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# APPETITE FOR LITIGATION: WHY PLAINTIFFS' LAWYERS HUNGER FOR FOOD-LABELING LAWSUITS

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## INTRODUCTION[1]

The food industry has become a fertile ground for class action lawsuits over the last few years and shows no signs of slowing down. New cases are decided daily. There are several factors that drive this trend and that are likely to propel forward new cases in the coming years.

First, there is little or no statutory or regulatory guidance governing important labeling issues.[2] Plaintiffs' lawyers have filled this gap left open by the Food and Drug Administration (FDA) and Congress. Many of the recently filed lawsuits allege claims based on false and misleading advertising regarding issues that the FDA has either refused to or not substantially addressed.[3] Litigation relating to products marketed as being "all natural" or "natural" is one of the most prominent examples of this trend.[4] Specifically, the FDA has not defined the term "natural" and "has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances."[5] Thus, several courts have concluded that lawsuits challenging "natural" or "all natural" claims on food labels are not preempted or barred by the doctrine of primary jurisdiction, and have allowed such litigation to move forward.[6] In the absence of comprehensive federal laws or regulations governing this area, states have adopted their own regulations regarding food-labeling issues, such as those pertaining to genetically modified organisms (GMOs).[7] Plaintiffs' lawyers are seizing the opportunities created by the lack of regulatory and legislative action in this area.

Second, there is a lack of uniformity and consistency of case law regarding food-labeling litigation among circuit courts throughout the country. This lack of uniformity may be seen as part of the process of the development of the law in this area. Because food-labeling lawsuits challenging health and nutrient claims are a relatively recent phenomenon, there is not a thorough, developed body of case law regarding the subject. For instance, Pierce Gore, of counsel at Pratt and Associates and leader of a consortium of 40 consumer plaintiffs' attorneys, who have filed more than 50 mislabeling cases since 2012, has been quoted as saying, "[t]here is not an abundance of jurisprudence in the Ninth Circuit in the food-labeling arena. There are a few famous cases, but a lot of things we've been litigating. . . . The

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[1] Nicole B. Stach, a Morgan Lewis associate, contributed research and drafting assistance in the development of this paper.

[2] *See, e.g.*, Diana R. H. Winters, "FDA In/Action and Food Litigation: Not an All or Nothing Proposition," Food and Drug Law Institute's Food and Drug Policy Forum, Apr. 3, 2015.

[3] *See* U.S. Food and Drug Administration, "FDA Requests Comments on Use of the Term 'Natural' on Food Labeling," Nov. 10, 2015, (last visited Nov, 10, 2015) (requesting comment "in direct response to consumers who have requested that the FDA explore the use of the term 'natural'").

[4] *See* Paul Chan, "Liable Labels," Los Angeles Lawyer, Vol. 37, No. 11, Feb. 2015, (last visited Mar. 22, 2015).

[5] *See* US Food and Drug Administration, "FDA Basics: What is the Meaning of 'Natural' on the Label of Food?" last updated Jan. 26, 2015, (last visited Mar. 22, 2015).

[6] *See* Chan, *supra* note 2.

[7] *See* Kathryn Flagg, "In Court, Vermont Makes Opening Salvo in Defense of GMO Law," Off Message, Jan. 7, 2015, (last visited Mar. 22, 2015).

Ninth Circuit has yet to weigh in on."[8] Indeed, most of the food-labeling litigation has been in the Ninth Circuit, much of it originating in the "Food Court" of the Northern District of California.[9] Thus, given the undeveloped body of case law, food-labeling lawsuits probably will continue to increase.

Third, food-labeling lawsuits today are no longer confined to traditional theories of liability such as product defects or health and safety risks that generally require an actual injury. Instead, food-labeling litigation today is focused on alleged misbranding or false advertising.[10] The prevailing litigation tactic is to allege violations of state consumer protection acts and common law theories of fraud, breach of warranties, and negligent misrepresentation.[11] In many cases, plaintiffs allege, for example, that food labels touted as "all natural" are misleading because they, as consumers, would not have purchased the food or paid the amount they spent on it had they known that it contains, or doesn't contain, certain ingredients.[12] The alleged injuries in such cases are typically economic.[13]

Fourth, food-labeling litigation may continue to increase because businesses can now sue one another under the Lanham Act for false advertising. A recent decision by the United States Supreme Court in *Pom Wonderful LLC v. Coca-Cola Co.*[14] clarifies that businesses now have standing to sue their competitors for engaging in false or misleading advertising on food labels under the Lanham Act.[15] Specifically, the Supreme Court found that the Lanham Act is not preempted and companies can no longer claim a safe harbor from liability simply because the FDA authorized the food labels at issue.[16] This development may drive further litigation.

Fifth, consumers are increasingly interested in eating healthy. Advertisers market their products as being "all natural," for instance, given consumers' growing concerns over their health. Such claims and their prominence on food labels have caused consumers to pay more attention to product labels and compare and contrast what is actually in their food with what is written on the label. This growing concern with wellness and the disparity between product labels and actual food products have led to a growth in food-labeling class action lawsuits.

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[8] *See* David Ferry, "Label Litigation Feeds New Practices: Food Labeling Cases Usher in a New Practice Area," Jan. 2015, https://ww2.callawyer.com/clstory.cfm?pubdt=NaN&eid=938888&evid=1 (last visited Mar. 22, 2015).

[9] *See, e.g.*, Andrew Westney, "Food & Beverage Cases To Watch in 2015," Law360, Jan. 2, 2015, (last visited Apr. 23, 2015).

[10] *See* Andrew J. Scholz, Matthew R. Shindell, and Matthew D. Cabral, "The New Wave of Food Labeling Litigation: Primary Defenses and Practical Considerations," NYSBA: Torts, Insurance & Compensation Law Section Journal, Winter 2013, Vol. 42, No. 1.

[11] *See* Chan, *supra* note 2.

[12] *See id.*

[13] *See id.*

[14] 134 S. Ct. 2228 (2014).

[15] *See* Chan, *supra* note 2.

[16] *See* Marcia Coyle, "Firms Can No Longer Claim Safe Harbor in False Labeling Suits," Class Action Reporter, July 29, 2014.

Sixth, plaintiffs' lawyers see the food industry as a "relatively untapped deep pocket."[17] Plaintiffs' lawyers are using the same playbook as they did in the tobacco litigation and are calling the food industry "Big Food."[18] For instance, Don Barrett, a Mississippi lawyer who earned millions of dollars in tobacco litigation, along with Robert Clifford, a Chicago lawyer who previously based his practice on commercial airline accidents, formed a consortium, spent over two years reviewing FDA regulations, and filed numerous lawsuits against food manufacturing companies, such as Procter & Gamble Co. and ConAgra Foods, for false or misleading advertising based on product labels.[19] Simply put, "[i]t's where the class action process has gone. I call it greener pastures. . . . Tobacco - the global settlement is done….The plaintiffs' bar has just been looking around for other targets."[20]

Seventh, intense media and press attention on the food industry as a natural response to consumers' growing focus on eating healthier, has naturally fueled further interest in the industry. There are now a variety of websites and blogs dedicated to issues pertaining to food safety, ingredients, and labeling.[21] Such sources of information feed litigious consumers, providing them the opportunity to communicate and coordinate with others, including the plaintiffs' bar and consumer industry groups looking to bring class action lawsuits.[22]

Not every one of these issues is at play in every case. Nor is this an exclusive list of all the reasons for the increase in food litigation over the last few years. However, these substantial drivers of the food litigation trend are unlikely to subside soon. As a detailed review of some of the cases in this area reveals, these factors make it probable that litigation in this area is likely to continue, even if not at the same rate that it has over the last couple of years.[23]

## Overview of Federal Statutes and Regulations Governing Food-labeling Litigation

Federal regulation of food labels stems from many sources, but the primary authorities in this area are from the Federal Food, Drug, and Cosmetic Act (FFDCA), the Nutrition Labeling and Education Act (NLEA), the FDA, and the Federal Trade Commission (FTC). These laws are discussed below, in

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[17] *See* Elaine Watson, "'Unprecedented Surge' in Food Lawsuits is Driven by Plaintiffs' Lawyers and Advocacy Groups, Not Consumers, Claims Report," Food Navigator-USA.com, Oct. 24, 2013, (last visited Mar. 22, 2015).

[18] *See* Jonathan Berman, Robert S. Faxon, Steven N. Geise and Janine C. Metcalf, "Defending Against the New Wave Of Food Misbranding Litigation," Metropolitan Corporate Counsel, Jan. 2013.

[19] *See* Vanessa Blum, "Welcome to Food Court," The Recorder (California), Mar. 1, 2013.

[20] *See id.* (quoting Angel Garganta, a partner with Arnold & Porter LLP and past president of the San Francisco Bank Attorneys Association).

[21] *See* Chan, *supra* note 2.

[22] *See id.*

[23] *See* Jessica Dye, "Food Companies Confront Spike in Consumer Fraud Lawsuits," Thomson Reuters, June 13, 2013 ("From 2008 until 2012, 186 class actions were filed in California court, many of them in the US District Court for the Northern District of California."); *see also* U.S. Chamber Institute for Legal Reform, "The New Lawsuit Ecosystem," Oct. 2013 ("We identified nearly 150 food class actions filed since 2011, with more than half filed in California courts.").

addition to the regulatory issues surrounding the terms "natural," "GMOs," and "organic" that have been involved in some of the most significant food-labeling cases to date.

Congress passed the FFDCA in 1938, which grants the FDA the power to ensure that "foods are safe, wholesome, sanitary, and properly labeled."[24] Two sections of the FFDCA that are often referenced in food-labeling lawsuits are sections 201(n) and 403(a). Section 201(n) provides that a label is misleading if it fails to reveal facts that are material in light of representations made on the label, or in light of consequences that may result from the use of the food.[25] Section 403 enables consumers to choose foods carefully by ensuring that the labels communicate accurate information.[26] More specifically, section 403(a) states that a food is misbranded "[i]f. . . its labeling is false or misleading in any particular."[27]

In 1990, Congress amended the FFDCA to include the NLEA, which "sought 'to clarify and strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods.'"[28] More specifically, the NLEA codified at 21 U.S.C. § 343 governs food nutritional labeling. It expressly preempts state-imposed nutrition labeling requirements and, as such, prohibits states from imposing labeling requirements that are not identical to federal standards.[29] This section has been the subject of significant litigation. Plaintiffs try to avoid its scope by focusing their labeling claims on things that are not specifically addressed by the FDA, such as the term "natural."[30]

The FDA is responsible for protecting public health by ensuring the safety and proper labeling of all domestic and imported food, except meat, poultry, and processed eggs. Pursuant to its authority under the NLEA, the FDA has promulgated regulations permitting three types of nutrition claims on food packages: (1) health and qualified health claims; (2) nutrient content claims; and (3) structure/function claims.[31]

Similar oversight of meat, poultry and processed egg products is conducted by USDA's Food Safety and inspection Service (FSIS). The core responsibility of FSIS is to prevent product adulteration and misbranding. This is identical to FDA's mission, although the FSIS program, which requires continuous in-plant supervision, is far more labor intensive. In addition, and again unlike FDA, FSIS maintains a prior approval program for the labels of products it regulates. States and other government authorities are specifically preempted from imposing marking labeling and ingredient requirements different than or in addition to those mandated by FSIS. In the area of health claims, FSIS policies are generally compatible with those established by the FDA.

