

Natural-Labeling Litigation: Preparing for the Next Five Years

by Stephen Safranski and Adam Welle

The flurry of litigation initiated over “natural” food labeling began half a decade ago and entered a new stage this January, as the FDA declined an invitation from three federal courts to formally define the term “natural” on food and beverage labels. Despite the hopes of many in the industry, the FDA’s decision signifies that the meaning of the term likely will continue to be subject to interpretation and re-interpretation by courts in all 50 states and that the “natural” litigation tempest will continue unabated.

But after five years of lawsuits, and dozens of rulings (but, as of yet, not one trial), some predictability has emerged concerning the litigation risks surrounding the “natural” label. While many questions remain unanswered, there are concrete steps that food and beverage producers should take in evaluating and managing their litigation risk and several important litigation tools available if they do face litigation.

The “Natural” Litigation Phenomenon: 2009 - 2014

It’s the perfect litigation storm, fueled by the convergence of two powerful market forces, and permitted to grow through regulatory inaction.

No doubt, food production in the modern era has experienced a technological revolution with rapid developments in industrial-scale farming, mass-production and processing technologies, and bioengineering. Indeed, in the 20 years since

they were first approved by the FDA, genetically modified (“GM”) foods have seen their share of the grocery aisles grow from zero to more than 70%.

But, as anyone who has recently walked down the same grocery aisles in recent years can tell you, there has been a “natural foods” counter-revolution in consumer demand. Health-conscious and environmentally concerned consumers increasingly demand food options that are less conventional – including foods that are certified organic, locally sourced, ecologically sustainable, without chemical additives or artificial ingredients, humanely raised, fresher, and more “authentic.”

Food and beverage producers have tried to meet those consumer demands in several ways, including participation in the USDA’s National Organic Program and investment in sustainable agricultural practices. But the most significant trend to meet this demand is the development of foods that can be marketed and labeled as “natural” because they lack synthetic ingredients and artificial preservatives – which became the second most commonly used labeling claim and accounted for annual sales exceeding \$40 billion last year, according to one recent report. But “natural” can mean different things in different contexts. A “natural” label on a box of manufactured, mass-produced crackers or a soft drink does not necessarily convey the same meaning as it would on a bushel of tomatoes.

The FDA and other federal regulators would have been well suited to provide a

bright-line, formal, regulatory definition of “natural.” Indeed, the FDA has adopted formal, precise definitions for other imprecise labeling terms, such as “healthy,” “low fat,” “healthy,” “light,” and “a good source.” But there is no formal, regulatory definition of “natural.” Instead, after the FTC passed on regulating the term in the 1980’s, the FDA and USDA have separately offered only informal guidance on the meaning of the term.

FTC: No regulation. The FTC initiated efforts to regulate the term “natural” more than thirty years ago, but terminated them because of the difficulty in finding a suitable definition that would apply to all contexts, including on mass-produced packaged foods. As the FTC put it, “[i]t is unlikely that consumers expect the same thing from a natural apple as they do from natural ice cream.”¹

FDA guidance. Although the FDA has formally defined “natural flavors” by regulation,² it has not provided a formal regulatory definition for “natural.” Instead, the FDA offered informal guidance, stating that it views “natural, as meaning that nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food.”³ Although the FDA has enforced this guidance with warning letters objecting to foods containing “synthetic chemical preservatives,” like sodium benzoate and potassium sorbate, it has also indicated that a processed corn derivative, high-fructose corn syrup (“HFCS”), could

also be labeled “natural.”⁴ But, despite its guidance and ad hoc determinations, the FDA has repeatedly declined requests to adopt a formal definition.

USDA guidance. The USDA’s guidance on the meaning of “natural,” which applies only to meat- and poultry-based products, dates back to 1982. Under that guidance, “natural” means that the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative, or any other artificial synthetic ingredient, and the product and its ingredients “are not more than minimally processed.”⁵

Last year, the USDA separately issued draft guidance for distinguishing between “synthetic” and “natural” ingredients for purposes of the National Organic Program. Under that draft guidance, an ingredient extracted from a natural source can be classified as “nonsynthetic” (i.e., natural) if the extraction process does not transform the ingredient into a different substance through chemical change, or transform the substance into a form that does not occur in nature, and any synthetic processing aids are substantially removed from the final ingredient.⁶ Alternatively, the USDA draft guidance provides, “products of naturally occurring biological processes,” including fermenting, composting, and enzymatic processes, “are considered natural and nonsynthetic,” even when the processing

¹ FTC, *Termination of Proposed Trade Regulation; Rule on Food Advertising*, 48 Fed. Reg. 23,270 (May 24, 1983).

