LITIGATION TO ADDRESS MISLEADING FOOD LABEL CLAIMS AND THE ROLE OF THE STATE ATTORNEYS GENERAL

Jennifer L. Pomeranz[*]

INTRODUCTION

The increased global prevalence of diet-related diseases, such as diabetes, heart disease, and cancer, elevates the importance of truthful and accurate nutrition information in the marketplace.[1] Consumers report an increased interest in consuming healthy food but concurrently evidence an inability to determine a food's healthfulness based on food labels.[2] Individuals also comprehend food labels to varying degrees,[3] so it is critical that the information disclosed on packaging is clear and not misleading.

Federal regulations require standardized ingredient information and nutritional disclosures on packaging.[4] Food manufacturers utilize

---

[*] Jennifer L. Pomeranz, JD, MPH, Assistant Professor, Department of Public Health, Center for Obesity Research and Education, Temple University, jennifer.pomeranz@temple.edu. Funding for this paper was provided by the Robert Wood Johnson Foundation through a grant to the Yale Rudd Center for Food Policy & Obesity, Yale University. Thank you to Regent Law Review for their work on this Article.

[1] William Kasapila & Sharifudin Shaarani, *Harmonisation of Food Labelling Regulations in Southeast Asia: Benefits, Challenges and Implications*, 20 ASIA PAC. J. CLINICAL NUTRITION 1, 1 (2011), http://apjcn.nhri.org.tw/server/APJCN/20/1/1.pdf; *see* Josephine M. Wills et al., *Exploring Global Consumer Attitudes Toward Nutrition Information on Food Labels*, 67 NUTRITION REVIEWS (SUPP.) S102, S105, (2009), http://www.nutrociencia.com.br/upload_files/artigos_download/food%20labels.pdf.

[2] *See* NIELSEN, BATTLE OF THE BULGE & NUTRITION LABELS: HEALTHY EATING TRENDS AROUND THE WORLD 1, 3–4 (2012), *available at* http://dk.nielsen.com/site/documents/NielsenGlobalHealthyEatingReportJan2012FINAL.PDF; *see also* Miri Sharf et al., *Figuring Out Food Labels. Young Adults' Understanding of Nutrition Information Presented on Food Labels Is Inadequate*, 58 APPETITE 531, 532 (2012), *available at* http://www.sciencedirect.com/science/article/pii/S0195666311006805 (discussing a study revealing how many people did not understand food labels as well as they thought they did); Wills et al., *supra* note 1, at S102–03; Press Release, Am. Dietetic Assoc., How Important Is It to You? Diet, Nutrition and Physical Activity Differ for Men and Women, Says American Dietetic Association Survey (Sept. 27, 2011), *available at* http://www.eatright.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=6442465294&libID=6442465277 (explaining statistics that show an increased interest in diet and nutrition).

[3] *See* Wills et al., *supra* note 1, at S102–03, S105.

[4] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a)(3)–(4) (2012). Internationally, the Codex Alimentarius ("Codex") was created in 1963 to develop international food standards. F. Edward Scarbrough, *Codex—What's All the Fuss?*, 65 FOOD & DRUG L.J. 631, 631 (2010). Codex is recognized "as the primary international

the remaining label space to draw consumers to their products and to stand out from their competitors. Given the increased interest in health, manufacturers have steadily expanded the number and type of nutrition-related claims on food packaging.[5] Research indicates that many such statements may be misleading,[6] and public health advocates have called for increased regulation to address unruly claims.[7]

The Food and Drug Administration ("FDA") has authority over food labels pursuant to the Food, Drug, and Cosmetic Act.[8] Conversely, the Federal Trade Commission ("FTC") is responsible for the veracity of food advertising.[9] Congress passed the Nutrition Labeling and Education Act ("NLEA") in 1990 authorizing the FDA to require the disclosure of

---

authority on food issues," and Codex documents serve as "templates for national regulations." Peter J. Aggett et al., *Nutrition Issues in Codex: Health Claims, Nutrient Reference Values and WTO Agreements: A Conference Report*, 51 EUR. J. NUTRITION (SUPP.) S1, S1–2 (2012), *available at* http://link.springer.com/article/10.1007%2Fs00394-012-0306-8#page-1. Despite this goal, country-specific regulations are not uniform globally. *See* Kasapila & Shaarani, *supra* note 1, at 2. For example, in a study of ten Southeast Asian countries, the countries utilized a mix of Codex nutrition labeling guidelines and U.S. standards, with the addition of country-specific values for nutrient references. *See id.* at 1–2.