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[24] 21 U.S.C.A. § 393(b)(2)(A).

[25] *Id.* § 321(n).

[26] *Id.* § 343(a).

[27] *Id.*

[28] *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 118 (2d Cir. 2009) (quoting H.R. Rep. No. 101-538, at 7 (1990)).

[29] 21 U.S.C.A. § 343-1.

[30] *See* Berman et al., *supra* note 16.

[31] *See* Nicole E. Negowetti, "Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority," Brookings, Jun. 2014.

Health and qualified health claims are limited to those that characterize "the relationship of any substance to a disease or health related condition."[32] Authorized health claims must be phrased in particular ways with specific wording used.[33] The FDA will only authorize unqualified health claims if they are supported by "significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims."[34] Nutrient content claims are those most commonly found on food products and characterize the level of a nutrient in a food through use of terms such as "fortified," "added," "free," "reduced," or "light."[35] The FDA provides specific standards and definitions for each nutrient content claim that may be used.[36] Structure/function claims describe the effect that a substance has on the structure or function of the body, but they do not make reference to any particular disease or disorder. The FDA does not require manufacturers to substantiate structure/function claims and it does not mandate the use of disclaimers when these claims are made.[37]

The FTC has overlapping jurisdiction with the FDA regarding the regulation of advertising and labeling of food. These agencies coordinate their responsibilities through a Memorandum of Understanding that has been in place since 1971.[38] Like the FDA, the FTC does not define "natural," but rather decides such issues on a case-by-case basis. The FTC does require that companies have a reasonable basis for all express or implied claims made in food advertising.[39] Some specific types of nutrition claims have received significant focus in litigation.

## A. "Natural"

Many food-labeling cases relate to disputes over a manufacturer's use of the term "natural" on the product's label. However, the FDA has never provided a definition for this term and seems unlikely to do so in the immediate future.

In 1991, the FDA adopted an informal policy that states that "natural" means 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."[40] The FDA further clarified in 1993 that it had not established a formal definition for the term "natural"; however, the agency does not object to the use of the term on food labels if it is used in a manner that is truthful and not misleading and the product does

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[32] 21 C.F.R. § 101.14(a)(1).

[33] *Id.* § 101.14(c)-(d).

[34] *Id.* § 101.14(c).

[35] *Id.* § 101.13.

[36] *See* Negowetti, *supra* note 29.

[37] *See generally* 21 U.S.C. § 343; *see also* 21 C.F.R. § 101.93 ("Certain Types of Statements for Dietary Supplements").

[38] Memorandum of Understanding Between the Federal Trade Commission and the Federal Drug Administration, U.S. Food and Drug Admin., 1971,

[39] *See* Sarah L. Brew, Ronald J. Levine and R. Trent Taylor, "Food Labeling Class Actions: Navigating Ascertainability, Predominance, Preemption, and Standing," Strafford, Oct. 1, 2014.

[40] *See* Food Labeling: Nutrient Content Claims, General Principles Petitions, Definition of Terms, 56 Fed. Reg. 60421 at 60466, Nov. 27, 1991.

not contain added color, artificial flavors, or synthetic substances.[41] Use of the term "natural" is not permitted in the ingredient list, with the exception of the phrase "natural flavorings."[42] The FDA has long maintained this stance on the term "natural."

In early 2014, three judges requested the FDA to provide a definition for "natural" as they believed that the issue was one for which the FDA had primary jurisdiction. For instance, in *Cox v. Gruma Corp.*, United States District Court Judge Yvonne Gonzalez Rogers stayed the case for six months on primary jurisdiction grounds and referred the issue of GMOs and labeling of natural foods to the FDA for the first time.[43] The court agreed with the defendants that the FDA, not the courts, should decide the issue and found that the FDA had primary jurisdiction over "the question of whether and under what circumstances food products containing ingredients produced using bioengineered seeds may or may not be labeled 'Natural' or 'All Natural' or '100% Natural.'"[44]

The FDA declined the opportunity to address the issue and provided a number of reasons why it would not define the term "natural." These reasons include that (1) amending its policy on the term would involve a public process; (2) it would require coordination and cooperation with the USDA and other federal agencies; (3) it would entail a consideration of a variety of things, such as scientific evidence, processing methods, consumer preferences and beliefs, food production, and First Amendment issues; (4) it lacks the resources to do so and has more urgent matters to look into; and (5) defining "natural" has implications well beyond the scope of the case immediately before the court.[45] Thus, for these reasons, the term "natural" remains undefined by the FDA and continues to be a highly contentious issue in food-labeling litigation.

## B. "Genetically Modified Organisms" (GMOs)

Often food-labeling litigation has involved GMOs. GMO foods are those that have been genetically engineered, meaning that scientific methods were used "to introduce new traits or characteristics to an organism. Such procedures can create a tolerance to herbicides, promote resistance to viruses, increase

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[41] *See* US Food and Drug Administration, *supra* note 3; *see also* Robert G. Hibbert and Grace Hsieh, "FSIS and FDA Policy on the Definition of 'Natural' and the Qualification for Use on Food and Meat/Poultry Labeling," Feb. 2007, (last visited Apr. 20, 2015).

[42] *See* Food Labeling, *supra* note 38; *see also* 21 C.F.R. § 501.22(a)(3) (defining "natural" in terms of natural flavors as the "essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional").

[43] No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013).

[44] *Id*; *see also Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013) (staying case pending FDA's opinion on what constitutes "natural" in a food-labeling dispute regarding soup and chili products allegedly made with GMO ingredients).

[45] *See* Julie A. Steinberg, "FDA Won't Formally Define 'Natural'; Judges' Requests in Label Suits Over GMOs Declined," Bloomberg BNA, Jan. 8, 2014.

yields, and alter acidic content."[46] Foods and ingredients that had been genetically engineered were first introduced to consumers in the mid-1990s. Examples of common GMO plants include corn, soybean, cotton, canola, zucchini, papaya, alfalfa, and yellow crookneck squash.[47] Ingredients derived from these GMO crops include amino acids, aspartame, ascorbic acid, vitamin C, citric acid, high fructose corn syrup, molasses, and xantham gum and are often found in foods as diverse as cereals, snack foods, and salad dressings.[48] It has been estimated that GMOs end up in approximately 70% of all processed foods.[49]

Federal law does not require manufacturers of GMO foods to include a label on food products stating that they have genetically modified. However, the FDA has issued two draft guidance statements regarding the issue: (1) Statement of Policy: Foods Derived from New Plant Varieties,[50] explaining that the FDA has not found any different or greater safety concerns regarding foods containing GMO ingredients, and (2) 2001 Draft Guidance for Industry Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, providing that a food label that states that it does not contain GMO ingredients may be misleading if it somehow implies that it is superior to other foods.[51]

In the absence of federal law requiring GMO foods to be clearly labeled, some states have begun to pass legislation to that effect. Specifically, three states, Connecticut, Maine, and Vermont, have passed laws requiring products that contain GMOs to be labeled as such. However both Connecticut's "Act Concerning the Labeling of Genetically-Engineered Food," and Maine's "Act to Protect Maine Food Consumers' Right to Know About Genetically Engineered Food and Seed Stock" include provisions that the state will not enforce the labeling requirements until more states have passed similar legislation.[52]

Vermont, by contrast, passed its "Act Relating to the Labeling of Food Produced with Genetic Engineering" in 2014 and it is set to take effect on July 1, 2016.[53] The Grocery Manufacturers' Association, the Snack Food Association, the National Association of Manufacturers, and the International Dairy Foods Association are challenging this proposed law. These companies filed a lawsuit against Vermont state officials alleging that the labeling requirement is unconstitutional as it violates the First Amendment by compelling manufacturers to force companies to make statements they do not wish to make and prevents them from describing their products in the terms of their choosing.[54] Vermont State Attorney General William H. Sorrell argues that the Act does not violate the First Amendment because the disclosures it mandates are purely factual and does not require manufacturers to state a particular

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[46] *See* Emily M. Lanza, "Legal Issues with Federal Labeling of Genetically Engineered Food: In Brief," Congressional Research Service Report, Aug. 28, 2014, (last visited Mar. 23, 2015).

[47] *See* Stephanie Resnik, "Labeling Genetically-Modified Foods: Where Have We Come From, And Where Are We Going?" FDLI Org., Jan./Feb. 2014.

[48] *Id.*

[49] *Id.*

[50] 57 Fed. Reg. 22,984-01 (May 29, 1992).

[51] *See* "Food Product Labeling," Practice Note, Practical Law Company, Thomson Reuters Legal Solution, 2015.

[52] *See* Lanza, *supra* note 44.

[53] *Id.*

[54] *Id.*

viewpoint, such as whether genetically engineered foods are good or bad.[55] Currently, this "food fight" is being actively litigated within the judicial system. On April 21, 2015, following months of comments and opinions being voiced by everyone from consumers to food manufacturers and upon approval by the Legislative Committee on Administrative Rules, the Attorney General's Office in Vermont adopted regulations implementing the act to take effect on July 1, 2016.[56] Moreover, on April 27, 2015, U.S. District Court Judge Christina Reiss denied the state's motion to dismiss allowing the litigation to proceed.[57]

### C. "Organic"

Pursuant to federal law, a party cannot sell or label food as being "organic" unless it is produced and handled in accordance with the Organic Food Productions Act.[58] For a product to be marketed or labeled as "organic" it must meet certain criteria. Specifically, the food must "(1) have been produced or handled without the use of synthetic chemicals. . . ; (2) . . .not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and (3) be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent."[59]

## Different Types of Food-labeling Cases

Food-labeling lawsuits include a wide variety of cases and issues. For instance, some involve particular health claims while others involve competitor litigation and still even more pertain to the use of the term "natural" on product labels. In 2013, food labels that contained the word "natural" did more than $40 billion worth of business in United States retail sales.[60] Moreover, in 2012, a survey found that 51% of Americans actually sought out "all natural" foods.[61] It appears that there is meaningful market demand for natural food products.

