



Consumer Understanding of Labels and Definitions

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Natural Explanations of Labels & Definitions

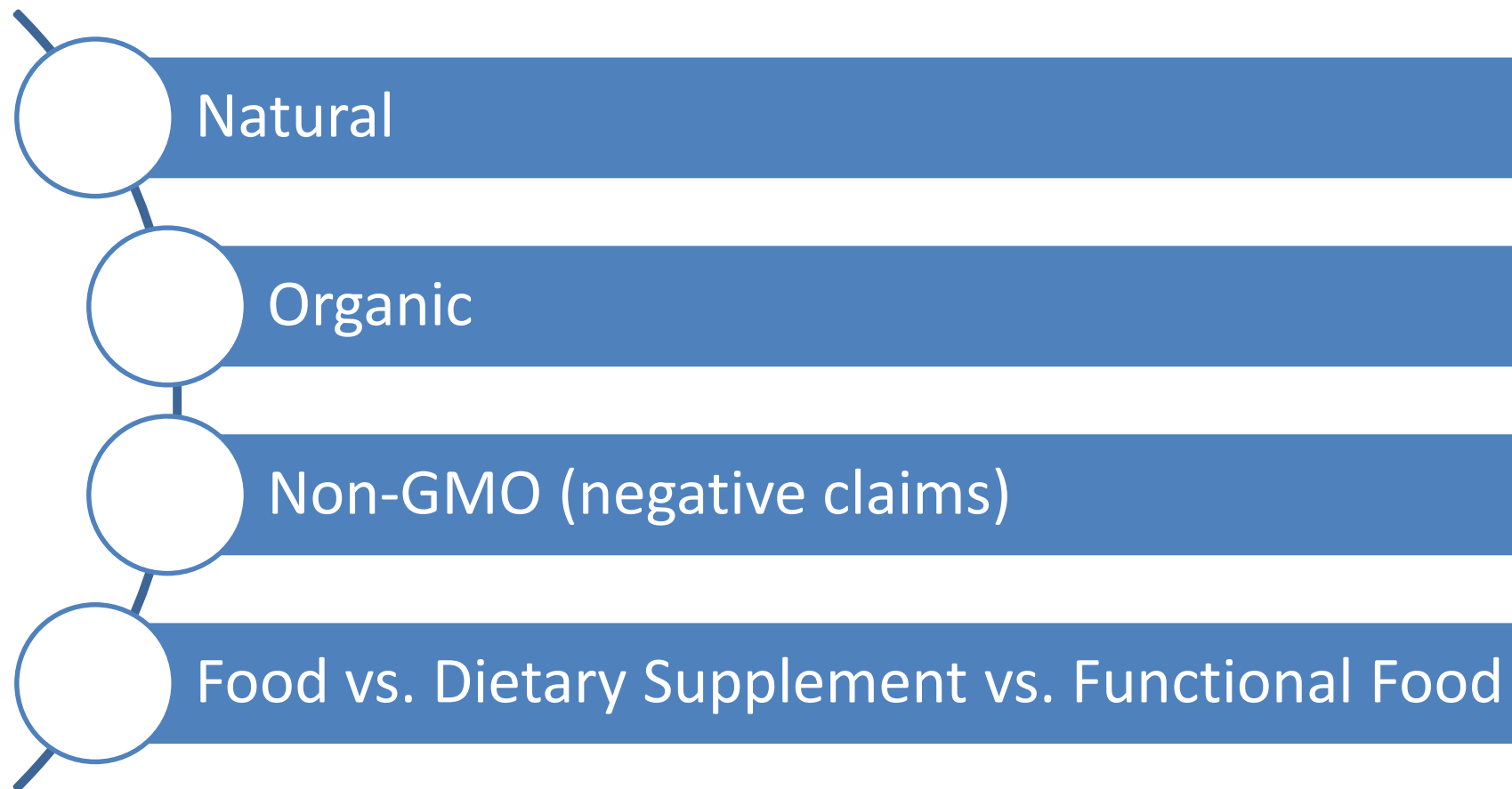
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(Un)natural Construction



