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# Food Litigation & *POM Wonderful, LLC v. Coca-Cola Co.*

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PEPSICO

# Regulatory Framework

**Food, Drug, and Cosmetic Act (FDCA)**

- FDCA was passed ". . . primarily to protect the health and safety of the public at large." *POM Wonderful, LLC v. Coca-Cola, Co.*, 134 S.Ct. 2228, 2234 (2014).

- "The FDCA prohibits the misbranding of food or drink." *Id.*, 21 U.S.C. 341.

- "A food or drink is misbranded if, *inter alia*, 'its labeling is false or misleading. . . .'" *Id.*

**Nutrition Labeling and Education Act of 1990 (NLEA)**

- Prohibits any State or political subdivision of a State from establishing "any requirement for a food . . . is ***not identical to such standard***. . . ." 21 U.S.C. § 343-1 (emphasis added).

**State Statutes**

- California
  - "Any food is misbranded if its labeling is false or misleading in any particular." Cal. Health & Safety Code § 110660 (1995)

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# What Does This Mean for Food Litigation?

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# Natural Food Regulation

**58 Fed. Reg. 2302, 2407 (Jan. 6, 1993)**

- Additionally, the agency will maintain its policy (Ref. 32) regarding the use of "natural," as meaning that **nothing artificial or synthetic** (including all color additive 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.

**FDA refusal to comment** – *Cox v. Gruma Corp.*, No 4:12-cv-6502-YGR (Dkt. 70, Jan. 6, 2014).

- "FDA has not promulgated a formal definition of the term 'natural' with respect to foods."

- "Based on the foregoing considerations, we respectfully decline to make a determination at this time regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may or may not be labeled 'natural.'"

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# Natural on its Way Out?

THE WALL STREET JOURNAL. WSJ

***Some Food Companies Ditch 'Natural' Label***

- "Food labeled 'natural' raked in more than $40 billion in U.S. retail sales over the past 12 months. That is second only to food claiming to be low in fat, according to Nielsen. A survey last year by Mintel, another market research company, found 51% of Americans seek out 'all natural' when food shopping."

- "Attorneys say at least 100 lawsuits have been filed in the past two years challenging the natural claims of UnileverULVR.LN -1.40% PLC's Ben & Jerry's, Kellogg Co. K -1.57% 's Kashi, Beam Inc. 's Skinnygirl alcohol drinks and dozens of other brands."

- "Only 22.1% of food products and 34% of beverage products launched in the U.S. during the first half of 2013 claimed to be 'natural,' down from 30.4% and 45.5%, respectively, in 2009 according to Datamonitor. Though many Americans still want natural products, Datamonitor says only 47% view the claims as trustworthy."

Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, Wall Street Journal, Nov. 6, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084

# Effecting Change in the Marketplace



- ***In re Frito-Lay N. Am., Inc.*, No. 12-MD-02413-RRM-RLM (E.D.N.Y. Dec. 12, 2012)**
  - Removed the "all natural" labels from Tostitos, SunChips, and Rold Gold pretzels.
- ***Krzykwa v. Campbell Soup Co.*, No. 12-CV-62058-WPD (S.D. Fla. Oct. 17, 2012)**
  - Removed the "Natural" labels from Goldfish crackers after suits alleging the products contained GMO soy.
- ***Silber v. Barbara's Bakery*, No. 12-cv-05511-WFK-RLM (E.D.N.Y. Nov. 5, 2012)**
  - Changed the logo on Puffin cereal and Snckimal crackers from "All Natural Since 1971" to "Since 1971."
- ***Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-cv-04387-PJH (N.D. Cal. Sept. 29, 2010)**
  - In 2010, agree to take "All Natural" off its label. Now it simply proclaims to be "Vermont's finest."

Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, Wall Street Journal, Nov. 6, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084

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# Trends in Food Litigation

## Natural


## No Added Sugar


## 0 Trans Fats


## Evaporated Cane Juice

**Nutrition Facts**

Serving Size: 1 Container (100g)
Servings Per Container 1
**Calories:** 110
Calories from Fat: 25

| Amount Per Serving | %DV* | Amount Per Serving | %DV* |
|---|---|---|---|
| **Total Fat** 3g | 5% | **Total Carbohydrate** 13g | 4% |
| Saturated Fat 2g | 10% | Dietary Fiber less than 1g | 0% |
| **Trans Fat** 0g | 0% | Sugars 13g | |
| **Cholesterol** 5mg | 2% | **Protein** 8g | 16% |
| **Sodium** 40mg | 2% | | |

Vitamin A 0% • Vitamin C 0% • Calcium 10% • Iron 4% • Vitamin D 20%

*Percent daily values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

**INGREDIENTS:** CULTURED PASTEURIZED NONFAT MILK, CREAM, EVAPORATED CANE JUICE, COCOA, COCOA BUTTER, NATURAL VANILLA FLAVOR, PECTIN, LOCUST BEAN GUM, VITAMIN D3 AND ACTIVE CULTURES: S. THERMOPHILUS, L. BULGARICUS, L. ACIDOPHILUS, BIFIDUS AND L. CASEI.