[5] STEVE W. MARTINEZ, ERS, ECONOMIC INFORMATION BULLETIN 108, INTRODUCTION OF NEW FOOD PRODUCTS WITH VOLUNTARY HEALTH- AND NUTRITION-RELATED CLAIMS, 1989–2010, at iii (2013), *available at* http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib108.aspx#.UmusR1PW41I.

[6] *See* Jennifer L. Harris et al., *Nutrition-Related Claims on Children's Cereals: What Do They Mean to Parents and Do They Influence Willingness to Buy?*, 14 PUB. HEALTH NUTRITION 2207, 2207, 2211 (2011) [hereinafter Harris et al., *Nutrition-related Claims on Children's Cereals*], http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN14_12%2FS1368980011001741a.pdf&code=620054c23c3918398a9e7b504bdd5319; *see also* Adam Drewnowski et al., *Testing Consumer Perception of Nutrient Content Claims Using Conjoint Analysis*, 13 PUB. HEALTH NUTRITION 688, 688 (2010), http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN13_05%2FS1368980009993119a.pdf&code=46253c1097d3cd35a467b20ce538f628 (discussing different types of labels as well as FDA action to prevent false or misleading labels).

[7] *See* Marion Nestle & David S. Ludwig, *Front-of-Package Food Labels: Public Health or Propaganda?*, 303 J. AM. MED. ASS'N 771, 772 (2010), http://jama.ama-assn.org/cgi/content/full/303/8/771.

[8] Matthew R. Kain, Comment, *Throw Another Cloned Steak on the Barbie: Examining the FDA's Lack of Authority to Impose Mandatory Labeling Requirements for Cloned Beef*, 8 N.C. J. L. & TECH. 303, 347 (2007); *see* 21 U.S.C. § 343; *see also* Memorandum of Understanding Between The Federal Trade Commission and The Food and Drug Administration, MOU 225-71-8003 (1971), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm115791.htm [hereinafter Memorandum of Understanding] (explaining the FDA's responsibilities and jurisdiction over misbranded food).

[9] Memorandum of Understanding, *supra* note 8.

nutrition information and to regulate certain nutrition-related claims.[10] In 1993, the FDA issued regulations that were groundbreaking at the time but that are now outdated and do not reflect manufacturers' current use of claims or scientific advances in nutrition information.[11] Some categorically unhealthy products bear several nutrition-related claims per package consistent with the law's permissive allowances.[12] In addition, the FDA does not consistently enforce all violations of its own regulations.[13]

As a result of outdated regulations and lax enforcement, the initiation of private lawsuits has escalated.[14] These lawsuits range from advocacy efforts to reign in problematic claims and hold food companies accountable to private plaintiffs claiming damages due to a misbranded or misleading label.[15] Also of note are litigious actions initiated by food manufacturers under the Lanham Act or the industry's self-regulatory body, the National Advertising Division ("NAD") of the Council of Better Business Bureaus,[16] both of which are based on concerns over unfair competition and which have interesting parallels to consumer-based activity. However, such litigation is time consuming and costly and

---

[10] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)).

[11] *See* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. § 1 (2013); Food Labeling, 21 C.F.R. § 101 (1994); Pauline M. Ippolito & Alan D. Mathios, *New Food Labeling Regulations and the Flow of Nutrition Information to Consumers*, 12 J. PUB. POL'Y & MARKETING 188, 188 (1993); *see also*, Elaine Watson, *Food Labeling Bill Proposes Radical Changes to 'Natural' Claims, Wholegrain Labels, Added Sugars; but Chances of Success Are Slim, Say Lawyers*, FOOD NAVIGATOR-USA.COM (Sept. 19, 2013), http://www.foodnavigator-usa.com/Regulation/Food-labeling-bill-proposes-radical-changes-to-natural-claims-wholegrain-labels-added-sugars-but-chances-of-success-are-slim-say-lawyers.

[12] JENNIFER L. HARRIS ET AL., RUDD CTR. FOR FOOD POL'Y & OBESITY, CEREAL FACTS: EVALUATING THE NUTRITION QUALITY AND MARKETING OF CHILDREN'S CEREALS 41, 54, 58 (2009) [hereinafter CEREAL FACTS], *available at* http://www.cerealfacts.org/media/Cereal_FACTS_Report_2009.pdf.