USDA FSIS – Policy

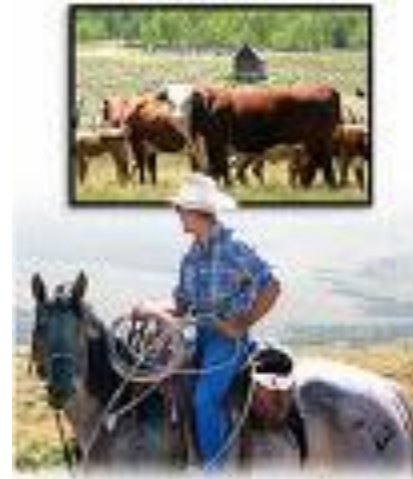
- “A product containing no artificial ingredient or added color and is only minimally processed. Minimal processing means that the product was processed in a manner that does not fundamentally alter the product.”
- The label must include a statement explaining the meaning of the term natural (“no artificial ingredients; minimally processed”)

FSIS Policy Memo 055 and *Food Standards and Labeling Policy Book*



Push for Stricter USDA “Natural”

- Sodium lactate allowed
 - Is it natural?
- Define “minimally processed”
- Chicken meat injected with saline solution
 - Additive itself natural
 - But is it natural to pump it into chicken?
- Does “natural” mean naturally raised”?



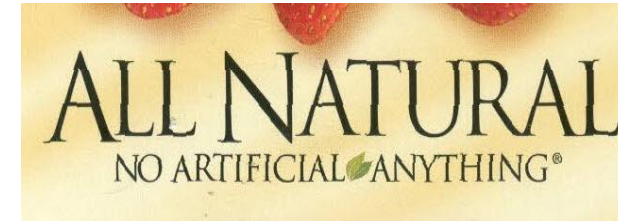
FDA Policy

- “Nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.”

58 FR 2302 at 2407 (Jan. 6, 1993)

- Relies on the general prohibition of any false or misleading labeling

Food, Drug, and Cosmetic Act § 403(a)(1))



FDA – All Added Color Artificial

- Strict details on use of “natural” for added color, synthetic substances, and flavors (21 C.F.R. § 101.22)
- “Since all added colors result in an artificially colored food, we would object to the declaration of any added color as ... ‘natural’”.

FDA Compliance Policy Guide (CPG) 587.100



Natural Progression

- 1983 – FTC abandoned attempt to define
- 1993 – FDA gave up attempt defining natural
- 2006-2009 – USDA proposed a rulemaking (ANPR)
(no further action)
- 2010 – FDA declined “Too much like whack-a-mole”
- 2014 – 3 Petitions to FDA
- 2015 – FDA opened comments, closed May 2016



Why so hard?

- “Natural” Trichotomy of Contexts:
 - *Ingredients*
 - *Product composition*
 - *Process*
- Moving target of public perception



“Organic”

- Organics Foods Production Act in 1990 Farm Bill
- National *production and process* standards
- **USDA Agricultural Marketing Service**
- No *synthetic* pesticides
- No synthetic fertilizer
- **No rDNA technology**
- No irradiation





“Organic” is USDA AMS, but . . .

- FDA oversees general food labeling compliance and safety issues
- Nothing false or misleading in any particular

Food, Drug, and Cosmetic Act § 403(a)(1))



GMO Free Claims



- USDA's proposed rule for the National Bioengineered Food Disclosure Standard
- Would allow absence claims
- FDA's labeling guidance on foods derived from genetically engineered plants
- Warns that absence claims may be misleading



Unicorn-free labeling





Because I care
about my
health



Food, dietary supplement,

Food:

- (1) articles used for food or drink for man or other animals,
- (2) chewing gum, and
- (3) articles used for components of any other such article.

