Congress has specifically indicated that it does not intend to occupy the field of food and beverage nutritional labeling and states are permitted to regulate matters covered by the NLEA and its regulations provided that such state laws do not fall within the FDCA’s express preemption provisions.”).

¹⁶⁴ *Wyeth v. Levine*, 555 U.S. 555, 574 (2009).

occupies the field and preempts state regulation.¹⁶⁵ Finally, the fact that FDA has declined to undertake formal rulemaking regarding “natural” claims, particularly when it was aware of state regulation of the term “natural,” shows that the FDA does not intend to fully occupy the field.¹⁶⁶

(b) Implied Conflict Preemption

Another type of implied preemption is implied conflict preemption. Federal law impliedly preempts state law “to the extent that it actually conflicts with federal law.”¹⁶⁷ Conflict preemption exists “where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁸

In *Holk*, the Third Circuit determined that the plaintiff’s state law claims could not conflict with federal law because there was no federal law on “natural” claims.¹⁶⁹ In reaching that conclusion, the court considered the regulatory record of the FDA’s policy on “natural” claims, as well as FDA enforcement actions (warning letters) based on the policy, and determined that the FDA had not undertaken the kind of formal, deliberative process required for agency action to have the force of law.¹⁷⁰

¹⁶⁵ *Holk*, 575 F.3d at 339 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990)).

¹⁶⁶ *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009).

¹⁶⁷ *English*, 496 U.S. at 79.

¹⁶⁸ *Id.* (citation omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁶⁹ *See Holk*, 575 F.3d at 340–42.

¹⁷⁰ *Id.*; *see also Briseno v. Conagra Foods, Inc.*, No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750 at *16, *26 (C.D. Cal. Nov. 23, 2011) (finding FDA’s informal policies re: “natural” claims and labeling of genetically modified foods not entitled to preemptive effect); *Astiana v. Ben & Jerry’s Homemade, Inc.*, C 10-4387 PJH, 2011 WL 2111796, at *10 (N.D. Cal. May 26, 2011) (concluding “there is no indication of any regulation of the use of an adjective such as ‘natural’ on a food label. Accordingly, the court finds that the claims are not preempted.”); *Ries v. Hornell Brewing Co.*, 10-1139-JF (PVT), 2010 WL 2943860, at *4 (N.D. Cal. July 23, 2010) (stating that “Because the FDA has not yet defined “natural” under regulations pursuant to 21 U.S.C. § 341, state laws that would define that term are not clearly preempted by the NLEA.”); *Wright v. Gen. Mills, Inc.*, Civ. No. 08cv1532 L(NLS), 2009 WL 3247148, at *3 (S.D. Cal. Sept. 30, 2009) (explaining that “because the FDA has deferred taking regulatory action with respect to the term ‘natural,’ plaintiff’s state law claims do not stand as an obstacle to accomplishing Congress’s objectives of uniformity and consistency in regulating labeling.”); *Hitt v. Arizona Beverage Co.*, No. 08cv809 WQH (POR), 2009 WL 449190, at *5 (S.D. Cal. Feb. 4, 2009) (holding that defendants promoting drinks as “100% Natural” and “All Natural” when they contained high fructose corn syrup was not preempted).

In the more recent case of *Bates v. Kashi Co.*, a federal district court in California took the position that the FDA's policy on "natural" claims might have a preemptive effect.¹⁷¹ However, the court ruled that the defendant's motion to dismiss on conflict preemption grounds was essentially premature. In other words, the court found that the record was not yet developed enough at the pleadings state to determine whether there was a conflict between the plaintiffs' claims and federal law.¹⁷² The court noted that the FDA's policy on "natural" claims turned on whether a consumer would normally expect the products to contain artificial or synthetic ingredients.¹⁷³ Determining whether Kashi's products conformed with FDA's definition of "natural," therefore, was "a question better suited for summary judgment."¹⁷⁴ The case subsequently settled without revisiting this issue.¹⁷⁵

D. Primary Jurisdiction Doctrine

The primary jurisdiction doctrine is another defense that has been asserted in "natural" claims litigation. Several courts have agreed with defendants' contentions that, under the doctrine of primary jurisdiction, FDA action is more appropriate than litigation to resolve "natural" food labeling disputes. However, because the FDA has declined to act in these cases, these defense victories have, for the most part, been short lived.