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# How are Food Cases Evaluated?

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# Reasonable Consumer Standard

**California**

- "Under the reasonable consumer standard, Appellants must 'show that "**members of the public are likely to be deceived**."' . . . The California Supreme Court has recognized 'that these laws prohibit "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public."'" *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)(citation omitted) (emphasis added).

**New York**

- "'Deceptive Acts' are defined objectively [ ] as acts **likely to mislead a reasonable consumer acting reasonable** under the circumstances.'" *Milich v. State Farm Fire & Cas. Co.*, 513 Fed. Appx. 97, 98 (2d Cir. 2013) (citation omitted) (emphasis added).

**Massachusetts**

- "An act or practice is "deceptive" if it has the **capacity or tendency" to deceive**." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 185 (1st Cir. 2009) (emphasis added).

**Texas**

- "Generally, an act is false, misleading, or deceptive if it has the **capacity to deceive an 'ignorant, unthinking, or credulous person**.'" *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 480 (Tex. 1995) (emphasis added).

**Minnesota**

- "The word 'deceptive' in the term 'deceptive practice' means 'tending to deceive,' and the root word 'deceive ' means '[t]o cause to believe what is not true; mislead. . . .' Thus, the term 'deceptive practice' refers to **conduct that tend to deceive or mislead a person**." *Graphic Commc'n Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, No. A12-1555, 2014 WL 2965400, at *9 (Minn. July 2, 2014) (emphasis added).