FD&C Act sec. 201(f)

Dietary supplement:

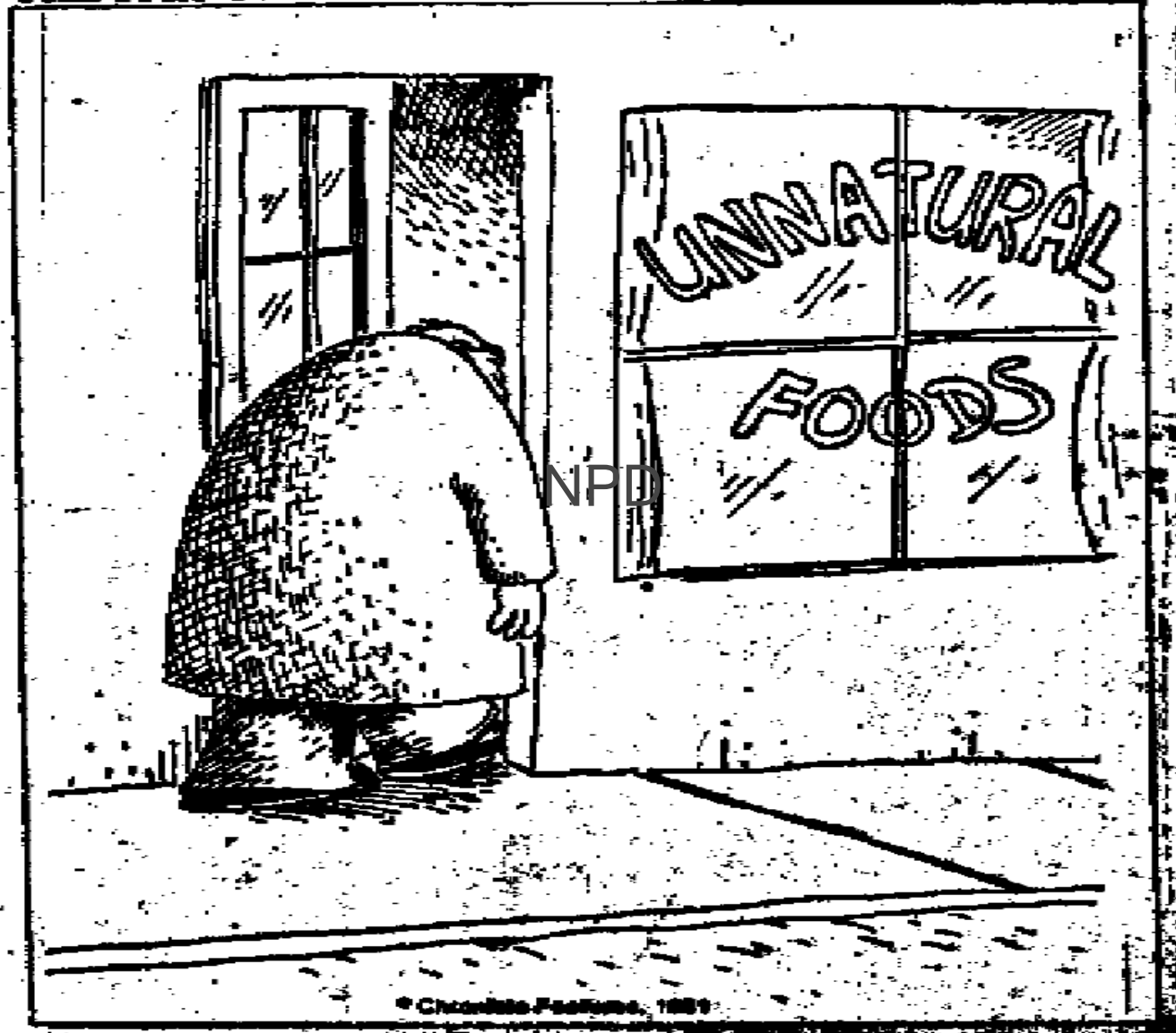
- A product “intended to supplement the diet” that contains:
- A vitamin, mineral, herb or botanical, amino acid, OR
- “a dietary substance for use by man to supplement the diet by increasing the total dietary intake”
- Not represented as a conventional food or as a sole item of a meal or diet



Functional Food



THE FAR SIDE GARY LARSON



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Consumer Expectations on Labels: natural, organic, and dietary supplements

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FDLI Food Advertising, Labeling, and Litigation Conference

Washington, D.C.