² 21 C.F.R. § 101.22(a)(3).

³ 58 Fed. Reg. 2,302, 2,407 (Jan. 6, 1993).

⁴ See Food Navigator, “HFCS is natural, says FDA in a letter,” (July 8, 2008), available at <http://www.foodnavigator-usa.com/Suppliers2/HFCS-is-natural-says-FDA-in-a-letter>.

⁵ See USDA, *Food Standards and Labeling Policy Book* (2005).

⁶ USDA Agricultural Marketing Service, National Organic Program, NOP 5033, April 26, 2013.

involves chemical transformation.⁷ Although it applies to the National Organic Program, this guidance may shed light on the more general “natural” labeling question.

With an increasingly technologized food industry attempting to meet consumer demand for foods with a natural aura, the FDA’s failure to formally regulate the term “natural” made conditions ripe for a vortex of class litigation to develop.

The class litigation deluge. While most food producers have employed the “natural” label in accordance with FDA or USDA guidance, as applicable, the absence of a formal regulation has permitted class-action attorneys to file hundreds of class actions challenging “natural” labels under state consumer-protection laws, offering their own definitions of what a hypothetical “reasonable consumer” might understand. That strategy potentially puts judges and juries across all 50 states in the position of determining what a “natural” label means to millions of different consumers and whether an ingredient – whether HFCS, alkalized cocoa, or soybean oil – lives up to that meaning.

In the face of these actions, a few judges have stayed cases to ask the FDA to act.⁸ But the agency declined – including as recently as January 2014 – claiming that further action would require a cumbersome

public-hearing process and involvement from other agencies.⁹

Thus, there is every reason to believe that the “natural” litigation storm will continue to surge, and food and beverage producers will need to both appreciate and manage their litigation risk and be prepared to deal with class litigation.

Five Steps for Managing “Natural” Litigation Risk

While food producers using a “natural” label cannot rely on FDA intervention anytime soon, there are five practical steps that they can take now to determine and manage legal risks. At the outset, it is important to point out these are recommendations for managing litigation risk, as distinct from the issue of legal compliance. No matter how truthful and non-misleading a “natural” label may be in the context in which it is used, the risk of costly class litigation still exists in this environment and that risk needs to be carefully assessed and weighed against the value that label may have to the company and its consumers.

Audit your ingredients. Any attempt at managing litigation risk around a “natural” label must include an ascertainment of the risk of suit, based on examination of each product’s ingredients and production methods. Applicable FDA or USDA guidance provides the framework for this analysis, but the analysis should not end there. It should also take into account the types of ingredients that are frequently challenged in consumer litigation under the “reasonable consumer standard,” accounting not only for the risk of liability but the risk of being targeted in costly and

⁷ *Id.*

⁸ *E.g., Holk v. Snapple Bev. Corp.*, No. 07-cv-3018, 2010 U.S. Dist. LEXIS 81596 (D. N.J. Aug. 10, 2010) (staying action for six months to provide opportunity for FDA to take steps for formal definition of natural); *Barnes v. Campbell Soup Co.*, No. 12-cv-5185, 2013 U.S. Dist. LEXIS 118225 (N.D. Cal. July 25, 2013) (same); *Cox v. Gruma Corp.*, No. 12-cv-6502, 2013 U.S. Dist. LEXIS 97207 (N.D. Cal July 11, 2013).

