DEFINING *NATURAL* FOODS: THE SEARCH FOR A *NATURAL* LAW

Nicole E. Negowetti[*]

INTRODUCTION

The term *natural* has escaped an enforceable definition by the Food and Drug Administration ("FDA") despite repeated requests from food industry groups[1] and food manufacturers[2] and various failed attempts over the past decade.[3] Retail sales demonstrate the claim's influence on consumers. In the United States, consumers have spent more than $40 billion on food labeled *natural* over the past year, and 51% of Americans search for *all natural* products when shopping.[4] Consumers, however, are confused by the term's meaning, and "only 47% view the claim as trustworthy."[5] As both consumers and businesses demand an enforceable, accountable, and uniform standard for the terms *natural* and *all natural*,[6] courts, legislatures, and retailers are attempting to create their own standards in the absence of action by the FDA.[7] Recent court decisions have referred the issue of *natural's* meaning to the FDA, but in January 2014, the FDA refused to act upon these requests.[8] This Article evaluates the recent attempts to establish a standard in the

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[*] Assistant Professor of Law, Valparaiso University Law School.

[1] "In 2006, the Sugar Association petitioned the FDA to 'establish specific rules and regulations governing the definition of "natural" before a "natural" claim can be made on food and beverages regulated by the FDA.'" Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581, 586 (2013) (quoting Citizen Petition from Andrew C. Briscoe III, President & CEO, Sugar Ass'n, to FDA, Re: Definition of the Term "Natural" for Making Claims on Foods and Beverages Regulated by the Food and Drug Administration 1 (Feb. 28, 2006), *available at* http://www.cspinet.org/new/pdf/sugar_fda_petition.pdf).

[2] In 2007, "the Sara Lee Corporation petitioned for the FDA to collaborate with the USDA's Food Safety and Inspection Service (FSIS) to create a uniform policy for the use of the term 'natural.'" *Id.* (citing Citizen Petition from Robert G. Reinhard, Dir. Food Safety/Regulatory, Sara Lee Corp., to FDA, Requesting the Food and Drug Administration to Develop Requirements for the Use of the Term "Natural" Consistent with USDA's Food Safety and Inspection Service 1–2 (Apr. 9, 2007), *available at* http://www.fda.gov/ohrms/dockets/dockets/07p0147/07p-0147-cp00001-02-vol1.pdf).

[3] *See id.* at 584–86, 589–91 for a discussion of regulatory attempts by the FTC, FDA, and USDA to define the term *natural*.

[4] Mike Esterl, *The Natural Evolution of Food Labels*, WALL ST. J., Nov. 6, 2013, at B1.

[5] *Id.*

[6] *See* Negowetti, *supra* note 1, at 583.

[7] *Id.* at 593.

[8] *See infra* Part I.A.2.

absence of government regulation and concludes that the *natural* claim is more likely to be abandoned by food manufacturers than it is to be defined in a uniform and enforceable manner.

The Federal Food, Drug, and Cosmetic Act ("FDCA") of 1938 grants the FDA the power to "promulgate food definitions and standards of food quality."[9] The FDCA also empowers the FDA to (a) protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled";[10] (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings.[11] The FDCA deems a food as "misbranded" if its labeling "is false or misleading in any particular."[12] There is no private right of action under the statute.[13]

Although the FDA has acknowledged that defining the term *natural* could prevent consumer confusion and ambiguity, the agency nevertheless has declined to adopt a formal definition.[14] In 1991, it adopted an "informal policy," which states that *natural* means merely that "nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there."[15] The policy carries only the weight of an advisory opinion, and it does not establish a legal requirement.[16] In 1993, when it initiated rulemaking for the Nutrition and Labeling Education Act ("NLEA"),[17] the FDA invited comments on a potential rule

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[9] Fellner v. Tri-Union Seafoods, 539 F.3d 237, 251 (3d Cir. 2008) (citing 21 U.S.C. § 341 (2006)).

[10] § 393(b)(2)(A).

[11] *See* Food and Drugs, 21 C.F.R. §§ 7.1, 10.25, 10.40, 10.50 (2013).

[12] 21 U.S.C. § 343(a) (2012).

[13] Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 806–07, 810 (1986).

[14] 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) [hereinafter 1993 Food Labeling Reg.]; Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms, 56 Fed. Reg. 60,421, 60,466 (proposed Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105) [hereinafter 1991 Proposed Food Labeling Reg.].

[15] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466.

[16] 21 C.F.R. § 10.85(d), (e), (j) (2013). The FDA has implemented only one regulation concerning the use of the term *natural*, distinguishing natural flavoring from artificial flavoring for the "labeling of spices, flavorings, colorings and chemical preservatives." § 101.22.

[17] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)). The NLEA amended the FDCA for nearly all food products within the FDA's jurisdiction to regulate health claims on food packaging, standardize nutrient content claims, and require that more detailed nutritional information be included on product labels. *See The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

that would define *natural*.[18] The FDA questioned whether it should "establish a definition for 'natural' so that the term would have a common understanding among consumers" or whether it should completely prohibit *natural* claims "on the basis that they are false and misleading."[19] Although the agency acknowledged that defining the term *natural* could reduce ambiguity and prevent misleading claims, the FDA ultimately decided that resource limitations and other priorities prohibited it from undertaking rulemaking to establish a definition for *natural*.[20]

Although consumer interest in *natural* foods continued to grow over the following decade, the FDA again declined to address the *natural* issue. In July 2008, when answering the question of whether high fructose corn syrup ("HFCS") is *natural*, the FDA explained that it would not "restrict the use of the term 'natural' except on products that contain added color, synthetic substances and flavors."[21] It thus concluded that whether HFCS could be considered *natural* would depend on the manner in which the corn syrup was made, and products containing HFCS could carry a *natural* label when synthetic fixing agents were not in contact with the product during manufacturing.[22] In doing so, the FDA continued to adhere to its position that its "longstanding policy on the use of the term 'natural' is that 'natural' means that nothing artificial (including artificial flavors) or synthetic (including all color additives regardless of source) has been . . . added to a food that would not normally be expected to be in the food."[23] The FDA also stated that it would make determinations on a case-by-case basis, as opposed to adopting a consistent, uniform policy:

> Consistent with our policy on the use of the term "natural," we have stated in the past that the determination on whether an ingredient

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[18] 1993 Food Labeling Reg., *supra* note 14, at 2397.

[19] *Id.* at 2407.

[20] *Id.*

[21] Letter from Geraldine A. June, Supervisor Prod. Evaluation & Labeling Team, FDA, to Audrae Erickson, President, Corn Refiners Ass'n (Jul. 3, 2008), *available at* http://www.corn.org/wp-content/uploads/2008/07/FDAdecision7-7-08.pdf. Just three months earlier, in April 2008, the FDA's position was that HFCS was *not* natural. In fact, in response to an article on Foodnavigator-usa.com regarding whether HFCS could be considered a *natural* ingredient, the FDA stated that "the use of synthetic fixing agents in the enzyme preparation, which is then used to produce HFCS, would not be consistent with our policy on the use of the term 'natural.' Consequently, we . . . would object to the use of the term 'natural' on a product containing HFCS." *Id.*; *see also* Lorraine Heller, *FDA Comments on HFCS Spark Industry Opposition*, FOOD NAVIGATOR-USA.COM (Apr. 3, 2008), http://www.foodnavigator-usa.com/Regulation/FDA-comments-on-HFCS-spark-industry-opposition.

[22] Letter from Geraldine A. June, *supra* note 21.

[23] *Id.*

> would qualify for use of the term "natural" is done on a case-by-case basis. Further, ingredients with the same common or usual name may be formulated in different ways, where a food containing the ingredient formulated one way may qualify for the use of [the] term "natural" and another food containing the ingredient with the same common or usual name, which has been formulated in a different way may not be eligible for the use of the term "natural."[24]

In 2012, the FDA updated its website to reflect its rationale for not providing a clear definition of *natural* on food labels; according to the FDA:

> From a food science perspective, it is difficult to define a food product that is "natural" because the food has probably been processed and is no longer the product of the earth. That said, the FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.[25]

The FDA's position regarding *natural* is merely an informal policy that has the weight of an advisory opinion.[26] The policy does not impose a legal requirement nor does it have the force of law.[27] This lack of an enforceable *natural* standard has created legal issues regarding consumer expectations and the ubiquitous use of the term on a wide variety of food products. Although food labeling and misbranding issues are properly within the FDA's province, the issue of what constitutes *natural* is now before the courts.

Part I of this Article discusses the recent decisions in the *natural* lawsuits. Part II evaluates the efforts of Congress and state legislatures to define *natural*. Part III then discusses whether the food industry or retailers will establish a *natural* standard. Part IV analyzes the issue of whether consumers should be required to investigate what a food producer's *natural* claim means, and the Article closes by offering a conclusion regarding the future of *natural* claims on food labels.

I. FOOD FIGHTS IN THE FOOD COURTS

As the FDA has continued to refrain from providing sufficient guidance to food manufacturers as to what constitutes *natural*, lawsuits have flooded the courts. At least one hundred lawsuits have been filed in

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[24] *Id.*

[25] Negowetti, *supra* note 1, at 588 (quoting *About FDA*, *What Is the Meaning of 'Natural' on the Label of Food?*, FDA, http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm (last updated Apr. 4, 2012)).

[26] 21 C.F.R. § 10.85(d), (e), (j) (2013).

[27] *See* Holk v. Snapple Beverage Corp., 575 F.3d 329, 342 (3d Cir. 2009).

the past two years challenging *natural* claims on food,[28] particularly in the Northern District of California, now referred to as the "Food Court."[29] Plaintiffs have alleged violations of state statutes on false advertising, unfair trade practices, consumer protection, fraud, and breach of warranty.[30] Most of the *natural* lawsuits filed in California allege that the *natural* claims on various products constitute violations of the Unfair Competition Law ("UCL"),[31] predicated on violations of the False Advertising Law ("FAL")[32] or the Consumer Legal Remedies Act ("CLRA").[33] The UCL, FAL, and CLRA are California consumer protection statutes which prohibit deceptive practices and misleading advertising.[34] Claims made under these statutes "are governed by the 'reasonable consumer' test" which focuses on whether "members of the public are likely to be deceived."[35] More specifically, the inquiry under the reasonable consumer standard is whether "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[36] "A 'reasonable consumer' is an 'ordinary consumer acting reasonably under the circumstances,' who 'is not versed in the art of inspecting and judging a

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[28] Esterl, *supra* note 4.

[29] Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, BLOOMBERG LAW, http://about.bloomberglaw.com/practitioner-contributions/jury-still-out-on-the-food-court/ (last visited Mar. 19, 2014); *see also* AM. TORT REFORM FOUND., STATE CONSUMER PROTECTION LAWS UNHINGED 18 (2013), *available at* http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf.

[30] *See, e.g.*, Class Action Complaint at 1–2, Janney v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013) (No. 4:12-cv-03919-PJH) (alleging violations of California's Unfair Competition Law, False Advertising Law, and unjust enrichment); Class Action Complaint at 2, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011) (alleging breach of express warranty along with claims under California's false advertising law, California's unfair competition law, and California's Consumer Legal Remedies Act); Class Action Complaint at 1–2, 16–17, Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009) (No. 3:08-CV-04151-CRB) (seeking injunctive relief and restitution on behalf of a class of California consumers for unlawful and deceptive business acts and practices and false advertising).

[31] CAL. BUS. & PROF. CODE § 17200 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, *Lockwood*, 597 F. Supp. 2d at 1029.

[32] § 17500 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, Ries v. Arizona Beverages USA, 287 F.R.D. 523, 527 (N.D. Cal. 2012).

[33] CAL. CIV. CODE § 1750 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d. 861, 863 (N.D. Cal. 2012).