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Consumer Reports Greener Choices website on Food Sustainability Labels: Characteristics of a Good label

<http://greenerchoices.org/2016/03/08/make-another-good-label/>

What makes a good eco-label?

Generally, the best eco-labels are seals or logos indicating that an independent organization has verified that a product meets a set of meaningful and consistent standards for environmental protection and/or social justice.

Here are five key criteria we use to evaluate label claims and certifying groups:

Meaningful, verifiable standards: Eco-labels should have a set of environmentally meaningful standards. These standards should be verifiable by the certifying group or another independent inspection organization.

Consistency: An eco-label used on one product should have the same meaning if used on other products. Standards should be verifiable in a consistent manner for different products.

Transparency: The organization behind an eco-label should make information about organizational structure, funding, board of directors, and certification standards available to the public.

Independence: Certifying organizations and their employees should not have any ties to, and should not receive any funding, sales fees, or contributions, from logo users except fees for certification. Employees of companies whose products are certified, or who are applying for certification, should not be affiliated in any way with the certifier.

Public comment: All certification standards should be developed with input from multiple stakeholders including consumers, industry, environmentalists and social representatives in a way that doesn't compromise the independence of the certifier. Industry representatives, for example, can play an important advisory role without having direct financial, decision making or management ties to the certifier.



The high cost of cheap chicken. *Consumer Reports* February 2014

<https://www.consumerreports.org/cro/magazine/2014/02/the-high-cost-of-cheap-chicken/index.htm>

Confusing chicken labels decoded

Read labels carefully. Terms are sometimes misleading, and chicken produced in different ways are often sold next to each other (in packages labeled "natural" and "no antibiotics," for example), according to a new CONSUMER REPORTS shopping survey. For more details about these labels and others, go to GreenerChoices.org.

- ORGANIC**
The chicken was fed a vegetarian diet with feed produced without genetically modified organisms or toxic synthetic pesticides. Chickens cannot be organically raised with antibiotics, though they can be treated up until their first day of life. Access to the outdoors is required, but there are no specific standards for the size of the outdoor area, the size of the door leading there, or the amount of time the birds spend outdoors. Annual inspections are required.
- NO ANTIBIOTICS**
Never given antibiotics, including in the egg. "Raised without antibiotics" means the same thing. No inspections are required.
- CERTIFIED HUMANE**
The chickens are raised according to guidelines from Humane Farm Animal Care. There are standards for the environment the birds are raised in and for minimizing their stress and
- injuries during transportation and slaughter. They may or may not have access to the outdoors. Annual inspections are required.
- NO HORMONES**
Hormone use is prohibited in chickens, so even if a product doesn't come with this claim, it will be free of added hormones as well as steroids.
- AMERICAN HUMANE CERTIFIED**
Requirements to minimize stress and suffering of the birds are very close to the basic industry standard. Birds are not required to have access to the outdoors. Inspections are required.
- CAGE-FREE**
Essentially meaningless. No chickens raised for meat in the U.S. are kept in cages. Neither does it mean that the birds have access to the outdoors. No inspections are required.
- NATURAL**
Meaningless. The product is minimally processed and contains no artificial ingredients, but no inspection is
- required to verify that. (See "The Most Misleading Label," below).
- FREE-RANGE**
There is no definition of "outdoors." And there are no requirements as far as the size of the outdoor area (it can be a small concrete slab), the size of the door to the outside, or the amount of time the birds spend there. Chickens can still be raised in crowded conditions. No inspections required.
- NO GMOs**
If you see the "Non GMO Project Verified" label, the feed contains less than 0.9 percent of GMO crops. Verification is required.
- PASTURE-RAISED**
Although not a legal definition, it should mean that the birds are raised on grassy pastures. "Animal Welfare Approved" is the only verified label requiring that animals are pasture-raised. But products with that label are not widely available.