In general, cases involve four types of issues surrounding the definition of the term "natural"[62]: (1) food or drinks containing high fructose corn syrup; (2) food or drinks containing GMOs; (3) food or drinks

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[55] *See* Elaine Watson, "From 'All Natural' Claims to GMO Labeling: The Food Litigation Trends We're Watching in 2015," http://www.foodnavigator-usa.com/Regulation/10-food-labeling-and-food-litigation-trends-Just-Mayo (last visited Mar. 24, 2015).

[56] *See* "Attorney General Adopts GMO-Labeling Rules," Burlington Free Press, Apr. 21, 2015, (last visited Apr. 24, 2015).

[57] See "Judge: Vermont's GMO-Labeling Law and Industry Lawsuit Can Both Proceed," Food Safety News, Apr. 29, 2015, (last visited June 18, 2015).

[58] 7 U.S.C.A. §§ 6501-6523.

[59] *Id.* § 6504; *see also* "Food Product Labeling," *supra* note 49.

[60] *See* Mike Esterl, "Some Food Companies Ditch 'Natural' Label: Amid Lawsuits Over the Claim, More Producers Drop the Word," Wall Street Journal, Nov. 6, 2013, (last visited Mar. 23, 2015).

[61] *Id.*

[62] *See* Dawn Goulet, "What Cases About 'All Natural' Labels Mean for Marketing," 22 Class Act. & Derv. Sts. 2, Apr. 30, 2012.

containing artificial preservatives; and (4) food or drinks that have been chemically processed or contain other unnatural ingredients.[63] There are also cases involving the term "natural" that pertain to allegedly fraudulent health/nutrition claims and cases in which competitors sue one another for false or misleading advertising under the Lanham Act.

## A. High Fructose Corn Syrup (HFCS) Cases

A frequent target for food-labeling lawsuits has been those products marketed as being "all natural," but which, in fact, contain HFCS. For instance, in *Weiner v. Snapple Beverage Corp.*, the plaintiffs brought an action seeking damages for the defendant's allegedly misleading labeling of its teas and juice drinks as "all natural," despite allegedly containing HFCS.[64] More specifically, the plaintiffs sought class certification arguing that they had paid a price premium for the beverages which they alleged were not "all natural," as they allegedly had been sweetened with HFCS.[65] However, the court found that "[i]t is undisputed that Snapple disclosed the inclusion of HFCS in the ingredient list that appears on the label of every bottle of Snapple that was labeled 'All Natural.'"[66] Moreover, the court thus denied the plaintiffs' motion for class certification.[67]

## B. Genetically Modified Foods Cases

Products containing GMOs that have been the subject of food-labeling lawsuits include Tostitos, Sun Chips, Naked Juice Beverages, and Wesson Vegetable Oil. An example of an "all natural" issue arising in the context of a food product containing GMOs arose in *Randolph v. J.M. Smucker Co.*[68] In *Randolph*, the plaintiff alleged that the defendant engaged in deceptive trade practices by misrepresenting to consumers that Crisco oils are "All Natural" when they are in fact produced from genetically modified plants.[69] Ultimately, the court denied the class certification motion as the plaintiff failed to demonstrate that the putative class was ascertainable and failed to satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3).[70] Moreover, the court held that the plaintiff had failed to demonstrate that an objectively reasonable consumer would agree with her individual interpretation of "all natural."[71]

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[63] *Id.*

[64] *Weiner v. Snapple Beverage Corp.,* No. 07 CIV. 8742 DLC, 2010 WL 3119452, at *1 (S.D.N.Y. Aug. 5, 2010).

[65] *Id.* at *1-2.

[66] *Id.* at *1.

[67] *Id.* at *13.

[68] 303 F.R.D. 679 (S.D. Fla. 2014).

[69] *Id.* at 683.

[70] *Id.* at 689.

[71] *Id.* at 692; *see also Krzykwa v. Campbell Soup Co.*, 946 F. Supp. 2d 1370 (S.D. Fla. 2013) (denying defendant's motion to dismiss a putative class action for its labeling of soup containing genetically modified corn as "100% natural"); *but see In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 568 (C.D. Cal. 2014) ("Here, every putative class member has been exposed to the alleged misrepresentation, because every bottle of Wesson Oil sold during the class period was labeled '100% Natural.' The court therefore finds the class ascertainable. . . .").

## C. Artificial Preservative Cases

In *Brazil v. Dole*, the court held that the plaintiff failed to prove that defendant's "All Natural Fruit" label on its fruit products was unlawfully deceptive, noting a lack of evidence that other consumers would be similarly misled.[72] The plaintiff claimed that ten of defendant's products were misleadingly labeled as "All Natural Fruit" where they contained ascorbic acid (Vitamin C) and citric acid.[73] The defendant moved for summary judgment asserting that the record contained insufficient evidence that reasonable consumers would be misled by its "All Natural Fruit" label.[74] The court agreed with the defendant and noted that the plaintiff asserted only that he was deceived by the label.[75] The court found that this was an isolated instance of actual deception that was insufficient to survive summary judgment.[76] Moreover, the court found that the record contained no evidence that reasonable consumers would not expect ascorbic and/or citric acid to be found in the challenged products.[77] This case is especially noteworthy as it is the first "natural" food-labeling case to reach a ruling on the merits.[78] It is on appeal to the Ninth Circuit.

However, in *Allen v. Similasan Corp.*, the court granted in part the plaintiffs' motion for class certification.[79] In *Allen*, the plaintiffs brought suit against a homeopathic-product producer alleging false advertising, unfair or deceptive acts, and breach of warranty under California law.[80] Specifically, the plaintiffs argued that six over-the-counter items were misleading/false as they contained statements on their labels such as "100 Natural Active Ingredients," "Preservative Free," and "Pharmacist Recommended."[81] In determining whether to grant class certification, the court noted that the "[p]laintiffs' proposed class definitions do use objective criteria to identify class members," and provided the court with a detailed notice plan.[82] The court, after considering other factors required for class certification, such as typicality and numerosity, granted the plaintiffs' motion in part, providing that it certified the putative classes "after modifying them to remove the ancillary representations and limit the time period in conformance" with its order.[83]

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[72] No. 12-CV-01831-LHK (N.D. Cal. Dec. 8, 2014).

[73] *See* David Siegel, "Dole Beats 'All Natural' Fruit Labeling Class Action," Law 360, Dec. 9, 2014, (last visited Apr. 26, 2015).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] No. 12-CV-376 BAS JLB, 2015 WL 1534005 (S.D. Cal. Mar. 30, 2015).

[80] *Id.* at *1.

[81] *Id.*

[82] *Id.* at *6-7.

[83] *Id.* at *16.

## D. Products Processed with Chemicals or Containing Other Unnatural Ingredients Cases

A recent case involved the alleged presence of chemicals and unnatural ingredients in the context of food-labeling litigation. In *Kane v. Chobani*, the court granted the defendant's motion to dismiss, holding that the plaintiffs failed to demonstrate actual reliance on the product's allegedly misleading labels that stated that the yogurt contained no added sugar and that it was "all natural" when, in fact, it was allegedly artificially colored with fruit and vegetable juice concentrates.[84]

Another case allegedly involving the presence of unnatural ingredients in food products was *Astiana v. Ben & Jerry's Homemade, Inc.*[85] In *Astiana*, the plaintiff sought class certification alleging that the ice cream, frozen yogurt, and popsicles plaintiff had purchased were labeled as being "all natural" despite containing cocoa allegedly alkalized with a synthetic ingredient.[86] The court denied plaintiff's motion for class certification holding that the class was not readily ascertainable and that the plaintiff had failed to demonstrate that there was a classwide method of awarding damages to putative class members.[87]

However, in *Lilly v. Jamba Juice Co.*, a case in which the plaintiffs alleged that Jamba Juice smoothie kits labeled as "All Natural" actually contained ascorbic acid, xanthum gum, steviol glycosides, modified corn starch, and gelatin, the court granted the plaintiffs' motion insofar as it sought to certify the putative class for purposes of determining liability.[88] Specifically, the court held that "[s]ince Plaintiff has established that, with the exception of determining damages, all of the required elements of class certification have been met, the Court will exercise its discretion pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure to certify the proposed class solely for purposes of determining liability."[89]

## E. Fraudulent Health/Nutrition Claim Cases

Food-labeling litigation also has included claims against food manufacturers regarding fraudulent health/nutrition statements. For instance, in *Craig v. Twinings North America, Inc.*, the court dismissed a putative class action against the tea maker Twinings North America for allegedly misbranding its tea as a "natural source of antioxidants" holding that (1) FDA requirements were not violated as the labels failed to characterize the level of antioxidants; (2) the generic phrase "natural source of antioxidants" does not appear to be either an express or implied nutrition-content claim; (3) any state law claims arising from the same facts are preempted; and (4) the plaintiff did not suffer actual damages as contemplated by the statute (i.e., the plaintiff paid for and received tea).[90] Other plaintiffs have brought food-labeling lawsuits alleging false health and nutrition benefit claims on cereals purporting to support a healthier immune system[91] and canned fish advertised as being a good source of Omega-3.[92]

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[84] 973 F. Supp. 2d 1120, 1138-39 (N.D. Cal. 2014).

[85] No. C 10-4387 PJH, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014).

[86] *Id.* at *1.

[87] *Id.* at *13 (citing to *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)).

[88] No. 13-CV-02998-JST, 2014 WL 4652283, at *11 (N.D. Cal. Sept. 18, 2014).

[89] *Id.*

[90] No. 5:14-CV-05214, 2015 WL 505867, at *9 (W.D. Ark. Feb. 5, 2015).

[91] *See, e.g.*, *Dennis v. Kellogg Co.*, No. 09-CV-01786 (S.D. Cal. 2009).

