

ARTIFICIALLY “NATURAL”: CLASS ACTION LAWSUITS ATTACK MISLEADING “NATURAL” CLAIMS IN FDA’S ABSENCE

SHEA THOMPSON*

INTRODUCTION

Any consumer perusing their local grocery store aisle is bombarded with hundreds of food advertisements and labels totting various health claims in big, bold letters: “low-fat,” “50 percent less sodium,” “low-carb,” “no artificial sweeteners,” and, most recently, “all-natural.”¹ While the government regulates some of these advertisements and labels, several of these labels have little or no significant meaning, and many are poorly regulated, if at all.² Consequently, consumers are left with the dilemma of determining which labels to believe and, unfortunately, often select products based on misleading health claims.³

With health risks and obesity at an all-time high in America, “natural” eating has emerged as a new consumer trend.⁴ In the past decade, natural foods have transformed from a small “niche market” into a \$22.3 billion industry⁵, and “all-natural” was the second most frequently used claim on new U.S. food products in 2008.⁶ According to market research publisher, Packaged Facts, U.S. retail sales of natural and organic foods rose nearly \$39 billion in 2010, an increase of nine percent over the previous year and sixty-three percent higher than five years earlier.⁷ Moreover, the number of U.S. households purchasing natural products also continues to grow, up thirteen percent in 2012, with ninety-seven percent of

* J.D. Candidate, 2014, Indiana University Robert H. McKinney School of Law; B.S. 2011, Butler University.

1. *Food Marketing and Labeling: Lesson Plan*, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE 12-13, http://www.jhsph.edu/research/centers-and-institutes/teaching-the-food-system/curriculum/_pdf/Marketing_and_Labeling_Lesson.pdf, archived at <http://perma.cc/9S35-HUD6> (last visited July 31, 2014).

2. *Id.* at 12.

3. *Id.*

4. FOOD MKTG. INST., <http://www.fmi.org/docs/facts-figures/nutrition.pdf?sfvrsn=2>, archived at <http://perma.cc/ZKM-93VF> (last visited July 31, 2014).

5. Lilly O'Donnell, *What Does a “Natural” Label Really Mean?*, FOOD POLITIC: JOURNAL OF FOOD NEWS AND CULTURE (Mar. 8, 2013, 8:38 AM), <http://www.foodpolitic.com/what-does-a-natural-label-really-mean/>, archived at <http://perma.cc/4ZYP-S5NJ>.

6. Sarah Hills, *Kosher Leads Top Ten Claims for New Products*, FOOD NAVIGATOR-USA (Dec. 11, 2008), <http://www.foodnavigator-usa.com/Suppliers2/Kosher-leads-top-ten-claims-for-new-products>, archived at <http://perma.cc/UTX3-Q823>.

7. “All Natural” Class Action Litigation: An Overview of the Regulatory Regime and Developing Case Law, FOLEY & LARDNER LLP (Apr. 11, 2012), <http://www.foley.com/files/Event/e58140ec-216e-4f48-8a0b-deedd7c4eb92/Presentation/EventAttachment/c57c721a-611e-4af0-9c36-d274d7ce913d/4-11LitPresentation.pdf>, archived at <http://perma.cc/4LNG-LNHA>.

the U.S. households now purchasing natural grocery products.⁸

Consumers are becoming more concerned with what they are putting into their bodies and are actively buying products labeled “natural.”⁹ However, if one were to ask ten different people what “natural” on a food label means, one would likely hear ten different answers.¹⁰ On the other hand, almost everyone will probably believe “natural” food is healthier.¹¹ Recent polls indicate many consumers believe “natural” means “almost organic,” or that a natural product is even better than organic.¹² People are usually surprised to discover that for most foods, “natural” on the label can be nutritionally insignificant.¹³ Specifically, the FDA tightly regulates nutrient claims such as “low-fat,” “low-sodium,” or “high-fiber.”¹⁴ Furthermore, to use terms such as “high” or “good” on a label, the food item must meet a certain percentage of the recommended daily allowance (RDA) of the specific nutrient.¹⁵ However, for the word “natural,” the same stringent rules do not apply.¹⁶

Currently, the Food and Drug Administration (FDA) does not have a legal definition for the term “natural” when used by food companies to advertise products.¹⁷ In 1991, the FDA announced that it was considering defining the term “natural” and even solicited formal comments on the term.¹⁸ However, the agency ultimately declined to adopt a formal rule “because of resource limitations and other agency priorities.”¹⁹ Although no binding legal standard exists, the FDA has developed an informal policy regarding the term “natural” without committing to a legal definition.²⁰ This policy considers “‘natural’ to mean that nothing artificial or synthetic (including colors regardless of source) is included

8. *SPINS Year End Overview: How Did Natural Products Perform?*, SPINS, <http://www.spins.com/wp-content/uploads/2013/07/SPINS-Year-End-Review-Strength-of-Natural-Products1.pdf>, archived at <http://perma.cc/UH8K-RUMR> (last visited July 31, 2014).

9. FOOD MKTG. INST., *supra* note 4, at 2.

10. Ronnie Cummins, *Whole Fraud: Exposing the Myth of So-Called Natural Foods*, ORGANIC CONSUMERS ASS’N (Feb. 9, 2012), http://www.organicconsumers.org/articles/article_24844.cfm, archived at <http://perma.cc/4EN-2U99>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Guidance for Industry: A Food Labeling Guide*, FOOD AND DRUG ADMIN. (Oct. 2009), <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labeling/nutrition/ucm064908.htm>, archived at <http://perma.cc/SAZ9-B8RW>.

15. *Id.*

16. *What Is the Meaning of ‘Natural’ on the Label of Food?*, FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>, archived at <http://perma.cc/Q8AH-JQKA> (last visited July 31, 2014).

17. *Id.*

18. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991) (to be codified at 21 CFR 5 and 101).

19. *Id.*

20. *What Is the Meaning of ‘Natural’ on the Label of Food?*, *supra* note 16.

in, or has been added to, the product that would not normally be expected to be there.”²¹

Due to the FDA’s reluctance to define the term “natural,” class action lawsuits, instead of FDA standards, are forcing food companies to confront whether their use of the term is false and misleading to consumers.²² The Center for Science in the Public Interest (CSPI)²³ is leading many of these attacks on the use of the term “natural” and is filing nearly all its cases under California’s stronger consumer protection laws.²⁴ If these California lawsuits are successful, they could reverberate nationwide, including implications for food advertisements and increased pressure on the FDA.

This Note explores the FDA’s reluctance to promulgate an official definition of “natural” and argues that class action lawsuits are, currently, the best way to address the lack of a “natural” definition and to protect consumers against misleading “natural” claims. Part I explores the history behind the FDA’s reluctance to define “natural” with an emphasis on its informal policy and that policy’s implications on class action lawsuits. Part II looks at the current docket of “natural” class action lawsuits in California, under California’s strong consumer protection laws, as well as other states’ “natural” lawsuits. Part III discusses the issue of federal preemption. Part IV advocates that class action lawsuits are currently, in the absence of an FDA rule, the best way to address the lack of a “natural” definition and to protect consumers against misleading “natural” claims. Finally, Part V recommends that when courts employ the FDA’s current “natural” policy in rulings, they should interpret the policy to prohibit both high fructose corn syrup (HFCS) and genetically modified organisms (GMOs) from being marketed as “natural.”

21. *Id.*

22. *See* Janney et al. v. Gen. Mills, No. 12-cv-03919 (N.D. Cal. filed July 26, 2012) (asserting deceptive advertising claims under California’s Unfair Competition Law and False Advertising Law for the use of “natural” on products containing high fructose corn syrup); *see also* Sandys v. Naked Juice Co., No. 11-cv-08007 (C.D. Cal. filed Sept. 27, 2011) (asserting false advertising claims under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act for the use of “natural” on fruit juice containing GMOs).

23. CSPI is a public interest group founded by three scientists which carved out a niche as the organized voice of the American public on nutrition, food safety, health and other issues during a boom of consumer and environmental protection awareness in the early 1970s. CSPI is currently one of the nation’s top consumer advocates, “fighting for government policies and corporate practices that promote healthy diets, prevent deceptive marketing practices, and ensure that science is used to promote the public welfare.” *About Us*, CTR. FOR PUB. INTEREST AND SCI., <http://www.cspinet.org/about/index.html>, archived at <http://perma.cc/A6EY-SCZU> (last visited July 31, 2014).