The high cost of cheap chicken. *Consumer Reports* February 2014

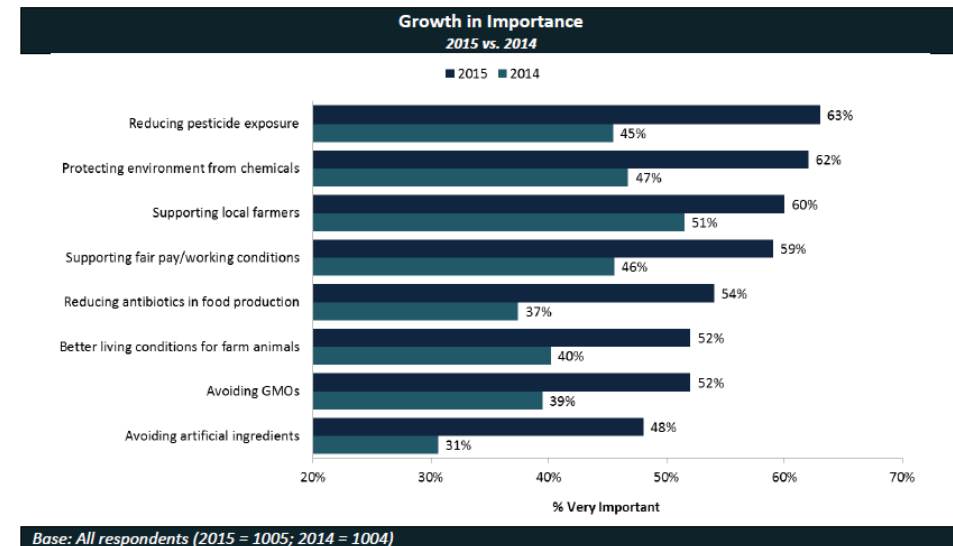
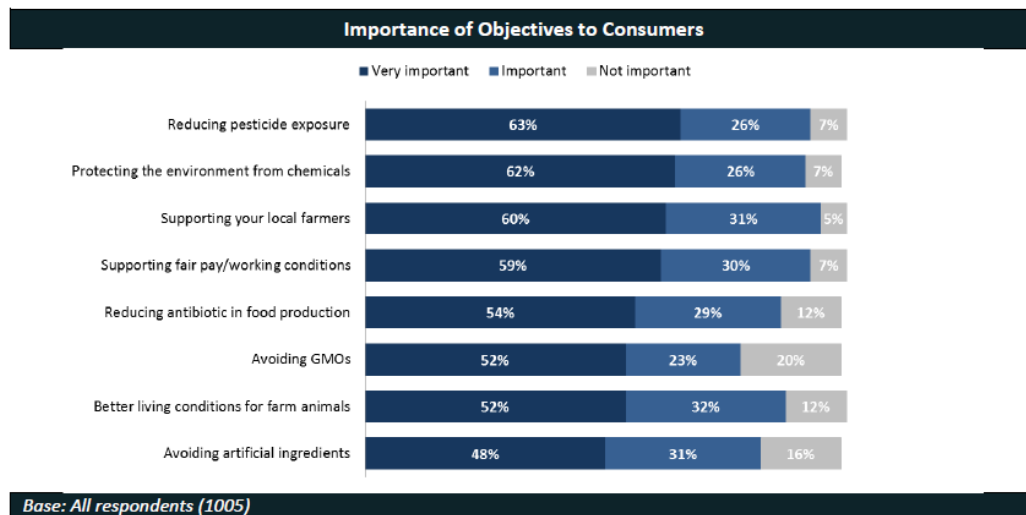
▣ THE MOST MISLEADING LABEL

A Consumer Reports survey on chicken safety found that more than half of the 1,005 U.S. residents polled thought that "natural" chickens didn't receive antibiotics or genetically modified feed. Forty-two percent thought the word meant that the birds were raised outdoors. More than one-third thought "natural" was equal to "organic." But it doesn't mean any of those things. You should simply ignore "natural" claims.