### F. Competitor Cases

Food-labeling cases have also been brought under the Lanham Act. The Lanham Act is codified at 15 U.S.C. § 1051 et seq. and provides a private right of action for one competitor to sue another for false advertising or misleading statements on a product label.[93] In *POM Wonderful LLC v. Coca-Cola Co,*[94] the United States Supreme Court in a unanimous decision (8-0; Justice Breyer recused), held that federal regulations do not preclude companies from bringing false advertisement claims under the Lanham Act, allowing for Pom Wonderful to pursue its allegations against Coca-Cola that it had deceptively labeled a product as "pomegranate blueberry" but allegedly only contained 0.2% blueberry juice and 0.3% pomegranate juice.[95] Writing for the majority, Justice Kennedy noted that "the Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose."[96] Moreover, "[a]lthough both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."[97] Justice Kennedy further asserted that nothing in the history or text of the FDCA or the Lanham Act showed that Congress intended to forbid Lanham Act suits and rejected the argument that such suits are barred when the FFDCA or FDA regulations specifically authorize the challenged aspects of a label.[98]

## Recent Court Trends in Food-labeling Litigation

### A. "The Food Court"

The United States District Court for the Northern District of California has developed a reputation as the "Food Court."[99] There are a number of reasons why the Food Court has earned its nickname and reputation. For instance, California has multiple far-reaching consumer protection laws and permits larger classes to be certified, and the jury pool in California is perceived as being more health conscious and thus more plaintiff friendly.[100] Another reason for the Food Court's popularity is that a significant number of cases have been filed in this venue making it easier for plaintiffs to predict what may happen with their

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[92] *Ogden v. Bumble Bee Foods, LLC*, No. 12-cv-01828 (N.D. Cal. 2012).

[93] *See* Paul W. Garrity and Tyler E. Baker, "Pom v. Coke At The Supreme Court: FDA Approval May Not Preempt False Advertising Challenges to Labels," Metropolitan Corporate Counsel, Jun. 2014 Northeast Edition.

[94] 134 S. Ct. 2228.

[95] *Id.* at 2231.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 2241-2242.

[99] *See* Paul M. Barrett, "California's Food Court: Where Lawyers Never Go Hungry," Bloomberg, Aug. 22, 2013, (last visited Apr. 26, 2015).

[100] *See* Elaine Watson, "Have 'All Natural Lawsuits Peaked? And What Defense Strategies Are Working?", Food Navigator-USA, Feb. 21, 2014, (last visited Mar. 29, 2015).

food-labeling lawsuits.[101] Moreover, California law, pursuant to the state Sherman Food, Drug, and Cosmetic Act, permits a private cause of action for any violation of federal requirements and, therefore, makes the state an especially attractive venue for plaintiffs' attorneys.[102] Finally, California is a large and populous state; therefore, the number of its allegedly injured consumers filing actions pursuant to its expansive consumer protection laws likely has the effect of driving up damages numbers, making it an even more attractive forum for plaintiffs' lawyers seeking to bring food labeling class actions.[103]

## B. Current Theories of Liability

Food-labeling lawsuits rarely involve causes of action based on actual physical injury. Instead, plaintiffs in such cases typically allege damages from allegedly higher prices they paid for premium "natural" products. The class actions often allege violations of state consumer protection laws, fraud and misrepresentation, breach of express and implied warranties, and unjust enrichment.[104] In addition, plaintiffs' lawsuits in California often bring claims alleging violations of the state's numerous and expansive consumer protection laws, such as its Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.[105] These are plaintiff-friendly statutes. California's Sherman Law is also especially attractive to plaintiffs as it expressly adopts the FFDCA and NLEA's prohibition against "false and misleading" food labeling.[106]

## C. Class Action Certification

Most food-labeling cases are brought as putative class actions. This means that the class certification fight is extraordinarily important in food labeling litigation because if a class is certified, it is likely to settle and if it is not, then it is likely to go away.[107] Federal Rule of Civil Procedure 23 governs class actions. "Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23. . . . While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23."[108]

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[101] *See* Richard E. Coe and Zoe K. Wilhelm, "Missing Receipts: Recent Decisions Suggest Two Defenses Against Food Labeling Class Actions," Food and Drug Law Institute, May 16, 2014, (last visited Mar. 25, 2015).

[102] *See* "2013's Key Rulings In Food Mislabeling Litigation," Law360, Jan. 7, 2014.

[103] *See generally* Dye, *supra* note 21; Paul M. Barrett, *supra* note 97; Glenn G. Lammi, "Who's Filling the 'Food Court' with Lawsuits: Consumers or Lawyers?" Forbes, July 22, 2013, (last visited Apr. 26, 2015).

[104] *See* Negowetti, *supra* note 29.

[105] *See id.*

[106] *See, e.g.* Cal. Health & Safety Code § 110100; *see also* Cal. Health & Safety Code § 110660 ("Any food is misbranded if its labeling is false or misleading in any particular.").

[107] *See* David Biderman, Joren Bass and Monica Ortiz, "Food Labeling: The Rising Tide of Consumer Fraud Class Actions," ABA Section of Litigation Food and Supplements Subcommittee and the Products Liability Committee, June 12, 2012.

[108] *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.) *opinion amended on denial of reh'g* 273 F.3d 1266 (9th Cir. 2001).

In seeking to avoid class certification, food companies should determine whether plaintiffs have satisfied their requirements both to identify an ascertainable class and to articulate a viable damages theory applicable on a class-wide basis.[109] For instance, courts will either refuse to certify or decertify a class where plaintiffs are unable to calculate damages because they have received at least some benefit from the product[110] or because they failed to prove a causal link between the alleged misconduct and their purported damages.[111] For instance, in *Rahman v. Mott's LLP*, the plaintiff sought class certification in a case in which he alleged that the defendant mislabeled its apple juice as having "no sugar added."[112] The court ultimately, however, denied the plaintiff's motion for class certification because he could not demonstrate that restitution damages could be calculated on a classwide basis.[113]

In addition, courts are unlikely to certify nationwide classes where relief will be given to different subclasses of consumers based upon their residence. For instance, in *Gianino v. Alacer Corp.*, the court held that because the class members were from multiple states with significant differences in their laws, common legal questions did not predominate, and therefore, class certification was inappropriate.[114] In defending class actions, companies should be mindful that complaints alleging claims under various state laws are generally not appropriate for class treatment because variations in state laws will predominate over common issues.[115] Thus, when faced with a putative nationwide class action, food manufacturers should consider filing a motion to strike based on the required elements for a class action under Federal Rule of Civil Procedure 23(b). These motions have often been effective when plaintiffs allege putative nationwide class actions that are almost always unmanageable by the court under Federal Rule of Civil Procedure 23 due to variations in the class. A closer look at defenses to class actions based on their requirements is discussed further below.

## Defenses to Food-labeling Litigation

Several types of defenses have been advanced in food-labeling litigation, including jurisdictional challenges, pleading challenges, and challenges designed to prevent plaintiffs from proving the elements of Federal Rule of Civil Procedure 23. Such arguments are increasingly important in light of recent successes by plaintiffs in certifying classes.[116]

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[109] *See, e.g.*, *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK VBKX, 2014 WL 1477400, at *2 -4 (C.D. Cal. Apr. 15, 2014).

[110] *See* Chan, *supra* note 2.

[111] *See id.*

[112] No.13-cv-03482-SI (N.D. Cal. Dec. 3, 2014).

[113] *Id.*; *see also* Jess A. Dance, "Mott's Defeats Class Certification in Apple Juice Labeling Fight," Perkins Coie, Food Litigation News, (last visited Apr. 20, 2015).

[114] 846 F. Supp. 2d 1096, 1100-03 (C.D. Cal. 2012).

[115] *See* Biderman et al., *supra* note 105.

[116] *See, e.g.*, *In re ConAgra Foods, Inc.*, No. CV 11-05379 MMM, 2015 WL 1062756 (C.D. Cal. Feb. 23, 2015) (granting in part a motion for class certification where plaintiffs allege that defendant's cooking oils are misleadingly labeled as "100% Natural" but contain genetically modified organisms); *Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2014 WL 6483216 (N.D. Cal. Nov. 18, 2014) (granting class certification in action where plaintiffs allege products were misleadingly labeled as organic); *Ebin v.*

## A. Standing

Standing is a threshold requirement for federal court jurisdiction that must be analyzed separately from the merits of a claim. The United States Supreme Court has found that "[t]o establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" [117] These requirements have often been raised by defendants seeking to challenge plaintiffs' ability to bring a food labeling class action.

Moreover, it is noteworthy that federal courts in California have liberally interpreted California state statutes to find standing in several circumstances, even where a plaintiff may never have actually used the item at issue.[118] For instance, in *Anderson v. Jamba Juice Co.*, the court denied a motion to dismiss a proposed class action in which the plaintiffs alleged that the defendant's "all natural" smoothie kits contained synthetic ingredients, holding that the named plaintiff can bring claims based on products he never purchased.[119] Specifically, the named plaintiff had only purchased two of the five kits at issue in the case.[120] However, the court determined that the class representative had standing to bring the claims involving the kits that he did not buy because the products were sufficiently similar and the labels contained the same alleged misrepresentations.[121]

## B. Challenges to Pleadings

Pleading challenges have also been successful in defense of food-labeling claims. Defendants should consider filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) where the complaint does not present enough details to make the allegations feasible. This is especially true regarding allegations sounding in fraud, as they must be pled with particularity as required by Federal Rule of Civil Procedure 9(b).[122] Specifically, a complaint must be sufficient and include "enough facts to state a claim for relief that is plausible on its face."[123] "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[124] Thus, plaintiffs are required to plead facts that allow a court to draw a reasonable

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*Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y. 2014), *reconsideration denied*, No. 13 CIV. 2311 JSR, 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014) (granting class certification in case where defendant allegedly misleadingly labeled its products as being "100% Pure Olive Oil").

[117] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal citation omitted) ("We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm."); *see also Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008).

[118] *See* Scholz, *supra* note 8.

[119] 888 F. Supp. 2d 1000, 1002 (N.D. Cal. 2012).

[120] *Id.* at 1005.

[121] *Id. at* 1006.

[122] Fed. R. Civ. P. 9(b).

[123] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[124] *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

inference that the defendant is liable for the allegedly misleading labeling.[125] Moreover, complaints in food-labeling cases can often be vague with plaintiffs failing to provide specific details regarding the where, when, and what behind the allegedly deceptively labeled products they claim to have purchased. Thus, if a court finds a complaint to be implausible or insufficiently pled, then it will dismiss the plaintiffs' complaint.[126]

## C. Primary Jurisdiction

The doctrine of primary jurisdiction is another defense often raised in the context of food-labeling litigation. Generally, courts will invoke the primary jurisdiction doctrine when a controversy requires an agency's expertise.[127] Courts typically apply this doctrine when they do not want to weigh in on an issue that they believe should be properly decided by the relevant regulatory authority. In food-labeling litigation, this often means deferring to the FDA.

In seeking to determine whether this doctrine is applicable to a particular case, courts weigh four factors: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.[128] Under this doctrine, defendants in food-labeling cases can argue that if the FDA is considering a similar issue but has not yet reached a decision, the lawsuit should be dismissed.[129] Essentially, the primary-jurisdiction doctrine gives courts the discretion to allow the FDA to decide the issue in the first instance so as to avoid later conflicts.