24. *Litigation Project: Current Docket*, CTR. FOR PUB. INTEREST AND SCI., <http://www.cspinet.org/litigation/current.html>, archived at <http://perma.cc/M6VU-LKNB> (last visited July 31, 2014).

I. HISTORY BEHIND THE FDA'S LACK OF A "NATURAL" DEFINITION

Congress began to regulate food and beverage labels more than 100 years ago when, in 1906, it passed legislation known as the "Wiley Act," or the Pure Food and Drug Act.²⁵ The Pure Food and Drug Act prohibited the misbranding of food sold and distributed through interstate commerce.²⁶ While the Pure Food and Drug Act was a big step for Congress, there were problems with the legislation because it did not have the dramatic effect Congress intended.²⁷ Accordingly, Congress replaced the Pure Food and Drug Act in 1938 with the Federal Food, Drug, and Cosmetic Act ("FDCA").²⁸ The FDCA authorized the FDA to regulate food safety and labeling, giving the FDA considerable latitude in food regulations, definitions, and standards.²⁹ However, neither the FDCA nor the FDA required strict nutritional labeling requirements for all food and beverage products.³⁰

In 1990, due to mounting demand for a national labeling law,³¹ Congress passed the Nutrition Labeling and Education Act ("NLEA").³² The NLEA introduced a number of substantial reforms: (1) it required nutrition labeling for nearly all food products under the authority of the FDA, (2) it changed the requirements for ingredient labels on food packages; (3) it imposed and regulated health claims on packages; (4) it standardized all nutrient content claims; and (5) it standardized serving sizes.³³ The NLEA provided uniformity to all food labels and package advertisements for consumers.³⁴ Specifically, the NLEA required the FDA to set comprehensive standards for nutrition claims such as "low fat," "light," and "healthy."³⁵ Since the introduction of the NLEA, the FDA has continued to regulate the majority of terms that appear on food and beverage labels.³⁶ However, the agency has not set the same comprehensive standards with regard to "natural" labels.³⁷

The FDA has the power to promulgate a rule regarding the use of "natural"

25. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 331 (3d Cir. 2009).

26. *Id.* (citing U.S. FOOD AND DRUG ADMIN., *The Story of the Laws Behind the Labels, Part II* (1981)).

27. *Id.* (citing Wallace F. Janssen, *The Story of the Laws Behind the Labels, Part II*, U.S. FOOD AND DRUG ADMIN. (June 1981), <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm>, archived at <http://perma.cc/YS83-S7FP>).

28. *Id.* at 331.

29. *Id.*

30. *Id.*

31. *Id.*

32. 21 U.S.C. § 343 (2006).

33. *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

34. *Id.*

35. *Id.* at 606 n.14.

36. *Id.* at 606 n.9.

37. *What Is the Meaning of 'Natural' on the Label of Food?*, *supra* note 16.

labels, but it has repeatedly declined to do so.³⁸ One policy reason governing this decision is that rulemaking is not a short or simple procedure.³⁹ The rulemaking process in administrative law requires legislative rules to go through a notice and comment process prior to their promulgation.⁴⁰ The notice and comment requirement allows some public participation prior to a declaration of a new rule as well as insures “agencies’ policy decisions are both informed and responsive.”⁴¹ After the agency considers this public feedback and makes changes where appropriate, it then publishes a final rule in the *Federal Register* with a specific date upon which the rule becomes effective and enforceable.⁴² In promulgating a final rule, the agency must describe and respond to the public comments it received.⁴³ This process can take many years to complete due to all the formal requirements.⁴⁴

If an agency is not prepared or does not want to go through the rulemaking process, it can issue informal policy or guidance. Guidance, unlike an official rule, is the “administrative [pronouncement] of general applicability which [is] not made pursuant to delegated authority and do[es] not have the force of law, i.e., [is] not [a] legislative [rule]. [Its] purpose is to guide or advise the public.”⁴⁵ Guidance can usually be pronounced without the public proceedings required to promulgate an administrative rule.⁴⁶ Therefore, an agency may opt to issue guidance on a subject because promulgating a rule may be too time or resource intensive.⁴⁷ However, if the agency opts to issue guidance instead of going through an official rulemaking process, the agency will not be able to enforce such guidance because it does not carry the same force of law as a legal rule.⁴⁸

The FDA has never completed the official rulemaking process required to issue a binding legal definition of “natural.”⁴⁹ In 1991, the FDA announced that it was considering defining “natural,” and specifically stated “if the term ‘natural’ is adequately defined, the ambiguity surrounding use of this term that results in misleading claims could be abated.”⁵⁰ The FDA solicited comments with regard to defining “natural” and determined the use of the term “is of considerable interest to consumers and industry”; however, the agency ultimately declined to

38. *Id.*

39. CHARLES H. KOCH, JR., 1 ADMIN. L. & PRAC. § 4:10 (3d ed. 2012).

40. *Id.*

41. *Id.*

42. *Id.* § 4:46.

43. *Id.* § 4:45.

44. *Id.*

45. *Id.* § 1:20.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 340-41 (3d Cir. 2009).

50. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

adopt a formal definition.⁵¹ The FDA declined to define “natural,” in part because there were still “many facets of this issue that the agency will have to carefully consider if it undertakes a rulemaking to define the term ‘natural.’”⁵² The FDA also cited resource limitation and other agency priorities as further reasons for its reluctance to promulgate a legal definition.⁵³ Although the FDA declined to adopt a formal legal definition of “natural,” it has provided an informal policy as guidance for corporations and consumers alike:

[T]he agency *has considered* ‘natural’ to mean 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. For example, the addition of beet juice to lemonade to make it pink would preclude the product being called “natural.”⁵⁴

Because the FDA has declined to adopt a legal definition of “natural” but has provided informal policy, some courts have been reluctant to rule on “natural” class action lawsuits.⁵⁵

II. CURRENT DOCKET OF “NATURAL” CLASS ACTION LAWSUITS

During the past decade, food and beverage companies advertising their products as “All Natural” have increasingly been targets of litigation from competing companies, consumer groups, and consumers in the form of class action lawsuits.⁵⁶ The majority of these lawsuits are punitive class action lawsuits brought by plaintiff lawyers, representing the class members.⁵⁷ Most of these lawsuits are being filed in California due to the strong consumer protection laws afforded to its residents.⁵⁸ These lawsuits usually allege deceptive business practices under California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and sometimes its Consumers Legal Remedies Act (CLRA).⁵⁹

A. *Unfair Competition Law (UCL)*

California’s Unfair Competition Law (UCL), the state’s model of the Federal

51. *Id.*

52. *Id.*

53. *Id.*

54. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991).

55. Dawn Goulet, *Confusion in Court over “All Natural” Claims*, AM. BAR ASSOC. (Apr. 30, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/spring2012-0412-all-natural-labels-mean-marketing.html>, archived at <http://perma.cc/F98G-HNNR>.

56. Erik Benny, Essay, “*Natural*” Modifications: *The FDA’s Need to Promulgate an Official Definition of “Natural” That Includes Genetically Modified Organisms*, 80 GEO. WASH. L. REV. 1504, 1512 (2012).

