

Navigating the Evolving

Landscape for Food Colors

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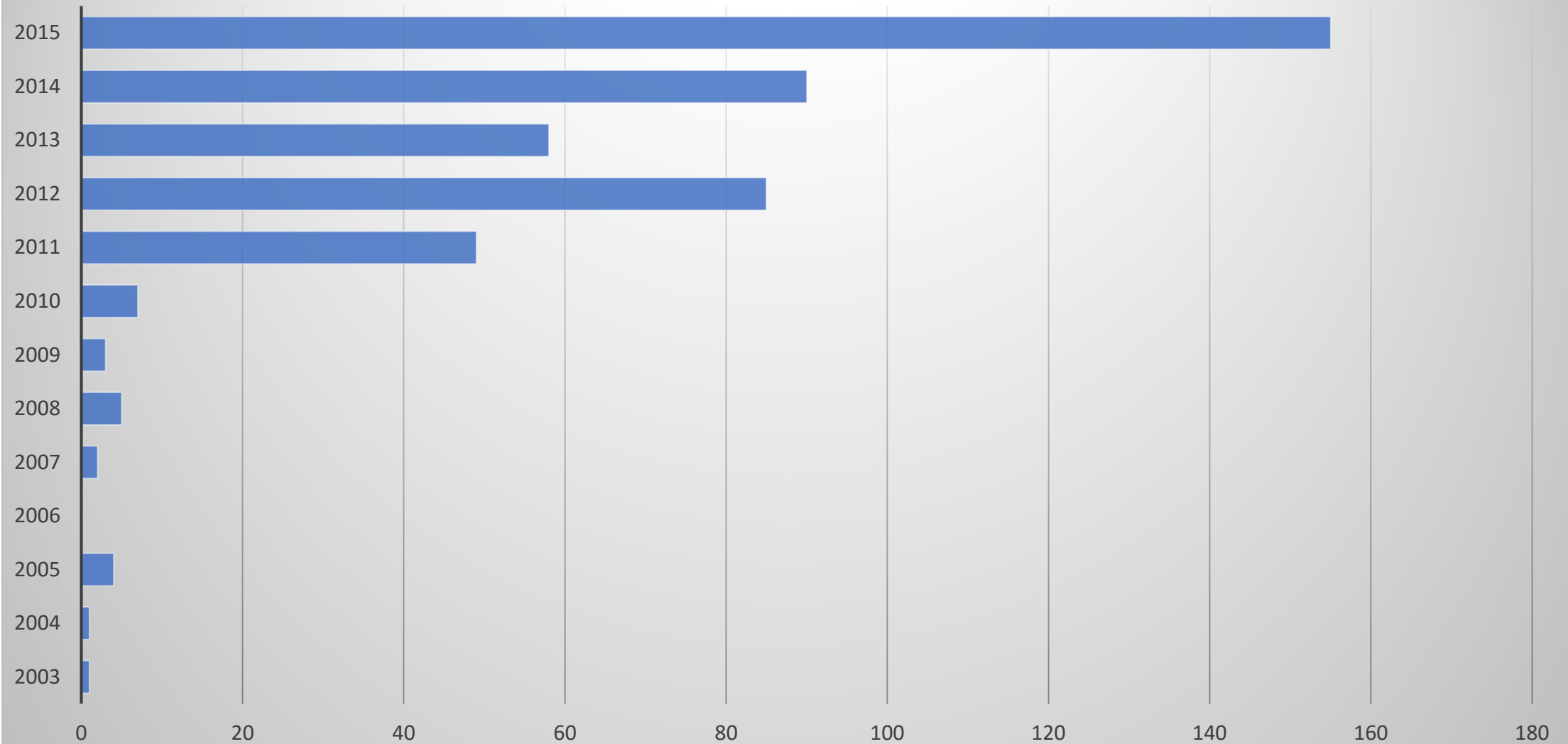
EVENT DATE: NOVEMBER 15-17, 2016

