

Is the Paradigm Shifting?

A Look at How Litigation & Regulatory Challenges are Shaping the Food and Food Ingredient Industries

Joanna R. Drake



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Natur

HELLO
I AM...

real...

100% Good

SUING YOU

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No Artificial Colors or Flavors

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Proposed rule for natural
foods in 1974



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

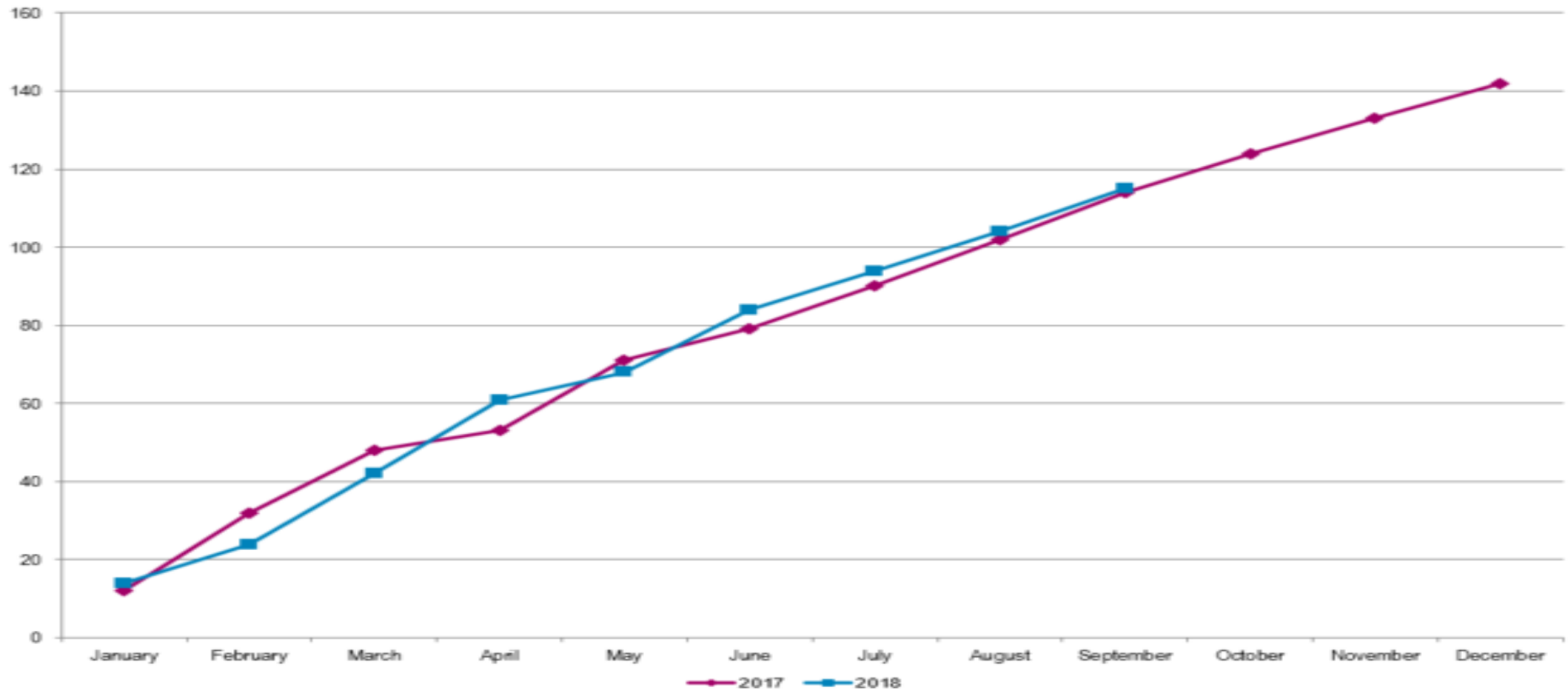


Adopted an informal policy
regarding natural; RFI on use
of “natural” on food labels