Primary jurisdiction is a "prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts."¹⁷⁶ To warrant such deference, Congress must have vested the agency "with the authority to regulate an industry or activity such that it

¹⁷¹ *Bates v. Kashi Co.*, No. 11-CV-1967-H (BGS), slip op. at 7-8 (S.D. Cal. July 16, 2012) (equating the FDA's guidance document on labeling products as "natural" with the FDA's guidance document on contact lens solution [a document which led to preemption of state claims in the area on contact lens solution]. This relied on the proposition that where the FDA has provided guidance in some area, any additional conditions imposed by state law in the same area are preempted).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Astiana v. Kashi Co.*, No. 11-CV-1967-H (BGS), 2014 U.S. Dist. LEXIS 127624, at *10 (S.D. Cal. Sept. 2, 2014).

¹⁷⁶ *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002).

would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question."¹⁷⁷ Application of the doctrine does not imply that the court lacks subject matter jurisdiction, but rather, that the case "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."¹⁷⁸ In deciding whether to stay or dismiss a case on the grounds of primary jurisdiction, courts consider four factors:

- (1) The need to resolve an issue that
- (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority
- (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that
- (4) requires expertise or uniformity in administration."¹⁷⁹

Although not controlling on a court's decision, FDA regulations state that, "FDA has primary jurisdiction to make the initial determination on issues within its statutory mandate."¹⁸⁰

The fact that FDA has not taken formal action to regulate "natural" claims in food labeling has mixed implications for the application of primary jurisdiction. On the one hand, some courts have been reluctant to enter into an area that the agency with primary jurisdiction has not yet resolved, out of concern that the court's decision will ultimately conflict with the agency's judgment. On the other hand, some courts have viewed the FDA's failure to act as a sign that the FDA has no interest in exercising its jurisdiction with regard to "natural" claims.

Astiana v. Hain Celestial Group, a case challenging "natural" labeling of cosmetic products, demonstrates the concern over encroaching on the FDA's turf. In that case, the court held that:

[I]n the absence of any FDA rules or regulations (or even informal policy statements) regarding the use of the word 'natural' on cosmetics labels, the court declines to make any independent

¹⁷⁷ *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1363 (9th Cir. 1987).

¹⁷⁸ *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002).

¹⁷⁹ *Syntek*, 307 F.3d at 781.

¹⁸⁰ 21 C.F.R. § 10.25(b) (2012).

determination of whether defendants’ use of ‘natural’ was false or misleading.¹⁸¹

The court, therefore, dismissed without prejudice on the basis of primary jurisdiction.¹⁸²

In several “natural” food labeling cases, courts have temporarily stayed actions on the basis of the primary jurisdiction doctrine and have referred the determination of whether the products at issue were “natural” to the FDA.¹⁸³ However, when the FDA declined to address the issue, the stays were lifted.¹⁸⁴

Other courts have rejected the primary jurisdiction defense. Some have reasoned abstention is inappropriate because the issue of whether food labeling is deceptive “is not an issue of first impression, and does not present an issue that requires the FDA’s expertise.”¹⁸⁵ Others have reasoned that, even if the primary jurisdiction doctrine does apply, it would be pointless to refer the determination of the “natural” labeling issue to the FDA. For example, in *Janney v. General Mills*, the court agreed with the defendant that the issue of whether particular ingredients could be labeled “natural” was one over which the FDA has primary jurisdiction.¹⁸⁶ Nevertheless, it declined to dismiss or stay the action because:

¹⁸¹ *Astiana v. Hain Celestial Grp.*, 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012) (citing *Pom Wonderful L.L.C. v. Coca-Cola Co.*, 679 F.3d 1170, 1177 (9th Cir. 2012)).

¹⁸² *Astiana*, 905 F. Supp. 2d at 1017.

¹⁸³ See *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at * 29-30 (N.D. Cal. July 25, 2013); *Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 U.S. Dist. LEXIS 97207, at *5-6 (N.D. Cal. July 11, 2013) (staying action for six months and referring to the FDA the question of whether products containing GMOs can be labeled “natural”); *Ries v. Hornell Brewing Co.*, No. 10-11139-JF (PVT), 2010 WL 2943860, at *6 (N.D. Cal. July 23, 2010) (referring question of whether high fructose corn syrup and citric acid are natural); *Coyle v. Hornell Brewing Co.*, Civ. No. 08-2797 (JBS), 2010 WL 2539386, at *7 (D.N.J. June 15, 2010) (same).