# Objection! How Consumer Class Actions are Challenging “Natural” Labeling

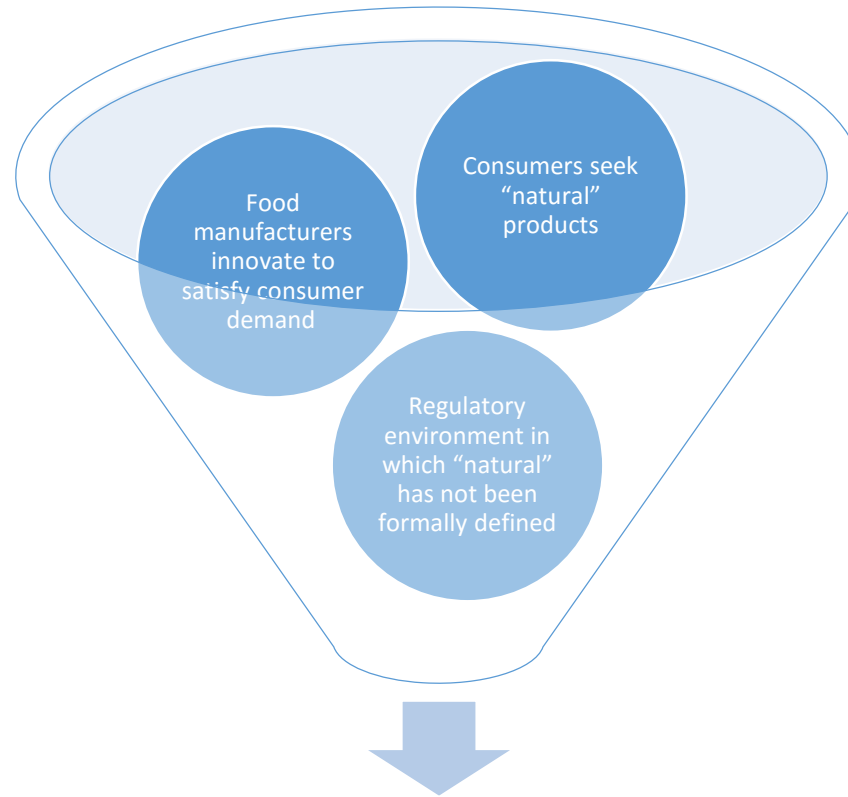
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## “Natural” and Food Claims Class Action Lawsuits (2003 - 2015)



# How Did We End Up Here?



"Natural" Labeling Litigation



Proposed rule for natural foods in 1974



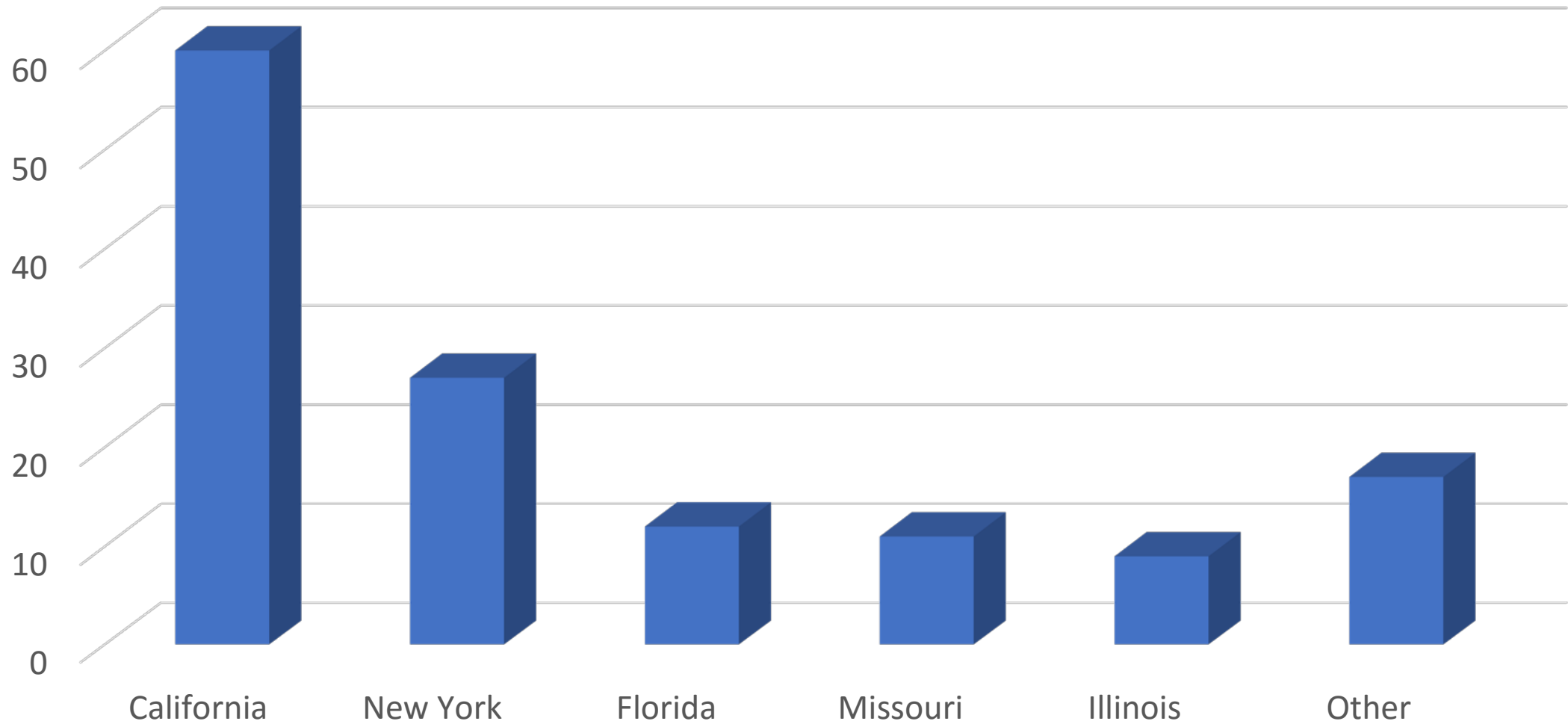
Established an informal policy regarding the use of natural in meat and poultry products