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Annual Filing Trends



Source: PerkinsCoie

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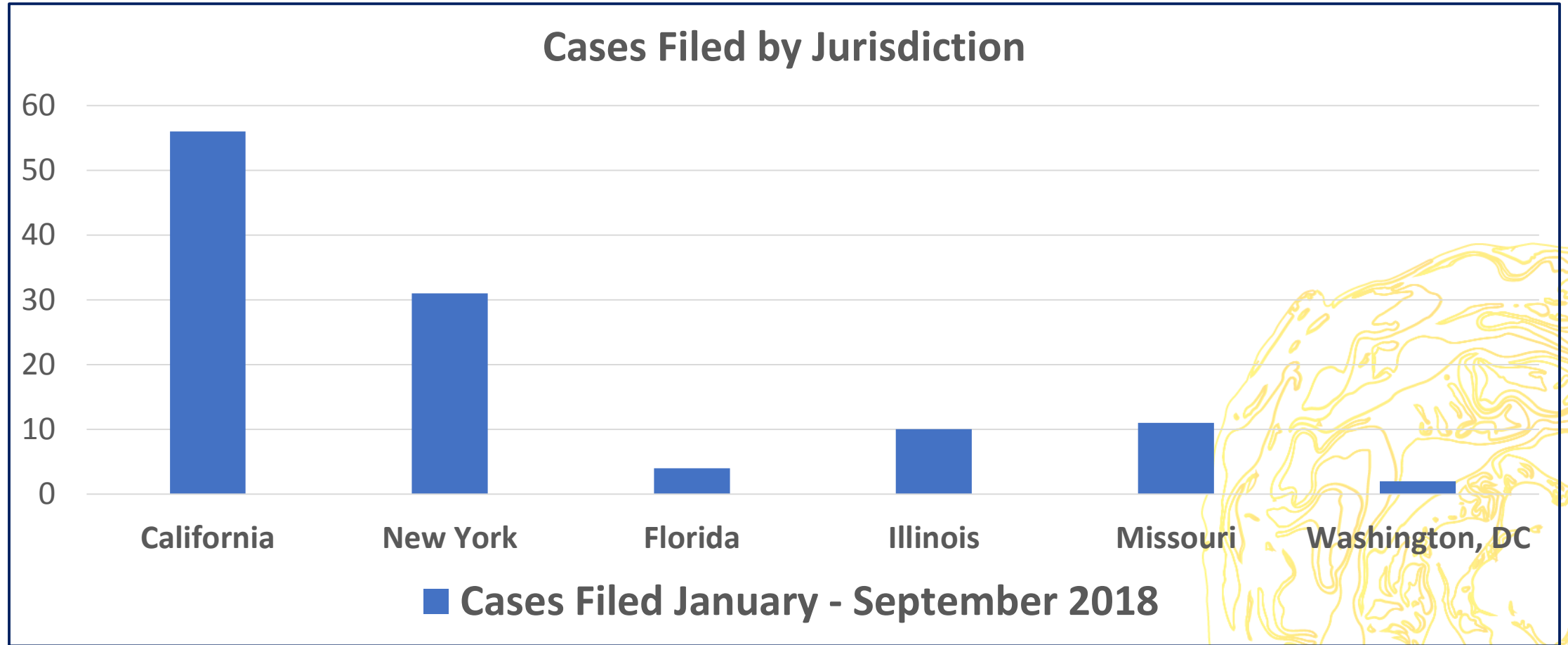
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Food Class Actions – The Surge

1. In 2008, there were only **19** consumer class actions targeting food manufacturers for false labeling claims
2. By 2015, **118** new actions on federal court dockets
3. The pace of filings continued in 2016 with at least **171** new consumer class actions
4. Through the end of 2017, over **140** new cases filed
5. In 2018, no signs of abatement: almost **120** cases filed through September



