



Consumers at odds with food  
manufacturers over natural  
foods with clean labels seek  
remedies in court.

Chemicals are present in everything—even natural foods. Some of the chemicals intrinsic in broccoli are on the unacceptable ingredient lists of Kroger Co., Safeway Inc., and Whole Foods Market.  
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**N**ATURAL, MINIMALLY processed foods are in demand, but food manufacturers and consumers have conflicting ideas of which ingredients make up natural foods with clean labels. Many consumers believe natural, clean-label foods should contain no artificial ingredients, no chemicals, and nothing unpronounceable. In addition, most consumers equate natural, clean-label foods with good health regardless of whether such

provocative blog entry by a food activist, a high-profile online petition, or a class-action lawsuit—even if the ingredient is natural. For example, consumers have referred to both ascorbic acid and alpha-tocopherol, the respective chemical names for vitamin C and vitamin E, in legal petitions for lawsuits challenging whether products are natural. As a consequence, manufacturers of “natural” processed foods made with artificial colors,

natural means. The U.S. Food and Drug Administration (FDA), which is responsible for regulating all foods except meat, poultry, and eggs, has avoided issuing an official definition for the term. From the FDA’s perspective, determining whether a food is natural is difficult because most foods undergo some form of processing and any food that has been processed is no longer a “product of the earth.” Anthony Pavel, Partner, Morgan, Lewis & Bockius LLP, provides context for the FDA’s viewpoint: “[The Federal Trade Commission] and FDA tried to define natural by rulemaking, and both agencies abandoned those efforts, largely citing resource limitations and other priorities. At its core, [natural] is being used as a marketing term, and issues of food safety will always (and should) take priority at FDA.” However, the FDA has distinguished what it considers unnatural: any food containing added color, artificial flavors, or synthetic substances. The U.S. Dept. of Agriculture has an official definition for natural and the FDA’s vague guidance for the term “natural” closely resembles the USDA’s official definition, which applies only to meat, poultry, and egg products: Meat, poultry, and egg products designated natural must be “minimally processed and contain no artificial ingredients or added color.”

The United States is not alone in its unwillingness to provide a clear, binding definition for the term natural. With the exceptions of France and the United Kingdom, most European countries have not provided a legal definition for the terms “natural” or “clean label.” The Food Standards Agency of the United Kingdom defines a natural product as being comprised of food and ingredients that are “produced by nature, not the work of man or interfered with by man.” The British agency’s definition further expresses that “[i]t is misleading to use the term to describe foods or

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foods are actually nutritious and healthful. In contrast, food manufacturers use ingredients such as high fructose corn syrup, sodium molybdate, sucralose, and calcium phosphate in foods labeled natural and all-natural. Because of this difference in interpretation, any food product label touting naturalness or simplicity is subject to scrutiny and challenge. Furthermore, any ingredient with a scientific or chemical-sounding name or that is otherwise unfamiliar may trigger a

artificial flavors, flavor enhancers, preservatives, stabilizers, genetically engineered ingredients (GMOs), and other seemingly unnatural elements not available in kitchen cupboards should beware and keep a good attorney on retainer.

## What Is Natural?

Perhaps the main cause of the litigious climate surrounding natural and clean-label foods is the inadequate regulatory guidance on what

Nevertheless, certain supermarket chains and retail stores have developed lists of unacceptable ingredients that appeal to U.S. consumers who want to purchase natural, chemical-free, minimally processed foods. Whole Foods Market refuses to sell food products containing any of 78 ingredients it considers unacceptable. The list includes artificial colors, artificial flavors, artificial sweeteners (e.g., aspartame, saccharin, and sucralose), azodicarbonamide (the yoga-mat component), bleached or bromated flour, high fructose corn syrup, nitrates/nitrites, and partially hydrogenated oils. Safeway Inc. and the Kroger Co. have created even longer lists of banned ingredients for their respective store brands *Open Nature*™ and

**Target Brands' Simply Balanced™** line is said to be free of artificial flavors, colors, and preservatives. Photo courtesy of Target Brands









**This table** lists some of the ingredients banned from all foods at Whole Foods Market and the all-natural store brands of Kroger Co. and Safeway Inc.