However, since the FDA's position that it will not define the term "natural," many courts now reject primary jurisdiction arguments advanced by defendants. For instance, in *Dye v. Bodacious Food Co.*, the plaintiff alleged that the defendant misleadingly labeled its cookies as "natural" when they allegedly contained synthetic or genetically modified ingredients.[130] The defendant moved to dismiss the action and argued, in part, that the primary jurisdiction precluded the court from reaching a decision on the merits of the case.[131] The court rejected this argument and noted that the FDA has declined numerous times to

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[125] *See* Bruce A. Silverglade, "Responding to Heightened Enforcement Risks from Consumer Class Actions Challenging Food Labeling," Food and Drug Law Institute, Jan./Feb. 2012.

[126] *See, e.g.*, *Young v. Johnson & Johnson*, No. CIV A. 11-4580 JAP, 2012 WL 1372286, at *2 (D.N.J. Apr. 19, 2012) (granting defendants' motion to dismiss where plaintiffs' allegations about Benecol butter/margarine substitute amounted to nothing more than subjective allegations and plaintiff lacked standing ).

[127] *See* Lanza, *supra* note 44.

[128] *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114-15 (9th Cir. 2008).

[129] *See* Sara Turner and Kevin Anderson, "Litigation: Labeling Lawsuit Defenses," Inside Counsel, Apr. 25, 2013, (last visited Mar. 29, 2015).

[130] Case No. 14-cv-80627 (S.D. Fla. Sept. 9, 2014); *see also* Ashley Harrison, John Mattox and Cort VanOstran, "Recent Developments and Case Updates in Food Labeling Class Actions and Advertising Litigation," ABA, Environmental, Mass Torts & Products Liability Litigation Committees' Joint CLE Seminar, (last visited Apr. 27, 2015).

[131] *Id.*

define "natural" leaving the matter within the court's authority.[132] Similarly, in another case involving allegations that tea had been falsely labeled as "100% Natural," the court rejected the defendant's primary jurisdiction argument stating that based on the "FDA's lack of interest in providing further guidance on the use of the word 'natural' in food labeling, staying or dismissing the case to permit the FDA to do so would likely be futile."[133]

Courts have held, though, that primary jurisdiction exists in certain contexts, such as those involving particular health claims. For instance, in *Haggag v. Welch Foods, Inc.*, the plaintiff filed a putative class action alleging that the defendant's grape juice made a health claim on its label, "Helps Support a Healthy Heart," which allegedly did not fall into any of the permissible categories of health claims permitted by the FDA.[134] The defendant argued that the doctrine of primary jurisdiction applied to the issue of whether it was within the FDA's authority to determine whether such a label constituted an implied health claim.[135] The court agreed and noted that "[i]t is evident from the FDA's commentary that it assumed the role of deciding whether a particular claim qualifies as an implied health claim."[136]

## D. Preemption

Preemption is another defense often raised in food-labeling litigation.[137] The viability of the defense largely turns on whether or not the label or statement is directly governed by a statute or regulation. If so, courts are likely to find preemption. If the challenged label or statement is not directly governed by statutes or regulations, then courts will likely find that no preemption exists.

Preemption is an appropriate defense to raise when a plaintiff brings a state law claim, but there is federal law already in place that governs the particular area of regulation.[138]
Specifically, " '[f]ederal preemption occurs when: (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that

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[132] *Id.*

[133] *In re Hain Celestial Seasonings Prods. Consumer Litig.*, Case No. 8:13-cv-01757 (C.D. Cal. June 10, 2014); *see also* Harrison et al., *supra* note 128.

[134] No. CV 13-00341-JGB OPX, 2014 WL 1246299 (C.D. Cal. Mar. 24, 2014); *see also* Harrison et al., *supra* note 128.

[135] *Haggag*, 2014 WL 1246299, at *7.

[136] *Id.* at *5.

[137] *See, e.g.*, *Nemphos v. Nestle Waters N. Am., Inc.*, 775 F.3d 616 (4th Cir. 2015) (finding that plaintiff's failure to warn and misleading marketing claims related to bottled water products were preempted by the Food, Drug and Cosmetic Act and the Nutrition Labeling and Education Act); *Young v. Johnson & Johnson*, 525 F. App'x 179 (3d Cir. 2013) (holding that consumers' claims are preempted by the NLEA); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111 (N.D. Cal. 2010) (holding that plaintiffs' state claims alleging that the term "wholesome" is misleading is not preempted by federal law).

[138] *See generally Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985).

field.' "[139] In determining whether preemption exists in a particular situation, the court will look at Congress's purpose in enacting the federal law and whether Congress has made its intention to supplant state law "clear and manifest."[140]

Express preemption has been found where the claims made in the food labeling are expressly governed by federal statutes or regulations and it is clear that Congress sought to displace state law on the issue.[141] Courts have declined to find either express or implied preemption in food-labeling cases where the challenged label or statement is not directly regulated by the FDA.[142] For instance, because the FDA has failed to define "natural," courts have generally been dismissive of preemption arguments in this area.[143]

Recently, in *Cortina v. Goya Foods Inc.*, the plaintiffs filed a putative class action alleging that the defendant deceptively failed to disclose that some of its beverages allegedly contained a potential carcinogen.[144] Specifically, among other arguments, the defendant asserted that the plaintiffs' claims were blocked by NLEA's express preemption clause.[145] Specifically, the defendant argued that NLEA added an express preemption clause to the FFDCA that took away the states' role in regulating the labeling of beverages and food.[146] Moreover, the defendant argued that 21 U.S.C.A. § 343-1(a)(3) (expressly preempts any state law requiring a food to be labeled with something other than its common or usual name) and 21 U.S.C.A.§ 343(k) (providing when a food is misbranded based on artificial flavoring, artificial coloring, or chemical preservatives) expressly preempt state labeling requirements.[147] The defendant also raised the same argument in regards to 21 C.F.R. § 73.85 in combination with 21 C.F.R. § 101.22(k)(2), which authorize food manufacturers to declare caramel color additives on labels, that such provisions expressly exempt California labeling laws. The court disagreed and held that "[b]ecause 21 U.S.C.A. § 343-1(a)(3), 21 U.S.C.A. § 343(k), 21 C.F. R. § 73.85, and 21 C.F.R. § 101.22(k)(2) apply generally to the labeling of artificial coloring, and do not address the labeling of carcinogens, these provisions do not preempt state law labeling requirements of potential

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[139] *Brod v. Sioux Honey Ass'n, Co-op.,* 927 F. Supp. 2d' 811, 823 (N.D. Cal. 2013) *aff'd*, 609 F. App'x 415 (9th Cir. 2015) (quoting *Chae v. SLM Corp.,* 593 F.3d 936, 941 (9th Cir.2010)).

[140] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (internal quotations omitted).

[141] *See e.g., Brod*, *supra* note 137.

[142] *See* Scholz et al., *supra* note 8.

[143] *See* Kara L. McCall, Elizabeth M. Chiarello and Laura A. Sexton, "Federal Preemption of Food Labeling Claims," Bloomberg BNA, Product Safety & Liability Reporter, 43 PSLR 61, Jan. 12, 2015; *see also Astiana*, 2011 WL 2111796, at *10 (finding no express preemption regarding the term "natural" as the FDA's failure to define it indicates its intent not to occupy the field); *but see Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 892 (C.D. Cal. 2013) ("Hansen's labeling of its diet soda conforms to FDA regulations, and any state law that requires different or additional labeling is preempted.").

[144] No. 14-CV-169-L NLS, 2015 WL 1411336 (S.D. Cal. Mar. 19, 2015).

[145] *Id.* at *6.

[146] *Id.*

[147] *Id.* at *7.

carcinogens."[148] The court, therefore, denied the defendant's motion to dismiss with regard to preemption.[149]

## E. Defenses to Class Certification

Defendants in food labeling class actions should focus on showing that the case at issue is not appropriate for classwide treatment for failure to satisfy elements of Federal Rule of Civil Procedure 23. Such issues have received significant attention in recent cases decided by the United States Supreme Court.[150] A party seeking class certification under Federal Rule of Civil Procedure 23 must first demonstrate the presence of four factors: numerosity, commonality, typicality, and adequacy.[151] "Although not specifically mentioned in Rule 23, plaintiffs must also. . . demonstrate that the members of the class are ascertainable."[152] Finally, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)."[153] In addition, pursuant to the United States Supreme Court's decision in *Comcast*, plaintiffs must present a damages model that is consistent with its liability theory.[154] Specifically, "[i]t follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[155]

One of the more commonly litigated provisions of Rule 23(b) in food-labeling lawsuits is the third requirement, providing that "the questions of law or fact common to class members predominate over any questions affecting only individual members."[156] For instance, in *Caldera*, the plaintiff's motion to certify classes seeking monetary relief was denied because the plaintiff failed to offer any method of proving damages on a classwide basis in a case challenging the labels on Crisco shortening and Uncrustables food products.[157] The defendant argued that the plaintiff failed to satisfy the predominance requirement because she had not identified any method of proving damages on a classwide basis, merely asserting "that damages can be proven on a classwide basis based on Defendant's California sales data" and thus determining damages would have involved individualized inquiries that predominate over common questions.[158] In response, the plaintiff contended that individual damage issues do not

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[148] *Id.* at *8-10.

[149] *Id.* at *10.

[150] *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[151] *Dukes*, 131 S. Ct. at 2548-49; *see also* Fed. R. Civ. P. 23(a).

[152] *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 564 (C.D. Cal. 2014).

[153] *Dukes*, 131 S. Ct. at 2548-49.

[154] 133 S. Ct. 1426.

[155] *Id.* at 1433.

[156] Fed. R. Civ. P. 23(b)(3).

[157] No. CV 12-4936-GHK VBKX, 2014 WL 1477400 (C.D. Cal. Apr. 15, 2014).