57. Goulet, *supra* note 55; see also discussion *infra* Part II.E.

58. See *supra* note 22 and accompanying text.

59. *Id.*

Trade Commission Act of 1914, defines unfair competition to include any “unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the [False Advertising Law].”⁶⁰ Hence, anything in violation of the FAL would also be in direct violation of the UCL.⁶¹ The UCL, which can be enforced by elected officials or private parties, gives California residents very broad protection against any fraudulent business practices.⁶² An “act or practice” under the UCL can range from repeated or habitual business practices to single, isolated acts.⁶³

Violations under the UCL can take three different forms: unlawful, unfair, and/or fraudulent.⁶⁴ An “unlawful” violation under the UCL is any business practice that violates any other state or federal law, which may seem redundant.⁶⁵ However, many of these underlying laws may not allow private rights of action.⁶⁶ Therefore, the UCL essentially provides California residents a universal private right of action to any “unlawful” business practice, whether the underlying law allows for private enforcement or not.⁶⁷ An “unfair” business practice violation, if between competitors, is one that “threatens an incipient violation of antitrust law, or violates the policy or spirit of one of those laws . . . , or otherwise significantly threatens or harms competition.”⁶⁸ Courts have not yet clearly defined what amounts to “unfair” business practices as they relate to consumer rights of action.⁶⁹ However, courts have allowed causes of action for business practices that offend public policy or where the harm outweighs the business utility.⁷⁰ Finally, the standard for a “fraudulent” business practice under the UCL is whether a member of the public is likely to be deceived by the business practice.⁷¹ The “fraudulent” business practice prong of the UCL is the prong that overlaps with coverage under the FAL.⁷²

B. False Advertising Law (FAL)

The main difference between the UCL and FAL fraudulent business practice standard is that the UCL, unlike the FAL, does not require that the company knew

60. CAL. BUS. & PROF. CODE § 17200 (West 2012).

61. *Id.*

62. *Id.* at § 17204.

63. *Klein v. Earth Elements, Inc.*, 69 Cal. Rptr. 2d 623, 625 n.3 (Ct. App. 1997).

64. CAL. BUS. & PROF. CODE § 17200 (West 2012).

65. Trenton H. Norris, *Consumer Litigation & FDA-Regulated Products: The Unique State of California*, 61 FOOD & DRUG L.J. 547, 553 (2006).

66. *Id.*

67. *Id.*

68. *Cel-Tech Comm’n, Inc. v. L.A. Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 565 (1999).

69. Norris, *supra* note 65, at 554.

70. *Id.*

71. *Comm. on Children’s Television v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983).

72. CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012).

or should have known that the advertisement was false or misleading.⁷³ Therefore, the FAL has a stricter standard than the UCL under California law.⁷⁴ The FAL makes it unlawful for companies “to make or disseminate . . . any statement, . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”⁷⁵ Therefore, in order to have a successful claim under the FAL, a plaintiff would need to prove that a company made a claim that was false or misleading and the company knew of or should have known the claim would be misleading to consumers.⁷⁶ Not only is the FAL expansive in coverage, but California courts have also interpreted it liberally.⁷⁷

C. Consumers Legal Remedies Act (CLRA)

The CLRA is very similar to both the UCL and the FAL, and plaintiffs often allege violations of all three laws for the same business practices.⁷⁸ The CLRA is specifically designed to protect consumers against “unfair methods of competition.”⁷⁹ While serving many of the same end goals as both the UCL and the FAL, the CLRA differs in that instead of providing broad coverage to residents, the CLRA specifically outlines twenty-five practices that are deemed “unfair methods of competition.”⁸⁰ Among the twenty-five unlawful practices are “representing that goods . . . have . . . characteristics, ingredients, uses, benefits, or quantities which they do not have” or that the goods “are of a particular standard, quality, or grade . . . if they are of another.”⁸¹ The CLRA is limited to consumer plaintiffs and to those plaintiffs who have suffered actual damage.⁸² Despite these restrictions, the CLRA offers broader remedies than do the UCL and the FAL, including compensatory and punitive damages.⁸³ Accordingly, California has become a very attractive venue for these “natural” class action lawsuits due to strong consumer protection laws, liberal court systems, and expansive remedies.⁸⁴

73. Norris, *supra* note 65, at 555.

74. *Id.*

75. CAL. BUS. & PROF. CODE § 17500 (West 2012).

76. Norris, *supra* note 65, at 555.

77. *Id.* at 547.

78. See Complaint, Pappas v. Naked Juice Co. of Glendora, Inc. et al, No La CV 11-08276 JAK (PLAx), 2012 WL 1925598 (C.D. Cal. May 14, 2012) (asserting false advertising claims under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act for the use of “natural” on fruit juice containing GMOs).

79. CAL. CIV. CODE § 1770 (West 2012).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Norris, *supra* note 65, at 547.

D. The Ninth Circuit’s Controlling Decision on Deceptive Food Labeling

In 2008, the Ninth Circuit in *Williams v. Gerber Products Co.* addressed deceptive food labeling under California’s consumer protection laws.⁸⁵ The class action was filed by consumers who were parents of small children and alleged eight causes of action, including claims under the UCL, FAL, and CLRA, against Gerber for deceptive packaging of its Fruit Juice Snacks.⁸⁶ Class members challenged five aspects of Gerber’s packaging: (1) “the use of the words ‘Fruit Juice’ juxtaposed alongside images of fruits such as oranges, peaches, strawberries, and cherries” when the Fruit Snacks contained no fruit juice from any of the fruits pictured;⁸⁷ (2) “a statement on the side panel of the packaging describing the product as made ‘with real fruit juice and other all natural ingredients’”;⁸⁸ (3) a statement on the side panel of the package that stated the Snacks were “one of a variety of nutritious Gerber Graduates foods and juices”;⁸⁹ (4) “Gerber’s decision to label the product a ‘snack’ instead of a ‘candy,’ ‘sweet,’ or a ‘treat’”;⁹⁰ and (5) “that the phrase ‘naturally flavored’ did not comply with applicable type size requirements.”⁹¹ The district court granted Gerber’s motion to dismiss, finding that the statements would not deceive a “reasonable consumer.”⁹²

The Ninth Circuit disagreed with the district court, finding that the class members sufficiently “stated a claim and could plausibly prove that a reasonable consumer would be deceived by the Snacks packaging.”⁹³ The Ninth Circuit reversed the district court’s grant of Gerber’s motion to dismiss, emphasizing that “California courts . . . have recognized that whether a business practice is deceptive [under the UCL] will usually be a question of fact not suitable for decision on demurrer.”⁹⁴ Specifically, the court noted, “the statement that Fruit Juice Snacks w[ere] made with ‘fruit juice and other all natural ingredients’ could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false.”⁹⁵ The Ninth Circuit specifically addressed the district court’s ruling in stating, “[w]e disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient

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

86. *Id.*

87. *Id.* at 936.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 937.

93. *Id.* at 940.

94. *Id.* at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 236 (Ct. App. 2007)).

95. *Id.* at 939.

list in small print on the side of the box.”⁹⁶

According to the Center for Science in the Public Interest’s website, after the reversal from the Ninth Circuit, the case is still pending in federal district court.⁹⁷ No final ruling has been reached, but even prior to the Ninth Circuit’s decision, Gerber had modified its packaging to remove some of the allegedly misleading representations.⁹⁸ Specifically, Gerber removed the word “nutritious” from the side panel, shortened “made with real fruit juice and other all natural ingredients” to “made with real fruit juice,” and changed the name of the product from “Fruit Juice Snacks” to “Fruit Juice Treats.”⁹⁹

E. Pending California “Natural” Class Action Lawsuits

Like the complaint in *Williams*, most “natural” class action lawsuits filed in California allege causes of action under the UCL, FAL, and CLRA, claiming defendants are able to charge a premium for their products because the “all natural” designation falsely leads consumers to believe the products do not contain “artificial” or “unnatural” substances.¹⁰⁰ These complaints “generally fall into four categories: products containing HCFS [high fructose corn syrup], products containing genetically modified organisms (GMOs), products containing artificial preservatives, and products processed with chemicals or containing other unnatural ingredients.”¹⁰¹

Astiana v. Ben & Jerry’s Homemade, Inc.,¹⁰² a class action lawsuit in the Northern District of California, alleged that defendants misrepresented ice cream by advertising that it was “all natural” when, in fact, the ice cream was made with “Dutch” or “alkalized” cocoa that “is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural.’”¹⁰³ Plaintiffs filed the false advertising claims in December 2010 on behalf of a nationwide class and a California sub-class.¹⁰⁴ Each member “allege[d] a claim of fraud; three claims under the [UCL]; a claim of false advertising under the [FAL]; and a claim for restitution based on a theory of unjust enrichment.”¹⁰⁵ Defendants promptly filed a motion to dismiss the case for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).¹⁰⁶ The district court denied the motion because

96. *Id.* at 940.