[13] *See, e.g.*, Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J.L. & MED. 617, 629–30 (2013).

[14] Elaine Watson, *Improper Nutrient Content Claims Cited in New Wave of Class Action Suits*, FOOD NAVIGATOR-USA.COM (Apr. 19, 2012), http://www.foodnavigator-usa.com/Regulation/Improper-nutrient-content-claims-cited-in-new-wave-of-class-action-suits [hereinafter Watson, *Improper Nutrient Content Claims*]; *see also Litigation Project*, CTR. FOR SCI. PUB. INTEREST, http://www.cspinet.org/litigation/index.html (last visited Mar. 20, 2014) (explaining reasons for increased litigation by the Center for Science in the Public Interest).

[15] *See* Red v. Kraft Foods, Inc., 754 F. Supp. 2d 1137, 1142–44 (C.D. Cal. 2010); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114, 1126 (N.D. Cal. 2010).

[16] *See infra* Part II.A.

sometimes produces different results for the same issue.[17] Although there have been individual successful cases, current litigation efforts have not precluded the introduction of new questionable nutrition-related claims on labels or effectively addressed the problematic food-labeling environment as a whole.[18]

A more effective alternative than private litigation would be for the state attorneys general ("attorneys general") to individually or collectively pursue litigation and other actions to address questionable food labels. Attorneys general have a unique set of authorities that are unavailable to other parties or government entities.[19] Their charge includes protecting consumers and supporting conditions for fair competition and transparency in the commercial marketplace.[20] Attorneys general can address questionable labeling practices through litigation and pre-litigation means and join together in concerted effort to effectuate industry-wide changes. A successful consumer protection action by the attorneys general can have wide-range implications and provide a stronger deterrent than private litigation. However, to date, attorneys general have not addressed misleading food-labeling issues to the extent their authority permits or to the level of other similar consumer protection issues.

Part I of this Article briefly describes the FDA's regulatory authority over food label claims and how the law hinders certain private attempts to enforce the regulations. This Article goes on to discuss the successes and limitations of the two primary types of private-party litigation in Part II. The first section of Part II briefly addresses manufacturer-initiated actions. The second portion of Part II addresses lawsuits initiated by consumers and consumer advocates pursuant to state consumer protection statutes. In Part III, this Article explains the

---

[17] *See* Elaine Watson, *Evaporated Cane Juice Lawsuits Update: Blue Diamond, Trader Joe's, Wallaby Yogurt Co Under Fire, Chobani Off the Hook?*, FOOD NAVIGATOR-USA.COM (Oct. 9, 2013), http://www.foodnavigator-usa.com/Regulation/Evaporated-cane-juice-lawsuits-update-Blue-Diamond-Trader-Joe-s-Wallaby-Yogurt-Co-under-fire-Chobani-off-the-hook.

[18] *See infra* Part II.

[19] *See infra* Part III.A.

[20] *See, e.g.*, ATT'Y GEN. ERIC T. SCHNEIDERMAN, http://www.ag.ny.gov/ (last visited Mar. 20, 2014) ("Law enforcement actions are taken by the [New York] Attorney General to protect the public good and to ensure a fair market place."). Attorneys general separately work on antitrust issues to support a fair marketplace that also protects consumers. *See generally A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates*, FTC (Oct. 1, 2003), http://www.ftc.gov/public-statements/2003/10/federal-state-partnership-competition-policy-state-attorneys-general ("The past 20 years has seen the emergence of a strong consensus in antitrust that enhancing consumer welfare is and should be its *single* unifying goal."). Antitrust litigation is beyond the scope of this paper.

litigation and pre-litigation authority of attorneys general to protect consumers in the food-labeling context and discusses how attorneys general can utilize this power to broadly address questionable food-labeling practices. Although the consumer protection authority of attorneys general is the focus of this section, a brief discussion of litigation pursuant to their *parens patriae* authority in the context of food and food labeling is included.