⁹ Jan. 6, 2014 Letter from Leslie Kux to the Hon. Yvonne Gonzalez Rogers, the Hon. Jeffrey S. White, and the Hon. Kevin McNulty.

disruptive class litigation. While plaintiffs' attorneys continue to come up with creative new theories for challenging the truthfulness of a "natural" label, several overlapping categories of ingredients and food additives have been subject to repeated challenge:

- **Artificial Preservatives.** At the highest end of the risk spectrum are artificial preservatives, like sodium benzoate and potassium sorbate, which the FDA itself has found to be prohibited by its "natural" policy.
- **"Highly Processed" Ingredients.** Many of the "natural" lawsuits filed in recent years challenge ingredients that are alleged to be "highly processed" or challenge food-processing techniques that allegedly fundamentally change an ingredient from its natural source. These include HCFS, high-maltose corn syrup, ascorbic acid, and xanthan gum, among many others. While several complaints in this category have been dismissed at the pleading stage, "processing" continues to be a hot-button issue in the "natural" litigation arena.
- **GM Ingredients.** The latest wave of "natural" lawsuits challenges foods that contain GM ingredients, on the theory that transgenic crops do not occur in nature. For example, products containing corn, soy, and

sugar beets are frequent targets, as these crops are predominantly GM in the United States. Some ingredients, like HCFS, are frequently challenged as both allegedly highly processed and genetically modified. Ingredients that actually contain protein or DNA, such as milled corn products, would have a higher risk profile than those that are merely produced with GM substances and have no GM components.

While any "natural" label carries some risk in this litigation environment, understanding whether a food product contains these kinds of frequently targeted ingredients is critical to any risk assessment.

Consider your risk tolerance and the value of "natural" to your brand. The other half of the risk-benefit equation, of course, is the manufacturer's tolerance for litigation risk and the value of continuing to use the "natural" label on a given product. For some products, "natural" may be critical to the brand and worth the burdens and risks associated with defending it in court. On the other hand, the manufacturer of a product with a simple, easily understood ingredient list may conclude that the product's "naturalness" is already apparent to consumers without the label, and decide not to encounter unnecessary litigation risk.

Consider defining "natural" for consumers or alternatives to "natural". One method to mitigate the risk of a "natural" lawsuit is for the manufacturer to define for consumers what it means by the term. For example, a recent federal court decision, *Balser v. Hain Celestial Group, Inc.*, dismissed a "natural" class action because, among other reasons, on its website "Defendant actively defines what its use of

natural means, so that no reasonable consumer could be deceived.”¹⁰ Providing explanatory information about the meaning of natural and a product’s ingredients, while not litigation-proof, could buttress a consumer-fraud defense, especially if the manufacturer references that explanation on the packaging at the point of sale. Similarly, qualifying or modifying the “natural” term could also manage litigation risk. For example, “contains natural ingredients” or “no artificial ingredients” may be feasible alternatives to “all-natural.”

Consider ingredient modifications.

Another potential solution, which some food companies have recently adopted, has been to eliminate the ingredients that are frequent litigation targets, including HFCS and GM crops. This option necessarily has to be balanced against the cost of alternative sourcing, including the difficulties in obtaining identity-preserved non-GM ingredients, but this step may make business sense regardless of litigation risk.

Involve legal counsel in the risk-assessment process. An important and overlooked aspect of this evaluation process is the importance of conducting it under the direction of counsel and within the scope of the attorney-client privilege. This process requires a frank and sensitive legal evaluation, and without the involvement of counsel, documents and communications generated in the re-examination of a “natural” label could be subject to disclosure in a subsequent lawsuit. But, if counsel is properly involved and confidentiality is maintained, even communications between businesspeople for the purpose of facilitating counsel’s advice should be protected by the attorney-

client privilege or work-product doctrine.¹¹ Thus, counsel should supervise and have substantive involvement in this process, and any documents generated should be labeled as attorney-client privileged and shared only between members of the team that is conducting the review.

The “Natural” Food Lawyer’s Cookbook

Companies faced with a “natural” class action have several defense strategies available. Although no “natural” case has gone to trial, the last five years have provided a useful proving ground for pre-trial litigation strategies, including motions for early dismissal and responding to class certification. While the following strategies are anything but exhaustive, and there are many others specific to the circumstances and the statutes invoked in a given lawsuit, each of these should be an essential part of the defense toolkit and given careful consideration from the beginning of the litigation.