Consumer Reports National Research Center Natural Food Labels Survey, 2015

http://greenerchoices.org/wp-content/uploads/2016/08/CR_2015_Natural_Food_Labels_Survey.pdf

A range of environmental, safety and social responsibility objectives are key (very important or important) to most U.S. consumers when purchasing food. Such key objectives include *supporting local farmers* (91% of consumers), *supporting companies with good working conditions/fair pay to workers* (89%), *reducing exposure to pesticides* (89%), *protecting the environment from chemicals* (88%), *providing better living conditions for animals* (84%), and *reducing antibiotic use in food* (83%). Avoiding artificial ingredients (79%; a notable increase from 69% in 2014) and GMOs (75%) are also key objectives for many. Also a notable increase between 2014 and 2015 in % consumers that say each objective is *very important*.

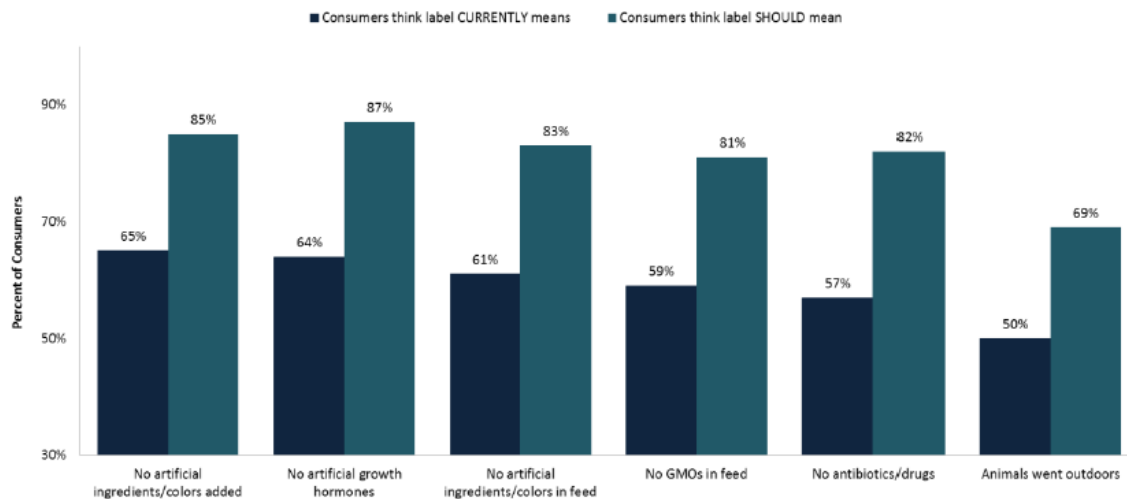


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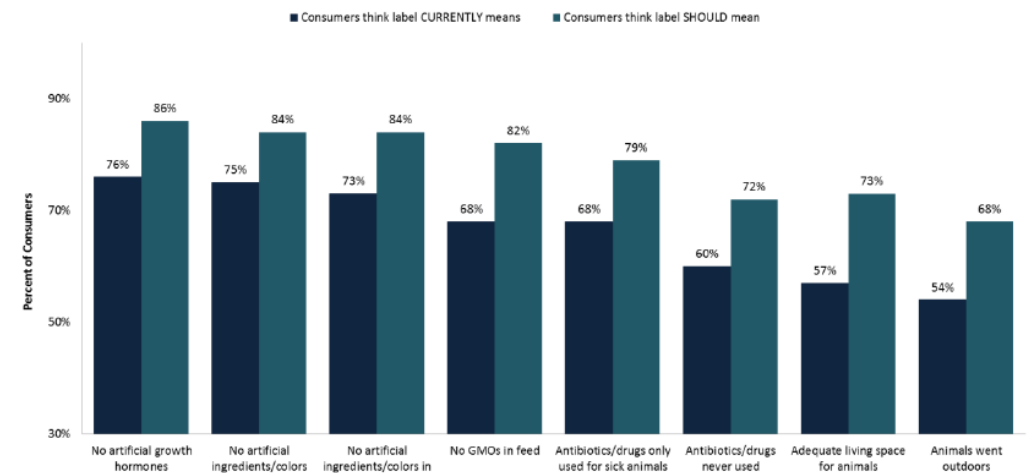