97. *Litigation Project: Current Docket*, CTR. FOR SCI. IN THE PUB. INT., <http://www.cspinet.org/litigation/current.html>, archived at <http://perma.cc/T9ES-N5S3> (last visited July 31, 2014).

98. *Williams*, 552 F.3d at 936 n.2.

99. *Id.*

100. See *supra* note 22 and accompanying text.

101. Goulet, *supra* note 55.

102. *Astiana v. Ben & Jerry’s Homemade, Inc.*, No C 10-4387 PJH, 2011 WL 2111796 (N.D. Cal. May 26, 2011).

103. *Id.* at *1.

104. *Id.* at *2.

105. *Id.*

106. *Id.* at *1.

plaintiffs (1) alleged a plausible legal theory, (2) had standing under Article III, (3) sufficiently pleaded the injury with particularity, and (4) had claims that were not preempted by federal law.¹⁰⁷

After the district court refused to grant defendant’s motion, Ben & Jerry’s decided to settle with the plaintiffs.¹⁰⁸ However, presiding Judge Hamilton rejected the settlement on September 12, 2012, because she found the proposed settlement legally unconscionable.¹⁰⁹ The proposal had set up a \$7.5 million fund for the plaintiffs, limiting individual consumer damages from two to twenty dollars.¹¹⁰ “Under the *cy pres* doctrine, the court would distribute any amount remaining after plaintiffs had asserted their claims to ‘not-for-profit charities related to food or nutrition in the United States.’”¹¹¹ The class action sought \$1.8 million in attorney’s fees.¹¹² Both parties filed a timely motion with the judge insisting they had new information regarding the proposed settlement and requesting a status conference.¹¹³ However, in January 2014, more than a year after the proposed settlement, Judge Hamilton denied a request to certify a class of consumers who purchased Ben & Jerry’s ice cream, effectively rendering a devastating blow to the plaintiff’s lawyers as the case will likely not proceed without class certification.¹¹⁴

Although Ben & Jerry’s effectively defeated the class action against it over a prolonged three-year litigation period, it is not the first company to fall prey to California’s consumer protection laws.¹¹⁵ In 2011, a handful of class actions against Kashi Co. and Kellogg Co. were filed and consolidated in the Southern District of California.¹¹⁶ The complaint alleged that Kashi and Kellogg deceived consumers “by promoting their products as ‘all natural’ or containing ‘nothing artificial,’ when, in reality, the products contained a wide range of substances like ascorbic acid, calcium pantothenate, calcium phosphates, potassium carbonate, and/or xanthium gum.”¹¹⁷ Similarly, “on September 21, 2011, a class action was filed in the Northern District of California against Bear Naked, Inc., alleging that the company’s products labeled ‘100% Pure & Natural’ actually contain

107. *Id.* at *13-15.

108. Cory L. Andrews, *Update: Judge Rejects Settlement in Ben & Jerry’s “Natural” Class Action*, FORBES (Sept. 28, 2012, 3:57 PM), <http://www.forbes.com/sites/wlf/2012/09/28/update-judge-rejects-settlement-in-ben-jerrys-natural-class-action/>, archived at <http://perma.cc/6WKB-LXAG>.

109. *Id.*

110. *Id.*; Goulet, *supra* note 55.

111. *Id.*

112. *Id.*

113. *Id.*

114. Josh Long, *Ben & Jerry’s Creams Plaintiff in ‘All-Natural’ Lawsuit*, FOOD PRODUCT DESIGN (Jan. 15, 2014), <http://www.foodproductdesign.com/news/2014/01/ben-jerry-s-creams-plaintiff-in-all-natural-lawsu.aspx>.

115. Goulet, *supra* note 55.

116. *Id.*

117. *Id.*

ingredients recognized as synthetic by federal regulators, including potassium carbonate, glycerin, and lecithin.”¹¹⁸ In 2012, General Mills became the next company hit with the wave of “natural” lawsuits when a class action lawsuit was filed against Nature Valley for advertising its products as “all natural.”¹¹⁹ The claim alleged that “Nature Valley goes to great length to market its granola bars and ‘thins’ as ‘natural,’ even though they contain industrially produced artificial ingredients such as high-fructose corn syrup, high-maltose corn syrup, and maltodextrin.”¹²⁰

Each of these class action lawsuits asserts causes of action under the California Legal Remedies Act, the Unfair Competition Law, and the False Advertising Law, with most cases combating HFCS or artificial sweeteners as being mislabeled as “natural.”¹²¹ However, with the heightened awareness of the GMO-labeling issue under California’s recently unsuccessful Prop 37,¹²² some attorneys believe that the new trend in these California “natural” lawsuits will be combating GMO ingredients.¹²³ In fact, just two days after voters in California defeated Prop 37, supporters of Prop 37 including Food Democracy Now, Green America, Institute for Responsible Technology, and Nature’s Path launched a coalition to help consumers identify GMO ingredients called “GMO Inside.”¹²⁴ In the press release announcing the coalition, the CEO of Green America declared,

Corporations may have misled voters in California about GMOs, but they can’t change the fact that over ninety percent of Americans support the labeling of foods with genetically engineered ingredients . . . [GMO Inside’s] campaign will show corporations that people will not complacently serve as lab rats for the testing of genetically engineered

118. *Id.*

119. *Litigation Project: Current Docket*, *supra* note 97; see Complaint, Janney et al. v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal 2013) (No. 12-cv-3919 PJH), 2012 WL 3691752 [hereinafter Janney Complaint].

120. *Litigation Project: Current Docket*, *supra* note 97.

121. See Janney Complaint, *supra* note 119 (asserting deceptive advertising claims under California’s Unfair Competition Law and False Advertising Law for the use of “natural” on products containing high fructose corn syrup); Goulet, *supra* note 55.

122. Prop 37, had it been successful, would have required mandatory labeling of most foods containing GMOs in the state of California. Mark Bittman, *Buying the Vote on G.M.O. ’s*, THE NEW YORK TIMES (Oct. 23, 2012, 9:00 pm), <http://opinionator.blogs.nytimes.com/2012/10/23/buying-the-vote-on-g-m-o-s/>, archived at <http://perma.cc/5HTB-RBBL>.

123. Elaine Watson, *PepsiCo back in the firing line over all-natural claims as new class action targets Frito-Lay*, FOOD NAVIGATOR USA (Sep. 24, 2012), <http://www.foodnavigator-usa.com/Regulation/PepsiCo-back-in-the-firing-line-over-all-natural-claims-as-new-class-action-targets-Frito-Lay>, archived at <http://perma.cc/3BCZ-WKUG>.

124. GO INSIDE, *Groups Launch National Initiative To Help All Americans Take Action On Genetically Engineered Foods*, GMOINSIDE.ORG (Nov. 8, 2012), <http://gmoinside.org/launch-press/>, archived at <http://perma.cc/L458-6934>.

foods.¹²⁵

It seems only a matter of time before food companies will see a rise in California’s GMO related “natural” class action lawsuits.

F. Closed California “Natural” Class Action Lawsuits

While most “natural” class action lawsuits are still pending with more being filed all the time, there are some cases which have been dismissed. In February 2012, a class action was filed against South Beach Beverage Co. and PepsiCo in the Central District of California alleging the “all natural” marketing of SoBe beverages is false and misleading.¹²⁶ Specifically, the class actions alleged the beverages do not contain juice from any fruits described in their names and “contain substances created by chemical processing, including ascorbic acid, cyanocobalamin, calcium pantothenate, niacinamide, and pyridoxine hydrochloride.”¹²⁷

On May 18, 2012, U.S. District Judge John F. Walter granted Sobe’s motion to dismiss with prejudice, which appears to be the first instance of dismissal with prejudice for an “all natural” claim under California’s consumer protection laws.¹²⁸

Judge Walter justified the dismissal in saying, “no reasonable consumer would read the ‘all natural’ language as modifying the ‘with vitamins’ language and believe that the added vitamins are suppose to be ‘all natural vitamins.’”¹²⁹ He further explained that “to the extent there is any ambiguity, it is clarified by the detailed information contained in the ingredient list, which explains the exact contents of Lifewater.”¹³⁰ Interestingly, Judge Walter relied on the same legal reasoning from the Ninth Circuit’s holding in *Williams v. Gerber* to reach a completely opposite decision than in *Williams*, which had very similar facts to the complaint against SoBe.¹³¹

G. Other State’s “Natural” Class Action Lawsuits

While most plaintiffs’ lawyers actively seek to file in California court because of its strong consumer protection laws,¹³² recent case filings may indicate

125. *Id.*

126. Goulet, *supra* note 55.

127. *Id.*

128. *Hairston v. S. Beach Beverage Co.*, No. CV 12 -1429-JFW (Dtbx), 2012 WL 1893818 (C.D. Cal. May 18, 2012).