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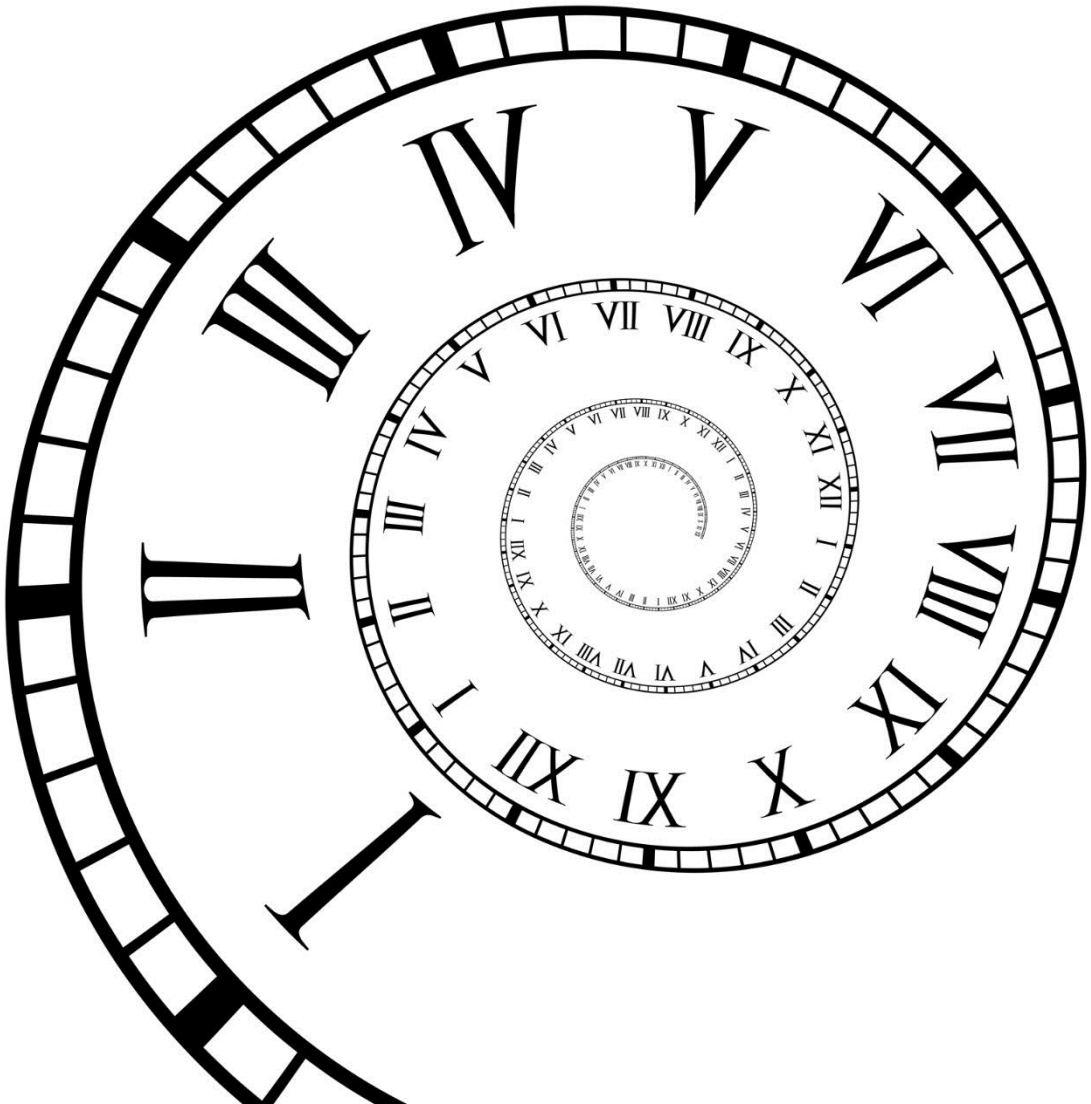
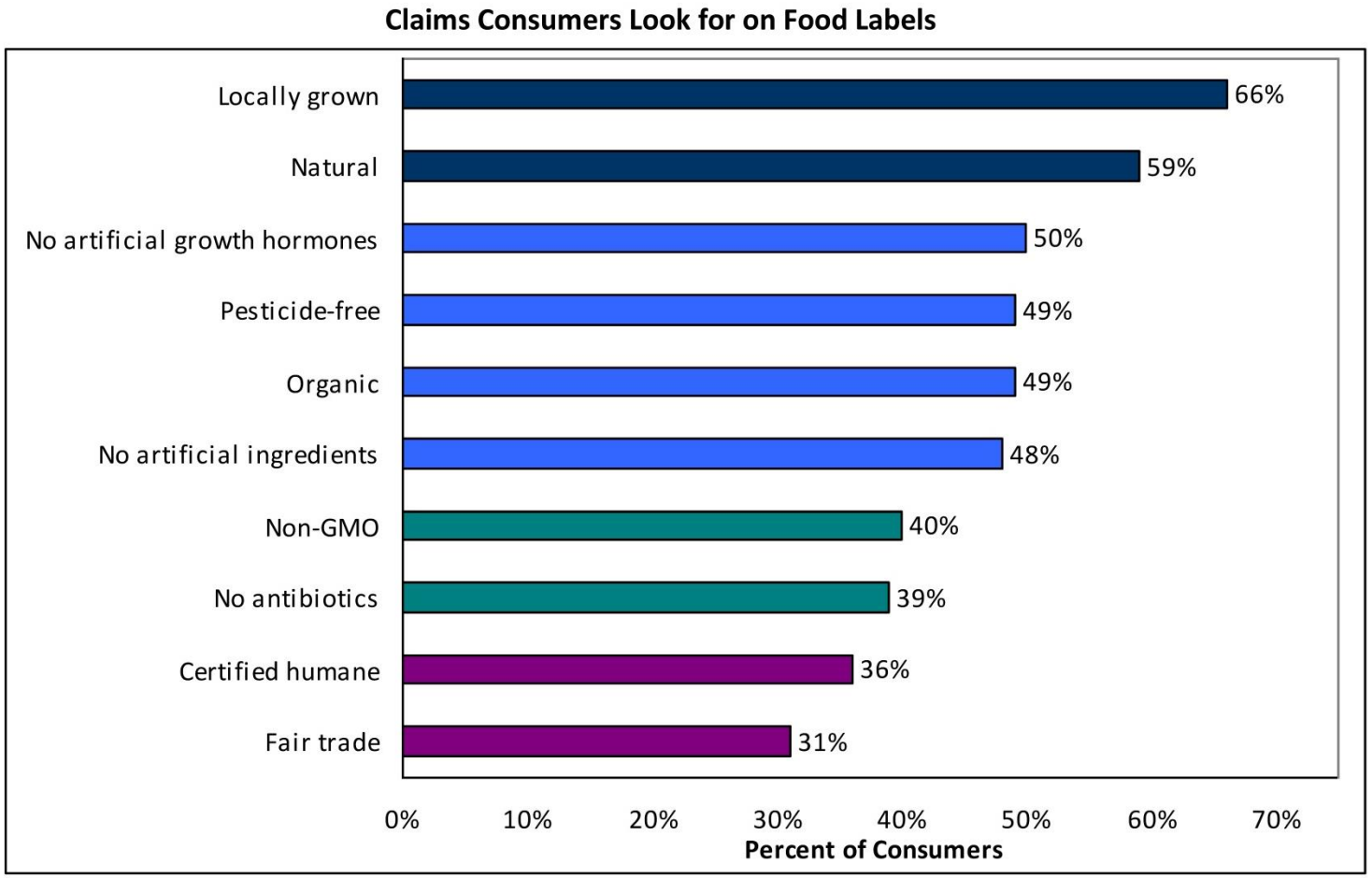
# What will the Future Bring?