Consumers want more stringent standards for natural and organic labeling on meat and poultry. Many consumers think that the natural or organic label on meat and poultry currently means that no artificial ingredients, growth hormones, genetically modified ingredients, or antibiotics were used; an even greater amount of consumers feel that this labeling should indicate this.

Consumer Perception of NATURAL Label on Meat and Poultry



Base: Food shoppers (967)

Consumer Perception of ORGANIC Label on Meat and Poultry



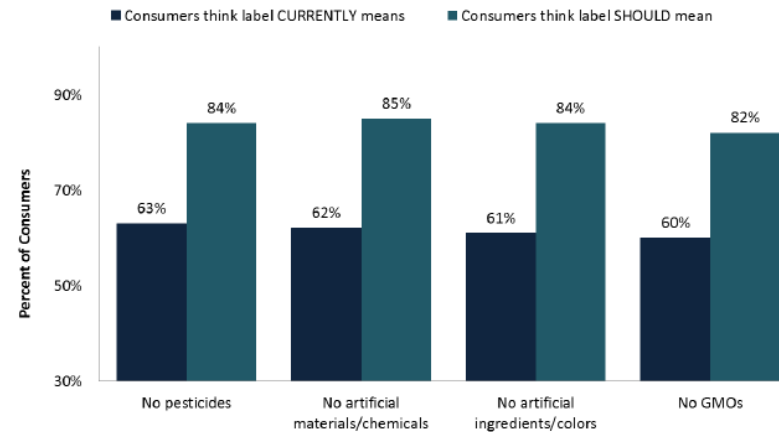
Base: Food shoppers (967)

Consumer Reports National Research Center Natural Food Labels Survey, 2015

http://greenerchoices.org/wp-content/uploads/2016/08/CR_2015_Natural_Food_Labels_Survey.pdf

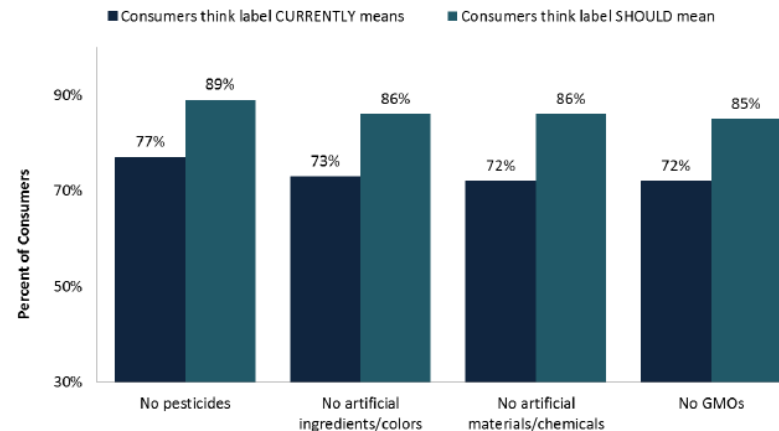
Consumers Demand More Standards for Natural and Organic Labels on Packaged and Processed Foods. Many consumers think that the natural or organic label on packaged and processed foods currently means that no pesticides, artificial ingredients, artificial chemicals, or genetically modified ingredients were used; an even greater percentage of consumers feel that this labeling should indicate this.