129. *Id.*

130. *Id.*

131. *See id.* “As the Ninth Circuit held in *Williams v. Gerber*, ‘reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.’ . . . In this case, the ingredient list is consistent with the front label statement of ‘all natural with vitamins.’” *Id.*

132. Melissa A. Jones, *UCL Class Actions in California Expand Beyond “All Natural”*

that the “all natural” fight will take place in more than just one state.¹³³ In September and October of 2011, eight class-action lawsuits were filed in federal courts in California, Florida, New Jersey, New York, and Illinois against the makers of SkinnyGirl Margarita beverages, asserting claims for consumer fraud, false advertising, and breach of express warranty.¹³⁴ Specifically, the class actions alleged SkinnyGirl Margarita has been packaged, marketed, and advertised as being “all natural” and containing “no preservatives,” when, in fact, the product contains a synthetic preservative found in many diet sodas.¹³⁵ In January 2012, a class action lawsuit was filed against Frito-Lay and PepsiCo in the Eastern District of New York, alleging Tostitos and SunChips products were not “made with all natural ingredients” because the corn and oils used to make them were made from genetically modified plants.¹³⁶ The class action asserted causes of action for violations of New York’s consumer-fraud and false-advertising laws and breach of express warranty.¹³⁷ PepsiCo and Frito-Lay are also being hit in Florida with a similar lawsuit against the use of the term “all natural” on Frito-Lay’s Bean Dip.¹³⁸ The complaint is one of the first that has been filed expressly against the use of GMO ingredients under “all natural” labeling.¹³⁹ The complaint alleges a cause of action under the Florida Unfair and Deceptive Practices Trade Act and asserted that Frito-Lay Bean Dips “contain soy, among other ingredients, which are known to be derived from GMOs.”¹⁴⁰ The express purpose of the Florida statute, as explained in the complaint, is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”¹⁴¹

On November 6, 2012, Pepperidge Farm, Inc., which is owned by Campbell Soup Co., became the most recent target of another GMO punitive class action suit filed in Colorado.¹⁴² The complaint alleges that Pepperidge Farm “mistakenly or misleadingly represented that its Cheddar Goldfish crackers . . . are ‘Natural’ when in fact, they are not, because they contain Genetically

Claims, FOOD LIABILITY LAW BLOG (Mar. 21, 2012), <http://www.foodliabilitylaw.com/articles/litigation-2/consumer-fraud-class-claims/>, archived at <http://perma.cc/NT5S-D7B8>.

133. See Goulet, *supra* note 55 (asserting deceptive advertising under New York General Business Law sections for the use of “natural” on products containing GMOs).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Complaint at 1, *Altman v. Frito-Lay N. Am., Inc.*, No. 12-cv-61803, 2012 WL 4043960 (S.D. Fla. Sept. 13, 2012).

139. *Id.*

140. *Id.* at 14.

141. *Id.* at 31.

142. Complaint at 1, *Bolerjack v. Pepperidge Farm, Inc.*, No 12-cv-02918 (U.S.D.C. Col. Filed Nov. 6, 2012).

Modified Organisms . . . in the form of soy and/or soy derivatives.”¹⁴³ The complaint alleges its cause of action under Colorado’s Consumer Protection Act, which prohibits deceptive trade practices.¹⁴⁴ Deceptive trade practices, under the statute, include when a company makes a false representation as to the “characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property.”¹⁴⁵

It appears that other states are beginning to host similar “natural” class action lawsuits as those that began in California.¹⁴⁶ However, while complaints may have begun being filed in other states, the question remains whether other court systems will be as liberal minded throughout the court proceedings as those in California.¹⁴⁷ Ultimately, no court has yet issued a final ruling in any of these “natural” class action lawsuits, mainly because the cases have been dismissed in the pleading stage or, if the plaintiffs succeed past the pleadings stage, companies have been eager to reach a settlement before having their day in court.¹⁴⁸ Although there has not been a big-judgment against any of the “deceptive” companies, these lawsuits have already begun to exact some changes.¹⁴⁹ Beginning in 2009, for instance, Snapple began replacing high fructose corn syrup with sugar in all of its products labeled as “All Natural.”¹⁵⁰ Similarly, even before a settlement was reached in litigation against it, Ben and Jerry’s agreed to phase out the phrase “all natural” from any of its ice creams or yogurts containing processed contents.¹⁵¹

III. FDA PREEMPTION

Some courts have been reluctant to rule in these “natural” class action lawsuits for fear of preemption by the FDA. For example, in 2010, the New Jersey District Court certified to the FDA for an administrative determination on whether high fructose corn syrup (HFCS) qualifies as a “natural” ingredient.¹⁵²

143. *Id.*

144. *Id.* at 6.

145. *Id.* at 10.

146. *See supra* note 132 and accompanying text; *see also* Bolerjack v. Pepperidge Farm, Inc., No. 12-cv-02918 (U.S.D.C. Col. Filed Nov. 6, 2012) (asserting deceptive advertising under Colorado’s Consumer Protection Act for the use of “natural” on products containing GMOs).

147. *See Jones, supra* note 132 (noting that California’s consumer-friendly laws are attracting more class action lawsuits to be filed in California).

148. Andrews, *supra* note 108.

149. *Id.*; *see also* Jane Black, *Ben & Jerry to Curb Use of ‘All Natural’ on Labels*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092704053.html>, archived at <http://perma.cc/5CR-SZKF> (last visited July 31, 2014).

150. Robin Hilmantel, *Why Snapple and Pepsi Are Going HFCS-Free*, QSR, <http://www2.qsrmagazine.com/articles/exclusives/0309/sugar-1.phtml>, archived at <http://perma.cc/A69C-MJB4> (last visited July 31, 2014).

151. Black, *supra* note 149.

152. Goulet, *supra* note 55.

However, in September 2010, the FDA declined to provide the requested guidance.¹⁵³ Instead, the FDA responded to this request in a letter making three main points: (1) Resolving the issue whether HFCS is “natural” would require opening a rulemaking process which would likely take two or three years to complete; (2) Consumers currently receive some “protection in the absence of a definition of natural” because the FDA requires all ingredients be declared on the food’s label and thus here, consumers will know from the label if a product contains HFCS; and (3) The most relevant statement of the Agency’s views is the informal policy or guidance the FDA maintains on the use of “natural.”¹⁵⁴ The FDA has made it clear that it does not intend to provide the guidance courts have requested to handle these “natural” lawsuits. Accordingly, the question remained whether the FDA’s informal policy, without having undergone any official rulemaking process, was enough to preempt the state statutes in these “natural” lawsuits.¹⁵⁵

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁵⁶ Under the Supremacy Clause, federal law may preempt state law in three circumstances: express preemption, field preemption, and implied conflict preemption.¹⁵⁷ Express preemption occurs when a federal statute or regulation contains specific language explaining when a state or local law is preempted.¹⁵⁸ Field preemption occurs when “state law occupies a ‘field reserved for federal regulation,’ leaving no room for state regulation.”¹⁵⁹ Field preemption can also be considered when “an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”¹⁶⁰ Implied conflict preemption exists when it is “impossible for a private party to comply with both state and federal requirements.”¹⁶¹ However, many federal statutes, like the FDCA, simply prohibit state or local laws that are “inconsistent” with the federal statute or regulation.¹⁶² In *Holk v. Snapple Beverage Corp.*, the Third Circuit did not address express preemption because it had been waived at the District Court; however, it did address both field and implied conflict preemption in determining the FDA’s informal policy does not hold the weight of federal law.¹⁶³

153. *Id.*

154. *Id.*

155. *See, e.g.,* *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

156. U.S. CONST. art. VI., cl. 2.

157. *Holk*, 575 F.3d at 335.