Augmenting the divergent interpretations of what constitutes clean-label food and who can be sued for offering premium natural products, consumers and consumer advocacy groups are not only filing lawsuits against big food companies with popular name brands. Whole Foods Market is the defendant in a class-action lawsuit filed in California last year; the suit alleges that the grocer's all-natural baked goods (in particular, mini muffins, soft-baked cookies, and gluten-free bakery items) contain synthetic ingredients. Whole Foods Market's motion to have the case dismissed was denied last month. The Kroger Co. is the defendant in a recently filed lawsuit that alleges the chickens used for its *Simple Truth*® premium-priced chicken products are not raised cage-free in a humane environment as advertised on package labels. In addition, Trader Joe's Co. recently announced a \$3.375 million settlement to resolve a lawsuit alleging that the grocery chain falsely marketed as 100% natural some of its store-brand foods that contained synthetic ingredients such as sodium acid pyrophosphate, xanthan gum, cocoa processed with alkali, and ascorbic acid. Without admitting to having done anything unlawful or misleading, Trader Joe's Co. will remove the phrases "all natural" and "100% natural" from the labels of the products named in the lawsuit.

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brominated vegetable oil is not on the FDA's list of additives that are generally recognized as safe.

### A Natural Solution

Although food manufacturers would like to designate which products in their portfolios are natural with clean labels, contentious consumers will not allow them to do so. Food activists, consumer advocacy groups, and nongovernmental organizations have taken the terms "natural," "all-natural," and "simple," and turned them into what

claim. I would also recommend monitoring the status of ongoing litigation to identify what products/ingredients are being targeted and which lawsuits are getting past a motion to dismiss," Pavel says. "It is important to put yourself in the shoes of a consumer that has zero understanding of food science and ask, 'Would the claims on this result in confusion or misunderstanding?'" he adds. Although these precautionary steps can delay or lengthen the product development process, they are essential because

avoid labeling anything made with genetically engineered ingredients as natural. Despite the fact that more than 70% of processed foods contain GMOs, Vermont's recent statutory requirement for the labeling of foods with GMO ingredients is likely a harbinger of what's to come. The Vermont law and ones similar to it have "set the stage for an unmanageable patchwork of labeling requirements across the U.S.," Pavel says. Without any official clarification on these issues from the FDA, food companies can expect to incur extra costs for creating different labels for identical products being sold in different states (e.g., GMO labels in Vermont) and fending off lawsuits over natural, clean-label foods. "Happily for the companies, these cases do not always succeed," Greenberg says. **FT**

*Some courts are giving credence to consumers' idiosyncratic beliefs, further muddying interpretations of what's natural and which ingredients shouldn't appear on clean labels.*

they want them to be. Moreover, some courts are giving credence to consumers' idiosyncratic beliefs, further muddying interpretations of what's natural and which ingredients shouldn't appear on clean labels. "These are the courts where state-based consumer fraud causes of action have been getting traction, which in turn [spurs] additional lawsuits in those courts. A court where similar cases have made it past a motion to dismiss will be favored by the plaintiff's bar," Pavel explains. In addition, such lawsuits "are based on accusations that the company has violated a state's consumer protection law rather than federal law or regulation," says Eric Greenberg, Principal Attorney, Eric F. Greenberg P.C.

In an ideal judiciary scenario, lawsuits involving food label features not regulated by the FDA or the USDA would be dismissed or otherwise fail, but there is really only one way to be sure: "The easiest way is to not use natural claims," says Pavel. For those determined to use the terms "natural," "clean," or "simple," "companies need to look at any product that bears a natural claim and perform a farm-to-fork analysis of that product to shore up the basis and justification for the

"plaintiffs' theories are often rather creative and do not match up with what federal regulations consider acceptable or unacceptable," says Greenberg.

In addition, it may be wise to

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