I. THE FOOD, DRUG, AND COSMETIC ACT

Pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), the FDA regulates the safety and labeling of packaged food.[21] The NLEA authorizes the FDA to require the disclosure of ingredient information and specific facts on the Nutrition Facts Panel and to regulate nutrition and health-related claims.[22] Food labels are considered commercial speech and are protected to an intermediate degree under the First Amendment.[23] As such, the government may "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[24] The government may also constitutionally restrict commercial claims found to be "[f]alse, deceptive, or misleading."[25] The FDA is the government entity in charge of policing food labels, but it is faced with resource and authority limitations.[26]

A. Labeling

The FDA permits food manufacturers to utilize several types of claims on food packaging: health claims,[27] qualified health claims,[28]

---

[21] *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2012).

[22] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)).

[23] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478, 481–83 (1995).

[24] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[25] *In re* R.M.J., 455 U.S. 191, 200, 203 (1982).

[26] A brief synopsis of these issues is presented in this paper. For a comprehensive discussion of the FDA's authority and lack thereof, see Pomeranz, *supra* note 13, at 630, 633–34, 636–37. Also see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 24–25, 27 (2011) [hereinafter GAO, FDA NEEDS TO REASSESS ITS APPROACH], *available at* http://www.gao.gov/assets/320/314473.pdf (discussing the FDA's authority as well as its lack of authority).

[27] Health claims characterize the relationship of a substance to a disease or health-related condition, and they must be based on a "significant scientific agreement" standard. Food Labeling, 21 C.F.R. § 101.14(c) (2013). An example is: "Healthful diets with adequate folate may reduce a woman's risk of having a child with a brain or spinal cord birth defect." *Id.* § 101.79(d)(1)(i).

structure/function claims, and nutrient content claims.[29] The latter two categories of claims have been the subject of most of the food packaging litigation.[30] According to the FDA, "[s]tructure/function claims describe the role of a nutrient or dietary ingredient intended to affect normal structure or function in humans, for example, 'calcium builds strong bones.'"[31] These make up 5.5% of claims on food labels.[32] The FDA does not require pre-approval for structure/function claims (i.e., there are no nutrition-related criteria to utilizing them), rendering manufacturers alone responsible for their accuracy.[33]

The vast majority of claims on food products (86.9%) are a type of nutrient content claim,[34] which "expressly or implicitly characterizes the level of a nutrient of the type required to be [disclosed] in nutrition labeling," such as "low sodium."[35] There are specific guidelines manufacturers must follow to make nutrient content claims.[36] In addition, if a product is high in fat, saturated fat, sodium, or cholesterol, the claim must be accompanied by a statement to consult the Nutrition Facts Panel.[37] Notably absent from this list are trans fat and added

---

[28] Qualified health claims are permitted when credible, emerging, or limited scientific evidence supports a relationship between a food and reduced risk of a "disease or health-related condition." Office of Nutrition, Labeling, & Dietary Supplements, FDA, *Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims—Final* (Jan. 2009), http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm073332.htm.

[29] Timothy D. Lytton, *Banning Front-of-Package Food Labels: First Amendment Constraints on Public Health Policy*, 14 PUB. HEALTH NUTRITION 1123, 1123 (2011), http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN14_06%2FS1368980010002843a.pdf&code=6eb5028a6ceb6e6d3592b187924f0996.

[30] Marc Sanchez, *70 Percent of Dietary Supplement Companies Violate FDA Regulations*, NATURALPRODUCTSINSIDER.COM (Nov. 7, 2013), http://www.naturalproductsinsider.com/articles/2013/11/70-percent-of-dietary-supplement-companies-violat.aspx; Watson, *Improper Nutrient Content Claims*, *supra* note 14.

[31] *Claims that Can Be Made for Conventional Foods and Dietary Supplements*, FDA (Sept. 2003), http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm111447.htm.

[32] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 13.

[33] *See* Taryn M. DeVeau, Note, *Naturally Confusing Consumers: Express Federal Preemption of State Claims Regarding False and Misleading Food Product Labels*, 5 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 119, 136 (2012–2013); Alexandra Ledyard, Comment, *Snake Oil in Your Pomegranate Juice: Food Health Claims and the FTC*, 47 U.S.F. L. REV. 783, 792 (2013).

[34] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 13. The FDA divides nutrient content claims into four distinct categories: "nutrient content claim," "significant source claim," "'healthy' claim," and "other implied nutrient content claim." *Id.*

[35] Food Labeling, 21 C.F.R. § 101.13(b)(1)–(2) (2013).

[36] *See id.* § 101.13 (defining nutrient content claims and restricting their size and placement).