# Consumer Survey




Consumer Reports Nat'l Research Ctr, Food Labels Survey, 4 (2014)

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# *POM Wonderful, LLC v. Coca-Cola Co.*, 134 S.Ct. 2228 (2014)

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# Impact on consumer litigation?

# Preemption in the consumer context?

- "First, **this is not a pre-emption case**. In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action…This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. " (*Id.* at 2236)

- "That provision, which Congress added to the FDCA … forecloses a "State or political subdivision of a State" from establishing requirements that are of the type but "not identical to" the requirements in some of the misbranding provisions of the FDCA.…It does not address, or refer to, other federal statutes or the preclusion thereof." (*Id.* at 2235)

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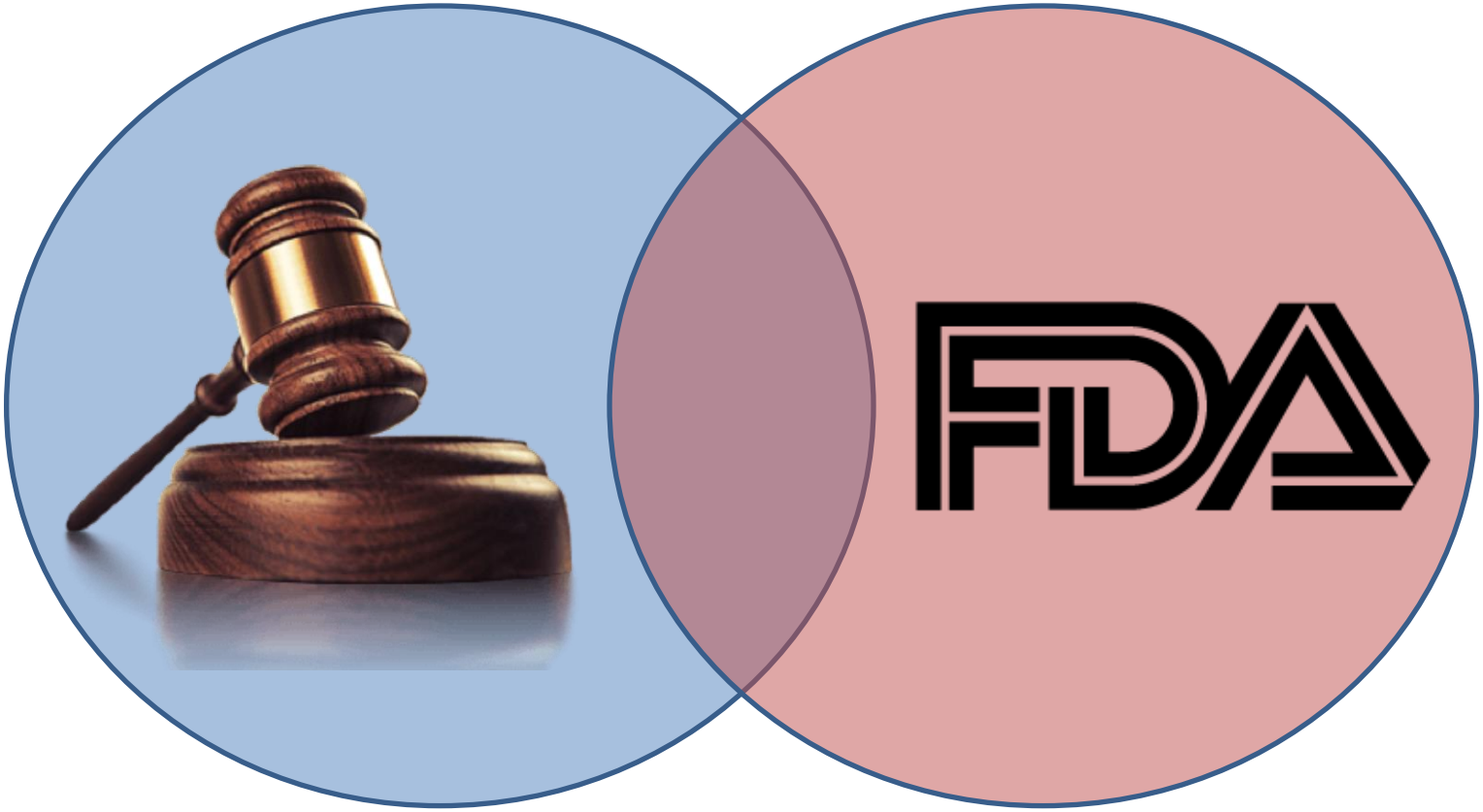
# Supreme Court on FDA Role