[158] *Id.* at *3.

predominate because the "[p]plaintiffs' methodology of calculating damages is susceptible to class-wide proof based on California sales data Smucker has provided."[159] In considering these arguments, the court noted that "after *Comcast*, the question is whether [a] plaintiff has met its burden of establishing that damages can be proven on a class-wide basis."[160] The court held that the plaintiff could not meet this burden.[161] Specifically, the court rejected the plaintiff's argument regarding damages on two grounds: (1) there was no question that the putative class members received some benefit from the products, rendering a full refund improper as a calculation of restitution (since a full refund was not appropriate the "[d]efendant's sales data alone would not provide sufficient information to measure classwide damages") and (2) the "[p]laintiff has failed to offer any evidence, let alone expert testimony, that the damages can be calculated based on the difference between the market price and true value of the products."[162]

To the extent that a plaintiff's claim requires proof of reliance, such a claim is usually not susceptible to classwide proof because the individualized inquiries necessary to establish reliance will mean that common questions do not predominate. While some consumers may allege that the food label was critical to their purchasing a product, many others may be shown through testimony and other evidence to not have relied on the disputed language on the food label.[163] Recently, for example, in *Major v. Ocean Spray Cranberries, Inc.*, the plaintiff alleged that the defendant violated numerous federal and California regulations because the juice labels at issue, which included a "no sugar added" statement, lacked a required disclaimer that they were not low calorie drinks.[164] However, the plaintiff testified at her deposition that she understood that the juices were not low calorie and admitted that she did not buy them because she thought that they were.[165] Thus, because she could not demonstrate that she relied on the "no sugar added" label statement to her detriment, she could not prevail on her claims.[166]

Sometimes a class is simply not ascertainable. More cases have focused on this requirement lately, even if it is not explicit in Rule 23. In general, courts have held that a class must be ascertainable in order for it to be certified.[167] For instance, in *Mirabella v. Vital Pharm., Inc.*, the court refused to certify a nationwide class in a case alleging that the defendant concealed the unsafe nature of its Redline Xtreme

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[159] *Id.*

[160] *Id.*

[161] *Id.* at *4.

[162] *Id.*

[163] *See* Berman et al., *supra* note 16.

[164] No. 12-03067 (N.D. Cal., Feb. 26, 2015).

[165] *See* Julie A. Steinberg, "Ocean Spray Wins Judgment in 'No Sugar Added' Label Suit," Bloomberg BNA, Feb. 27, 2015.

[166] *See id.*; *see also Stewart v. Beam Global Spirits & Wine, Inc.*, No. CIV. 11-5149 NLH, KMW, 2014 WL 2920806 (D.N.J. June 27, 2014) (denying plaintiffs' class certification motion where the court held that defendants have a right to cross-examine plaintiffs on their alleged purchases of Skinnygirl Margarita and cannot be forced to accept as true absent individuals' declarations that they are class members without any further indicia of reliability).

[167] *See, e.g., Marcus v. BMW of N. Am., LLC,* 687 F.3d 583 (3d Cir. 2012); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp.,* 727 F.3d 300 (3d Cir. 2013).

energy drink.[168] Specifically, the defendant argued that the class was unascertainable because defendant did not keep a master list of consumers and customers rarely keep finished bottles that would help prove they belong in the class.[169] The court agreed with the defendant and found that the drink sold for less than $3.00 and customers were unlikely to have kept their receipts.[170] Moreover, the court noted that the defendant sells a variety of similar drinks which may cause consumers to be unable to recall which product they specifically purchased and they likely would not be able to determine if they belong in the class.[171]

Recently, in *Byrd v. Aaron's Inc.*, the United States Court of Appeals for the Third Circuit reversed a district court's denial of class certification because the lower court failed to correctly apply the ascertainability requirement to the plaintiff's proposed Rule 23(b) (3) classes.[172] In this case, the plaintiffs sought class certification for consumers who allegedly were harmed by renting laptop computers that had spyware installed and activated on them.[173] Specifically, they alleged that an agent of a franchisee owned by the defendant came to their home to repossess their laptop for failing to make lease payments on it and, in the course of doing so, "presented a screenshot of a poker website Mr. Byrd had visited as well as a picture taken of him by the laptop's camera as he played."[174] The Third Circuit, in reversing the district court's denial of class certification, found that "[t]he ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.' The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that 'class members can be identified.'"[175] The Third Circuit, based on these criteria, noted that because Plaintiff had demonstrated that objective records could be used to identify members of the proposed classes, the ascertainability requirement was met.[176]

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[168] No. 12-62086 (U.S. Dist. Ct., S.D. Fla., order entered Feb. 27, 2015).

[169] *Id.*

[170] *Id.*

[171] *See* Jorden Burt and Joshua E. Roberts, "Food for Thought: *Mirabella v. Vital Pharmaceuticals, Inc.*," Lexology, Mar. 19, 2015, http://www.lexology.com/library/detail.aspx?g=c1445e5e-ebe9-4208-81b3-2a780b055582 (last visited Apr. 27, 2015); *see also Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2014 WL 815253, at *3 (S.D. Fla. Mar. 3, 2014) (denying class certification motion where the class was not ascertainable as plaintiff failed to identify a reliable method for identifying individuals who purchased the VPX Meltdown Fat Incinerator); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014) (denying class certification for a putative class action after finding that the class was not ascertainable as plaintiff failed to provide any method for determining class membership in food-labeling lawsuit alleging that ZonePerfect All Natural Nutrition Bars contained artificial ingredients).

[172] 784 F.3d 154 (3d Cir. 2015), *as amended* (Apr. 28, 2015).

[173] *Id.* at 159-60.

[174] *Id.*

[175] *Id.* at 163.

[176] *Id.* at 168-70.

Thus, the Third Circuit reversed and remanded the decision to the district court, which denied class certification.[177]

Finally, challenging motions for class certification for lack of commonality and typicality may also be an effective strategy.[178] For instance, food manufacturers should raise issues regarding commonality under *Dukes*.[179] This case demonstrates that just identifying common questions alone is not enough to permit class certification rather, those questions must be capable of classwide resolution.[180] For instance, in *Kosta v. Del Monte Foods, Inc.*, a case involving allegedly deceptive food product labels on fruit drinks, the court denied a motion for class certification, based in part, on the fact that plaintiffs "failed to demonstrate, on the record before the Court, that there are common issues of fact or law for the class at issue that would be capable of determination 'in one stroke.'"[181]

## F. Class-Action Settlements

Class-action settlements in federal court must be "fair, reasonable, and adequate."[182] In order to receive final court approval, settlement classes must meet the four requirements of Federal Rule of Civil Procedure 23(a).[183] Class-action settlements are on the rise in food-labeling litigation because companies face enormous potential liability from the threat of class action.[184] Many food labeling class action settlements have provided refunds to consumers and may involve a change in the defendant's marketing practices.[185] Some examples of settlements over the past few years in the food-labeling context include:

- In 2013, the parties agreed to a $9 million settlement over claims that Naked Juice products were deceptively advertised and labeled as "all natural" and "non-GMO" when its products actually contained processed and synthetic ingredients and ingredients from genetically modified crops;[186]
- Kellogg's settled a lawsuit for $4 million in which plaintiffs claimed that the company falsely advertised that its Frosted Mini-Wheats cereal improved kids' attentiveness, memory, and other cognitive functions to a degree not supported by competent clinical evidence;[187]

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[177] *Id.* at 170.

[178] *See* Biderman et al., *supra* note 105.

[179] 131 S. Ct. 2541.

[180] *Id.*

[181] 308 F.R.D. 217, 231 (N.D. Cal. 2015)

[182] Fed. R. Civ. P. 23(e).

[183] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

[184] *See* Biderman et al., *supra* note 105.

[185] *See id.*

[186] *See Pappas v. Naked Juice Co. of Glendora*, No. 2:11-cv-08276-JAK-PLA (C.D. Cal. Aug. 7, 2013 http://nakedjuiceclass.com/ (last visited Mar. 30, 2015).

[187] *See Dennis v. Kellogg Co.*, No. 3:09-cv-01786-IEG-WMC (S.D. Cal. Sept. 10, 2013), http://www.cerealsettlement.com/ (last visited Mar. 30, 2015).

- A preliminary settlement approval, which will include Jamba Juice re-labeling its products and paying each plaintiff an amount not to exceed $5,000 and attorneys' fees, in a putative class action alleging that defendants' smoothie kits are falsely labeled as "All Natural" despite allegedly containing synthetic ingredients;[188]

- Flax USA Inc. agreed to establish a $260,000 settlement fund and to stop using "All Natural" on its flax milk packaging[189]; and

- Truvia settled a lawsuit by contributing $6.1 million to a settlement fund and agreeing to change its marketing and labeling of its sweetener products, which allegedly were mislabeled as "natural" but contain GMO-derived ingredients.[190]

Recently, courts have more closely scrutinized class-action settlements in all contexts, including in the food-labeling context. Practitioners should be mindful that courts are increasingly focused on specific types of provisions, including *cy pres* awards, named plaintiff-incentive awards, clear-sailing agreements, and notice issues. Often in food labeling class action settlements provide *cy pres* relief, which permits a court to distribute unclaimed funds in a class action settlement to the "next best" class of beneficiaries, such as charities whose goals are aligned with class members' interests, to address the situation where not every class member chooses to partake of the remedy. *Cy pres* relief comes in different forms, like asking for the defendant to fund research on a particular issue.[191] For instance, in *Yumul v. Smart Balance*, No. 10-927, a trans fat case in the Central District of California, Defendant agreed to provide restitution to margarine purchasers, as well as attorneys' fees and costs.[192] Any unclaimed settlement funds were to be donated to a university researcher with instructions to use the money to research and develop healthier foods.[193]

In *Miller v. Ghiradelli Chocolate Co.*, the Northern District of California court certified a food labeling class action against Defendant and approved a proposed settlement.[194] The plaintiffs' claimed that the defendant mislabeled its "White Chips" and other products in a way that would mislead consumers into believing that the products contained white chocolate.[195] The plaintiffs also alleged that the "all natural" label was improper because its products contained "genetically modified, hormone treated…or chemically extracted ingredients."[196] As part of the settlement, the defendant agreed to pay $5.25 million into a common fund and agreed to effect certain labeling changes to all products at issue for a period of three

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[188] *Lilly v. Jamba Juice Co.*, No. 13-cv-02998 (N.D. Cal. Mar. 18, 2015).

[189] *Madenlian v. Flax USA Inc.*, No. SACV13-1748 (C.D. Cal. Mar. 16, 2015).

[190] *Howerton v. Cargill, Inc.*, No. 1:13-cv-00336 (D. Haw. Nov. 26, 2014).

[191] *See* Biderman et al., *supra* note 105.

[192] *Id.*

[193] *See id.*

[194] No. 12-cv-04936-LB (N.D. Cal. Feb. 20, 2015); *see also* Alina Alonso Rodriguez and Gary M. Pappas, "Sweet Ending for Plaintiffs in Food Labeling Class Action Against Ghiradelli," Carlton Fields Jorden Burt Class Action Blog, Mar. 10, 2015.