[37] *Id.* § 101.13(h)(1); *see also id.* § 101.14(a)(4).

sugar. Therefore, foods often bear nutrient content claims that highlight a positive aspect of the product (e.g., "healthy" or "high in antioxidants") despite the presence of other negative properties, which is most often added sugar.[38] The FDA has not evidenced a plan to update the regulations with respect to permissible claims.[39]

Congress granted the FDA the authority to protect consumers from misbranded food products, which are defined to include false or misleading labels, labels with information and claims not disclosed in the manner required by the regulations, or products that are not properly named or identified.[40] However, Congress did not grant the FDA the necessary authority or resources to adequately police these issues.[41] When the Agency finds a violation, it may issue a Warning Letter to the manufacturer and thereafter it may bring the matter to the Department of Justice for prosecution; however, this latter tool is rarely utilized in this context.[42] Although Warning Letters seem to hold little practical weight,[43] FDA enforcement is still inconsistent, and the Agency does not issue Warning Letters for every potential violation it finds.[44] For example, both Diet Coke Plus and Cherry 7Up Antioxidant directly violated the FDA's Policy on Fortification,[45] but only the manufacturer of the former received a Warning Letter.[46] The Agency additionally does not seem to enforce the general prohibition on misleading claims.[47]

---

[38] *See* CEREAL FACTS, *supra* note 12, at 28, 41; Pomeranz, *supra* note 13, at 623–24.

[39] However, the FDA has indicated that it plans to update the Nutrition Facts Panel, and it is considering including a requirement to disclose added sugar. *See* Notice, Experimental Study on Consumer Responses to Nutrition Facts Labels with Various Footnote Formats and Declaration of Amount of Added Sugars, 78 Fed. Reg. 32,394, 32,394–96 (May 30, 2013).

[40] *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2012).

[41] For a more comprehensive discussion of the FDA's lack of authority, see Pomeranz, *supra* note 13, at 619.

[42] Erin J. Asher, Comment, *Lesson Learned from New Zealand: Pro-Active Industry Shift Towards Self-Regulation of Direct-to-Consumer Advertising Will Improve Compliance with the FDA*, 16 ALB. L.J. SCI. & TECH. 599, 605 (2006); *see* 21 U.S.C. § 335.

[43] *See* Watson, *Improper Nutrient Content Claims*, *supra* note 14; *see also* Pomeranz, *supra* note 13, at 619–20.

[44] *See* Massachusetts v. EPA, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action." (citation omitted)).

[45] Pomeranz, *supra* note 13, at 626–27.

[46] *See id.* at 627; Warning Letter from Roberta F. Wagner, Director, FDA Office of Compliance, to Muhtar Kent, President and CEO, Coca-Cola Co. (Dec. 10, 2008), *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.htm.

[47] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 27; *see also* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(a) (defining a misleading label).

Due to lax requirements and enforcement mechanisms, many food products bear claims that appear legally sound but are nutritionally questionable. If the FDA questions whether a label violates the regulations, the Agency cannot require the food manufacturer to turn over the scientific basis for the claim, referred to as substantiation documents.[48] Unlike the FTC, which has this power, the FDA must actually conduct its own research to determine if it is scientifically valid—a requirement that is prohibitive given the limited resources of the Agency.[49]

B. "Enforcing" the Nutrition Labeling and Education Act

Consumers, advocacy groups, and food manufacturers attempt to utilize litigation as a tool to address food-labeling deficiencies and fulfill the enforcement gaps left by the FDA. However, the FDCA does not

---

Internationally, Codex Alimentarius general principles state that "no food should be described or presented in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect." WORLD HEALTH ORG. & FOOD & AGRIC. ORG. OF THE U.N., CODEX ALIMENTARIUS: FOOD LABELLING § 1.2, at 21 (5th ed. 2007), *available at* ftp://ftp.fao.org/codex/Publications/Booklets/Labelling/Labelling_2007_EN.pdf. Countries generally prohibit misleading labels but have taken different approaches in permitting or restricting specific types of nutrition-related claims. *See* Kasapila & Shaarani, *supra* note 1, at 2, 4.

[48] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at Highlights, 27.

