Consumer Understanding of Labels and Definitions

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Natural Explanations of Labels & Definitions

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(Un)natural Construction

Natural

Organic

Non-GMO (negative claims)

Food vs. Dietary Supplement vs. Functional Food
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

Unnatural Foods
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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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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
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.
As consumers become increasingly concerned with how food is produced and how farm animals are raised and treated, farmers and companies are responding with various labels and claims. Labels or claims generally aim to assure consumers that the food was produced in a better way — whether it be more humane, sustainable or healthy — but they can vary widely in how meaningful they are and in what is actually required.

The chart below is designed to help you better understand the different labels and examine your food on chicken. It's looked at 23 different labels you might find on a package of chicken, and what they actually require for 17 different areas that affect animal welfare (e.g., whether the chickens can go outside), public health (e.g., prudent antibiotic use) and sustainability (e.g., whether the chicken feed contains genetically engineered crops).

Click on the heading of each label column to see details on what the colors mean for that particular criteria.

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<tr>
<th>CHICKEN LABELS REPORT</th>
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- **Conventional**: No restrictions on how the chicken is raised.
- **Animal Welfare Approved**: Claims that animals were raised in a way that meets specific welfare standards.
- **Certified Humane**: Claims that animals were raised in a way that meets specific welfare standards.
- **USDA Organic**: Claims that the product is grown organically and meets specific standards.
- **USDA Organic Verdana**: Claims that the product is grown organically and meets specific standards.
- **USDA Organic Verdana - Humane**: Claims that the product is grown organically and meets specific standards.

For a more detailed explanation of each label, refer to the chart.
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.
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.
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.
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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State Consumer Protection Laws

► Variations

► Minimal standing

► Require some unfair or deceptive practice

► Common venues
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”? 
“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
“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
Evidence in Food Labeling Class Actions

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