[195] *Id.*

[196] *Id.*

years.[197] In addition, the named plaintiffs would each receive a $5,000 incentive payment.[198] Other class members would receive between $0.75 and $1.50 depending on the products purchased.[199] Class counsel would receive over $1.5 million in attorneys' fees and approximately $87,000 in costs.[200] Moreover, if there remains a balance in the common fund the settlement provided that the plaintiffs would ask the court to approve a list of charitable organizations to receive any balance remaining in the settlement fund.[201] The court found that this application of the *cy pres* doctrine was appropriate as the class members who did not make claims could not be located or identified easily and this would "put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class."[202]

In addition to *cy pres* distributions, courts are focusing on specific attributes of class action settlements when determining whether such settlements should be approved, including the use of coupons, incentive awards for class representatives, and clear-sailing provisions. Coupons are often used because they reinforce brand loyalty, ensure future purchases, and provide more value to plaintiffs than a small-cash payment at lesser cost to retailers. Incentive awards are often used to motivate individuals to serve as class representatives because such awards compensate plaintiffs for work done on behalf of named plaintiffs for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action. For instance, courts have held that incentive awards are "justified where the class representatives expend extraordinary effort, bear personal hardship, and risk their current and future livelihood to remedy unfair practices for the benefit of the class."[203] Clear-sailing provisions provide that defendants will not contest class counsel's request for attorneys' fees. However, in *Myles v. AlliedBarton Security Services*, the court found that "parties must provide a good reason for any 'clear-sailing clause' . . . because such clauses are a telltale sign of collusion."[204] Thus, practitioners should proceed carefully in negotiating settlements involving these kinds of provisions.

## G. Prior Substantiation

Prior substantiation of a claim has been used as an effective defense in food-labeling litigation. The doctrine of prior substantiation, i.e., "the requirement that a defendant substantiate a claim pursuant to certain FDA and/or FTC standards," may help food manufacturers avoid duplicative litigation as more and more plaintiffs file class-action complaints based on federal FDA warning letters or FTC complaints.[205]

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *See* Rodriguez et al., *supra* note 192.

[202] *Id.*

[203] *Ramirez v. Ghilotti Bros. Inc.*, No. C 12-04590 CRB, 2014 WL 1607448, at *2 (N.D. Cal. Apr. 4, 2014).

[204] No. 12-cv-05761-JD, 2014 WL 6065602, at *5 (N.D. Cal. Nov. 12, 2014).

[205] *See* Dana Rosenfeld and Daniel Blynn, "The 'Prior Substantiation' Doctrine: An Important Check on the Piggyback Class Action," Antitrust, Vol. 26, No. 1, Fall 2011.

In its 1972 *Pfizer* decision, the FTC established that an advertiser must have and rely on a reasonable basis to substantiate any product claims it makes.[206] A reasonable basis is usually demonstrated through competent scientific evidence.[207] The FTC and the FDA can choose to investigate advertisers' claims to ensure that they are able to be substantiated.[208] Both the FTC and the FDA will issue warning letters if an advertiser's claims cannot be substantiated.[209] If corrective measures are not taken, then enforcement actions can be brought against advertisers.[210]

Recently, "courts have held that the FTC and FDA – and not private plaintiffs – retain exclusive authority to prosecute claims of unsubstantiation."[211] For instance, in *Scheuerman v. Nestle Healthcare Nutrition, Inc.,* a case challenging health claims made by the defendant about its BOOST Kid Essentials drink, Defendant argued that Plaintiffs' consumer protection and false advertising claims should be dismissed because they were "prior substantiation claims" (i.e., claims on which the FTC had already taken action and the parties had reached a settlement as to how to correct the misrepresentations) and were not recognized under the consumer-fraud statutes at issue.[212] The court agreed and held that "the core allegations of fraud in the Complaint are clearly grounded in a prior substantiation theory of liability."[213]

## Emerging Trends in Food-labeling Litigation

Food-labeling litigation shows no signs of slowing down in the near future. Indeed, the range of food-labeling issues in litigation seems to be expanding into different areas. These diverse areas include olive oils ("Imported From"), pet food labeling, trans fat, disputes regarding evaporated cane juice, synthetic biology techniques, high pressure processing of treated juice, egg-free products, and medical food labeling, and paleo foods. Each of these topics is discussed briefly below.

First, litigation was brought against the maker of Filippo Berrio olive oil for allegedly falsely labeling its bottles with "Imported from Italy" statements and for allegedly marking its products as "extra virgin" when product testing, performed by plaintiff's counsel, allegedly demonstrated that the sampled products did not meet federal and state standards for extra virgin olive oil. In *Kumar v. Salov N. Am. Corp.*, a case brought on February 3, 2015 in the Northern District of California, the plaintiff alleged that Filippo Berrio olive oil was falsely labeled as being "Imported from Italy" and that independent tests done on its "Extra Virgin" varieties demonstrated that it was not of such quality.[214] The plaintiff argued that she bought the

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[206] *See In Re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[207] *See* Rosenfeld, *supra* note 203.

[208] *See id.*

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] No. CIV. 10-3684 FSH PS, 2012 WL 2916827 (D.N.J. July 17, 2012).

[213] *Id.* at *7; *see also Bronson v. Johnson & Johnson, Inc.,* No. C 12-04184 CRB, 2013 WL 1629191 (N.D. Cal. Apr. 16, 2013) (providing, in relevant part, that claims based on a lack of substantiation are not cognizable under California's consumer protection laws and "[c]hallenges based on a lack of substantiation are left to the Attorney General and other prosecuting authorities; private plaintiffs, in contrast, have the burden of proving that advertising is actually false or misleading.").

[214] No. 14-CV-2411-YGR, 2015 WL 457692, at *7 (N.D. Cal. Feb. 3, 2015).

olive oil because she believed it had been made solely from Italian olives, although the back label of the product provided otherwise. [215] In discussing the merits of the case, the court found that a reasonable consumer is not "expected to look beyond misleading representations on the front of the box to discover the truth" and that, as a matter of law, the court could not decide, that a reasonable consumer would not interpret "Imported from Italy" to mean that the product contains only olive oil.[216]

Second, class action lawsuits have recently been filed against pet-food manufacturers for representing that their products are "all natural" when they actually contain artificial ingredients. For instance, in February 2015, a class action lawsuit was filed in the United States District Court for the Northern District of Florida – Tallahassee Division (4:15-cv-00048) against Heart Pet Brands, more commonly known as Del Monte Corporation, alleging that the food under the brand name Nature's Recipe is falsely marketed as being "all natural."[217] The plaintiffs assert that the label "affirmatively misrepresents" that Nature's Recipe contains no artificial preservatives when it actually contains compounds that include "mixed tocopherols, dicalcium phosphate, inositol, ferrous sulfate, copper sulfate and sodium trypolyphosate." [218] They further allege that the "[d]efendant knowingly and purposefully failed to disclose to its consumers that the Nature's Recipe are not actually 'all natural.'" [219] In addition, "[t]o this day, Defendant has taken no meaningful steps to clear up consumers' misconceptions regarding its product."[220] The lawsuits seeks more than $5 million in damages, plus court costs.[221]

Third, consumers are concerned not just with "natural" and "all natural" food-labeling litigation, but also with the contents of their nutrition labels – particularly, in the area of trans fat. For instance, in *Reid v. Johnson & Johnson*, in relevant part, plaintiff filed a false advertising lawsuit against the defendant alleging that its product, Benecol, a vegetable oil based spread that the defendant sells as a healthy substitute for butter or margarine, actually contains trans fat, even though its label indicates "no trans fat." [222] The defendant argued that the amount of trans fat in the product was insignificant and it was authorized under FDA regulations to make that statement.[223] Plaintiff further alleged that he bought Benecol based on this statement and other health claims contained on its packaging.[224] In finding that the plaintiff had standing to bring the case as he demonstrated individual reliance on the alleged misrepresentations, the Ninth Circuit noted that "[r]egardless, it is far from clear that typical consumers understand that a product containing partially hydrogenated vegetable oil necessarily has trans fat, so even if an ingredient list has a curative effect in some cases, it might not here. Reid's allegations of

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[215] *Id.* at *1.

[216] *Id.* at *4-6.

[217] *See* "Class Action Filed Against Maker of Nature's Recipe Dog Food," Legal Newsline Legal Journal, Feb. 5, 2015.

[218] *See id.*

[219] *See id.*

[220] *See id.*

[221] *See id.*

[222] 780 F.3d 952, 955 (9th Cir. 2015).

[223] *Id.*

[224] *Id.*

misrepresentations are plausible enough to survive a motion to dismiss."[225] In addition, the court found that the plaintiff's claims for relief were not preempted or barred by the primary jurisdiction doctrine.[226]

Fourth, Evaporated Cane Juice (ECJ) has prompted a "tsunami of civil litigation" which is continuing its wave in 2015. Such litigation started shortly after the FDA, in 2009, issued draft guidance that advise against the use of the term ECJ because it is "false and misleading" and urges marketers to use the term "dried cane syrup" instead.[227] In March 2014, the FDA said that it would revisit this draft guidance.[228] More recently, in a March 12, 2015 decision, United States District Court Judge Sara Ellis, dismissed a putative class action with prejudice where a plaintiff alleged that ECJ and molasses were refined sugars and thus the label on KIND granola bars, which states "no refined sugars," was false and misleading to consumers.[229] In dismissing the case, Judge Ellis stated that "no reasonable consumer would think. . .that the sugar contained in Kind's Healthy Grains products was still in its natural, completely unrefined state. . . . [A] reasonable consumer would know that all sugar-cane derived sweeteners suitable for human consumption must be at least partially refined."[230] Judge Ellis then found that "the only reasonable conclusion after reading the entire Vanilla Blueberry Clusters label is that Kind used the word 'refined' as a term of art to distinguish partially refined sugars like evaporated cane juice and molasses from fully refined sugars like table sugars" and dismissed plaintiff's first amended complaint in its entirety with prejudice.[231]

However, recently, the FDA sent a warning letter to KIND's CEO, Daniel Lubetsky, citing "significant violations" in the labeling of its products as they are allegedly not as healthy as advertised.[232] Specifically, the FDA found that four flavors of KIND Bars should not have been labeled as "healthy" or contain health-related claims.[233] The FDA noted that these four flavors do not "meet the requirements for use of the nutrient content claim 'healthy'" as provided by federal regulations.[234] The FDA further noted that KIND Bars should take prompt action to correct these violations or else regulatory action, such as seizure and/or an injunction against the company, could occur.[235] On April 14, 2015, on its website, KIND published a note stating that its team "is fully committed to working alongside the FDA, and we're moving quickly to comply with its request."[236] Moreover, the FDA has recently stated that it will not provide any

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[225] *Id.* at 959.
[226] *Id.* at 966-68.

[227] *See* Watson, *supra* note 53.