¹⁸⁴ See generally *Barnes*, 2013 WL 5530017, at *31 (explaining the six month time frame); see also *Cox*, 2013 U.S. Dist. LEXIS 97207, at *6 (same); *Ries*, 2010 WL 2943860, at *6; *Coyle*, 2010 WL 2539386, at *5.

¹⁸⁵ *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 960 (N.D. Cal. 2013); *Jones v. Conagra Foods, Inc.*, 912 F. Supp. 2d 889, 899 (N.D. Cal. 2012); *Bates v. Kashi Co.*, No. 11-CV-1967-H (BGS), slip op. at 10-11 (S.D. Cal. July 16, 2012); *Briseno v. Conagra Foods, Inc.*, 2011 U.S. Dist. LEXIS 154750, *28-29 (C.D. Cal. Nov. 23, 2011); *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d 1028, 1034-35 (N.D. Cal. 2009); *Wright v. Gen. Mills, Inc.*, Civ. No. 08-CV-1532-L (NLS), 2009 WL 3247148, at *3-4 (S.D. Cal. Sept. 30, 2009); but cf. *Taradejna v. Gen. Mills, Inc.*, 909 F. Supp. 2d 1128, 1134-35 (D. Minn. 2012) (dismissing without prejudice on primary jurisdiction grounds, finding “[t]he FDA is in the best position to resolve any ambiguity about the standard of identity for yogurt—a matter requiring scientific and nutritional expertise.”).

¹⁸⁶ *Janney v. Gen. Mills*, 944 F. Supp. 2d 806, 814 (N.D. Cal. 2013).

In repeatedly declining to promulgate regulations governing the use of “natural” as it applies to food products, the FDA has signaled a relative lack of interest in devoting its limited resources to what it evidently considers a minor issue, or in establishing some “uniformity in administration” with regard to the use of “natural” in food labels. Accordingly, any referral to the FDA would likely prove futile.¹⁸⁷

Based on these decisions, primary jurisdiction does not appear to be a promising defense.

E. Standing

1. Article III Standing

Under Article III of the US Constitution, a plaintiff's standing to bring suit is a jurisdictional requirement of the federal courts. A motion to dismiss for lack of subject matter jurisdiction can challenge standing.¹⁸⁸ To establish standing,

A plaintiff must show (1) [he or she] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁸⁹

In a class action, at least one of the named class representatives must meet the standing requirements.¹⁹⁰

¹⁸⁷ *Id.* at *7; *see also Bates*, slip op. at 10-11 (stating the “plaintiffs are unlikely to achieve resolution of their claims by petitioning the FDA due to the FDA’s decision not to formally define ‘natural,’ the FDA’s lack of resources in regulating use of ‘natural’ on labels, and the lack of a private right of action under the Food, Drug, and Cosmetic Act.”).

¹⁸⁸ FED. R. CIV. P. 12(b)(1).

¹⁸⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81 (2000).

¹⁹⁰ *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2011).

Defendants have successfully challenged Article III standing when the named plaintiffs of a putative class assert consumer protection claims for products they did not personally purchase.¹⁹¹ However, some courts have held that the named plaintiffs need not have purchased all of the products that are the subject of the complaint as long as the products they purchased are sufficiently similar to others targeted in the case that they did not purchase. For example, in *Astiana v. Dreyer's Grand Ice Cream, Inc.*, the court found sufficient similarity between the products the plaintiffs purchased and others included in the complaint that they did not purchase because they were the same kind of food product (ice cream) and the defendant used the same labeling statements for all of the products.¹⁹²

2. Statutory Standing

Some statutes providing private rights of action have their own standing requirements. The standing requirements under California's UCL, FAL, and CLRA are relatively lax. Under those statutes, a private plaintiff must have “suffered injury in fact and [have] lost money or property as a result of the unfair competition.”¹⁹³ Thus, the plaintiff must “plead and prove an injury in fact—e.g., the loss of money or property—and ‘actual reliance’ on the alleged fraudulent conduct.”¹⁹⁴ An injury is established if the plaintiff can show he would not have purchased the product had it been