158. *Id.* at 336.

159. *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 111 (2000)).

160. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

161. *Id.* at 79.

162. *See, e.g.,* FEDERAL FOOD, DRUG, AND COSMETIC ACT, 21 U.S.C. § 343-1 (2006).

163. *Holk*, 575 F.3d at 338-42.

A. *Holk v. Snapple Beverage Corp.*

With the FDA remaining silent on any guidance to courts concerning the use of “natural” labels, the Third Circuit, in *Holk v. Snapple Beverages*, tackled the preemption issue and determined that the FDA’s informal policy did not preempt any state law claims concerning the term “natural”.¹⁶⁴ In coming to its conclusion in *Holk*, the Third Circuit looked first at the FDA’s reluctance to preempt state law in the past.¹⁶⁵ Specifically, the FDA stated that it “does not use its authority to preempt state requirements unless there is a genuine need to stop the proliferation of inconsistent requirements between the FDA and the States.”¹⁶⁶ Moreover, in response to comments for the FDA to preempt state law labeling regulations, the agency explained preemption was a complex issue and states should be allowed to require additional information for their consumers.¹⁶⁷

The *Holk* court also pointed to the Supreme Court precedent.¹⁶⁸ “[T]he mere existence of a federal regulatory scheme,” even a particularly detailed one, “does not by itself imply pre-emption of state remedies.”¹⁶⁹ Simply because a federal agency has decided to step into a field, it does not necessarily mean its regulations will be exclusive.¹⁷⁰ The *Holk* court also noted that the Supreme Court has declined to allow preemptive effect in “less formal measures lacking the ‘fairness and deliberation’ which would suggest Congress intended the agency’s action to be a binding and exclusive application of federal law.”¹⁷¹ Moreover, the Supreme Court has previously stated “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’”¹⁷²

The Third Circuit, in *Holk*, cited that the FDA has stated it does not intend to occupy the field of food and beverage labeling,¹⁷³ and it does not use its authority to preempt state requirements unless there is a genuine need to stop the proliferation of inconsistent requirements between the FDA and the states.¹⁷⁴

164. *Id.* at 342.

165. *Id.*

166. *Id.* at 338 (quoting Food Labeling; Declaration of Sulfiting Agents, 51 Fed. Reg. 25,012, 25,016 (July 9, 1986)).

167. *Id.* at 338-39 (quoting Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision, 55 Fed. Reg. at 29,509; Food Labeling; Serving Sizes, 55 Fed. Reg. at 29, 528).

168. *Id.* at 339 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990)).

169. *Id.* (citing *English*, 496 U.S. at 87).

170. *Id.* (citing *English*, 496 U.S. at 87).

171. *Id.* at 340 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

172. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

173. *Holk*, 575 F.3d at 338.

174. *Id.*

Therefore, *Holk* determined that field preemption did not exist.¹⁷⁵

Implied conflict preemption exists when it is “impossible for a private party to comply with both state and federal requirements.”¹⁷⁶ In these “natural” lawsuits, there have not been inconsistent requirements because the FDA has not expressly required anything. Furthermore, no court has actually ruled on any state law issue in “natural” cases. Therefore, there is no way to know whether there would be inconsistent requirements.

In addressing implied field preemption, the Third Circuit ultimately determined the FDA’s informal policy did not have preemptive effect for four main reasons: (1) the FDA did not commence a formal process or receive public input; (2) the FDA admitted it was not officially defining the term; (3) the FDA’s enforcement letters to food and beverage manufacturers telling them to remove “natural” labels were inadequate to determine that the policy held the weight of federal law; and (4) the FDA reissued the preexisting “natural” policy after soliciting public comments, proving that the agency did not take any of the comments they received into account.¹⁷⁷

B. Going Forward: Following Holk

Due to the FDA’s lack of an official definition of “natural,” companies are free to use the term at their own risk. However, after the Third Circuit found no preemption problem in class action lawsuits attacking the deceptive use of “natural,” the risk for companies has grown exponentially.¹⁷⁸ Now that there is an official decision addressing the lack of preemptive effect of the FDA’s informal policy, a flood of class action lawsuits attacking companies on their deceptive use of “natural” has commenced.¹⁷⁹ As preemption should not be a barrier for current and future class action lawsuits and the FDA presently wants nothing to do with defining “natural,” courts should begin ruling on these cases in an effort to protect consumers against deceptive and misleading advertisements.

IV. CLASS ACTION LAWSUITS ARE CURRENTLY, ABSENT AN FDA RULE, THE BEST SOLUTION TO PROTECT CONSUMERS AGAINST MISLEADING “NATURAL” CLAIMS

Consumers are willing to pay more for natural foods due to a perceived higher quality and health and safety benefits associated with products labeled as “natural.”¹⁸⁰ By marketing their products as “natural” while they contain unnatural ingredients, companies are seeking to capitalize on consumers’

175. *Id.* at 339.

176. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

177. *Holk*, 575 F.3d at 342.

178. *Id.*

179. *See supra* note 22 and accompanying text.

180. Complaint at 4, *McKendrick v. Gen. Mills*, No. 12-3919 (N.D. Cal. filed Jul. 26, 2012).

preference for all-natural foods.¹⁸¹ These unnatural ingredients can, in many instances, be very harmful or increase health risks if consumed frequently.¹⁸² Accordingly, the Center for Science in the Public Interest (CSPI) has found that large amounts of high fructose corn syrup (HFCS) promote “tooth decay, as well as increase triglyceride (fat) levels in blood, thereby increasing the risk of heart disease.”¹⁸³ Also, recent studies show that consuming twenty-five percent of calories from fructose or HFCS leads to more visceral (deep belly) fat or liver fat.¹⁸⁴ These effects of HFCS may then directly increase the risk of diabetes or heart disease.¹⁸⁵ While beliefs about the safety concerns relating to GMOs vary, the American Academy of Environmental Medicine cites evidence, primarily from animal studies, of possible health risks of GM food consumption including infertility, organ damage, gastrointestinal and immune system disorders, and accelerated aging.¹⁸⁶

Consequently, consumers seeking “natural” products are doing so to avoid these harmful effects on the body.¹⁸⁷ As the Ninth Circuit noted in *Williams v. Gerber*, “[w]e do not think that the FDA requires an ingredients list so that manufacturers can mislead consumers and then rely on the ingredients list to correct those misinterpretations.”¹⁸⁸ Therefore, “natural” products should be just that, instead of “natural” on the front of the box with a small-printed ingredients list on the back suggesting otherwise.

The “natural” and organic industry is still growing with no indication of decline in the near future.¹⁸⁹ Therefore, misbranding products as “natural” is a problem that has most likely not yet reached its apex. It is clear that the FDA has no intention of making a ruling on the definition of “natural” in the near future.¹⁹⁰ For almost twenty years, the FDA has recognized that the term “natural” causes confusion in the industry, and most importantly to consumers.¹⁹¹ Yet, the agency has still evaded tackling a working definition for the term.¹⁹² If the FDA has

181. *Id.*

182. *Chemical Cuisine: Learn about Food Additives*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/reports/chemcuisine.htm#hfc>, archived at <http://perma.cc/RC6W-E3TU> (last visited July 31, 2014).

183. *Id.*

184. *Id.*

185. *Id.*

186. Elisa Zied, R.D., *Calif. to Vote on Labeling GMO Foods, but You May Already Eat Them*, NBCNEWS (Nov. 2, 2012), http://vitals.nbcnews.com/_news/2012/11/02/14836665-calif-to-vote-on-labeling-gmo-foods-but-you-may-already-eat-them?lite, archived at <http://perma.cc/S7G3-8GG8>.

187. Complaint at 4, *McKendrick v. Gen. Mills*, No. 12-3919 (N.D. Cal. filed Jul. 26, 2012).

188. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 940 (9th Cir. 2008).

189. FOOD MKTG. INST., *supra* note 4.

190. *See* Goulet, *supra* note 55 (noting that the FDA has continuously declined to adopt a formal “natural” definition despite consumer confusion over the term).

191. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

192. *Id.*

recognized a problem for twenty years but has still yet to fix the issue there is nothing to suggest that a binding rule is in the near future. Therefore, courts should stop trying to defer questions concerning the term “natural” to the FDA and begin ruling on these class action lawsuits.