Preemption and Primary Jurisdiction. Food and beverage companies

¹¹ *Long v. University*, 204 F.R.D. 129 (S.D. Ind. 2001) (holding that emails between university employees regarding communications and legal advice from lawyer were privileged); *Johnson v. Sea-Land Serv. Inc.*, No. 99 Civ. 9161, 2001 U.S. Dist. LEXIS 11447, at *4 (S.D.N.Y. Aug. 9, 2001) (“The attorney-client privilege affords confidentiality to communications among clients, their attorneys, and the agents of both, for the purpose of seeking and rendering an opinion on law or legal services, or assistance in some legal proceeding, so long as the communications were intended to be, and were in fact, kept confidential.”); *FDIC v. Bryan*, No. 1:11-cv-2790, 2012 U.S. Dist. LEXIS 189743, at *17 (N.D. Ga. Nov. 28, 2012) (“[T]he fact that the email was not directly to or from an attorney does not preclude application of the attorney-client privilege.”)

¹⁰ No. CV 13-05604, 2013 U.S. Dist. LEXIS 180220, at *3-4 (C.D. Cal. Dec. 18, 2013).

have invoked the FDA's regulatory authority to argue for dismissal on the basis of preemption and primary jurisdiction. These arguments have had only limited success.

Preemption arguments have had little success, with the FDA's failure to adopt formal notice-and-comment regulations defining "natural" being a primary obstacle.¹² But preemption has been more successful in defending "natural" claims on labels for products with meat or poultry that are pre-approved by the USDA.¹³ The future strength of preemption arguments, particularly implied preemption, however, remains very much in play because the Supreme Court recently granted certiorari in *POM Wonderful v. Coca-Cola Co.*,¹⁴ addressing whether private parties can bring Lanham Act claims challenging product labels that are regulated under the Federal Food, Drug, and Cosmetic Act ("FFDCA"). Although the appeal concerns the interplay between two federal statutes, the Court's analysis is likely to influence the future of preemption arguments against state-law consumer protection claims as well.

Defendants have had more success in asking courts to dismiss or stay "natural" class actions under the primary-jurisdiction doctrine, which allows judges to take a back seat to federal agencies charged with

¹² E.g., *Holk v. Snapple Bev. Corp.*, 575 F.3d 329, 339-342 (3d Cir. 2009); *Lockwood v. ConAgra Foods*, 597 F. Supp. 2d 1028, 1031 (N.D. Cal. 2009); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-cv-4387, 2011 U.S. Dist. LEXIS 57348, at *27 (N.D. Cal. May 26, 2011).

¹³ See *Barnes v. Campbell Soup Co.*, No. 12-cv-05185, 2013 U.S. Dist. LEXIS 118225, at *18-19 (July 25, 2013) (preempting plaintiff's challenge to "Natural Chicken Soup" label, but not to "Natural Vegetable Soups").

¹⁴ 187 L. Ed. 701 (2014).

policymaking that governs a given dispute. Primary-jurisdiction arguments enjoyed early success at the beginning of the "natural" litigation storm, but that success declined when the FDA declined to accept referrals to determine the meaning of "natural." The Ninth Circuit's *Pom Wonderful* decision combined with GMO-based "natural" claims brought a resurgence of primary-jurisdiction referrals in 2013, but it is unclear how the courts will consider the argument in light of the FDA's recent refusal to weigh in on the GMO/"natural" question.

As they are highly sensitive to current developments at the FDA and other regulatory agencies, the strength of these defenses should be continually reevaluated in light of those developments.

Twombly/Iqbal. Some recent decisions suggest that manufacturers may be able to defeat "natural" class actions in a motion to dismiss by attacking the plausibility of the complaint's theory of consumer deception. Namely, does the plaintiff's theory of "natural" deception jive with the context in which "natural" is being used?

In *Bell Atlantic Co. v. Twombly and Iqbal v. Ashcroft*, the Supreme Court established a "plausibility" standard for surviving a motion to dismiss.¹⁵ No complaint can survive Rule 12(b)(6) and proceed to discovery unless it *plausibly* suggests that the claimant is entitled to relief. Because they are interpreting a rule of civil procedure, the *Twombly* and *Iqbal* standard applies equally to state-law claims asserted in federal court.

Applying *Twombly* and *Iqbal* to the state-law "reasonable consumer" standard that often governs the plaintiffs' consumer-

¹⁵ *Iqbal*, 556 U.S. 662, 679 (2009); *Twombly*, 550 U.S. 544, 555-557 (2007).

protection claims may provide a powerful argument for dismissal. In doing so, a defendant may be able to use the lack of a clear, definite understanding of “natural,” and the FDA’s own refusal to formally define the term, to challenge the plausibility of a plaintiff’s allegation that a significant portion of the consuming public shares her understanding of the term “natural.”