¹⁹¹ Compare *Chin v. Gen. Mills, Inc.*, No. 0:12-CV-02150, 2013 WL 2420455, at *3 (D. Minn. June 3, 2013) (citing *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011)) (dismissing claims without prejudice as to products that the named plaintiff did not purchase); and *Lieberson v. Johnson & Johnson Consumer Co.*, 865 F. Supp. 2d 529, 537 (D.N.J. 2011) (dismissing allegations regarding products that Plaintiff did not purchase and only considering allegations regarding products that Plaintiff alleges she purchased and used); with *Hemy v. Perdue Farms, Inc.*, Civ. No. 11-888 (FLW), 2011 WL 6002463, at *11 (D.N.J. Nov. 30, 2011) (dismissing claims with prejudice as to products that named plaintiff did not purchase).

¹⁹² *Astiana v. Dreyer's Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at *13 (N.D. Cal. July 20, 2012), *motion to certify appeal denied*, *Astiana v. Dreyer's Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 4892391, at *13 (N.D. Cal. Oct. 12, 2012).

¹⁹³ CAL. BUS. & PROF. CODE § 17204 (2008); see also *Ries v. Ariz. Beverages USA L.L.C.*, 287 F.R.D. 523, 529 (N.D. Cal. 2012) (explaining the test for standing under UCL, FAL, and CLRA is the same).

¹⁹⁴ *Ries*, 287 F.R.D. at 529 (quoting *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009)).

labeled truthfully.¹⁹⁵ The plaintiff need not prove damages with certainty,¹⁹⁶ nor must he be entitled to restitution to have standing.¹⁹⁷

To establish the reliance element of standing, a plaintiff asserting a cause of action under California's consumer protection statutes must have evidence that, "in all reasonable probability," the plaintiff would not have purchased the product had the defendant not made the misleading statement.¹⁹⁸ However, the alleged misrepresentation need not be the only reason for plaintiff's decision to purchase or consume the product, nor "even the predominant or decisive factor influencing his conduct."¹⁹⁹ Moreover, reliance is presumed whenever the misrepresentation was material—i.e., when "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."²⁰⁰ In *Ries v. Arizona Beverages USA L.L.C.*, the court found that "the representation that a beverage is 'All Natural' or '100% Natural' is likely to be material."²⁰¹ This decision shows that it is relatively easy to satisfy the reliance element of standing in a California consumer protection case challenging "natural" labeling.

F. Challenges to Class Certification

Named plaintiffs in "natural" labeling litigation face significant hurdles in obtaining class certification. For practical purposes, defeating class certification is often as effective in eviscerating the plaintiffs' case as obtaining a dismissal or judgment on the merits. Thus, challenges to class certification are crucial to the defense of food labeling litigation.

¹⁹⁵ *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 901 (N.D. Cal. 2012) (citing *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835, 840 (9th Cir. 2011)).

¹⁹⁶ *Ries*, 287 F.R.D. at 530 (finding sufficient proof of injury in fact where named plaintiffs' evidence consisted only of sworn statements estimating the prices they paid for defendant's product).

¹⁹⁷ *Pom Wonderful L.L.C. v. Coca-Cola Co.*, 679 F.3d 1170, 1178-79 (9th Cir. 2012) (citing *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 895 (Cal. 2011); *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1088 (Cal. 2010)).

¹⁹⁸ *See Ries*, 287 F.R.D. at 529 (quoting *In re Tobacco II Cases*, 207 P.3d at 39) (internal quotation marks omitted).

¹⁹⁹ *Ries*, 287 F.R.D. at 529-30 (citing *In re Tobacco II Cases*, 207 P.3d at 39).

²⁰⁰ *Id.*

²⁰¹ *Ries*, 287 F.R.D. at 531.

1. Rule 23 Requirements

Plaintiffs seeking class certification must meet all of the prerequisites of Federal Rule of Civil Procedure 23(a) by showing that:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.²⁰²

Courts must undertake a “rigorous analysis” to determine that the prongs of Rule 23(a) have been met.²⁰³ In addition, the plaintiffs in food labeling class actions must establish, “through evidentiary proof,”²⁰⁴ that the proposed class fits one of the pertinent types of class actions under Rule 23(b). Rule 23(b)(2) applies where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”²⁰⁵ Alternatively, plaintiffs in food labeling cases may seek certification as a Rule 23(b)(3) damages class. Such a class can be certified only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”²⁰⁶ Plaintiffs must establish all requirements for class certification by a preponderance of the evidence.²⁰⁷

²⁰² FED. R. CIV. P. 23(a).