[228] *See id.*

[229] *See Ibarrola v. Kind, LLC*, No. 13 C 50377, 2015 WL 1188498, at *1 (N.D. Ill. Mar. 12, 2015).
[230] *Id.* at *3-4.

[231] *Id.* at *4-6.

[232] *See* Food and Drug Administration, Warning Letter to Daniel Lubetsky, Mar. 17, 2015, (last visited Apr. 26, 2015); *see also* Poncie Rutsch, "Nut So Fast, Kind Bars: FDA Smacks Snacks on Health Claims," NPR, Apr. 15, 2015, (last visited Apr. 26, 2015).

[233] *See id.*

[234] *See id.*

[235] *See* Food and Drug Administration, *supra* note 238; *see also* Susan Wyatt, "FDA Warns KIND Bars on 'Healthy; Labeling'," USA Today, Apr. 16, 2015, (last visited Apr. 26, 2015).

[236] *See* Susan Wyatt, "FDA Warns Kind Bars on 'Healthy' Labeling," Food Democracy Now, Apr. 22, 2015

guidance on ECJ until 2016, as it is currently reviewing numerous comments and materials regarding it.[237]

Fifth, an issue that likely will come to the forefront soon is in regard to synthetic biology techniques. Synthetic biology techniques are those that produce food not through traditional methods, such as growing it in fields, but rather by using fermentation tanks with a variety of materials from genetically engineered yeast to microalgae.[238] In addition, a company is now even applying advanced technology, such as 3D bioprinting, to develop leather and meat from animal cells without slaughtering any animals.[239]

Sixth, there is likely to be an increase soon in food-labeling litigation in the high pressure processing (HPP) of treated juice. HPP is a "nonthermal pasteurization process" that involves preserving and sterilizing "food and juice by applying very high pressure (between 100 and 1,000 mpa) through a water bath that surrounds the product."[240] Specifically, this technique inactivates certain enzymes and microorganisms in the product and slows down its deterioration, increasing its shelf life.[241] Currently, the FDA has no labeling requirement with respect to representinge juices as "raw."[242] For instance, in July 2014, the United States District Court for the Northern District of California dismissed a putative class action where the plaintiffs alleged that the defendants' products were misleading and falsely advertised as being "100% Raw," "Raw and Organic," and/or "Unpasteurized." The court found that the plaintiffs had admitted that these claims were not literally false and that the articles they had submitted on the topic directly contradicted their allegations that HPP deprives the juice of nutritional value.[243] Thus, the court held that the plaintiffs had pled themselves out of court and dismissed their complaint with prejudice.[244]

Seventh, consumer attention has, recently, turned to food labels marked as being "egg-free" where the food item at issue traditionally contains eggs. In October 2014, Hampton Creek Food was sued for falsely advertising its egg-free spread as "Just Mayo."[245] Specifically, the lawsuit alleged that "mayo" is short for mayonnaise and must be made with eggs; however, the lawsuit was eventually withdrawn.[246] This, however, was not the end of Hampton Creek Foods' problem with its "Just Mayo" product.

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[237] *See* Jody Godoy, "FDA Won't Give 'Cane Juice' Guidance Until 2016, Court Told," July 17, 2015, (last visited Sept. 14, 2015).

[238] *See* Watson, *supra* note 53.

[239] *See id.*

[240] *See* Marcus Antebi, "Core Beliefs: What is High Pressure Pasteurization?" "What is High Pressure Pasteurization," http://juicepress.com/learn/beliefs/ (last visited Mar. 24, 2015).

[241] *Id.*

[242] *See* Elaine Watson, "FDA: You Can't Call HPP-treated Juice 'Fresh'...(But Can You Call It 'Raw'?), Feb. 11, 2014, (last visited Oct. 27, 2015).

[243] *See Alamilla v. Hain Celestial Grp., Inc.,* No. 13-CV-05595-VC, 2014 WL 3361761, at *1 (N.D. Cal. July 3, 2014).

[244] *See id.* at *1-2.

[245] *See* Watson, *supra* note 53.

[246] *Id.*

On February 4, 2015, a consumer filed a copycat lawsuit in the Southern District of Florida.[247] However, the plaintiff's attorneys voluntarily dismissed the lawsuit after the judge determined that she had not provided sufficient evidence that her damages would exceed the threshold amount of $5 million dollars.[248] Hampton Creek Foods' woes did not end there. On March 13, 2015, the plaintiff refiled her case in Florida's Eleventh Judicial Circuit (2015-5993-CA) alleging violations of Florida's Deceptive and Unfair Trade Practices Act and of unjust enrichment. Specifically, the plaintiff asserts that the federal standard for mayonnaise, codified at 21 C.F.R. § 169.140, provides that it must contain egg-yolk ingredients and "Just Mayo" does not contain such ingredients, rather it is made from yellow-pea protein.[249] Moreover, the FDA recently issued a warning letter to Hampton Creek asserting that its "Just Mayo" products are misbranded and further stated that its labels include "unauthorized use of nutrient content and health claims."[250] Thus, food manufacturers should be concerned that plaintiffs' attorneys are now watching competitor lawsuits and bringing their own putative class actions based on the very same allegations.

Eighth, another potential area that may catch consumers' attention is medical foods. Medical foods, as first defined in the Orphan Drug Act in 1988, are generally those foods that have been given to patients with certain conditions for therapeutic purposes and are administered or consumed under a physician's supervision.[251] More specifically, FDA regulations define a food as a "medical food" only if certain criteria are met.[252] To qualify as a medical food, it must (1) be a specifically formulated and processed product for the partial or exclusive feeding needs of a patient eaten through the mouth or by a feeding tube; (2) be intended for a patient, who has limited or an impaired ability to ingest or digest certain foods because of medical issues and for whom a normal diet alone would be insufficient; (3) provide nutrition for the patient's specific medical/nutrition needs; (4) be intended only for a patient under medical supervision; and (5) be intended only for a patient receiving ongoing and active medical supervision where the patient must receive medical care on a recurring basis.[253] Medical foods are exempt from labeling claims under the NLEA, but are not exempt from the Food Allergen and Consumer Protection Act of 2004 ("FALCPA") and must meet all FDA requirements for food products, including "Current Good Manufacturing Practice regulations, registration of the facility where the medical food is being manufactured and other regulations as applicable to the specific type of food brought to the market."[254]

While there were less than 100 products being marketed as medical foods in 2014, this is an estimated $2.1 billion industry that is slated to grow 10% per year.[255] On August 13, 2013, the FDA issued a

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[247] *Id.*

[248] *See* Elaine Watson, "Lawsuit v. Hampton Creek Foods re-filed in Florida: 'Just Mayo' is Not Mayonnaise at All," Food Navigator-USA, Mar. 23, 2015, (last visited Mar. 24, 2015).

[249] *Id.*

[250] *See* Ricardo Carvajal, "The Other Shoe Drops on Just Mayo," FDA Law Blog, Sept.1, 2015, (last visited Sept. 14, 2015); *see also* Jody Godoy, "FDA Says 'Just Mayo' Isn't Mayo, Violates Branding Rules," Aug. 25, 2015, (last visited Sept. 14, 2015).

[251] *See* Karin A. Gregory, M.P.H., "The Expanded Market of Medical Foods: Is This a Long Term Industry Strategy or a Fad?" Food and Drug Law Institute, Jan./Feb. 2014, (last visited Mar. 24, 2015).

[252] 21 C.F.R. § 101.9(j)(8), *amended by* 80 FR 39675-01.

[253] *See* Gregory, *supra* note 249.

[254] *Id.*

[255] *Id.*

warning letter to a company advising it that several of its products labeled as medical food were misbranded under Section 403(a)(1) of the FFDCA.[256] The warning letter was triggered by a review of the company's website without any other type of inspection or investigation and targeted fourteen products labeled as "medical foods" on the company's website.[257] The warning letter concluded that the company's products did not meet its criteria for being classified as medical foods and, thus, were unapproved drugs.[258] The FDA's main concern appeared to be "whether or not certain diseases and/or conditions warranted" indication as a medical food.[259] Specifically, the FDA found that it was unaware "of any distinctive nutritional requirement for patients with chronic fatigue syndrome, fibromyalgia, cardiovascular disease, IBD, allergy responsive asthma, PAD, bariatric patients before and after stomach reduction surgery and Type 2 diabetes."[260]

On October 31, 2013, the Council for Responsible Nutrition (CRN) sent a letter to the FDA asking it to reconsider its position that certain diseases, such as diabetes, are not conditions for which a medical food can be marketed and sold to patients.[261] Moreover, the letter stated that the "CRN is concerned, however, that FDA's interpretation of the medical foods category is overly narrow and inconsistent with the statutory definition of medical foods.[262] In CRN's view, the agency has imposed an 'extra-statutory limitation' on medical food manufacturers to constrain the products that may be marketed as medical foods."[263] Thus, with consumers becoming increasingly determined to control their healthcare needs it is likely that litigation may erupt over what is marketed as a "medical food."

Last, another potential area that is ripe for food-labeling lawsuits involve food products that are part of a current health fad known as the "Paleolithic (Paleo) diet."[264] Followers of a Paleo diet eat foods that hunters and gatherers would have eaten, such as nuts, seeds, fish, and fruits.[265] The paleo diet also excludes processed foods and those that include preservatives, sweeteners, or artificial coloring.[266] Recently, some food manufacturers have begin to tout their products as being "paleo" and making certain health and nutrition claims about them.[267] With this in mind, "[i]t seems inevitable, then, that Paleo food producers. . . .will eventually face claims that their advertising is false or misleading."[268]

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[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *See* Drew Amoroso, "Is 'Paleo' The Next Battleground in Food Litigation?" Law 360, Apr. 7, 2015, (last visited Apr. 13, 2015).

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

## Conclusion

The food industry has become a popular target for plaintiffs' attorneys. There are numerous factors contributing to the continued growth of litigation in this area, including the unsettled regulatory framework relating to food labeling, especially given the FDA's refusal to define "natural," the lack of uniformity among circuit courts in reaching different rulings on issues pertaining to class certification, and claims based on false advertising theories of liability, rather than on traditional product liability theories, where damages are based on physical injuries. In addition, food-labeling lawsuits are growing in number as the class of plaintiffs pursuing food-labeling claims now also include business competitors pursuant to the Lanham Act. Moreover, with current trends focused on maintaining good health, plaintiffs' lawyers view food labeling class actions in the same health-related vein as the big tobacco cases, leading to increased media and press attention being given to food-law litigation contributing to its popularity. Given these factors and the fact that new and more health-related claims are being made on labels each and every day, litigation is likely to hold strong in this area for years to come. Thus, attorneys with an appetite for litigation are unlikely to let up.

### Contacts

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