[49] *Id.* at 27. A striking example of this point is the case of Kellogg's claim that its Rice Krispies cereal "helps support your child's immunity." Press Release, Or. Dep't of Justice, Kellogg Settlement Will Provide Nearly 500,000 Boxes of Cereal to the Hungry (Dec. 17, 2009) [hereinafter Kellogg Settlement], *available at* http://www.doj.state.or.us/releases/pages/2009/rel122209.aspx. The FDA did not issue a Warning Letter to Kellogg based on this claim likely because it is considered a structure/function claim, over which the Agency did not establish guidelines, *see* DeVeau, *supra* note 33, at 136, and because it could not obtain substantiation documents to determine the veracity of the claim, which the Agency has limited ability to obtain, *see* GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at Highlights, 27. However, the Oregon Attorney General issued a letter to Kellogg's demanding the company explain the scientific basis for the claim. NAT'L POL'Y & LEGAL ANALYSIS NETWORK, FACT SHEET: STATE AG ENFORCEMENT OF FOOD MARKETING LAWS: A BRIEF HISTORY 3 (2010) [hereinafter FACT SHEET: STATE AG ENFORCEMENT], *available at* http://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agstatefoodenforce-2010.pdf. Thereafter, the FTC investigated the immunity claim in the advertising for the product. *See* Press Release, FTC Investigation of Ad Claims that Rice Krispies Benefits Children's Immunity Leads to Stronger Order Against Kellogg (June 3, 2010) [hereinafter FTC Investigation of Ad Claims], *available at* http://www.ftc.gov/news-events/press-releases/2010/06/ftc-investigation-ad-claims-rice-krispies-benefits-childrens. The FTC and attorneys general have similar authorities and both had the jurisdiction to pursue the claim, while the FDA did not. Pomeranz, *supra* note 13, at 634; *see* FACT SHEET: STATE AG ENFORCEMENT, *supra*, at 3; Kellogg Settlement, *supra*. Kellogg withdrew the statement and settled with the Attorney General and was reprimanded by the FTC. FTC Investigation of Ad Claims, *supra*; Kellogg Settlement, *supra*.

provide a private right of action to enforce the regulations.[50] This means that a private party cannot sue under the Act to claim a violation of the NLEA. Therefore, aggrieved parties attempt to sue pursuant to other federal and state laws.[51] But the NLEA also contains a preemption provision, which, although narrow, further confines such lawsuits.[52]

The NLEA's preemption provision explicitly states that it preempts efforts that seek to compel manufacturers to label food in a manner that is "not identical to" the federal requirements.[53] Therefore, state laws that "are affirmatively different from the Federal requirements" are preempted.[54] This protects manufacturers from competing state laws, such as having to comply with fifty different state requirements for a Nutrition Facts Panel, which would make conducting business in each state prohibitive. The preemption provision does, however, permit plaintiffs to bring lawsuits that seek to enforce identical requirements of the NLEA contained in state law[55] and address practices that the FDA has chosen not to regulate.[56]

Sometimes a claim might not be preempted, but a court will decline to entertain the case based on the doctrine of primary jurisdiction.[57] This

---

[50] Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 372–73 (N.D. Cal. 2010); *see also* 21 U.S.C. § 337(a); Khasin v. Hershey Co., No. 5:12-CV-01862 EJD, 2012 U.S. Dist. LEXIS 161300, at *11–12 (N.D. Cal. Nov. 9, 2012).

[51] *See, e.g.*, Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 91 (D.N.J. 2011) (discussing plaintiff's claims based on the New Jersey Consumer Fraud Act and breach of express warranty); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114 (N.D. Cal. 2010) (hearing complaints against Quaker Oats based on the Lanham Act and California law); *In re* Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig., 588 F. Supp. 2d 527, 528–29 (S.D.N.Y. 2008) (examining plaintiffs' allegations that defendant violated consumer protection statutes, was unjustly enriched, and violated California's Song-Beverly Consumer Warranty Act).

[52] 21 U.S.C. § 343-1(a).

[53] *Id.* § 343-1(a)(5).

[54] *Chacanaca*, 752 F. Supp. 2d at 1118 (quoting Beverages: Bottled Water, 60 Fed. Reg. 57,076, 57,120 (Nov. 13, 1995) (codified at 21 CFR pts. 103, 129, 165, 184)).

[55] Turek v. Gen. Mills, Inc., 662 F.3d 423, 426 (7th Cir. 2011).