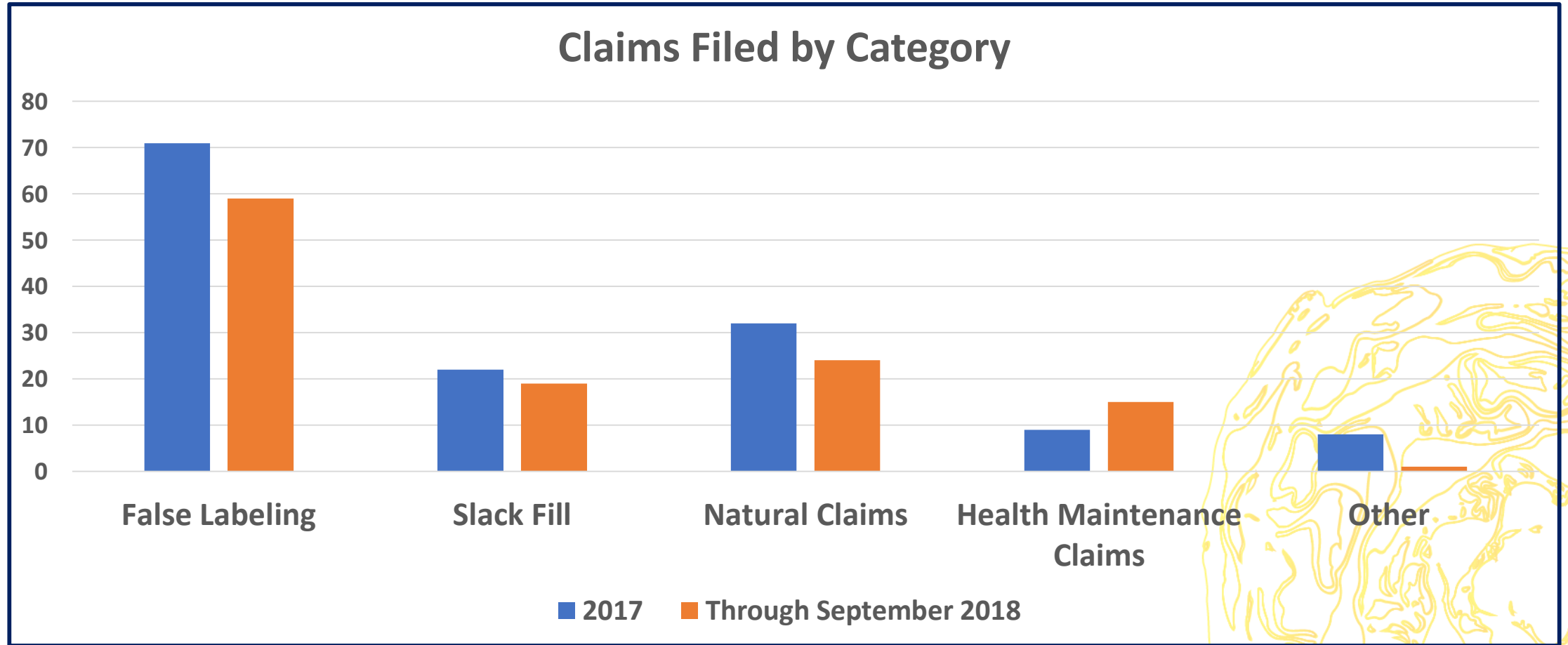
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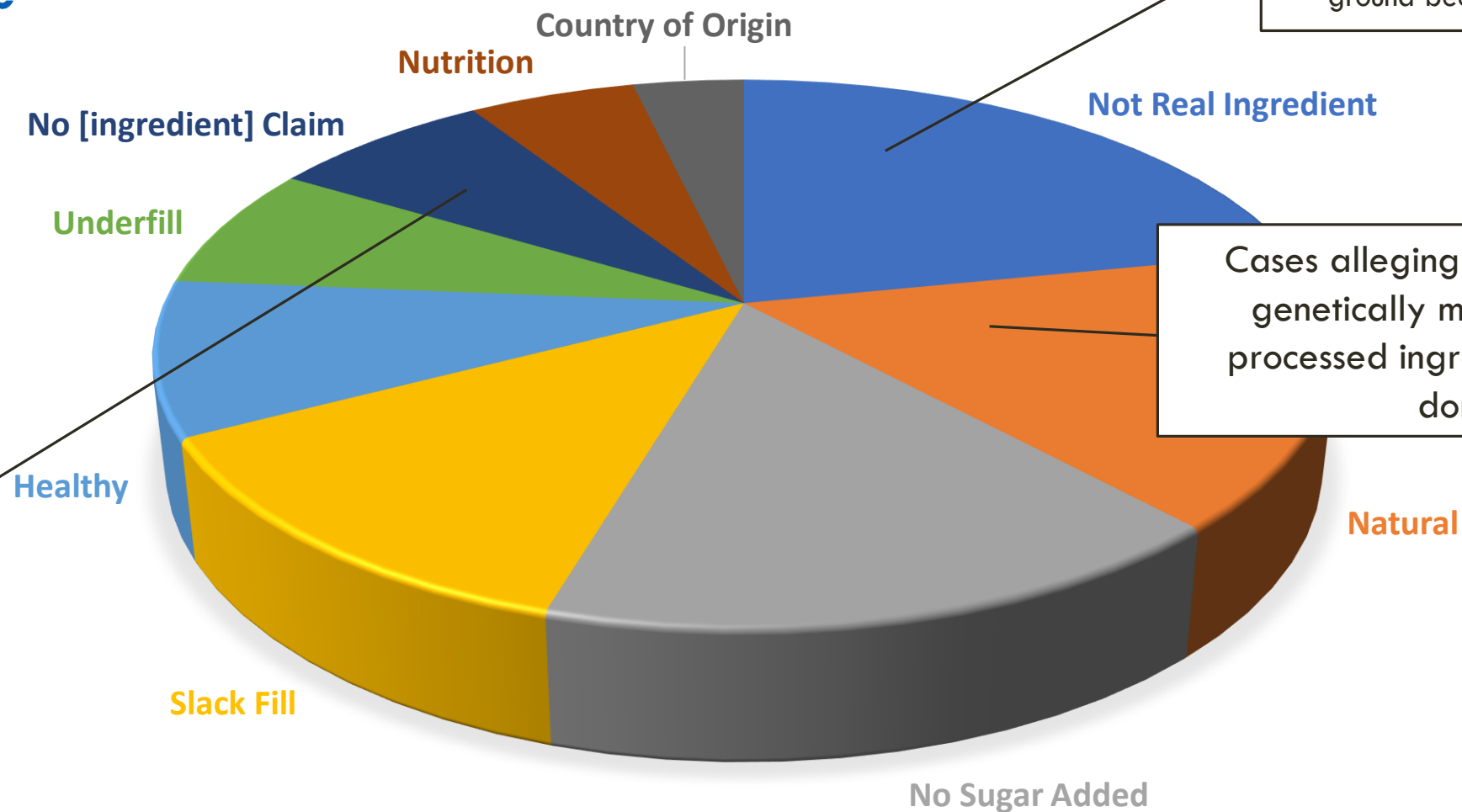