[34] *See* § 1770 (Westlaw through 2013 Reg. Sess.); CAL. BUS. & PROF. CODE §§ 17200, 17500.

[35] Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)).

[36] Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003).

product, [or] in the process of its preparation or manufacture.'"[37] Because plaintiffs have alleged that they were misled by defendants' *natural* claims on unnatural products, satisfying the "reasonable consumer" test requires that they offer an objective standard for *natural* that was not met by the food producer.[38] Thus, courts will engage in an analysis of what constitutes *natural* to a reasonable consumer.[39] Before discussing how the courts have evaluated the meaning of *natural*, this Article will first analyze whether the inquiry is a proper one for the courts, or whether defining *natural* is within the FDA's area of expertise.

A. Preemption and Primary Jurisdiction

Recently, several courts have announced decisions that reveal a lack of consensus on whose role—courts or FDA—it is to address the issue of what *natural* means to consumers. Federal courts have consistently ruled "that the FDA, pursuant to the FDCA and NLEA, [does] not preempt claims brought under state consumer protection laws that utilized labels emphasizing that the food contained 'all natural' ingredients."[40] For example, in denying Defendant Campbell Soup's Motion to Dismiss, the court in *Barnes v. Campbell Soup Company* reasoned that "because the FDA deferred taking regulatory action by providing a mere general and unrestrictive policy on the term 'natural,' the FDA provided no actual federal requirements regarding the term 'natural' for the Court to endow with preemptive effect."[41] Therefore, until the FDA issues an enforceable requirement regarding the term

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[37] Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 885 (C.D. Cal. 2013) (alteration in original) (quoting Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 682 (2006)).

[38] *See Williams*, 552 F.3d at 938.

[39] *Id.* at 939–40.

[40] Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *7 (N.D. Cal. July 25, 2013); s*ee also* Holk v. Snapple Beverage Corp., 575 F.3d 329, 341–42 (3d Cir. 2009) (holding that the plaintiff's claims brought under state law were not preempted); Astiana v. Ben & Jerry's Homemade, Inc., Nos. C10-4387 PJH & C10-4937 PJH, 2011 WL 2111796, at *7–8 (N.D. Cal. May 26, 2011) (denying defendant's motion to dismiss because plaintiff's claims were not preempted by the FDCA); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1031–32 (N.D. Cal. 2009) (finding defendant's argument that plaintiff's claims were preempted non-persuasive); Hitt v. Arizona Beverage Co., No. 08CV809 WQH (POR), 2009 WL 449190, at *5 (S.D. Cal. Feb. 4, 2009) (concluding that plaintiff's claims were not preempted by federal law).

[41] *Barnes*, 2013 WL 5530017, at *7; *see Hitt*, 2009 WL 449190, at *3 (noting that "'deliberate agency inaction—an agency decision not to regulate an issue—will not alone preempt state law'") (quoting Fellner v. Tri-Union Seafoods, 539 F.3d 237, 247 (3d Cir. 2008)).

natural, the court will not "intrude upon the FDA's authority" and preempt plaintiffs' claims.[42]

In addition to raising preemption claims, which have been consistently unsuccessful, defendants in these *natural* lawsuits have routinely sought dismissal of the cases also on primary jurisdiction grounds.[43] The doctrine applies "whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."[44] It serves to maintain uniformity and consistency, uphold the integrity of a regulatory scheme, and establish a "workable relationship between the courts and administrative agencies."[45] Although "[n]o fixed formula exists for applying the doctrine of primary jurisdiction,"[46] courts will generally weigh four factors in deciding whether it applies: "(1) a need to resolve an issue (2) that 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."[47] If the doctrine applies, a court will "refer" the issue to the appropriate agency, allowing the parties reasonable opportunity to seek an administrative ruling.[48]

In 2010, although Defendant Snapple's Motion to Dismiss was denied, the company succeeded in arguing the applicability of the primary jurisdiction doctrine in *Coyle v. Hornell Brewing Company*.[49] The New Jersey District Court certified to the FDA for administrative determination the question of whether HFCS is a *natural* ingredient.[50]

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[42] *Barnes*, 2013 WL 5530017, at *7. However, where the USDA and Food Safety and Inspection Service ("FSIS"), pursuant to the Federal Meat Inspection Act ("FMIA") and the Poultry Products Inspection Act ("PPIA"), pre-approved Campbell's Natural Chicken Tortilla soup label, the court held that state claims with respect to this soup must be preempted. *Id.* at *5. Because the pre-approval process for labels includes a determination of whether the label appears "false or misleading," the Defendant's Natural Chicken Tortilla soup labels indicating that the soup contains "100% Natural" ingredients, despite its inclusion of GMO corn, "cannot be construed, as a matter of law, as false or misleading." *Id.*

[43] *See, e.g.*, *Holk*, 575 F.3d at 333; *Barnes*, 2013 WL 5530017, at *8; *Lockwood*, 597 F. Supp. 2d at 1030.

[44] United States v. W. Pac. R.R. Co., 352 U.S. 59, 63–64 (1956).

[45] MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1105 (3d Cir. 1995).

[46] *W. Pac. R.R.*, 352 U.S. at 64.

[47] Janney v. Gen. Mills, 944 F. Supp. 2d 806, 811 (N.D. Cal. 2013) (citing Clark v. Time Warner Cable, 523 F.3d 1110, 1114–15 (9th Cir. 2008)).

[48] Reiter v. Cooper, 507 U.S. 258, 268 & n.3 (1993).

[49] Coyle v. Hornell Brewing Co., No. 08-02797 (JBS), 2010 WL 2539386, at *1, 3–4 (D.N.J. June 15, 2010).

[50] *Id.* at *4–5.

Just a few months later in September 2010, the FDA refused to provide the requested guidance.[51] Again, the FDA referenced more pressing concerns and limited resources and stated it would take years to properly formulate a definition of *natural* through its normal process including public participation.[52] In the response letter, the FDA remarked that "[c]onsumers currently receive some protection in the absence of a definition of 'natural' because the Federal Food, Drug, and Cosmetic Act and FDA's implementing regulations require that all ingredients used in a food be declared on the food's label."[53] Since the FDA's refusal to intervene in *Coyle* and respond to the issue of whether HFCS is a *natural* ingredient, most district courts have ruled that the primary jurisdiction doctrine does not apply to lawsuits alleging misleading use of the *natural* claim.[54]

1. Issue within the Courts' Competence

The majority of district courts recently deciding whether to grant defendants' motions to dismiss on primary jurisdiction grounds have concluded either that primary jurisdiction is inappropriate in these *natural* lawsuits or that referral to the FDA would be futile even if the doctrine was applicable.[55] For example, in *Brazil v. Dole Food Company*, the Northern District of California rejected the defendant's argument that the court should either dismiss or stay the case under the doctrine of primary jurisdiction.[56] Plaintiff alleged that he purchased Dole's misbranded food products, such as Dole Mixed Fruit in 100% Fruit Juice and Dole Blueberries, which claimed to be "'All Natural' despite containing artificial or unnatural ingredients, flavorings, coloring, and/or chemical preservatives."[57] The court concluded that "this case does not

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[51] Negowetti, *supra* note 1, at 588 (citing Letter from Michael M. Landa, Acting Dir., Ctr. for Food Safety & Applied Nutrition, FDA, to Judge Jerome B. Simandle, U.S. Dist. Court, Dist. N.J. (Sept. 16, 2010), *available at* http://www.kashifalse advertisingclassaction.com/Documents/KKA0002/KKA_KashiComplaint_131105.pdf).

[52] *Id.*

[53] *Id.* (quoting Letter from Michael M. Landa, Acting Dir., Ctr. for Food Safety & Applied Nutrition, FDA, to Judge Jerome B. Simandle, U.S. Dist. Court, Dist. N.J. (Sept. 16, 2010), *available at* http://www.kashifalseadvertisingclassaction.com/Documents/KKA0002/KKA_KashiComplaint_131105.pdf).

[54] *See infra* I.A.1; *see also* Janney v. Gen. Mills, 944 F. Supp. 2d 806, 811–15 (N.D. Cal. 2013).

[55] *Compare Janney*, 944 F. Supp. 2d at 814–15 (holding that referral of the matter to the FDA is futile), *and* Brazil v. Dole Food Co., 935 F. Supp. 2d. 947, 959–60 (N.D. Cal. 2013) (declining to apply the doctrine of primary jurisdiction to the case), *with* Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *8–9 (N.D. Cal. July 25, 2013) (referring the case to the FDA and ordering a six-month stay).

[56] *Brazil*, 935 F. Supp. 2d at 959–60.

[57] *Id.* at 950–51.

raise a 'particularly complicated issue that Congress has committed to a regulatory agency.'"[58] The court opined that the case is "'far less about science than it is about whether a label is misleading'"[59] and it went on to comment that "'every day courts decide whether conduct is misleading,' and the 'reasonable-consumer determination and other issues involved in Plaintiff's lawsuit are within the expertise of the courts to resolve.'"[60] Finding that the case did not "require[ ] resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency," the court declined to stay the case based on primary jurisdiction.[61] Quoting the Ninth Circuit, the court reasoned that "the doctrine of primary jurisdiction does *not* require that all claims within an agency's purview be decided by the agency. Nor is it intended to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit."[62]

Similarly, in *In re Frito–Lay North America, Inc. All Natural Litigation*, the Eastern District of New York reasoned that "the primary jurisdiction doctrine does not apply when 'the issue at stake is legal in nature and lies within the traditional realm of judicial competence.'"[63] In this consolidated multi-district class action against Frito-Lay North America Inc., plaintiffs alleged that Tostitos, SunChips, and Fritos Bean Dip products are deceptively labeled and marketed as "All Natural" when, in fact, the products contained unnatural genetically modified organisms ("GMOs").[64] The court adopted reasoning similar to that in *Brazil* and explained that the issue regarding whether a reasonable consumer would find the label misleading is one in which "courts are

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[58] *Id.* at 960 (quoting Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d. 1166, 1172 (9th Cir. 2002)).

[59] *Id.* (quoting Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d. 889, 898 (N.D. Cal. 2012)).

[60] *Id.* (quoting *Jones*, 912 F. Supp. 2d. at 899); *see also* Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010) (stating that "plaintiffs advance a relatively straightforward claim: they assert that defendant has violated FDA regulations and marketed a product that could mislead a reasonable consumer[,] . . . [and that] this is a question courts are well-equipped to handle" (internal quotation marks omitted)).

[61] *Brazil*, 935 F. Supp. 2d at 960 (alteration in original) (quoting *Brown*, 277 F.3d. at 1172).

[62] *Id.* (internal quotation marks omitted) (quoting *Brown*, 277 F.3d at 1172).

[63] *In re* Frito-Lay N. Am., Inc. All Natural Litig., No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *8 (E.D.N.Y. Aug. 29, 2013) (quoting Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988)).

[64] *Id.* at *1.

eminently well suited, even well versed."[65] The court also noted that a formal definition of *natural* by the FDA "would not dispose of plaintiffs' state law claims."[66] Furthermore, the court noted:

> There is no telling, if it even chose to respond with any directive to the Court's referral, how the FDA would define the term, and whether its definition would shed any further light on whether a reasonable consumer is deceived by the 'All Natural' food label when it contains bioengineered ingredients.[67]

In In re *ConAgra Foods, Incorporated*,[68] the court was not persuaded by ConAgra's argument that a stay of the case pursuant to the primary jurisdiction doctrine would be "highly probative," if not "determinative" of its liability.[69] The court reasoned:

> First, the FDA would have to act, something it has declined to do in the past. Second, the court would have to assess whether the FDA's action was such that it preempted all state regulation of the subject; this would necessitate that the court consider whether any regulation adopted by the FDA conflicted with the law of the various states in which plaintiffs reside. Third, ConAgra does not concede that an FDA regulation precluding the use of a "100% Natural" label on GMO foods would establish that it is liable to plaintiffs. As a result, the impact any potential FDA action might have on future litigation of this case is speculative at best.[70]

Therefore, due to the "uncertain prospect that the FDA will act, . . . the fact that the impact of any regulatory action on this litigation is speculative, [and] the specter of a lengthy delay that could prejudice plaintiffs," the court denied ConAgra's application for an order staying the action.[71]

The FDA's repeated reluctance to establish an enforceable *natural* requirement was critical to other courts' holdings regarding the

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[65] *Id.* at *8. "[E]very day courts decide whether conduct is misleading." *Id.* (alteration in original) (quoting Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009)).