²⁰³ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Ries*, 287 F.R.D. at 528 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992)).

²⁰⁴ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

²⁰⁵ FED. R. CIV. P. 23(b)(3).

²⁰⁶ *Id.*

²⁰⁷ *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 37-38 (2d Cir. 2006).

2. Commonality/Predominance

One challenge for plaintiffs seeking class certification is sufficiently establishing the existence of common issues. The commonality requirement of Rule 23(a) is less demanding than the predominance requirement of 23(b)(3).²⁰⁸ Commonality under Rule 23(a) requires “some questions of fact and law which are common to the class,” while predominance under Rule 23(b)(3) “questions of law or fact common to class members must predominate over any questions affecting only individual members.”²⁰⁹ To meet the predominance requirement for a Rule 23(b)(3) damages class, plaintiffs must show “that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof.”²¹⁰ The court considers whether the class members could establish the elements of their claims using common evidence.²¹¹

The *Weiner v. Snapple Beverage Corp.* case illustrates the difficulties for plaintiffs to establish predominance of common issues sufficient to certify a Rule 23(b)(3) damages class.²¹² In that case, the court found that plaintiffs could not prove essential elements of their claims with common evidence, as opposed to individualized proof. For instance, the court found that the plaintiffs failed to propose a reliable methodology for establishing injury and causation necessary for their New York GBL § 349 claim—that class members paid more for the product as a result of its “all natural” label—on a class-wide basis. The plaintiffs had proffered an economics expert for that purpose, but the court excluded his testimony as unreliable because he had not identified what economic methodologies or data he would use, nor had he built an algorithm for the court to review for reliability.²¹³ Without expert testimony to develop class-wide evidence, proof of injury and

²⁰⁸ *Ries*, 287 F.R.D. at 536 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)).

²⁰⁹ *Id.*

²¹⁰ *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *5 (S.D.N.Y. Aug. 5, 2010) (quoting *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010)).

²¹¹ *Weiner*, 2010 WL 3119452, at *5 (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001)).

²¹² *Weiner*, 2010 WL 3119452, at *6.

²¹³ *Id.* at *8.

causation “would require, among other things, an examination of each of the millions of class members’ Snapple purchases, which the evidence shows were made in different locations, at different times, and for different prices, over the nearly eight-year class period.”²¹⁴

The *Weiner* court also found that the plaintiffs failed to show that they could prove the elements of unjust enrichment and express warranty claims with common evidence.²¹⁵ For unjust enrichment, plaintiffs would need to prove the amount of premium (i.e., the amount of the alleged unjust enrichment) each class member paid and whether class members received less than they bargained for.²¹⁶ Such evidence would require individualized evidence regarding what class members knew about high fructose corn syrup and whether they believed it was natural.²¹⁷ For their breach of express warranty claim, the plaintiffs would need to prove that the promise of a natural product was a “basis of the bargain,” which would require individualized evidence about whether class members purchased in reliance on the “natural” claim or for other reasons.²¹⁸ Given that all of these issues require individual determinations, the court ruled that the plaintiffs had failed to show that common issues were predominant.

Predominance has become even more difficult for plaintiffs to satisfy since the Supreme Court’s ruling in *Comcast v. Behrend*,²¹⁹ which was decided in 2013. In that case, the Court held that a plaintiff seeking to certify a Rule 23(b)(3) damages class must put forth a damages model that is capable of measuring damages across the entire class, “consistent with [his or her] liability case” and that it “must measure only those damages attributable to [the defendant’s conduct].”²²⁰ Applying *Comcast*, courts in several “natural” labeling cases have found that the plaintiffs’ proffered damages models failed to identify the price premium attributable only to

²¹⁴ *Id.* at *10.

²¹⁵ *Id.* at *11.

²¹⁶ *Id.* at *10-11.

²¹⁷ *Id.* at *11.

²¹⁸ *Weiner*, 2010 WL 3119452, at *11.

²¹⁹ *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).