Consider the example of *Pelayo v. Nestle S.A.*, a case in which the consumer challenged the “natural” labeling of Buitoni pastas because they were “manufactured” and contained allegedly artificial ingredients. Applying *Twombly*, the court dismissed the claim because the plaintiff had not offered a plausible definition of “natural” in this context. The court rejected the proposed definition of “produced or existing in nature” because “this definition clearly does not apply to the Buitoni Pastas because they are a product manufactured in mass, and the reasonable consumer is aware that Buitoni Pastas are not ‘springing fully-formed from Ravioli trees and Tortellini bushes.’”¹⁶ It then rejected various definitions of “natural” that the plaintiff mixed and matched from regulatory guidance, ultimately concluding that “[g]iven the FTC’s finding that the term ‘natural’ can be used in numerous contexts, it is implausible that a significant portion of the general consuming public or of the targeted consumers’ would be deceived or misled by the use of the term ‘All Natural’ on the Buitoni pastas.”¹⁷

Ingredient-list defense. Where the definition of “natural” might be vague and depend on the context and the product, the ingredients list is the logical place for food

producers to provide consumers with additional clarification. And indeed this argument has had some success, with some courts rejecting “natural” fraud claims when the allegedly unnatural ingredients are listed on the nutrition facts panel.¹⁸ As one court put it, a “100% Natural” claim could not be “viewed in isolation and must be read in the context of the entire package, including the ingredient panel.”¹⁹ Other courts have sometimes rejected this argument, however, reasoning that clarification is one thing, but the ingredient list on the back cannot contradict the “natural” label on the front of the packaging.²⁰

Standing. Standing can be challenged when a plaintiff has not sufficiently alleged an injury, when a future injury is unlikely, or when claims involve products not purchased by the named class plaintiff.²¹

¹⁸ *Id.* (“[T]o the extent there is any ambiguity regarding the definition of ‘All Natural’ with respect to each of the Buitoni Pastas, it is clarified by the detailed information contained in the ingredient list.”); *Chin v. General Mills*, No. 12-2150, 2013 U.S. Dist. LEXIS 77345, *18 (D. Minn. June 2, 2013) (“[T]he Court agrees with General Mills and finds that the specific terms determine the scope of the express warranty that was allegedly made to the Plaintiffs.”).

¹⁹ *Chin*, 2013 U.S. Dist. LEXIS 77345 at 18.

²⁰ *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-1586, 2013 U.S. Dist. LEXIS 47126, at *34-36 (N.D. Cal. Apr. 1, 2013).

²¹ *E.g.*, *Thomas v. Costco*, No. 5_12-cv-02908, Dkt. 40 (N.D. Cal. Apr. 9, 2013) (“Because she has not asserted that she received a product different from the one as labeled, she has not met the injury-in-fact requirement for standing. . . . The Court finds that the allegations of the remaining claims do not provide a clear and unambiguous account of the allegedly fraudulent, deceptive, or misrepresentative

¹⁶ *Pelayo v. Nestle USA, Inc.*, No. 13-5213, 2013 U.S. Dist. LEXIS 154434, *12 (C.D. Cal. Oct. 25, 2013).

¹⁷ *Id.* at *14-16.

Standing goes to the heart of whether there is a case or controversy for the Court to decide under Article III of the Constitution. And if the named plaintiff never purchased the product, wasn't deceived or didn't read the complained-of label, or otherwise wasn't affected by the alleged conduct, there is no injury for the Court to redress and the case should be dismissed. This defense can be effective for winnowing down a class complaint that makes scattered allegations about various products, labels, and other harms that are not specified or realized by the named plaintiff.²²

Class Certification. Of course, in a class action, "the fight over class certification is often the whole ball game."²³ The denial of class certification may spell the end of the litigation because it is not economical for the plaintiff to continue, and the grant of class certification can put extraordinary settlement pressure on a defendant. Any manufacturer faced with a "natural" class action should start developing a robust defense to class certification, and several grounds of opposition are promising in this context.