[66] *Id. (*quoting *Lockwood*, 597 F. Supp. 2d at 1035).

[67] *Id.*

[68] No. CV 11–05379–MMM (AGRx), 2013 WL 4259467 (C.D. Cal. Aug. 12, 2013). On August 6, 2013, in light of the *Cox v. Gruma* order referring to the FDA the question of whether food products containing bioengineered ingredients may be labeled "100% Natural," ConAgra filed an *ex parte* application for an order staying its action under the primary jurisdiction doctrine. *Id.* at *1–2. Plaintiffs alleged that ConAgra Foods deceptively and misleadingly marketed its Wesson brand cooking oils as "100% Natural," when in fact Wesson Oils are made from GMOs. Class Action Complaint at 2, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[69] In re *ConAgra Foods, Inc.*, 2013 WL 4259467, at *4.

[70] *Id.*

[71] *Id.* at *5.

inapplicability of the primary jurisdiction doctrine. The court in *Krzykwa v. Campbell Soup Company* noted that "the FDA has repeatedly declined to adopt formal rule-making that would define the word 'natural.'"[72] The court found persuasive those courts that have refused to dismiss lawsuits involving *natural* claims because the FDA simply does not regulate those claims.[73] Similarly, in *Bohac v. General Mills, Incorporated*, the court reasoned:

> Given the amount of attention that the FDA has apparently directed towards the issue before the Court, "there is no such risk of undercutting the FDA's judgment and authority by virtue of making independent determinations on issues upon which there are no FDA rules or regulations (or even informal policy statements)."[74]

Similarly, in a class action against J.M. Smucker Co. alleging that Crisco Oils' claims of *natural* are deceptively labeled because they are made from GMOs and are heavily processed, the Northern District of California declined to apply the primary jurisdiction doctrine.[75] "[V]arious parties have repeatedly asked the FDA to rule on 'natural' labeling, and the FDA has declined to do so because of its limited resources and preference to focus on other priorities. . . . [R]eferring the matter to the FDA would do little more than protract matters."[76]

In *Janney v. General Mills*, although the judge found that the primary jurisdiction "factors favor the resolution of this issue by the FDA," he refused to dismiss or stay the action on primary jurisdiction grounds because "any referral to the FDA would likely prove futile."[77] The court determined that the issue of what constitutes *natural* implicates the FDA's regulatory authority, expertise, and uniformity in administration.[78] However, the FDA's repeated refusal "to promulgate

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[72] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1374–75 (S.D. Fla. 2013). The plaintiffs allege that Campbell's 100% Natural Soups are falsely labeled as "All Natural" because they contain genetically modified corn. *Id.* at 1371.

[73] *Id.* at 1374–75.

[74] Bohac v. Gen. Mills, Inc., No. 12-CV-05280-WHO, 2013 WL 5587924, at *3 (N.D. Cal. Oct. 10, 2013) (quoting Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 959–60 (N.D. Cal. 2013)); *see also* Rojas v. Gen. Mills, Inc., No. 12-CV-05099-WHO, 2013 WL 5568389, at *6 (N.D. Cal. Oct. 9, 2013) (holding that the plaintiff's "'claims do not necessarily implicate primary jurisdiction, and the FDA has shown virtually no interest in regulating' the term 'natural'" (quoting Chavez v. Nestle USA, Inc., 511 F. App'x 606, 607 (9th Cir. 2013))).

[75] Parker v. J.M. Smucker Co., No. C 13-0690 SC, 2013 WL 4516156, at *1, *7 (N.D. Cal. Aug. 23, 2013).

[76] *Id.* at *7.

[77] Janney v. Gen. Mills, 944 F. Supp. 2d 806, 814–15 (N.D. Cal. 2013). A consumer class alleges that General Mills' Nature Valley brand food products' *natural* labels are deceptive because the products contain high fructose corn syrup and other processed sweeteners. *Id.* at 809.

[78] *Id.* at 814.

regulations governing the use of 'natural' . . . 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."[79] Therefore, the court concluded that there was little reason to provide the FDA with another opportunity to address the *natural* issue.[80]

2. Referring the *Natural* Question to the FDA

The FDA's repeated reluctance to establish a definition or enforceable standard for the term has recently been challenged by several judges who have decided that the primary jurisdiction doctrine does apply to these *natural* lawsuits. Although the majority of judges in the Northern District of California have ruled against the applicability of primary jurisdiction, two judges in the same District reached the opposite result.[81] The order in *Cox v. Gruma Corporation* presented the issue of GMOs and labeling of *natural* foods to the FDA for the first time.[82] In *Cox*, the plaintiff alleged that the labels on Gruma Corporation's tortilla products are false and misleading because while they indicate that the products are *natural*, they contain corn grown from bioengineered seeds.[83] The court granted Gruma's motion to dismiss based on primary jurisdiction grounds.[84] It recognized that "[t]he FDA has regulatory authority over food labeling," the FDCA "establishes a uniform federal scheme of food regulation to ensure that food is labeled in a manner that does not mislead consumers," and food labeling "requires the FDA's expertise and uniformity in administration."[85] The

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[79] *Id.* at 814–15.

[80] *Id.*

[81] For cases where judges have declined to apply the primary jurisdiction doctrine, see, for example, *id.* at 809, 818 (Hamilton, J.); Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 950, 959 (N.D. Cal. 2013) (Koh, J.); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114, 1124 (N.D. Cal. 2010) (Seeborg, J.); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1029–30 (N.D. Cal. 2009) (Breyer, J.). *But see, e.g.*, Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *1, *9 (N.D. Cal. July 25, 2013) (White, J.) (dismissing the plaintiffs' claims on the grounds of primary jurisdiction); Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800, at *1–2 (N.D. Cal. July 11, 2013) (Rogers, J.) (granting the defendant's motion to dismiss on the basis of primary jurisdiction).

[82] *Cox*, 2013 WL 3828800, at *2; *see also* Elaine Watson, *FDA 'Respectfully Declines' Judges' Plea for It to Determine if GMOs Belong in All-Natural Products*, FOOD NAVIGATOR-USA.COM (Jan. 8, 2014), http://www.foodnavigator-usa.com/Regulation/FDA-respectfully-declines-judges-plea-for-it-to-determine-if-GMOs-belong-in-all-natural-products.

[83] *Cox*, 2013 WL 3828800, at *1; Class Action First Amended Complaint at 1–2, *Cox*, 2013 WL 3828800, ECF No. 33.

[84] *Cox*, 2013 WL 3828800, at *2.

[85] *Id.* at *1.

court agreed with the plaintiff's position that there is "a gaping hole in the current regulatory landscape for 'natural' claims and GMOs."[86] Although the FDA has not addressed the question of whether foods containing GMO or bioengineered ingredients may be labeled *natural*, or whether those ingredients would be considered "artificial or synthetic," the court concluded that the FDA is charged with resolving the issue.[87] It thus referred to the FDA "the question of whether and under what circumstances food products containing ingredients produced using bioengineered seed may or may not be labeled 'Natural' or 'All Natural' or '100% Natural.'"[88] Otherwise, the court reasoned, it "would risk 'usurp[ing] the FDA's interpretive authority[,]' and 'undermining, through private litigation, the FDA's considered judgments.'"[89] To provide the FDA an opportunity to address the question, the court stayed the proceedings for six months.[90]

Following the *Cox* court's lead, two other judges also stayed *natural* labeling cases to refer the issue to the FDA of whether food products containing GMOs can be labeled *natural*. One week after the *Cox* decision, a judge in the District of Colorado stayed a case in which plaintiffs alleged that Nature Valley Granola Bars are mistakenly or misleadingly labeled as "100% Natural," when in fact they are not *natural* because the Granola Bars contain GMOs.[91] The court found the primary jurisdiction doctrine appropriate because "[t]he issues of fact in this matter are not within the conventional experience of judges, they require the exercise of administrative discretion, and they require uniformity and consistency in the regulation of the business entrusted to the particular agency."[92]

The inconsistency in federal courts' decisions regarding primary jurisdiction, and thus the proper venue to determine the meaning of *natural*, is further highlighted by two lawsuits against Campbell Soups. In *Barnes v. Campbell Soup Company*,[93] a case that is nearly identical to

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[86] *Id.* at *2 (citing Opposition to Defendant's Motion to Dismiss First Amended Class Action Complaint at 12, *Cox*, 2013 WL 3828800, ECF No. 47).

[87] *Id.*

[88] *Id.*

[89] *Id.* (alteration in original) (quoting Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1176, 1178 (9th Cir. 2012)).

[90] *Id.*

[91] Van Atta v. Gen. Mills, Inc., No. 12-cv-02815-MSK-MJW, at *1 (D. Colo. July 18, 2013) (Watanabe, Mag. J.), ECF No. 51.

[92] *Id.* at *7.

[93] The plaintiffs asserted that Campbell's 100% Natural Soups are falsely labeled as "100% Natural" when they contain genetically modified corn. Barnes v. Campbell Soup Co., No. C 12-05185 JSW, 2013 WL 5530017, at *1 (N.D. Cal. July 25, 2013).

Krzykwa v. Campbell Soup Company,[94] discussed above, the district court reached the opposite conclusion regarding the applicability of the primary jurisdiction doctrine.[95] Although it acknowledged that the FDA has refused to directly regulate the term or impose a requirement upon companies to disclose GMOs as "unnatural" ingredients, the court nevertheless held that it was proper to defer to the FDA's regulatory authority.[96] The court explained that the FDA's inaction on the issue of whether food products labeled *natural* can contain GMOs "does not remove the presumption that Congress squarely empowered that authority to the FDA pursuant to the FDCA and NLEA. Under these circumstances, deference to the FDA's regulatory authority continues to remain the appropriate course."[97] As in *Cox*, the court reasoned that failing to refer the issue to the FDA would risk challenging the FDA's authority and undercutting its judgments.[98] Therefore, "out of respect for the FDA's authority," the court granted the defendant's motion to dismiss, referred the matter to the FDA for an administrative determination, and stayed the action for six months.[99]

In response to these courts' referral of the GMO issue to the FDA, the Center for Food Safety ("CFS")[100] submitted a letter to FDA Commissioner Margaret Hamburg urging the "FDA to decline defining the term 'natural' for use on food labels in an *ad hoc*, fact-specific, and haphazard manner, per individual court request, lacking public process and general applicability."[101] As the CFS argued,[102] to define *natural*, the FDA should engage in rulemaking pursuant to the Administrative Procedure Act ("APA").[103] This process "requires that the agency provide notice of proposed rulemaking and an opportunity for the public to

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[94] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1371, 1374–75 (S.D. Fla. 2013) (holding that the primary jurisdiction doctrine does not apply regarding the "all natural" labeling of food products containing genetically modified ingredients).

[95] *Barnes*, 2013 WL 5530017, at *8.

[96] *Id.* at *9.

[97] *Id.* (citing Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1178 (9th Cir. 2012)).