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CLAIMS IN FILED FOOD CLASS ACTIONS THROUGH AUGUST 2018



Allegations that product does not contain the ingredient it claims to contain:

- EVOO that isn't
- No ginger in ginger ale
- Steak patties really pressed ground beef

Cases challenge food labels that market absence of certain "undesirable" ingredients (i.e., trans fat)

Cases alleging that food contains genetically modified or highly processed ingredients continue to dominate



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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



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Evolving Theories & Categories of Claims

Over the last several years, cases have centered around familiar themes, but the cases have gotten more nuanced

- “All Natural” and “Natural”
- Healthfulness
- Sugar Claims

Foundational element is one based on the reasonable consumer



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Other Regulatory Challenges Impacting the Food Industry

- Largely, class action litigation about product claims based on state consumer protection or unfair competition statutes
 - Analogous: Prop 65 bounty hunter actions
 - Risk mitigation strategies to prevent or eliminate litigation risk
- Consumer groups have made other regulatory challenges regarding food ingredients
 - 2016 Food Additive Petition filed by the Center for Science in the Public Interest and several other non-governmental organizations (NGOs)
 - Request FDA de-list seven synthetic flavoring substances from food additive regulations
 - Legal theory is the food additive Delaney Clause



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- Class litigation on label claims will continue
 - Focus on supply chain
 - 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
 - Continued use of “testing” as avenue to challenge claims
- Regulatory action in the future
 - FDA RFI on the use of the term “natural” and recent FDA Commissioner statements indicate at least in interest
 - FDA Nutrition Innovation Strategy – modernization of food standards further evidence that FDA concerned about how foods are marketed
- NGO activity will likely continue
 - Focus on Delaney Clause?



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Thank you!

Questions?

Joanna R. Drake

Partner

Verto Legal Solutions

202-331-2325

jdrake@vertolegalsolutions.net