[56] *See In re* Simply Orange Orange Juice Mktg. & Sales Practices Litig., No. 4:12-MD-02361-FJG, 2013 U.S. Dist. LEXIS 28080, at *1–2, *8–9 (W.D. Mo. Mar. 1, 2013) (allowing plaintiffs to make allegations that fruit juices improperly used the word *natural* on their labels); Red v. Kraft Foods, Inc., 754 F. Supp. 2d 1137, 1142, 1145 (C.D. Cal. 2010) (denying defendant's motion to dismiss plaintiff's suit alleging that defendant had improperly claimed its foods contained real vegetables); *Chacanaca*, 752 F. Supp. 2d at 1123–24 (refusing to preempt plaintiffs' state claims that the word "wholesome" was used inappropriately on a label). *But see* Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012) (declining to determine whether cosmetics labels improperly used the word *natural*).

[57] Elaine Watson, *GMOs and Natural Claims: 'FDA Is Losing Credibility with Industry, Consumers and the International Community by Ignoring Key Food Labeling Controversies', Says Attorney*, FOOD NAVIGATOR-USA.COM (Sept. 12, 2013),

occurs when a court determines that Congress delegated the determination of an area of law to a regulatory agency and the court is faced with a novel or particularly complicated issue.[58] In this context, a court might determine that the FDA has primary jurisdiction over the issue and that the court should abstain from deciding the case in order to protect the "integrity of a regulatory scheme."[59] If the FDA has not indicated whether a particular claim is unlawful or misleading, a court may not want to make that determination.[60] Conversely, when FDA policy is clear or if the Agency affirmatively opted out of regulating an issue, this doctrine is inapplicable because a court would be less concerned that it could undermine the FDA's authority.[61]

One method to avoid preemption or the doctrine of primary jurisdiction is for plaintiffs to bring a lawsuit based on an advertising campaign that uses the same misleading language as the label. As opposed to the FDCA, the FTC Act contains a savings clause expressly permitting litigation based on state statutes that prohibit unfair and deceptive marketing.[62] If a consumer were induced to purchase a product based on the misleading advertisements, then the alleged injury would exist regardless of the label, and thus litigation based on this claim is not preempted by the FDCA.[63]

II. LITIGATION TO ADDRESS MISLEADING FOOD LABELS

Litigation by consumers and consumer advocates has escalated in the context of food labels. Unlike manufacturer-initiated litigation, consumers and advocates sometimes initiate litigation for the very purpose of protecting the public and improving the food-labeling landscape. Proponents of such litigation deem a substandard regulatory environment the opportune setting to use litigation to fill gaps in the law

---

http://www.foodnavigator-usa.com/Regulation/GMOs-and-natural-claims-FDA-is-losing-credibility-with-industry-consumers-and-the-international-community-by-ignoring-key-food-labeling-controversies-says-attorney [hereinafter Watson, *GMOs and Natural Claims*].

[58] *See* Ivie v. Kraft Foods Global, Inc., No. C-12-02554-RMW, 2013 U.S. Dist. LEXIS 25615, at *15 (N.D. Cal. Feb. 25, 2013).

[59] United States v. Phila. Nat'l Bank, 374 U.S. 321, 353 (1963). The Northern District of California recently applied the doctrine of primary jurisdiction to a food law case. *See Ivie*, 2013 U.S. Dist. LEXIS 25615, at *14 (quoting *Syntek Semiconductor*, 307 F.3d at 781).

[60] *Ivie*, 2013 U.S. Dist. LEXIS 25615, at *18.

[61] *Id.*

[62] 15 U.S.C. § 57b(e) (2012).

[63] Loreto v. Proctor & Gamble, 515 F. App'x 576, 579–80 (6th Cir. 2013). This type of claim mimics the complaints by the FTC for the Kellogg "immunity" claim described in FTC Investigation of Ad Claims, *supra* note 49.

and fulfill an agency's duty to police regulatory infractions.[64] Litigation in this context is also considered a useful tool when other forms of advocacy have not proven successful.[65] But even proponents recognize the need to use the tool carefully to avoid unintended consequences.[66]

Consumer-based litigation has led to great public health victories. For example, litigation in the area of motor vehicle safety resulted in safer product design for automobiles, protecting all consumers.[67] Sometimes, however, litigation is a misguided effort to ostensibly further public interests because it is based on incorrect scientific conclusions[68] or on promising but undeveloped legal theories,[69] and it backfires for public interests related to health and consumer protection.[70] For example, when two teenagers unsuccessfully sued McDonald's alleging that the restaurant's food caused them health problems such as obesity and diabetes, the National Restaurant Association ran a successful nationwide campaign to pass legislation blocking this type of lawsuit.[71] Now, at least twenty-five states have laws preempting a plaintiff's ability to bring such a case, which has had farther-reaching ramifications for public health than simply obstructing personal injury lawsuits.[72]

---

[64] Stephen P. Teret, *Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027, 1027 (1986), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.76.8.1027.