[98] *Id.*

[99] *Id.*

[100] The "Center for Food Safety (CFS) is a nonprofit public interest organization whose mission centers on protecting and furthering the public's right to know how their food is produced, through accurate labeling and other means." Letter from Andrew Kimbrell, Exec. Dir., & Bill Freese, Sci. Policy Analyst, Ctr. for Food Safety, to Margaret A. Hamburg, Comm'r, FDA 1 (Nov. 4, 2013), http://www.centerforfoodsafety.org/files/2013-11-1-letter-to-fda-re-natural-final_85868.pdf.

[101] *Id.*

[102] *Id.*

[103] 5 U.S.C. § 553 (2012).

comment."[104] Such a process is lengthy and would require considerable agency resources.[105] The FDA's recent correspondence with the courts indicates its agreement with this argument.

3. The FDA's Response

While the rise in food labeling litigation and consumer confusion over *all-natural* claims could pressure the FDA to revisit its *natural* policy in the near future, on January 6, 2014, the FDA responded to the courts and again declined the opportunity to address the issue.[106] In a letter from Leslie Kux, the FDA's Assistant Commissioner for Policy, the FDA cited several reasons for its refusal to define *natural*.[107] First, it noted that amending its *natural* policy would likely involve "a public process, such as issuing a regulation or formal guidance," rather than an *ad hoc* decision made "in the context of litigation between private parties."[108] Acknowledging the complexity of the issue and the competing interests of various stakeholders, Ms. Kux stated that "it would be prudent and consistent with FDA's commitment to the principles of openness and transparency to engage the public on this issue."[109] The letter also noted that defining *natural* would require coordination and cooperation with the USDA and other agencies.[110] Reconsidering its *natural* policy would entail a consideration of scientific evidence, consumer preferences and beliefs, food production and processing methods, and First Amendment issues.[111] Finally, the FDA again noted its lack of resources and identified other priorities, such as regulations implementing the Food Safety Modernization Act of 2011 and nutrition labeling regulations.[112]

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[104] Kimbrell & Freese, *supra* note 100.

[105] For example, it took the FDA more than six years after it issued a proposed rule to finalize the definition of *gluten-free*. The FDA issued a proposed rule in January 2007 and subsequently reopened the comment period in August 2011. Food Labeling; Gluten-Free Labeling of Foods, 78 Fed. Reg. 47,154, 47,157–58 (Aug. 5, 2013) (to be codified at 21 C.F.R. pt. 101). On August 5, 2013, the FDA promulgated the final rule regarding the meaning of *gluten-free* on food labels pursuant to the Food Allergen Labeling and Consumer Protection Act of 2004's (FALCPA's) directive. *Id.* at 47,154.

[106] *See* Letter from Leslie Kux, Assistant Comm'r for Policy, FDA, to Judges Yvonne Gonzalez Rogers, Jeffrey S. White, & Kevin McNulty 3 (Jan. 6, 2014), *available at* www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf ("[W]e respectfully decline to make a determination at this time regarding whether and under what circumstances food products . . . may or may not be labeled 'natural.'").

[107] *Id.* at 2.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

B. The Difficulties of Defining Natural *Foods: A Problem for Plaintiffs*

Although the lack of an enforceable standard for *natural* has made the term a target for consumer protection lawsuits, these cases illustrate the difficulties inherent in defining the term. Because the plaintiffs have alleged that the various *natural* claims on food labels are misleading and deceptive in violation of consumer protection statutes, to achieve class certification and prevail on their claims, they must demonstrate that the food producer's use of the term *natural* was inconsistent with a reasonable consumer's definition of *natural*.[113] Given the ambiguity and ubiquity of the term, the wide variety of products which feature the term, and the lack of any uniform standard, identifying the meaning of *natural* according to the "reasonable person" is no simple task. Both the FDA and FTC have indicated that this task may be insurmountable. As the FDA has recognized, consumers, food industry experts, and scientists adopt widely divergent views about the meaning of *natural* food products.[114] The FTC, meanwhile, has declined to adopt a definition of *natural* because "natural may be used in numerous contexts and may convey different meanings depending on that context."[115]

Plaintiffs in these *natural* lawsuits take exception to the inclusion of GMOs,[116] high fructose corn syrup ("HFCS"),[117] synthetic ingredients,[118] pesticides,[119] and processing aids, such as hexane, in foods labeled *natural*.[120] For example, the consumer class in *Janney*[121] asserts that *natural* labels should be applied only to "products that contain no artificial or synthetic ingredients and consist entirely of ingredients that are minimally processed."[122] In a lawsuit against Pepperidge Farm, the plaintiff advocated a similar, but not identical definition—claiming that

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[113] *See* Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013).

[114] *See* 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101).

[115] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013) (quoting 75 Fed. Reg. 63,552, 63,586 (Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260)) (internal quotation marks omitted).

[116] Class Action Complaint at 1, 6–7, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[117] Class Action Complaint at 2, Janney v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013) (No. 4:12-cv-03919-PJH).

[118] *Id.*

[119] Class Action Complaint at 2, Von Slomski v. Hain Celestial Grp., Inc., No. 8:13-cv-01757-AG-AN (C.D. Cal. filed Nov. 6, 2013).

[120] *See, e.g.*, Astiana v. Kashi Co., 291 F.R.D. 493, 498, 509 (S.D. Cal. 2013).

[121] The plaintiffs allege that General Mills's Nature Valley brand food products' *natural* labels are deceptive because the products contain high fructose corn syrup and other processed sweeteners. *Janney*, 944 F. Supp. 2d at 809.

[122] Class Action Complaint at 2, *Janney*, 944 F. Supp. 2d 806 (No. 4:12-cv-03919-PJH).

GMO ingredients and artificial or synthetic substances are "by definition, *not* natural, and reasonable consumers reasonably do not expect food labeled as 'natural' . . . to include artificial or synthetic substances."[123]

The same difficulties cited by the FDA and FTC in their refusing to establish a uniform and enforceable standard of the term *natural* have also been problematic for some plaintiffs, particularly at the class certification stage when they must demonstrate that common issues predominate over considerations individual to each class member.[124] In *Astiana v. Kashi Company* and *Thurston v. Bear Naked*, the Southern District of California declined to certify classes of purchasers of Kashi and Bear Naked products that contained synthetic ingredients and were labeled *natural* because the plaintiffs failed to show that the term "has any kind of uniform definition among class members."[125] The plaintiffs were therefore unable to demonstrate "that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant's representation of 'All Natural' in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members."[126] The court emphasized the disagreement among the named plaintiffs regarding the definition of *natural*, and as to whether the allegedly unnatural ingredients failed to meet their expectations of *all-natural* food products.[127] For example, one plaintiff testified "that 'all natural' is 'synonymous with organic,' although she also considers 'nonorganic fruits or vegetables to be all natural.'"[128] Another plaintiff disagreed, stating that "'all natural' is not the same as 'organic.'"[129] One plaintiff's definition is merely that there is "nothing

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[123] Class Action Complaint at 8–9, Koehler v. Pepperidge Farm, Inc., No. 13-cv-02644-YGR, 2013 WL 4806895 (N.D. Cal. Sept. 9, 2013). The CFS supports this definition and argues that "[m]ost consumers, if asked, would *not* consider GE foods as *natural*, under the generally recognized meaning of the term." Kimbrell & Freese, *supra* note 100, at 4.

[124] *Astiana*, 291 F.R.D. at 504.

[125] *Id.* at 508; Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013). In *Astiana*, the court certified a narrow class covering products containing calcium pantothenate, pyridoxine hydrochloride, and/or hexane-processed soy ingredients but labeled "All Natural." *Astiana*, 291 F.R.D. at 509. In *Thurston*, the court certified a class of California purchasers of Bear Naked's products that contain hexane-processed soy ingredients. *Thurston*, 2013 WL 5664985, at *9.

[126] *Astiana*, 291 F.R.D. at 508; *see also Thurston*, 2013 WL 5664985, at *8 (resulting in the same conclusion as the *Astiana* decision when using the term *natural* rather than *Astiana's* use of the term *all-natural*).

[127] *Astiana*, 291 F.R.D. at 508; *Thurston*, 2013 WL 5664985, at *8.

[128] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification at 8, *Astiana*, 291 F.R.D. 493 (No. 3:11-cv-01967-H-BGS).

[129] *Id.*

bad for you in there."[130] While another views *all natural* as food that is "completely unprocessed,"[131] one plaintiff testified "that allegedly synthetic vitamins are acceptable in 'all natural' products."[132] The lack of a consistent definition of *natural* was fatal to the plaintiffs' request to certify a broad *all natural* class. In denying certification, the court explained that "[i]f the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified."[133]

Similarly, the plaintiff's failure to offer a plausible definition of *natural* provided the court in *Pelayo v. Nestle USA* with a reason to grant Nestle's motion to dismiss without leave to amend.[134] The plaintiff alleged that the "All Natural" claim on Nestle's Buitoni Pastas is "false, misleading, and reasonably likely to deceive the public because the Buitoni Pastas contain . . . ingredients that are unnatural," such as "synthetic xanthan gum and soy lecithin."[135] In her complaint, the plaintiff offered several definitions of *natural*, such as "produced or existing in nature and not artificial or manufactured."[136] The plaintiff nevertheless admitted that these definitions from Webster's Dictionary do not apply to Buitoni Pastas because they are mass-produced and the reasonable consumer understands "that Buitoni Pastas are not springing fully-formed from Ravioli trees and Tortellini bushes."[137] The plaintiff also attempted to define *natural* by arguing "that none of the ingredients in a 'natural' product are 'artificial' as that term is defined by the Food and Drug Administration."[138] However, "the FDA definition of 'artificial' applies only to flavor additives."[139] The FDA provides the following definition:

> The term "artificial flavor" or "artificial flavoring" means any substance, the function of which is to impart flavor, which is not

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[130] *Id.*

[131] *Id.*

[132] *Id.* at 10.

[133] *Astiana*, 291 F.R.D. at 508 (quoting Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022–23 (9th Cir. 2011)).

[134] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013).

[135] *Id.* at *1. Plaintiff alleged claims under the California Unfair Competition Law ("UCL") and California Consumer Legal Remedies Act ("CLRA"). *Id.* at *2.

[136] *Id.* at *4 (quoting First Amended Class Action Complaint at 7, *Pelayo*, 2013 WL 5764644, ECF No. 18) (internal quotation marks omitted).

[137] *Id.* (quoting Plaintiff's Opposition to Defendants' Motion to Dismiss First Amended Complaint at 16, *Pelayo*, 2013 WL 5764644, ECF No. 33) (internal quotation marks omitted).

[138] *Id.*

[139] *Id.*; *see also* 21 C.F.R. § 101.22(a)(1) (2013).

> derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof.[140]

Although the plaintiff alleged that ingredients in the pastas such as "xanthan gum, soy lecithin, sodium citrate, maltodextrin, sodium phosphate, disodium phosphates, and ferrous sulfate . . . are 'unnatural, artificial and/or synthetic ingredients,'" the plaintiff did not allege that any of the those ingredients satisfy the FDA's definition of "artificial," nor did she assert that those ingredients are flavor additives.[141] On this basis, the court held this definition of *natural* to be inapplicable.[142]

The plaintiff's third attempt to offer a plausible definition also failed. The plaintiff alleged "that none of the ingredients in a 'natural' product are 'synthetic' as that term is defined by the National Organic Program ('NOP')."[143] Under that definition, a synthetic ingredient is a "substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources."[144] The court held that "because Buitoni Pastas are not labeled as 'organic,' the definition of 'synthetic' under the NOP does not apply."[145]

These cases illustrate the formidable task of identifying a definition of *natural* food. As the FDA recognized, there is no uniform definition among food producers or consumers—or, as *Astiana* and *Thurston* demonstrate, among plaintiffs in a lawsuit. These cases, as well as the *Pelayo* decision, also underscore the FTC's point regarding the permeable meaning of *natural* in light of the varying contexts in which it is used. As Kashi argued—and the court appeared to credit—the plaintiffs' allegations regarding ninety different *natural* products containing different ingredients and featured in different advertising campaigns "inspire different calculations in the minds of prospective customers."[146] Class action plaintiffs arguing that a processed food product is deceptively labeled *natural* because it contains a variety of allegedly synthetic substances will likely face the same challenges as the plaintiffs in *Astiana*, *Thurston*, and *Pelayo* in proving that the consumer class held and relied upon a uniform definition of *natural* and that they viewed the presence of each challenged ingredient as *unnatural*.