²²⁰ *Id.* at 1433-34.

the “natural” claim, rather than other factors, such as value in the defendant’s brand.²²¹

3. Typicality

Typicality of class representatives’ claims also can be problematic for plaintiffs seeking class certification. Courts have interpreted the typicality requirement to mean that the class members’ claims must “arise from the same course of events, and each class member [must] make similar legal arguments to prove the defendant’s liability.”²²² Although a named plaintiff may have some unique factual issues with regard to his or her claims, the court should not certify a class “where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.”²²³ For example, where the state law that governs a class representative’s claims is different than that which applies to putative class members, the claims are not typical. This was one of the problems for the named plaintiff in *Rapcinsky v. Skinnygirl Cocktails, L.L.C.* The plaintiff purchased a product in Massachusetts, and therefore, he could not assert the New York GBL § 349 claim that was available to putative class members who made their purchases in New York.²²⁴ The court in that case also found that the named plaintiff’s reasons for purchasing the product were not typical of class members because he stated he would have bought the product regardless of its price and that its naturalness was irrelevant to his purchasing decision.²²⁵

²²¹ *Werdebaugh*, 2014 U.S. Dist. LEXIS 173789, *38-39; *Brazil v. Dole Packaged Foods, LLC*, 2014 U.S. Dist. LEXIS 157575, *45 (N.D. Cal. Nov. 6, 2014); *Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, *76-77 (N.D. Cal. June 13, 2014).

²²² *Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, No. 11 Civ. 6546 (JPO), 2013 WL 93636, at *4 (S.D.N.Y. Jan. 9, 2013) (quoting *Marisol v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997)).

²²³ *Rapcinsky*, 2013 WL 93636 at *4 (quoting *Baffa v. Donaldson*, 222 F.3d 52, 59 (2d Cir. 2000)).

²²⁴ *Rapcinsky*, 2013 WL 93636 at *6.

²²⁵ *Id.* at *8; see also *Weiner*, 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010) (explaining that “Given New York’s ‘basis of the bargain’ conception of reliance for express warranty claims, it is clear that plaintiffs’ purported reliance on Snapple’s ‘All Natural’ label cannot be the subject of generalized proof.”).

4. Manageability/Ascertainability

In addition, manageability and ascertainability of the proposed class can also be a problem for plaintiffs seeking class certification. While not an express requirement of Rule 23, the need to define a class includes an "implied requirement of ascertainability."²²⁶ An ascertainable class is "defined by objective criteria that are administratively feasible, and when identifying its members would not require a mini-hearing on the merits."²²⁷ Furthermore, under Rule 23(b)(3), plaintiffs seeking certification of a damages class have to show that the class action procedure is superior, including consideration of the "difficulties likely to be encountered in the management of a class action."²²⁸

In *Weiner*, the court found serious impediments to establishing that the proposed class was manageable or ascertainable.²²⁹ The plaintiffs sought certification of a proposed class of potentially millions of persons worldwide who purchased a Snapple beverage labeled "all natural" and containing high fructose corn syrup in New York from October 10, 2001 to January 1, 2009.²³⁰ The plaintiffs failed to explain how such a class could be managed or how class members could be ascertained given that they were unlikely to have a receipt, bottle label, or any other documentation of their purchases.²³¹

Even when plaintiffs have defined the class more narrowly than that alleged in *Weiner*, some courts have struggled to find that the class members would be ascertainable without holding what would essentially constitute mini-trials. In this regard, the Third Circuit's decision in *Carrera v. Bayer Corp.*, a case involving dietary supplement labeling, has influenced some courts.²³² In *Carrera*, the Third Circuit held that the plaintiff failed to establish ascertainability because there was no evidence that class members

²²⁶ *Weiner*, 2010 WL 3119452, at *12 (citing *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 30 (2d Cir. 2006)).

²²⁷ *Weiner*, 2010 WL 3119452, at *12 (citing *Charron v. Pinnacle Grp. N.Y. L.L.C.*, No. 07 Civ. 6316 (CM) (RLE), 269 F.R.D. 221, 229 (S.D.N.Y. 2010)).

²²⁸ FED. R. CIV. P. 23(b)(3)(D).

²²⁹ *Weiner*, 2010 WL 3119452, at *12.

²³⁰ *Id.*

²³¹ *Id.* at *12-13.