Consumer Perception of NATURAL Label on Packaged and Processed Foods



Base: Food shoppers (967)

Consumer Perception of ORGANIC Label on Packaged and Processed Foods



Base: Food shoppers (967)

Dietary Supplements

- FDA should: Establish definition of conventional food to clarify distinction dietary supplements and food and beverage products with additives
- Require manufacturers to provide registration information for new products within 30 days of marketing and for product withdrawal
- Require more information on labels, including warnings associated with specific ingredients, batch numbers
- Require manufacturers to forward all adverse event reports to FDA on regular basis and incorporate Poison Control Center data

Evidence in Food Labeling Class Actions

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September 26, 2018

State Consumer Protection Laws

- ▶ **Variations**
- ▶ **Minimal standing**
- ▶ **Require some unfair or deceptive practice**
- ▶ **Common venues**



Class Actions Relating to Food Labeling

Class actions may compensate for regulatory failures

Why are they attractive to plaintiffs' counsel?

- ❑ Aggregate small claims
- ❑ Attorneys fees, potential for 3x damages
- ❑ Relatively easy to file / hard to dismiss

The Usual Suspects

- ❑ Natural
- ❑ Sugar
- ❑ Standards of identity
- ❑ Nutritional content
- ❑ Slack fill



Examples

- ❑ Mondelez, Post General Mills – “healthy” but high in sugar?
- ❑ Krispy Kreme – imitation “blueberry”?



What's the standard?: California Example

Ebner v. Fresh, Inc. (9th Circuit, 2016)

▶ “Reasonable consumer”

The reasonable consumer standard requires a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”

➤ What did they decide?

What's the standard?: California Example

Ebner v. Fresh, Inc. (9th Circuit, 2016)

▶ “Reasonable consumer”

The reasonable consumer standard requires a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”

➤ **On what basis?**

Claim “is not plausible”

“The reasonable consumer understands”

The consumer may not know precisely but

How Can It Work?: California Example

Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc. (ND Cal., 2018)

- ▶ Consumer perceptions survey
- ▶ Price premium survey (*conjoint survey with market simulator*)
- ▶ Principles
 - ▶ Survey evidence to be admitted if relevant and conducted according to accepted principles
 - ▶ Technical inadequacies go to weight, not admissibility
- ▶ 3 Points of Inquiry

How Can it work?: California Example

Fitzhenry-Russell v. Dr. Pepper cont'd

▶ 3 Points of Inquiry:

- ▶ What do consumers think “Made from Real Ginger” means?
- ▶ Is it material to purchasing decisions?
- ▶ Does it cause a price premium?

▶ National Opinion Research Center (Chicago, IL)

▶ “Made from Real Ginger”

- ▶ “What is your understanding of the statement ‘Made From Real Ginger’ on the Canada Dry Ginger Ale?”
 1. *Ginger oil, steam extracted from ginger root*
 2. *Ginger root, not an extract*
 3. *Ginger oleoresin, extracted by solvent*
 4. *None of the above*

How Can it work?: California Example

Fitzhenry-Russell v. Dr. Pepper *cont'd*

▶ “Made from Real Ginger”

- ▶ “What is your understanding of the statement ‘Made From Real Ginger’ on the Canada Dry Ginger Ale?”

1. *Ginger oil, steam extracted from ginger root* 8.6%
2. *Ginger root, not an extract* 78.5%
3. *Ginger oleoresin, extracted by solvent* 4.8%
4. *None of the above* (8.1%)

How Can it work?: Focus Group examples

- ❑ **Martin v Monsanto (CD Cal., 2018)**
 - ❑ Focus group supports 3,000 person survey on importance of price to gallon value
- ❑ **In re Conagra Foods (CD Cal., 2015)**
 - ❑ Plaintiff's expert to use focus groups to design non-misleading survey questions

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