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140 § 101.22(a)(1).

141 *Pelayo*, 2013 WL 5764644, at *4 (quoting First Amended Class Action Complaint at 7, *Pelayo*, 2013 WL 5764644, ECF No. 18).

142 *Id.*

143 *Id.*

144 7 C.F.R. § 205.2 (2013).

145 *Pelayo*, 2013 WL 5764644, at *4.

146 Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013).

On the other hand, plaintiffs alleging that a product containing GMOs is not *natural*[147] may fare better in certifying a class and surviving dispositive motions. In these cases, class action plaintiffs have an easier task of articulating a uniform definition of *natural* that simply identifies the absence of GMOs. Support for this position is abundant. For example, as the CFS has asserted, GMOs are not *natural* because they have been developed through artificial means, by "inserting foreign (often bacterial) genetic material into a food plant, crop or animal."[148] Additionally, Black's Law Dictionary defines *natural* as something that is "[i]n accord with the regular course of things in the universe and without accidental or purposeful interference" or "[b]rought about by nature as opposed to artificial means."[149] Plaintiffs in their class action complaints[150] have also referenced Monsanto's definition of GMOs: "Plants or animals that have had their genetic makeup altered to exhibit traits *that are not naturally theirs*. In general, genes are taken (copied) from one organism that shows a desired trait and transferred into the genetic code of another organism."[151] The World Health Organization similarly defines genetically engineered organisms as "organisms in which the genetic material (DNA) has been altered in a way that *does not occur naturally*."[152]

Defining *natural* with respect to the absence of GMOs may help plaintiffs in these lawsuits succeed on their claims. Yet in light of the entire *natural* litigation landscape and the variety of problems involved in defining the term, it is doubtful that a class of plaintiffs will be able to offer a uniform and comprehensive definition of *natural* that will take into account all of the ingredients and processes which plaintiffs challenge as being unnatural.

C. The Difficulties of Defining Natural *Foods: The Inadequacy of Judge-made* Natural *Law*

Although none of the issues in the *natural* lawsuits have been resolved at trial, judges have recently issued orders on dispositive

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[147] *See* Class Action Complaint at 14, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[148] Press Release, Ctr. for Food Safety, Center for Food Safety Tells FDA: "Natural" Label Should Not Include GE Foods (Dec. 19, 2013), *available at* http://www.centerforfoodsafety.org/rss/press-releases/.

[149] BLACK'S LAW DICTIONARY 1126 (9th ed. 2009).

[150] *See* Class Action Complaint at 6, *Briseño*, No. 2011 WL 7939790.

[151] *Glossary*, MONSANTO, http://www.monsanto.com/newsviews/Pages/glossary.aspx#gmo (last visited Mar. 19, 2014) (emphasis added).

[152] WORLD HEALTH ORGANIZATION, 20 QUESTIONS ON GENETICALLY MODIFIED (GM) FOODS 1 (2014) (emphasis added), *available at* http://www.who.int/foodsafety/publications/biotech/en/20questions_en.pdf?ua=1.

motions in several of these cases. As courts continue to analyze whether a *natural* claim on a food label is false or misleading in each case,[153] a definition for the term *natural* may emerge. The courts have explained that the FDA's views are "relevant to the issue of whether these labels could be deceptive or misleading to a reasonable consumer," and "would likely be highly relevant to the Court's determinations"; yet they have also announced that the issues "are squarely within the conventional experience of judges."[154] As discussed above, the claims in these lawsuits require courts to evaluate whether a "reasonable consumer" would be misled by the *natural* claim.[155] Thus, answering this question requires a determination as to what a "reasonable consumer" would consider to be a *natural* food. A majority of courts have concluded that the FDA's refusal to promulgate an enforceable *natural* standard "implies that the FDA does not believe that the term 'natural' requires uniformity in administration."[156] Recent decisions demonstrate that allowing judges to use their own conventional experience to determine what *natural* means to consumers on a case-by-case basis will result in inconsistent and inaccurate definitions.[157] If the FDA and FTC, the federal agencies responsible for preventing misleading claims, cannot establish a definition of the term *natural*, how can judges do so?

The recent *Astiana*, *Thurston*, and *Pelayo* decisions demonstrate the problem with a judge-made rule regarding the meaning of *natural*. In *Astiana* and *Thurston*, the court credited Kashi's and Bear Naked's argument that consumers, including named plaintiffs, "often equate 'natural' with 'organic' or hold 'organic' to a higher standard."[158]

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[153] The majority of cases holds that this issue is within the province of the courts. *See, e.g.*, Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889, 898–99 (N.D. Cal. 2012); Reid v. Johnson & Johnson, No. 11cv1310 L (BLM), 2012 WL 4108114, at *11 (S.D. Cal. Sept. 18, 2012); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009). Furthermore, the court in *Jones* explained that "allegations of deceptive labeling do not require the expertise of the FDA to be resolved in the courts, as 'every day courts decide whether conduct is misleading.'" *Jones*, 912 F. Supp. 2d at 898–99 (citation omitted) (quoting *Lockwood*, 597 F. Supp. 2d at 1035).

[154] Bohac v. Gen. Mills, Inc., No. 12-cv-05280-WHO, 2013 WL 5587924, at *3–4 (N.D. Cal. Oct. 10, 2013) (citations and internal quotation marks omitted).

[155] *Id.* at *3.

[156] *Jones*, 912 F. Supp. 2d at 898 (internal quotation marks omitted); *see also Bohac*, 2013 WL 5587924, at *4; Janney v. Gen. Mills, No. 12-cv-03919-WHO, 2013 WL 1962360, at *3 (N.D. Cal. Oct. 10, 2013).

[157] *Compare* Barnes v. Campbell Soup Co., No. C 12-05185 JSW, 2013 WL 5530017, at *8 (N.D. Cal. July 25, 2013) (holding that the primary jurisdiction doctrine applies), *with* Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1374–75 (S.D. Fla. 2013) (holding that the primary jurisdiction doctrine does not apply).

[158] Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013); Thurston v. Bear Naked, Inc., No. 3:11-CV-02890-H(BGS), 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013).

Therefore, because many of Kashi's and Bear Naked's allegedly unnatural ingredients are permitted in certified "organic" foods, the court concluded that plaintiffs failed to demonstrate that class members would view those ingredients as unnatural.[159] The *Pelayo* court interpreted *Astiana*'s assumption that consumers "often equate 'natural' with 'organic'" as a holding, adopted this reasoning, and thus concluded that "it is implausible that a reasonable consumer would believe ingredients allowed in a product labeled 'organic,' such as the [allegedly unnatural ingredients in Buitoni Pastas], would not be allowed in a product labeled 'all natural.'"[160] By announcing as a matter of law what reasonable consumers generally believe regarding the term *natural*, these judges offered their own interpretation of the term and thus set the parameters of *natural's* meaning. In this way, a definition of *natural* may emerge from the courts, but not a definition that withstands scrutiny. Contrary to the courts' conclusion, it is plausible that a reasonable consumer would believe that *natural* foods are different from, and are held to a higher standard than, *organic*. As surveys demonstrate, consumers express a preference for products labeled *natural* over those labeled *organic*.[161] While 50% of polled consumers in 2009 said the *natural* label on food was either "important" or "very important," only 35% believed *organic* carried the same value.[162] While consumers define the terms in a similar manner, *natural* claims are more strongly associated with the absence of artificial flavors, colors, and preservatives.[163] A majority of respondents in a 2010 poll believed the term *natural* implied "absence of pesticides," "absence of herbicides," and "absence of genetically modified foods."[164]

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[159] *Astiana*, 291 F.R.D. at 508; *Thurston*, 2013 WL 5664985, at *8.

[160] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *4 (C.D. Cal. Oct. 25, 2013).

[161] CONTEXT MARKETING, BEYOND ORGANIC: HOW EVOLVING CONSUMER CONCERNS INFLUENCE FOOD PURCHASES 4 (2009), *available at* http://www.contextmarketing.com/foodissuesreport.pdf.

[162] *Id.*

[163] While 66% of respondents associated *organic* foods with no artificial flavors, colors, or preservatives, 73% associated *natural* foods with an absence of these additives. *Where Organic Ends and Natural Begins*, HARTMAN GROUP (Mar. 23, 2010), http://www.hartman-group.com/hartbeat/where-organic-ends-and-natural-begins.

[164] *Id.* These results prove that consumers are confused about the meaning of *natural* and *organic*. Although one author predicted in 1991 that "[a] clear distinction between organically grown produce and natural foods should be resolved by the regulations to be promulgated under the Organic Foods Production Act of 1990," Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 405 n.3 (1992), this did not occur. Unlike the term *natural*, *organic* foods are governed by a comprehensive set of requirements. The National Organic Program ("NOP")—implemented in 2002 by the U.S. Department of Agriculture ("USDA")—holds the industry to strict

Moreover, the conclusion that a reasonable consumer would equate *natural* with *organic* runs afoul of the FDA's policy that *natural* means "*nothing* artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there."[165] In contrast, synthetic substances approved by The National Organic Standards Board are permitted in the production of *organic* crops.[166] To illustrate, the FDA issued an import alert against an Israeli "berry juice," citing, among other things, its claim of *natural*

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standards in the production and sale of such foods. *Organic Certification*, USDA, http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-certification.aspx#.UwQN0rQjeZE (last updated May 26, 2012). The NOP was established by the Organic Foods Production Act of 1990 ("OFPA"), in order, "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501 (2012). "Organic" refers not only to the food itself, but also to how it was produced. *See* Agric. Mktg. Serv., *Organic Standards*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrganicStandardsLinkNOPFAQsHome&rightNav1=OrganicStandardsLinkNOPFAQsHome&topNav=&leftNav=&page=NOPOrganicStandards&resultType=&acct=nopgeninfo (last updated Apr. 4, 2013) [hereinafter *Organic Standards*]. To qualify as organic, crops must be grown without synthetic pesticides (unless that substance is on the National List of Allowed and Prohibited Substances) or bioengineered genes. *See* Agric. Mktg. Serv., *About the National List*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=AboutNationalListLinkNOPOrganicStandards&rightNav1=AboutNationalListLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPNationalList&resultType=&acct=nopgeninfo (last updated Mar. 12, 2014). Organic foods also may not be irradiated. *Organic Standards*, *supra*. All organic production and handling operations must be certified by third parties accredited by the USDA. *See* Agric. Mktg. Serv., *Organic Certification & Accreditation*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrgCertLinkNOPOrganicStandards&rightNav1=OrgCertLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPAccreditationandCertification&resultType=&acct=nopgeninfo (last updated Dec. 31, 2012). The regulations require that products labeled "100% organic" contain only organic ingredients, 7 C.F.R. § 205.102, 205.303 (2013), and that products labeled "Organic" contain at least 95% organic materials, § 205.301(b). Products in this or the first category can (but are not required to) display the USDA Organic seal. § 205.303. Products that contain "between 70 and 95 percent organically produced ingredients may use the phrase, 'made with organic (specified ingredients or food group(s)),'" but the label "must not list more than three organic ingredients." § 205.309. Products with less than 70% organic ingredients may not use the term organic other than to list specific organic ingredients. § 205.305.