As a 2012 Loyola Consumer Law Review article noted, the “natural” dilemma is not the first misleading advertising claim to find its way into the court system by way of class action lawsuits.¹⁹³ The history of tobacco litigation has revealed that the tobacco industry was willing to ignore dangers, act solely in the interest of profit, and completely disregard public health before the historic tobacco litigation cases began.¹⁹⁴ Just as the tobacco industry marketed “light cigarettes” as safer than “regular” brands, companies are advertising ice cream as “all natural” and containing “no preservatives.”¹⁹⁵

Once laws required tobacco companies to disclaim health risks on their cigarette packaging, the tobacco industry tried another advertising tactic by introducing the “low tar” cigarette.¹⁹⁶ The main goal was to dissuade smokers from actually quitting by suggesting that if they smoked light or “low tar” cigarettes they would be able to avoid the documented health consequences associated with smoking.¹⁹⁷ Unfortunately, the low-tar and light cigarette brands were far less safe than advertised.¹⁹⁸ The problem was that

the smoker inhaling from a low-tar or filtered cigarette would simply compensate by drawing more heavily on the cigarette in order to achieve the same level of nicotine delivery. The tobacco companies were not only aware of this fact, but also relied on it in order to sustain cigarette sales. This was achieved by altering nicotine levels in their products to maintain consumer dependence.¹⁹⁹

Similarly, companies advertising their products as “all natural” and containing “no preservatives” know their product is not natural, but they are relying on these advertisements to sustain their sales.²⁰⁰ There are many “natural” labeled foods on the market today that are horrible, by most health standards, just like “light” cigarettes.²⁰¹ However, most consumers believe that if companies are allowed to make a claim regarding their product, it must be true because of all the

193. Franklin Smith, *Where Have We Seen This Before: Comparing the “Natural” Caloric-sweetened Beverage Trend to the Claims of “Light” Cigarettes*, 24 LOY. CONSUMER L. REV. 389, 401 (2012).

194. *Id.*

195. *Id.*; *Astiana v. Ben & Jerry’s Homemade, Inc.*, No C 10-4387 PJH, 2011 WL 2111796, at *1 (N.D. Cal. May 26, 2011)

196. Smith, *supra* note 193.

197. *Id.*

198. *Id.*

199. *Id.* at 401-402.

200. Goulet, *supra* note 55.

201. *Astiana*, 2011 WL 2111796 at *1; Smith, *supra* note 193.

consumer protection laws against false advertising.²⁰² Unfortunately, because “natural” has no legal definition, which is unbeknownst to the average consumer, companies are free to use the term at their own risk.²⁰³ As noted by the Ninth Circuit in *Williams*, labels should not be used to manipulate the consumer, but instead instruct the consumer on what they will be eating should they purchase the product.²⁰⁴

The notion that consumers have enough information to make their own choices and focus only on health when purchasing food is unrealistic, especially when the food industry is using deceptive advertisements and labels.²⁰⁵ Companies argue that consumers should know that ice cream is not a healthy food choice, and the food industry should not be blamed for consumers’ unintelligent choices.²⁰⁶ However, it should not be the consumer’s job to decipher which advertisements are true and which ones are not.²⁰⁷

Class action lawsuits are currently, in the absence of an FDA rule, the best solution to define “natural” and protect consumers against misleading “natural” claims. The FDA has failed to protect consumers against deceptive “natural” claims for nearly twenty years.²⁰⁸ There is no sign that this trend will change in the near future.²⁰⁹ First, at the very best, if the FDA were to begin its rulemaking process now, that process would take at least two to three years to complete.²¹⁰ At worst, the FDA may never define the term. There needs to be some kind of regulation of the term in the absence of FDA provisions, considering that an FDA provision would not be in place for some time due to the formal requirements of the rulemaking process.²¹¹ Therefore, similar to the long-protracted tobacco litigation that preceded it, at least one avenue in the battle against “natural” claims should be fought in the courtroom.²¹² Furthermore, although none of these cases has yet to go to trial, “natural” class action lawsuits have already succeeded in exacting change. Many defendant companies have removed misleading “natural” packaging and advertising statements from their products.²¹³

202. See, e.g., CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012).

203. *What Is the Meaning of ‘Natural’ on the Label of Food?*, *supra* note 16.

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

205. *Id.*

206. See *Astiana*, 2011 WL 2111796 at *2 (asserting that most consumers know the ice cream is not a healthy dietary choice).

207. *Williams*, 552 F.3d at 939.

208. *Guidance for Industry: A Food Labeling Guide*, FOOD & DRUG ADMIN. (Jan. 2013), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm>, archived at <http://perma.cc/Q8QM-WPXT>.

209. See Goulet, *supra* note 55 (noting that the FDA has continuously declined to adopt a formal “natural” definition despite consumer confusion over the term).

210. CHARLES H. KOCH, JR., 1 ADMIN. L. & PRAC. § 4:45 (3d ed. 2012).

211. *Id.*

212. Smith, *supra* note 193, at 406-07.

213. Andrews, *supra* note 108; Hilmantel, *supra* note 150.

V. WHEN RULING ON THESE “NATURAL” CLASS ACTION LAWSUITS, COURTS
SHOULD INTERPRET THE FDA’S INFORMAL “NATURAL” DEFINITION TO
EXCLUDE HFCS AND GMOs

When ruling on these “natural” cases, courts should apply the FDA’s current informal policy and, when doing so, should interpret it to exclude HFCS and GMOs because neither are “natural” ingredients. Many scholarly articles have been written about how the FDA needs to promulgate a definition of “natural” because it should not be left to the courts.²¹⁴ These articles claim that allowing this problem to be solved in the courtroom will lead to inconsistent judgments and confusion.²¹⁵ They also argue that the courts do not have the expertise necessary to rule on a “natural” definition.²¹⁶ However, by employing the FDA’s current informal policy, most of these proposed issues dissipate with regards to the run-of-the-mill “natural” lawsuit, which usually allege the company’s use of preservatives or chemically processed ingredients while still labeling the product as “natural.”²¹⁷ Nevertheless, courts would have to interpret the FDA’s broad informal policy with regards to two major trends in “natural” litigation: (1) whether HFCS is “natural”; and (2) whether the use of GMO’s in a product should prohibit that product from being labeled “natural” without also identifying that the product contains GMOs.

The FDA’s policy considers “‘natural’ to mean 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.”²¹⁸ Nearly all of the current class action cases rely on the FDA’s informal policy in concluding that businesses were misleading or deceptive in their labeling. Some of these cases deal with the more difficult questions of whether HFCS or GMOs should be labeled “natural.”²¹⁹ However, many complaints simply allege the use of “artificial preservatives” as not complying with the “natural” label on the product, which appears to be in direct violation of the FDA’s policy prohibiting anything

214. See Benny, *supra* note 56, at 1514 (asserting the FDA should promulgate a “natural” definition which allows GMOs to be considered “natural”); see also April L. Farris, *The “Natural” Aversion: The FDA’s Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403, 404 (2010) (asserting that the FDA needs to promulgate a “natural” definition because allowing class action lawsuits will lead to inconsistent results).

215. Benny, *supra* note 56, at 1514.

216. *Id.*

217. See *Astiana v. Ben & Jerry’s Homemade, Inc.*, 2011 WL 2111796, at *1 (N.D. Cal. May 26, 2011) (“assert[ing] that the alkalized cocoa used in Ben & Jerry’s and Breyers’ ice cream is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural’”).

218. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2397 (Jan. 6, 1993).