- **Ascertainability.** Every class action must include a class that is "ascertainable," or administratively feasible to

statements with the specificity and particularity required by Rule 9.").

²² *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (quotations omitted)

²³ *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006).

determine who is in the class. Recent appellate decisions from the U.S. Court of Appeals for the Third Circuit have suggested that this requirement cannot be met in consumer class actions involving low-value, consumable products, where neither the defendant nor the class members have sales records or receipts that would identify individual class members.²⁴ This approach would establish a strong argument against class certification in "natural" cases, involving thousands or millions of anonymous, low-value purchases. And in February, the Northern District of California denied class certification of an "all-natural" case on "ascertainability" grounds precisely because the manufacturer defendant generally did not sell directly to consumers and, because of due process concerns, the court was unwilling to determine class membership based simply on the class members' say-so.²⁵

- **Commonality and Predominance.** Attacking the existence and predominance of common issues is another key strategy for opposing

²⁴ See *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

²⁵ *Sethavanish v. Zoneperfect Nutrition Co.*, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2004); see also *In re Pom Wonderful, LLC*, 2014 U.S. Dist. LEXIS 40415, at *24 (C.D. Cal. Mar. 25, 2014) (denying class certification in beverage-labeling suit because class included millions of purchasers and "[f]ew, if any, consumers are likely to have retained receipts during the class period").

class certification. Even in cases in which every class member was exposed to the same “natural” product label at the point of sale, the defendant can argue that individualized issues of materiality, reliance, and causation predominate because “natural” can mean different things to different consumers and the label may not have influenced the consumer’s buying decision. For example, one federal court recently found commonality and predominance lacking because the plaintiff “fail[ed] to sufficiently show that ‘natural’ has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant’s representation of natural in light of the presence of the challenged ingredients would be considered a material falsehood by class members.”²⁶

But the Supreme Court’s 2013 *Comcast Corp. v. Behrend*²⁷ suggests that food producers have a compelling argument that class certification can be denied because individualized injury and damages issues predominate. In *Comcast*, the Supreme Court instructed that predominance requires that injury and damages be “capable of measurement on a classwide basis.”²⁸ But in a “natural” class, while the plaintiffs

typically seek damages in the form of a “price premium,” the actual price a consumer pays and the existence of any “premium” would vary based on the identity of the retailer, the quantity purchased, or whether any promotions or discounts were offered – requiring a customer-by-customer analysis of information that would have to be obtained from each consumer. This reality has led several courts, most recently in *Astiana v. Ben & Jerry’s Homemade*²⁹ and *In re Pom Wonderful, LLC*³⁰ to deny class certification for damages classes on predominance grounds.

Conclusion

The law on “natural” labeling is far from settled, and will likely remain so as long as the term continues to occupy a regulatory void. But lessons from five years of litigation are beginning to give food and beverage producers the tools they need to manage their future litigation risk and more

²⁶ *Thurston v. Bear Naked, Inc.*, No. 11-cv-02890, 2013 U.S. Dist. LEXIS 151490, *24 (S.D. Cal. July 30, 2013).

²⁷ 133 S. Ct. 1426 (2013).

²⁸ *Id.* at 1433.

²⁹ No. C 10-4387, 2014 U.S. Dist. LEXIS 1640, at *39 (N.D. Cal. Jan. 7, 2014) (no predominance because “Ben & Jerry’s does not sell retail, and does not set retail prices. Establishing a higher price for a comparable product would be difficult because prices in the retail market differ and are affected by the nature and location of the outlet in which they are sold. Moreover, individualized awards of monetary restitution would require individualized assessments of damages based on how many packages of ice cream each class member purchased.”)

³⁰ *Pom Wonderful*, 2014 U.S. Dist. LEXIS 401415, at *18-19 (“where, as here, consumers buy a product for myriad reasons, damages resulting from the alleged misrepresentations will not possibly be uniform or amenable to class proof”).

effectively defend their labels in court if necessary.

Stephen Safranski and Adam Welle are trial attorneys at Robins, Kaplan, Miller & Ciresi L.L.P. They represent Food and Beverage companies in complex business disputes and class actions involving false advertising, labeling, the protection of trade secrets, antitrust, and unfair competition. spsafranski@rkmc.com and ahwelle@rkmc.com.