[165] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466 (emphasis added).

[166] 7 C.F.R. § 205.601; *see* Agric. Mktg. Serv., *About the National List*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=AboutNationalListLinkNOPOrganicStandards&rightNav1=AboutNationalListLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPNationalList&resultType=&acct=nopgeninfo (last updated Mar. 12, 2014).

despite the inclusion of sulfur dioxide.[167] In the alert, the FDA explained that although it "has not established a regulatory definition for the term natural[,] . . . the Agency has a long-standing policy that restricts the use of the term natural when a product is formulated with added color, synthetic substances, and flavors . . . that would not normally be expected to be in the food."[168] Because the product contains "sulfur dioxide, which is listed in the ingredient statement as a preservative[,] . . . the product name can not [sic] include the term Natural."[169] Sulfur dioxide is, however, permitted in wines labeled "made with organic grapes."[170] The NOP also allows ingredients that, even though they may be naturally derived, would, within context, be considered unnatural, such as beet or carrot juice extract for coloring in a product.[171] Under the FDA's policy, by contrast, a *natural* product does not contain coloring agents "regardless of source."[172]

As the *Astiana*, *Thurston*, and *Pelayo* decisions illustrate, a judge's use of his or her conventional experience to uncover the meaning of *natural* is likely to miss the mark regarding the term's meaning, both in terms of the perception of reasonable consumers and the FDA's limited guidance.

II. EFFORTS TO LEGISLATE A *Natural* STANDARD

In the absence of a comprehensive and enforceable definition from court decisions in the *natural* lawsuits, there have been efforts to legislate a definition. The following Part of this Article evaluates the efforts of Congress and state legislatures to fill the "gaping hole in the current regulatory landscape for 'natural' claims."[173] The Organic Foods Production Act of 1990 ("OFPA")[174] exemplifies a successful effort by Congress to address an issue very similar to defining *natural*; it established uniform and enforceable standards for *organic* foods.[175]

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[167] *Import Alert 99-20: Detention Without Physical Examination of Imported Food Products Due to NLEA Violations*, FDA (Apr. 3, 2012), http://www.accessdata.fda.gov/cms_ia/importalert_264.html.

[168] *Id.*

[169] *Id.*

[170] Sulfur dioxide is permitted "for use only in wine labeled 'made with organic grapes,' [p]rovided, [t]hat, [the] total sulfite concentration does not exceed 100 ppm." 7 C.F.R. § 205.605 (2011).

[171] *See* National Organic Program, 7 C.F.R. § 205.606(d) (2013).

[172] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466.

[173] Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013).

[174] 7 U.S.C. §§ 6501 to 6523 (2013).

[175] *See* Negowetti, *supra* note 1, at 595. For a discussion of issues related to the effects of the FDA's informal *natural* policy, see *id.* at 591–99.

Congress enacted the OFPA to address inconsistency among states in *organic* food labeling,[176] dilution of the term's meaning,[177] and confusion among consumers.[178] Similar to *natural* foods, consumer surveys revealed a demand for *organic* foods and a willingness to pay more for those products.[179] At that time, "even the most sophisticated consumer" could not have understood what the term *organic* really meant because food labeled *organic* was allowed to consist of anywhere from 20% to 100% organically-grown ingredients.[180] As was recognized in the context of establishing the *organic* standard, "[t]he clear and consistent definition needs to be enforceable, needs to be definable, and it needs to be practical."[181] This sentiment accurately summarizes the requirements for formulating a *natural* standard. Although the Organic Program provides an analog to the creation of a legal standard for a food term that created (and still creates) confusion among consumers, there is no indication that *natural* will receive the same legislative and resulting regulatory treatment at the federal level in the near future. One recent bill proposal in the House and Senate and several state initiatives have sought to establish a *natural* standard.[182]

The Food Labeling Modernization Act of 2013, recently introduced in the House and Senate, would amend the FDCA to establish a

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[176] *See Proposed Organic Certification Program: J. Hearing Before the Subcomm. on Domestic Mktg., Consumer Relations, & Nutrition & the Subcomm. on Dep't Operations, Research, & Foreign Agric. of the H. Comm. on Agric.*, 101st Cong. 2 (1990) (statement of Rep. Hatcher, Chairman, H. Subcomm. on Domestic Mktg., Consumer Relations, & Nutrition) [hereinafter *Proposed Organic Certification Program*]. When the OFPA was passed, there were twenty-two states with varying organic programs. *Id.*

[177] *See id.* at 13 (statement of Rep. DeFazio) ("[S]ome farmers are actually labeling things organic which are produced in a manner no different than other conventional agricultural practices, yet it gives them a distinct marketing advantage. . . . [T]he playing field is not level . . . those less scrupulous persons in the industry who would label nonorganic products as organic are getting a marketing advantage above them and a premium price for a product which is essentially no different."); *see also* RENÉE JOHNSON, CONG. RESEARCH SERV., RL31595, ORGANIC AGRICULTURE IN THE UNITED STATES: PROGRAM AND POLICY ISSUES 3 (2008) (explaining that the organic industry petitioned for federal standards to "reduce consumer confusion over the many different state and private standards then in use, and . . . promote confidence in the integrity of organic products over the long term").

[178] Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 538 (1997).

[179] *Id.* at 540; Negowetti, *supra* note 1, at 583.

[180] Amaditz, *supra* note 178, at 539.

[181] *Proposed Organic Certification Program, supra* note 176, at 13–14.

[182] *See infra* notes 183–95 and accompanying text.

standard definition for the term *natural*.[183] According to the proposed standard, a food labeled as *natural* would be misbranded if it contains any artificial ingredient, including any artificial flavor, artificial color, synthetic version of a naturally occurring substance, or any ingredient "that has undergone chemical changes," such as high-fructose corn syrup and cocoa processed with alkali.[184] A food may be labeled *natural* even though it has undergone a traditional process, such as smoking or freezing, to make it edible, preserve it, or make it safe.[185] A "food that has undergone traditional physical processes that do not fundamentally alter" the food or only separates the whole food into parts, such as pressing fruits to produce juice, may also be labeled *natural*.[186] The definition also prohibits "any other artificially-created ingredient" that the FDA identifies in regulations.[187] Although this definition is more comprehensive than that offered by the FDA and it addresses several issues identified in the *natural* lawsuits, such as whether HFCS and processing render a product unnatural, there is a key inadequacy. Notably missing from this proposed definition is perhaps the most contentious issue—whether GMOs may be considered *natural*. Therefore, if this definition were to have the force of law, the issue of GMOs would remain unaddressed.

Although unresolved by the federal Food Labeling Modernization Act, the issue of whether food containing GMOs may be labeled *natural* has been addressed by several state legislatures in bills requiring the labeling of GMO foods. Currently, Connecticut and Maine are the only

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[183] The House and Senate versions of the proposed amendments to 21 U.S.C. § 343 are identical. *Compare* Food Labeling Modernization Act of 2013, S. 1653, 113th Cong. § 4(a) (introduced Nov. 5, 2013) (proposing amendment of 21 U.S.C. § 343 (2006), titled "Misbranded food"), *and* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. § 4(a) (introduced Sept. 19, 2013) (same), *with* 21 U.S.C. § 343 (2006) (defining "Misbranded Food"). Therefore, only the Senate version, introduced more recently, will be cited hereinafter.

[184] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2), which would prohibit the use of a *natural* label on foods containing these ingredients, among others), *with* 21 U.S.C. § 343 (defining "Misbranded Food"). These ingredients have been the subject of several *natural* lawsuits. *See, e.g., infra* notes 228–44.

[185] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2)(A), which exempts foods that have undergone these processes from a general rule prohibiting the use of a *natural* label on foods that have undergone chemical changes), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

[186] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2)(B), which exempts foods that have undergone certain "traditional physical processes" from a general rule prohibiting the use of a *natural* label on foods that have undergone chemical changes), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

[187] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(3), which would prohibit the use of a *natural* label on foods containing such ingredients), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

states which have enacted such laws, but similar laws have been proposed in twenty-six states.[188] For example, GMO labeling bills proposed in Indiana[189] and Massachusetts[190] would prohibit GMO foods from being labeled as *natural*. According to Connecticut's new law, "'natural food' . . . has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring or artificial coloring"; "has not been processed in a manner that makes such food significantly less nutritive"; and "has not been genetically-engineered." [191] A food that is processed "by extracting, purifying, heating, fermenting, concentrating, dehydrating, cooling or freezing shall not, of itself, prevent the designation of such food as 'natural food.'"[192] California's defeated Genetically Engineered Foods Labeling ballot initiative, Proposition 37,[193] also prohibited the labeling of foods containing GMOs as *natural*, but its standard went further and could be interpreted as prohibiting the labeling or advertising as *natural* any processed food.[194] This definition of *natural* would have conflicted with the standard in Connecticut. "Processed food" was defined to mean "any food other than a raw agricultural commodity, and includes any food produced from a raw agricultural commodity that has been subject to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation, or milling."[195] This strict standard for *natural* would prohibit smoked almonds or frozen vegetables, for example, from being labeled as *natural*.

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[188] Stephanie L. Russ, *Does This Law Make My Butt Look Big? A Survey of Health-Related and Food Labeling Laws Food Service Franchise Systems Should Know*, 33 FRANCHISE L.J. 217, 228 (2013); *Consumers Demand Food & Chemical Companies Stay Out of GE Labeling Fight*, JUST LABEL IT (Oct. 25, 2013), http://justlabelit.org/consumers-demand-food-and-chemical-companies-stay-out-of-ge-fightlabeling/.

[189] H.R. 1196, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013) (introduced on January 10, 2013).

[190] H.R. 2037, Gen. Ct. (Mass. 2013).

[191] An Act Concerning Genetically Engineered Food, No. 13-183, § 1(17), 2013 Conn. Pub. Acts 1, 5 (amending § 21a-92 of Connecticut's general statutes).

[192] *Id.*

[193] DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 6, 2012, GENERAL ELECTION 13 (2012), *available at* http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf.

[194] DEBRA BOWEN, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 55 (2012), *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf. For the relevant, official text of the defeated ballot initiative, see *id.* at 111–12.

[195] *Id.* at 111. *But see* An Act Concerning Genetically Engineered Food, No. 13-183, § 1(17), 2013 Conn. Pub. Acts 1, 5 (allowing the *natural* label on food that "has not been processed in a manner that makes such food significantly less nutritive").

These federal and state attempts to define *natural* provide other evidence for the difficulties of defining the term and inconsistencies that will result if the FDA leaves this issue to be addressed by courts or legislatures. A comprehensive definition of *natural* must address which ingredients and processing aids may or may not be included, which methods of processing are permitted, and whether GMOs constitute a *natural* food.

III. DEFINING *NATURAL* IN THE MARKETPLACE

The threat of a class action lawsuit or dilution of the term's impact on consumers could prompt food producers or retailers to create a uniform standard for the industry. In fact, an attempt to create standards for use of the word *natural* in food marketing is currently being undertaken by the Natural Products Association ("NPA"), a non-profit organization that represents *natural* product retailers, manufacturers, wholesalers, and distributors.[196] Although the NPA has not yet revealed its standards or how it will implement its system, the NPA has stated that its goal is to "give consumers confidence that foods featuring the [*natural*] seal adhere to [a] clear set of standards."[197]

A. Food Producers

Although the NPA's goal is to create an industry standard, as the *natural* lawsuits reveal, there is little agreement among producers regarding the term's meaning.[198] For example, Barbara's Bakery, which

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[196] Negowetti, *supra* note 1, at 599; John Shaw, *Defining 'Natural' Is a Priority for NPA in 2014*, NUTRA INGREDIENTS-USA.COM (Dec. 18, 2013), http://www.nutraingredients-usa.com/Regulation/Defining-natural-is-a-priority-for-NPA-in-2014.