219. See *supra* note 22 and accompanying text.

“artificial” from being labeled “natural.”²²⁰ Therefore, in ruling on the “natural” cases involving products containing artificial preservatives and the like, courts should have little inconsistency in applying the FDA’s policy.²²¹ The only inconsistencies would be regarding the strength of state consumer protection laws.²²² However, even this is seemingly becoming less inconsistent because class action lawsuits on “natural” claims are now being filed in other states beside California.²²³

By employing the FDA’s informal policy, courts will have to interpret the broad definition in regards to both HFCS and GMOs.²²⁴ When doing so, courts should determine that neither HFCS nor GMOs meet the “natural” standard provided by the FDA. While these decisions may, at first, lead to inconsistent conclusions, similar to what happened with the preemption issue that was finally addressed in *Holk*, inconsistencies are what persuade appellate courts to take cases and eventually resolve the issue.²²⁵ Ultimately, because the FDA refuses to address the “natural” issue, similar to its refusal to address the preemption issue, some inconsistent decisions that lead to an appellate court taking the issue are preferable to silence on the matter.²²⁶

A. HFCS Should Not Be Considered “Natural”

In its first response to a letter requesting guidance on whether HFCS was “natural,” the FDA responded by stating the typical process used to produce HFCS “would not be consistent with our . . . policy regarding the use of the term ‘natural.’”²²⁷ However, after a Corn Refiners Association (CRA) member appealed to the FDA describing a different HFCS production process, the FDA promptly reneged its statement and reverted back to its stance that HFCS fit under the “natural” definition.²²⁸ Over the past several years, the FDA has not expressly

220. See *Astiana*, 2011 WL 2111796 at *1 (“assert[ing] that the alkalized cocoa used in Ben & Jerry’s and Breyers’ ice cream is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural’”).

221. See generally Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2,302, 2,397 (Jan. 6, 1993).

222. See generally CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012); COLO. REV. STAT. § 6-1-105 (West 2012).

223. See *supra* Part II(G).

224. See generally Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2,302, 2,397 (Jan. 6, 1993).

225. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

226. *Id.*

227. Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle over Restricting High Fructose Corn Syrup from Food and Beverages Labeled ‘Natural,’* 5 J. FOOD L. & POL’Y 145, 172 (2009).

228. *Id.*

stated that HFCS is “unnatural” or “natural.”²²⁹

This indecision has caused more confusion in the marketplace, and ultimately led to what is now referred to as “The Sugar Wars.”²³⁰ With the recent increased negative advertising concerning HFCS, the CRA asked the FDA to allow them to call HFCS “corn sugar” on product labels, but they were rejected.²³¹ The CRA also commenced a string of commercials with consumers questioning the harmful effects of HFCS with the commercials advertising HFCS as no different than regular sugar, announcing: “sugar is sugar.”²³² In early 2012, following the launch of these commercials, the sugar industry promptly filed suit alleging misrepresentation and false advertising against the CRA.²³³ In September 2012, a group of U.S. food companies subsequently sued the sugar industry claiming promoters of “natural” sugar are unfairly criticizing high fructose corn syrup.²³⁴ An attorney for the sugar industry summarized the ongoing debate in stating, “[t]he bottom line is it (high fructose corn syrup) is not a natural product . . . [i]t is something that is synthesized . . . [i]t is not the same thing as real sugar.”²³⁵

The modern HFCS production method starts with the pure fructose found in corn, but after the production process, the industry standard HFCS is converted to only a forty-two percent fructose mixture.²³⁶ The production process uses “synthetic fixing agents” and “artificial agents”; however, the CRA argues that these “agents” either never actually come in contact with the HFCS or are “washed away” before the end of the process.²³⁷ This argument, however, should hold zero weight when looking toward the FDA’s current policy because both “synthetic” and “artificial” ingredients are used in creating the product, which appears to be in direct conflict with the FDA’s policy.²³⁸ Regardless of whether the synthetic, artificial ingredients are present in the end product, the idea that HFCS is debatably “natural” based on the current production process is in itself misleading and deceptive.²³⁹ Therefore, in employing the FDA’s current “natural” policy, courts should interpret it to prohibit HFCS from being labeled “natural.”

229. *Id.*

230. Carey Gilliam, *Food Companies Sue Sugar Industry, Say High Fructose Corn Syrup Being ‘Unfairly Maligned,’* HUFFINGTON POST (Sept. 5, 2012, 5:15 PM), http://www.huffingtonpost.com/2012/09/06/sugar-vs-corn-syrup_n_1859311.html, archived at <http://perma.cc/M7PH-HSAW>.

231. *Id.*

232. *Id.* See also Robyn O’Brien, “*Sugar Is Sugar*” Claims the Corn Refiners Association. *But Is It?*, HUFFINGTON POST (Sept. 15, 2010, 9:10 AM), http://www.huffingtonpost.com/robyn-o/sugar-is-sugar-claims-the_b_717537.html, archived at <http://perma.cc/E492-C4LC>.

233. *Id.*

234. *Id.*

235. *Id.*

236. Schlosser, *supra* note 227, at 178.

237. *Id.*

238. *Id.*

239. *Id.*

B. GMOs Should Not Be Considered Natural

In the wake of Proposition 37's rejection in California, GMOs will likely be the next wave in the “natural” class action lawsuits.²⁴⁰ Some complaints have already been filed, alleging that products containing GMOs should not be labeled “natural.”²⁴¹ Just as HFCS should not be considered “natural,” products containing GMOs, should, likewise, be prohibited from being marketed as “natural.”

First and foremost, a chemical company, not an agricultural or food group, initially introduced GMOs to the world.²⁴² First introduced in the mid-1990s, GM crops are those in which the genetic material of an organism is transferred from one organism to another to introduce a new trait into the organism.²⁴³ The resulting crops, GMOs, are then super-resistant to herbicides, which are extremely toxic and kill most everything except for the specified crop.²⁴⁴ Specifically, one of the chemicals sprayed on newly engineered corn, is 2,4-D, which is one of the components in Agent Orange.²⁴⁵

Some scholars argue that GMOs should fall within the FDA's current “natural” policy.²⁴⁶ As stated previously, the FDA's current policy considers “natural,” as meaning 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 in the food.”²⁴⁷ When analyzing GMOs, it would appear that the very purpose of creating GMOs is to produce a product containing herbicide-resistance “that would not normally be expected to be in the food.”²⁴⁸ Therefore, it is hard to understand why companies using these ingredients should be permitted to label their products as “natural” and then argue that they are compliant with the FDA's “natural” policy.²⁴⁹ Recently, Prop 37 was defeated in California, and with it the requirement that companies label products containing

240. Zied, *supra* note 186.

241. *See supra* note 78 and accompanying text.

242. *See supra* note 78 and accompanying text; Zied, *supra* note 186; *see also* James Chapman, *History of Genetically Modified Food*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-419985/History-genetically-modified-food.html> (last visited July 31, 2014).

243. *Id.*

244. *Id.*

245. Mark Bittman, *Buying the Vote on G.M.O.'s*, N.Y. TIMES, Oct. 23, 2012, <http://opinionator.blogs.nytimes.com/2012/10/23/buying-the-vote-on-g-m-o-s/>, archived at <http://perma.cc/9A7N-QCJT>.

246. *See* Benny, *supra* note 56, at 1514 (asserting the FDA should promulgate a “natural” definition which allows GMOs to be considered “natural”).

247. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2397 (Jan. 6, 1993).

248. *Id.* at 2407; Bittman, *supra* note 245.

249. *See supra* note 78 and accompanying text.

GMOs as such.²⁵⁰ However, simply because companies are not currently required to identify the presence of GMOs in their product, it does not follow that they should also be allowed to advertise their products as “natural.”

CONCLUSION

With obesity rates continuing to grow in the United States and health risks at an all-time high, Americans are beginning to look at health and nutrition claim on the brands they have grown to love. Unfortunately, due to the FDA’s reluctance to promulgate a legal definition of the term “natural,” many consumers believe they are making a “smart” choice, when really that choice is simply misinformed. Consumers need to be protected from these deceptive “natural” claims, and without a rule from the FDA, class action lawsuits are currently the best way to accomplish this. Therefore, courts need to rule on these cases using the FDA’s current informal policy. When doing so, courts should interpret the FDA’s policy to prohibit both HFCS and GMOs from being labeled “natural” to ensure that the proliferation of deceptive “natural” claims does not continue.

250. Amy Westervelt, *With California Prop Defeated, GMO Labeling Proponents Look to Farm Bill*, FORBES (Nov. 13, 2012, 11:05 AM) <http://www.forbes.com/sites/amywestervelt/2012/11/13/with-california-prop-defeated-gmo-labeling-proponents-look-to-farm-bill/>, archived at <http://perma.cc/W7XD-YDEH>.