²³² *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

would have kept receipts of their purchases that they could be identified from retailer records, or that affidavits of putative class members would be reliable.²³³

Within the Ninth Circuit, district courts have split on the issue of whether the inability to identify the members of a putative class of purchasers makes the class unascertainable.²³⁴ Some have found insurmountable problems with ascertaining the class members.²³⁵ In others, the courts held that class certification was appropriate—even without having records to identify purchasers—because “[t]here is no requirement that ‘the identity of the class members . . . be known at the time of certification.’”²³⁶

G. Plaintiffs’ Failure of Proof

Very few “natural” labeling cases have reached decisions on the merits. Three that have reached the summary judgment stage, however, resulted in favorable rulings for the defense. In these three cases, summary judgment was granted for the defendants due to the plaintiffs’ failure to proffer evidence essential to their claims.

In *Weiner*, the court found that the plaintiffs failed to present reliable evidence that they paid a premium for the “All Natural” label on Snapple containing HFCS.²³⁷ Rather, they had only vague recollections of the prices they paid and the prices of alternative beverages available at the time.²³⁸ The plaintiffs also admitted that prices fluctuated and that Snapple may have been cheaper than other options at certain times and places.²³⁹ Based on these facts, the court found that the plaintiffs had “not provided a sufficient ‘basis in fact’ upon which a damages award could be based.”²⁴⁰

In *Ries v. Arizona Beverages*, the court granted summary judgment for

²³³ *Id.* at 309-11.

²³⁴ *See In re Conagra Foods, Inc.*, 302 F.R.D. 537, 565 (C.D. Cal. 2014) (noting the split).

²³⁵ *See, e.g., Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, *38 (N.D. Cal. June 13, 2014)

²³⁶ *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal.2013) (quoting *Ries*, 287 F.R.D. at 536).

²³⁷ *Weiner*, 2010 WL 3119452, at *6 .

²³⁸ *Id.* at *2-3.

²³⁹ *Id.*

²⁴⁰ *Id.* at *13.

the defendants based on the plaintiffs' failure to adequately prosecute their case.²⁴¹ Initially, the court rejected the defendants' argument for summary judgment, which was based on the plaintiffs' lack of evidence that they were entitled to monetary relief.²⁴² At that time, the court found that the defendants' motion was premature because discovery was incomplete.²⁴³ After the close of discovery, however, the court granted defendants' renewed motion for summary judgment, finding that plaintiffs "offer not a scintilla of evidence from which a finding of fact could determine the amount of restitution or disgorgement to which plaintiffs might be entitled if this case were to proceed to trial."²⁴⁴ Furthermore, because the plaintiffs' counsel had been "dilatatory and [had] failed to prosecute this action adequately," the court decertified the class it previously certified so that its decision to grant summary judgment would not have a preclusive effect on the entire class.²⁴⁵

Most recently, in *Brazil v. Dole Packaged Foods, LLC*, the court found that the plaintiff offered insufficient evidence to establish that Dole's "All Natural Fruit" label on products containing ascorbic acid and citric acid would mislead reasonable consumers.²⁴⁶ In that case, the only evidence that consumers were likely to be deceived was the plaintiff's own testimony that the label misled him.²⁴⁷ The court found that evidence inadequate under Ninth Circuit precedent holding that "a few isolated examples of actual deception are insufficient."²⁴⁸

V. CONCLUSION

The legal issues discussed in this paper surely will evolve as litigation involving "natural" food labeling progresses through the courts. Trial

²⁴¹ *Ries v. Ariz. Beverages USA L.L.C.*, No. 10-01139 RS, 2013 WL 1287416, at *7-9 (N.D. Cal. Mar. 28, 2013).

²⁴² *Ries*, 287 F.R.D. at 531.

²⁴³ *Id.* at 532-33.

²⁴⁴ *Ries*, 2013 WL at *8.

²⁴⁵ *Id.* at *9.

²⁴⁶ *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 169943, *11 (N.D. Cal. Dec. 8, 2014).

²⁴⁷ *Id.* at *20.

²⁴⁸ *Id.*

judgments and appellate decisions could significantly change the game. It remains to be seen whether this particular type of lawsuit will have staying power. For now, companies that may be hit with such litigation can prepare by staying aware of developments in the cases and taking steps to minimize the risks of being sued. Most importantly, food manufacturers should evaluate their labeling and other marketing with the assistance of counsel and consider removing "natural" or other hot-button terms, particularly from higher-risk products containing synthetic or genetically engineered ingredients and from products that have been made with more than minimal processing.