"It is unlikely that Congress intended the FDCA's protection of health and safety to result in **less policing of misleading food and beverage labels** than in competitive markets for other products." (*Id.* at 2239)

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# So What About Consumers?

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# So What About Consumers?

- "The FDA, however, does not have the same perspective or expertise in assessing market dynamics that day-to-day competitors possess. Competitors who manufacture or distribute products have detailed knowledge regarding **how consumers rely upon certain sales** and marketing strategies. Their awareness of unfair competition practices **may be far more immediate and accurate** than that of agency rulemakers and regulators**.**" (*Id.* at 2238.)

- Aren't consumers better positioned to understand what is misleading than the FDA or a manufacturer?

- Only time will tell…

# *POM Wonderful's* Progeny

***Ibarrola v. Kind, LLC*, No. 13 C 50377, 2014 WL 3509790, at *6 (N.D. Ill. July 14, 2014)**

- Plaintiff brought a consumer class action against a cereal manufacturer for labeling sugar as "evaporated cane juice."

- The court quoted *POM* as saying "'food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims.'" *Ibarrola*, 2014 WL 3509790, at *6.

***McCarthy Fin., Inc. v. Premera*, No. 69848-6-I, 2014 WL 2819025, at n.45 (Wash. Ct. App. June 23, 2014)**

- A class of insured brought an action under the Consumer Protection Act (CPA) against a nonprofit insurance provider.

- "Moreover, the CPA expressly allows claims against insurers for matters subject to the insurance commissioner's regulation, provided the claim is not based on activity allowed by insurance statutes and regulations. It would be anomalous, in light of this statutory authorization for CPA claims, to conclude that the insurance commissioner's primary jurisdiction acts as an absolute bar to such claims." *McCarthy*, 2014 WL 2819025, at *6 (citing *POM Wonderful*).

# *POM Wonderful's* Progeny

***Comm'n Import Export S.A. v. Congo*, No. 13-7004, 2014 WL 3377337, at *10 (D.C. Cir. July 11, 2014).**

- A company tried to enforce a foreign judgment under the D.C. Uniform Foreign-Country Money Judgments Recognition Act, but the district court held that the Federal Arbitration Act's 3 year statute of limitations to confirm a foreign arbitral award preempted the longer period under the DC law.

- The DC Court of Appeals reversed, stating "[the company's] use of a lawful parallel enforcement scheme does not present an obstacle to the summary process Congress adopted implementing the [New York] Convention." *Comm'n Import Export*, 2014 WL 3377337, at *10.

***Natural Res. Def. Council v. U.S. Food and Drug Admin.*, Nos. 12-2106-cv(L), 12-3607-cv(CON), 2014 WL 3636283, at *23 (2d Cir. July 24, 2014)**

- Public interest organization brought action alleging FDA acted arbitrarily and capriciously when it denied citizens petitions, pursuant to the FDCA, requesting the FDA withdraw regulatory approval for subtherapeutic use of antibiotics in animal feed. The district court entered summary judgment for the plaintiffs and the FDA appealed. The Second Circuit reversed.

- In the dissent, Chief Judge Katzmann quoted *POM* as stating "'The FDCA statutory regime is designed primarily to protect health and safety of the public at large.'" *Natural Res.*, 2014 WL 3636283, at *23.

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# Questions ?