> Founded in 1936, the Natural Products Association is the nation's largest and oldest nonprofit organization dedicated to the natural products industry. NPA represents over 1,900 members accounting for more than 10,000 retail, manufacturing, wholesale, and distribution locations of natural products, including foods, dietary supplements, and health/beauty aids. NPA unites a diverse membership, from the smallest health food store to the largest dietary supplement manufacturer. NPA is recognized for its strong lobbying presence in Washington, D.C., where it serves as the industry watchdog on regulatory and legislative issues.

About the Natural Products Association, NATIONAL PRODUCTS ASSOCIATION, http://www.npainfo.org/NPA/About_NPA/NPA/AboutNPA/AbouttheNaturalProductsAssociation.aspx?hkey=8d3a15ab-f44f-4473-aa6e-ba27ccebcbb8 (last visited Mar. 19, 2014).

[197] Elaine Watson, *NPA Weighs Into 'Natural' Debate as Natural Seal Initiative for Food Gathers Pace*, NUTRA INGREDIENTS-USA.COM (Nov. 7, 2011), http://www.nutraingredients-usa.com/Regulation/NPA-weighs-into-natural-debate-as-Natural-Seal-initiative-for-food-gathers-pace.

[198] For example, "Kashi encountered this divergence when it undertook an internal project [details of which were filed under seal] to create an 'aspirational definition of

recently settled a lawsuit accusing the cereal company of deceptively labeling its products as *natural* although they contained GMOs,[199] had defined the term *natural* as "no artificial preservatives, flavors, colors or ingredients."[200] However, the company now considers the term to be "vague and confusing."[201]

Although many producers of *natural* foods do not identify how their products qualify as *natural*,[202] Kashi, sued for making allegedly misleading *natural* claims, has offered a definition. On its website, Kashi

> define[d] natural as: Natural Food is made without artificial ingredients like colors, flavors or preservatives and is minimally processed. A natural ingredient is one that comes from or is made from a renewable resource found in nature. Minimal processing involves only kitchen chemistry, processes that can be done in a family kitchen and does not negatively impact the purity of the natural ingredients.[203]

Comparing this definition to several *natural* food products illustrates the inconsistency with which the term is used on food labels. For example, the definition which states that "natural food" is "minimally processed" and "comes from . . . a renewable resource *found in nature*"[204] implies the exclusion of GMOs from the definition. Certainly food producers such as Frito Lay,[205] ConAgra,[206] Bear Naked,[207] Campbell Soup,[208] and others being sued for deceptive use of *natural* claims on products containing

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"natural" for the industry.'" Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 7.

[199] *Compare* Class Action Complaint at 4, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. May 23, 2012) (alleging harm to consumers by falsely labeling a product *natural* while it contains GMOs), *with* Final Judgment at 1, 5, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013) (defining terms of the settlement of the lawsuit), *and* BARBARA'S BAKERY SETTLEMENT WEBSITE, https://barbarasbakerysettlement.com/ (last visited Feb. 28, 2014) (providing information about the lawsuit to potential class members).

[200] Esterl, *supra* note 4.

[201] *Id.*

[202] *See* CHARLOTTE VALLAEYS ET AL., CEREAL CRIMES: HOW "NATURAL" CLAIMS DECEIVE CONSUMERS AND UNDERMINE THE ORGANIC LABEL—A LOOK DOWN THE CEREAL AND GRANOLA AISLE 9 (2011), *available at* http://cornucopia.org/cereal-scorecard/docs/Cornucopia_Cereal_Report.pdf.

[203] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 4–5.

[204] *Id.* (emphasis added).

[205] *In re* Frito-Lay N. Am., Inc. All Natural Litig., No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *1 (E.D.N.Y. Aug. 29, 2013).

[206] Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889, 893 (N.D. Cal. 2012).

[207] Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *1 (S.D. Cal. July 30, 2013).

[208] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1371 (S.D. Fla. 2013).

GMOs or synthetic additives would object to this definition. Nestle, sued for deceptive use of the *natural* claim on Buitoni Pastas containing synthetic ingredients such as "xanthan gum, soy lecithin, sodium citrate, maltodextrin, sodium phosphate, disodium phosphates, and ferrous sulfate,"[209] would likely disagree that *natural* foods are made only through "processes that can be done in a family kitchen."[210] Likewise, Tropicana, which markets its pasteurized, deaerated, colored, and flavored orange juice as *natural*,[211] would also take exception to a definition of *natural* that "involves only kitchen chemistry."[212]

The divergence of opinion regarding whether products containing GMOs should be labeled further demonstrates that food producers are not likely to agree on a uniform definition of *natural* that will take into consideration contentious ingredients such as GMOs. For example, the opposition to the GMO state labeling campaigns in California and Washington included large food companies such as PepsiCo, Coca-Cola, Nestle, and Kraft, while top contributors to the "Yes" campaign included Nature's Path Foods, Good Earth Natural Foods, Wehah Farm Inc., and Amy's Kitchen.[213]

Although the development of a uniform standard through collaboration of food producers is highly unlikely, it is foreseeable that many individual food producers will undertake efforts to distinguish their truly *natural* products from competitors. For example, in light of ambiguity about what *natural* claims mean, organic producers, such as yogurt company Stonyfield, are developing labeling initiatives that distinguish their *organic* products from *natural* competitors.[214] Stonyfield's new packaging features a logo that includes the phrase "no

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[209] Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *4 (S.D. Cal. July 30, 2013).

[210] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 5.

[211] *See* Lynch v. Tropicana Prods., Inc., No. 2:11-cv-07382 (DMC)(JAD), 2013 WL 2645050, at * 1 (D.N.J. June 12, 2013).

[212] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 5.

[213] Eliza Barclay & Martin Kaste, *Washington State Says 'No' To GMO Labels*, NPR (Nov. 7, 2013, 11:41 AM), http://www.npr.org/blogs/thesalt/2013/11/06/243523116/washington-state-says-no-to-gmo-labels; Dan Flynn, *GM Food Labeling in California Goes Down in Defeat*, FOOD SAFETY NEWS (Nov. 7, 2012), http://www.foodsafetynews.com/2012/11/big-setback-for-right-to-know-about-gm-foods-prop-37-goes-down-in-crushing-defeat/#.Umv753Aqhjo; Lewis Kamb, *Foes of Food-Labeling Initiative 522 Set Funding Record*, SEATTLE TIMES (Oct. 28, 2013, 7:58 PM), http://seattletimes.com/html/localnews/2022143831_gmofundraisingxml.html.

[214] *Stonyfield Packaging Overhaul Highlights Absence of 'Toxic Pesticides'*, FOOD NAVIGATOR-USA (Oct. 28, 2013), http://www.foodnavigator-usa.com/Trends/Natural-claims/Stonyfield-packaging-overhaul-highlights-absence-of-toxic-pesticides.

toxic pesticides used here" in response to research suggesting seventy-four percent of Americans prefer food produced with fewer pesticides.[215] Stonyfield's website also features a discussion of the difference between *natural* and *organic* foods, and it explains that "[w]hile 'natural' assures you of little, 'organic' tells you you're buying food made without the use of toxic persistent pesticides, GMOs, antibiotics, artificial growth hormones, sewage sludge or irradiation."[216] Ice cream producer Ben & Jerry's, whose mission is "[t]o make, distribute and sell the finest quality *all natural* ice cream . . . with a continued commitment to incorporating wholesome, *natural ingredients*,"[217] has announced that it will source only non-GMO ingredients for all its products everywhere by midyear 2014.[218]

These trends indicate that food producers are unlikely to reach consensus on the meaning of *natural*, but *true natural* food producers will likely capitalize on the distrust of consumers by developing and publicizing their own standards of *natural* to distinguish themselves from competitors.

B. Retailers

Perhaps consumer interest and demand will cause retailers and wholesalers to set standards for the *natural* products they sell. If food producers will not establish a consistent standard in the industry, they may be required to comply with a *natural* standard set by those selling their products. Several retailers have made attempts to educate consumers about the contents of the *natural* foods products in their stores. For example, Whole Foods Market publishes its standards and a list of unacceptable ingredients for the *natural* products it sells.[219] Ingredients such as artificial flavors and colors, HFCS, hydrogenated fats, irradiated foods, lead soldered cans, monosodium glutamate

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[215] *Id.*

[216] Amy VanHaren, *Do "Natural" and "Organic" Mean the Same Thing?* (*The Short Answer: Nope.*), STONYFIELD (Sept. 3, 2013), http://www.stonyfield.com/blog/natural-and-organic/.

[217] *Ben & Jerry's Mission Statement*, BEN & JERRY'S, http://www.benjerry.com/values (last visited Mar. 19, 2014) (emphasis added).

[218] *Our Position on Genetically Modified Organisms (GMOs)*, BEN & JERRY'S, http://www.benjerry.com/values/issues-we-care-about/our-stance-on-gmo (last visited Mar. 19, 2014).

[219] *See* Joe Dickson, *"Natural" Means… What?*, WHOLE STORY WHOLE FOODS BLOG (Mar. 20, 2009), http://www.wholefoodsmarket.com/blog/whole-story/natural-meanswhat. To view Whole Foods Market's list of unacceptable ingredients see *Unacceptable Ingredients for Food*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/about-our-products/quality-standards/unacceptable-ingredients-food (last visited Mar. 19, 2014) [hereinafter *Unacceptable Ingredients*].

("MSG"), nitrates/nitrites, and partially hydrogenated oil are prohibited in all the *natural* products sold at Whole Foods.[220] These standards are "widely regarded by the industry and consumers as the touchstone for acceptable natural food ingredients."[221] Whole Foods is also "the first national grocery chain to set a deadline for full GMO transparency."[222] In March 2013, the company announced that all products in its U.S. and Canadian stores must be labeled to indicate whether they contain GMOs by 2018.[223] The grocery chain Kroger also lists the 101 ingredients they avoided in developing the "Simple Truth" line of *natural* products.[224] On its website, the grocer defines *natural* as "appl[ying] broadly to foods that are minimally processed and free of: synthetic preservatives[,] hydrogenated oils[,] stabilizers[,] emulsifiers[,] artificial sweeteners[,] most artificial colors[,] artificial flavors[, and] artificial additives."[225] EarthFare is another grocer that has banned from its stores products containing certain artificial ingredients[226] and is committed to selling food that is "as close to the ground as it gets."[227]

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[220] *Unacceptable Ingredients*, *supra* note 219.

[221] Defendant Kashi Company's Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 4.

[222] *GMO: Your Right to Know*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/gmo-your-right-know (last visited Feb. 28, 2014).

[223] *The United States and Agricultural Biotechnology Newsletter*, FOREIGN AGRICULTURAL SERVICE (USDA/Office of Agric. Aff., U.S. Embassy, Paris, Fr.), May 2013, at 4, *available at* http://www.usda-france.fr/media/Biotech%20newsletter%20May%20 2013%20new.pdf. Whole Foods has "designated certified organic, which prohibits the intentional use of GMOs, and the Non-GMO Project Verified program as the only two verification methods that [it] will permit as substantiation that a product can be considered non-GMO within Whole Foods Market." A.C. Gallo, *Three-Month Update on GMO Labeling*, WHOLE STORY WHOLE FOODS BLOG (June 18, 2013), http://www.wholefoodsmarket.com/blog/three-month-update-gmo-labeling. In addition, "meat, dairy, egg, and farmed seafood vendors also will need to verify whether or not animals were fed GMO corn, soy or alfalfa. In [its] Whole Body department, the ingredient list of each product will have to be examined for possible GMO-derived items." *Id.*

[224] *Free From 101*, SIMPLE TRUTH, http://www.simpletruth.com/about-simple-truth/ 101-free/ (last visited Mar. 19, 2014); *see also* Wendy Koch, *Wal-Mart Announces Phase-Out of Hazardous Chemicals*, USATODAY.COM (Sept. 12, 2013, 7:30 PM), http://www.usatoday.com/story/news/nation/2013/09/12/walmart-disclose-phase-out-toxic-chemicals-products-cosmetics/2805567/.