Adopted an informal policy regarding natural

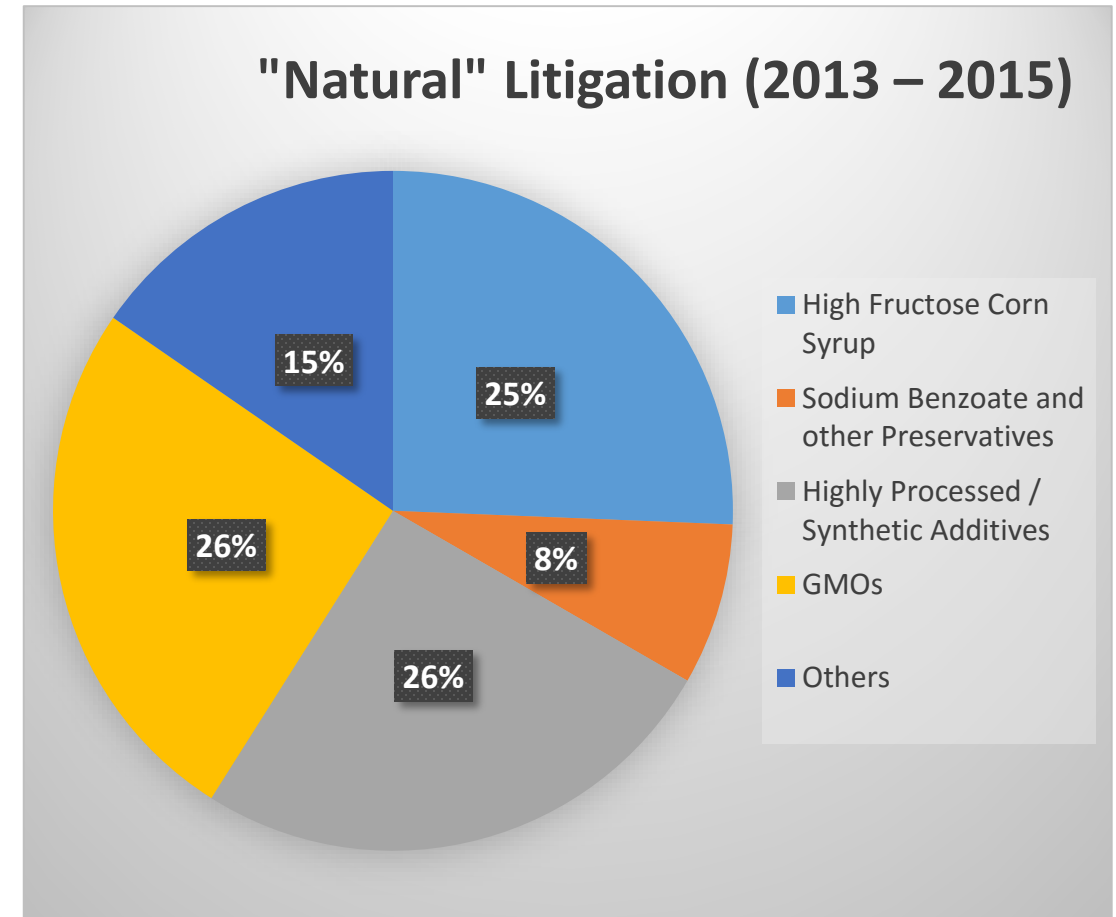


## 2015 Class Action Filings by Jurisdiction



Cases can largely be divided into four categories:

- 1) High Fructose Corn Syrup
- 2) Artificial Preservatives
- 3) GMOs
- 4) Highly Processed / Synthetic Ingredients



# What About Challenges Based on Added Color?

- FDA's current policy on the use of the term "natural" in labeling human food specifically prohibits labeling a food as "natural" if it contains added color, regardless of source.
- But...challenges to food products containing 4-MEI in California because of Prop 65 have occurred.



# “Natural” Labels – What Types of Products Have Been Challenged?



# A Case is Filed – What is Likely to Happen?

Once a case is filed, it is either dismissed at pleading stage, dismissed after a failed motion to certify the class of plaintiffs or settled

- Dismissal in pleading stage
  - Courts have been frenetic and therefore not likely for defendants
- Voluntary dismissal by plaintiffs if class is not certified
  - Defendants are succeeding more frequently but typically after costly discovery
- Settlement

# Class Action Settlement

- Those cases that have settled are characterized by a settlement fund and some types of labeling or ingredient modification
  - Disbursed from the settlement fund:
    - Premium “refund” to class members either with or without proof of purchase that are capped, i.e., \$0.50 per product up to \$20 per class member
    - Plaintiffs’ attorney fees
  - Defendants may also agree to modify the label claims for the implicated products although this may not always mean simply removing “natural” or “all natural” label claims

# Impacts of Litigation – What’s Next

## 1) Changing Product Labels

- Removing “natural,” “all natural” and “100% natural” on products that contain ingredients whose naturalness were challenged in the litigation
- Shifting claim to qualifying language
  - “natural blueberries”
  - “natural flavors”