[225] *Natrual Meat and Poultry*, SIMPLE TRUTH, http://www.simpletruth.com/about-simple-truth/natural/ (last visited Feb. 28, 2014).

[226] EARTH FARE, BOOT LIST, *available at* https://www.earthfare.com/~/media/V3/ Files/Boot%20List/9-7_New%20Boot%20List.pdf (last visited Mar. 19, 2014); *Food Philosophy*, EARTH FARE, https://www.earthfare.com/food/foodphilosophy (last visited Mar. 19, 2014).

[227] EARTH FARE, TEAM MEMBER HANDBOOK 7 (2013), *available at* http://www.team earthfare.com/~/media/TeamEarthFareV2/HR%20Resources/Handbook.pdf.

These efforts by retailers provide a significant incentive for food producers to adhere to some standard for use of the term *natural*. These retailers are also helping to educate consumers regarding the meaning of *natural* as used on the products they sell. However, these approaches will surely lead to inconsistent standards. Additionally, the impact on consumers is slight—the majority of consumers without access to these stores, either because of their location or because they cannot afford to shop there, will continue to be confused about what *natural* means.

IV. UNDERSTANDING *NATURAL* CLAIMS: IMPETUS ON CONSUMERS?

The inconsistencies among food producers' use of *natural*, the FDA's lack of enforcement against misleading *natural* claims, and the insufficiency of the courts to address deceptive *natural* claims on an *ad hoc* basis leave the average consumer effectively unprotected against misleading products claiming to be *natural*. Cases deciding whether consumers have a reasonable expectation regarding the *naturalness* of a product have been divided regarding the effect of a product's ingredient lists to decode its *natural* claims. Thus, the case law presents a mixed message regarding whether the impetus is on the consumer to understand a food producer's meaning of *natural* or, conversely, whether a food producer should use that *natural* claim in a way that meets a reasonable consumer's expectation of the term.

In *Lynch v. Tropicana Products, Inc.*, Tropicana argued that a consumer could not reasonably claim that she was induced into believing that the claim "100% pure and natural orange juice" meant that the juice was freshly-squeezed when the statement "pasteurized" was displayed on the front of the label.[228] Plaintiffs asserted that Tropicana falsely claimed that its "not-from-concentrate" orange juice is 100% pure and *natural* orange juice; however, the product is "pasteurized, deaerated, stripped of flavor and aroma, stored for long periods of time before available to the public, and colored and flavored before being packaged."[229] Tropicana moved to dismiss the complaint for failure to allege facts demonstrating the plaintiffs' reasonable expectation that the juice was *natural*.[230] Citing *Williams v. Gerber Products Company*,[231] the

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[228] Lynch v. Tropicana Prods., Inc., No. 2:11-cv-07382 (DMC)(JAD), 2013 WL 2645050, at *6 (D.N.J. June 12, 2013).

[229] *Id.* at *1.

[230] *Id.* at *6.

[231] 552 F.3d 934, 939 (9th Cir. 2008) (holding that "reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth" and explaining that "[w]e do not think that the FDA requires an ingredient list . . . to correct those [consumer] misinterpretations and provide a shield for liability for the deception").

New Jersey District Court denied Tropicana's motion to dismiss, explaining that discovery is needed to ascertain plaintiffs' expectations regarding the juice.[232]

In *Williams*, plaintiffs alleged that Gerber's Fruit Juice Snacks, packaged with pictures of different fruits and claiming to be made with "fruit juice and other all natural ingredients," were deceptively marketed because the most prominent ingredients were corn syrup and sugar.[233] The district court granted Gerber's motion to dismiss because it found that Gerber's claims were unlikely to deceive a reasonable consumer, given that the ingredients were listed on the side of the box.[234] The Ninth Circuit reversed the decision, reasoning that

> [w]e disagree with the district court 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. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms other representations* on the packaging.[235]

Similarly, the *Lynch* court concluded that Tropicana's "'pasteurized' [claim on its label] does not inherently 'provide a shield for liability for the deception' that its product has no added flavoring or is 100% pure and natural orange juice."[236]

Other courts have reached the opposite conclusion regarding the import of other information on a food label and inclusion of allegedly unnatural ingredients in the ingredients list.[237] For example, in *Kane v. Chobani, Inc.*, the Northern District of California held that because Chobani disclosed "fruit or vegetable juice concentrate [*for color*]" on its labels and the plaintiffs acknowledged that they read the label and ingredient list, the court concluded that it was not plausible that the plaintiffs believed, based on Chobani's "all natural" claims, that the

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[232] *Lynch*, 2013 WL 2645050, at *7.

[233] *Williams*, 552 F.3d at 936.

[234] *Id.* at 937; Williams v. Gerber Prods. Co., 439 F. Supp. 2d 1112, 1116–17 (S.D. Cal. 2006), *rev'd*, 552 F.3d 934.

[235] *Williams*, 552 F.3d at 939–40 (emphasis added).

[236] *Lynch*, 2013 WL 2645050, at *7 (quoting *Williams*, 552 F.3d at 939).

[237] *See, e.g.*, McKinniss v. Gen. Mills, Inc., No. CV 07–2521 GAF (FMOx), 2007 WL 4762172, at *3 (C.D. Cal. Sept. 18, 2007) ("A reasonable consumer would . . . be expected to peruse the product's contents simply by reading the side of the box containing the ingredient list.").

yogurts did not contain added fruit juice.[238] The plaintiffs alleged that Chobani falsely stated that its yogurts "contain '[o]nly natural ingredients' and are 'all natural'" although they "include artificial ingredients, flavorings, and colorings as well as chemical preservatives."[239] In particular, the plaintiffs alleged that the *natural* claims are misleading because some of Chobani's yogurts are colored "artificially" using "fruit or vegetable juice concentrate."[240] The court concluded that plaintiffs' allegation that they would not have purchased the yogurts had they known that they "contained . . . unnatural ingredients" was insufficient to demonstrate that they relied on the *natural* claim.[241] Accordingly, the court dismissed the plaintiffs' claims without prejudice.[242] Similarly, in *Pelayo*, the court determined that because the "All Natural" term on the back of the package appears immediately above the list of ingredients, "to the extent there is any ambiguity regarding the definition of 'All Natural' with respect to each of the Buitoni Pastas, it is clarified by the detailed information contained in the ingredient list."[243]

The decisions in *Kane* and *Pelayo* can be interpreted as contrary to *Williams*. These decisions seem to require a reasonable consumer "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."[244] As surveys demonstrate, consumers are enticed by a *natural* claim.[245] Under these decisions, a food producer may lure consumers with the *natural* claim and then "correct those misinterpretations"[246] by including the unnatural ingredients in the ingredients list. As a result, consumers are required to thoroughly investigate the product to discern how the food producer defines *natural*. This seems to be a perverse standard. As the Ninth Circuit correctly noted, a reasonable consumer is likely to believe that the ingredient list provides more detailed

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[238] Kane v. Chobani, Inc., No. 12-CV-02425-LHK, 2013 WL 5289253, at *10 (N.D. Cal. Sept. 19, 2013) (alteration in original).

[239] *Id.* at *2. Plaintiffs also allege that the Defendant's "evaporated cane juice" and "no sugar added" claims are false and misleading. *Id.* at *1–2.

[240] *Id.* at *10.

[241] *Id.* California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act (designated UCL, FAL, and CLRA respectively), *id.* at *3, require the plaintiff to demonstrate reliance on the alleged misrepresentation in order to demonstrate standing. *Id.* at *8.

[242] *Id.* at *10.

[243] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013).

[244] Williams v. Gerber Prods. Co., 552 F.3d 934, 939 (9th Cir. 2008).

[245] Esterl, *supra* note 4.

[246] *Williams*, 552 F.3d at 939.

information which confirms the representations made elsewhere on the product.[247] Assuming that a reasonable consumer would and should review the ingredients list of a product, a consumer who believes that a *natural* product is free of GMOs, for example, would have no way to verify that from the ingredients list unless the product is certified as non-GMO. Because the FDA does not recognize any meaningful difference between GMOs and foods developed by traditional plant breeding, it does not require labeling of products containing GMOs.[248]

Thus, regardless of the legal issues, the practical impact of lax regulatory oversight of the *natural* claim is that the impetus to understand what *natural* means for each food producer is currently on the consumer. Those who are concerned with purchasing products that are free of HFCS and artificial colors or ingredients will have to look beyond the *natural* claim to the ingredients list. However, consumers who desire products free of GMOs, pesticides, synthetic fertilizers, synthetic processing aids, such as hexane, cannot determine whether the food contains these items from information on the package. To verify the *naturalness* of certain products thus requires a thorough investigation of how the food is produced. A consumer who believes that a food represented as *natural* is "from the earth," "wholesome," and free of harmful substances, would be mistaken to trust in a consistent application of the term.

CONCLUSION

As this Article has demonstrated, there is no indication that the FDA, courts, Congress, state legislatures, or the marketplace will create a comprehensive, uniform, and enforceable definition of *natural* anytime in the near future. Regardless of how the *natural* food lawsuits will be resolved,[249] the impact of the litigation will be two-fold. First, consumer surveys already demonstrate that the publicity surrounding the *natural* litigation will lead to further consumer distrust of the term. For

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[247] *Id.* at 939–40.

[248] *See* Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 22,984–85 (May 29, 1992); *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance*, FDA, http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatory Information/LabelingNutrition/ucm059098.htm (last updated Feb. 21, 2014).

[249] Several of the *natural* lawsuits have recently resulted in successful settlements for the class action plaintiffs. *See*, *e.g.*, Final Judgment at 1, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013); (In Chambers) Order Re Motion For Preliminary Approval of Class Action Settlement at 1, Pappas v. Naked Juice Co. of Glendora, No. 2:11-cv-08276-JAK-PLA (C.D. Cal. Aug. 7, 2013); Order Granting Preliminary Approval of Class Action Settlement at 1, *In re*: Alexia Foods, Inc. Litig., No. 4:11-cv-06119-PJH (N.D. Cal. Jul. 10, 2013).

example, "[o]nly 22.1% of food products and 34% of beverage products launched in the U.S. during the first half of 2013 claimed to be 'natural.'" [250] In 2009, 30.4% of new food products and 45.5% of new beverages were labeled with the term.[251] Secondly, food producers are already abandoning use of *natural* on their food labels.[252] As the Wall Street Journal recently reported, "'Natural' Goldfish crackers will soon be just Goldfish. 'All Natural' Naked juice is going stark Naked. 'All Natural' Puffins cereal is turning into plain old Puffins."[253] As consumers increasingly demand healthy, wholesome food that is free of GMOs and artificial ingredients, the food industry will entice consumers with other claims. For example, Barbara's Bakery no longer labels its products *natural*, but now "plans to rely on terms such as 'simple,' 'wholesome,' 'nutritious,' and 'minimally processed.'"[254] Although the *natural* claim may be disappearing from food labels, the difficulties of defining the term highlight the issue of transparency in food labeling—an issue that demands the FDA's attention and expertise.

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[250] Esterl, *supra* note 4.

[251] *Id.*

[252] *See id.*

[253] *Id.*

[254] *Id.*