  - “no preservatives”
- Modifying claim language
  - “fresh,” “simple,” “wholesome,” “nothing artificial,” “preservative free” – NOT LITIGATION PROOF!
- Not removing natural claim, but changing ingredients in the implicated products
  - Removing HFCS and replacing with sucrose

# Impacts of Litigation – What’s Next?

2) “Natural Litigation may spur

Regulatory action in the future

- Despite plaintiffs’ general lack of productivity in the courtroom, the pace of new “natural” cases has not slowed tremendously
- Plaintiffs may marshal sufficient evidence to convince FDA that consumers are misled and regulation needed





# Impacts of Litigation – What's Next?



3) Litigation threat spreading beyond food industry

# Impacts of Litigation – What's Next?

4) Consumers will continue to challenge food claims and food ingredients outside the courtroom

- Blogs
- Social media
- Other news and media outlets



# Impacts of Litigation – What’s Next?

- 5) Plaintiff challenges to “natural” labeling will continue but evolve
- Challenging food label claims beyond “natural”
    - “raw,” “100% raw” and “never heated”
  - “Natural” label challenges will delve deeper
    - Challenging “natural” label claims because of manufacturing processing, i.e., preservatives derived from an enzymatic process
    - Challenging “natural” label claims not due to how an ingredient is produced but because the ingredient has other uses which calls into question its inherent naturalness
    - Challenging “natural” label claims because ingredient was grown with the use of pesticides, insecticides, fungicides or herbicides
    - Challenging “natural” label claims because of ingredient solvents
  - Legal challenges pivoting to other food labeling claims
    - Allegations of false statements of fact
    - Alleged misrepresentation of health benefits of a food product



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# THANK YOU!

Questions?

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