[65] *Id.*

[66] *Id.*

[67] *See* Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REVS. 90, 92–93 (2003), http://epirev.oxfordjournals.org/content/25/1/90.full.pdf.

[68] *See, e.g.*, PAUL A. OFFIT, AUTISM'S FALSE PROPHETS: BAD SCIENCE, RISKY MEDICINE, AND THE SEARCH FOR A CURE 156, 158, 175 (2008) (describing litigation based on falsified study results showing that autism is caused by vaccinations—a now debunked theory).

[69] *See, e.g.*, Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 516, 519 (S.D.N.Y. 2003) (granting McDonald's motion to dismiss claims that the corporation was liable for causing health problems such as obesity).

[70] *See* State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 435–36 (R.I. 2008) (holding that defendants were not liable for the alleged creation of a nuisance due to lead paint on their products); OFFIT, *supra* note 68, at 175 (explaining that the court's decision in the Omnibus Autism Proceeding left "virtually no room for a successful appeal"); Melanie Warner, *The Food Industry Empire Strikes Back: Lobbying Effort to Shield Companies from Court Action is Gaining Ground*, N.Y. TIMES, July 7, 2005, at C1, *available at* http://www.nytimes.com/2005/07/07/business/07food.html?pagewanted=all&_r=1& (describing how food companies responded by successfully lobbying for laws protecting them from suits alleging their products caused consumers' obesity).

[71] Warner, *supra* note 70, at C1.

[72] Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD & DRUG L.J. 229, 230, 237 (2013); *see also Study of State Cheeseburger Bills Finds They Go Well*

Consumer-initiated litigation in the area of food labels has not had such disconcerting outcomes or backfired in the same manner. The drawback, however, is that it is not fulfilling the need for a robust regulatory scheme and has not led to a comprehensive or even notable shift in the food-labeling environment. In order for this strategy to work, it must foster industry-wide change. Such change has not been borne out by current litigation efforts. Further, there is a concern that litigation provides an excuse for needed agency action or congressional intervention to address the current regulatory deficiencies and related resource needs.[73] Therefore, acknowledging the weak regulatory environment and recognizing the political reality that Congress is not imminently overhauling food-labeling regulations and the FDA is not undertaking this on its own, this Article argues that if litigation is the last alternative, it should be initiated by the attorneys general.

The remainder of this section briefly discusses manufacturer-initiated litigation under the Lanham Act and actions under NAD to dispose of any notions that this strategy can effectively protect the public[74] and to show the overlapping interests that manufacturers and consumers have in truthful, clear labeling. It then discusses the successes and failures of consumer-initiated litigation in the context of food-labeling cases.

A. Food Manufacturer Plaintiffs

The Lanham Act is traditionally regarded as a trademark protection act but functions to protect fair competition in business.[75] The Lanham Act provides a cause of action to a manufacturer who believes it has been or is likely to be damaged by a competitor's food label that has a false or misleading description or representation of fact (using words or images) or that "misrepresents the nature, characteristics, qualities, or geographic origin of . . . [the] goods."[76] There is no consumer right of action under the Lanham Act, so only commercial competitors with an

---

Beyond "Tort Reform," PUB. HEALTH ADVOC. INST. (Aug. 26, 2013), http://www.phaionline.org/2013/08/26/study-of-state-cheeseburger-bills-finds-they-go-well-beyond-tort-reform/.

[73] *See* Ledyard, *supra* note 33, at 787, 805.

[74] The suggestion that Lanham Act litigation could be used to address food industry violations of the FDCA was made to the author by a prominent corporate attorney who later worked with public health experts at a leading public health school.

[75] Dustin Marlan, Comment, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. PA. J. CONST. L. 1581, 1606 (2013).

[76] 15 U.S.C. § 1125(a)(1) (2012).

economic interest may sue pursuant to it.[77] Successful plaintiffs can obtain monetary damages, lost profits, or injunctive relief. In order to obtain monetary damages for a Lanham Act violation, the plaintiff must show that consumers were "actually" misled by the statement through survey evidence.[78] Plaintiffs seeking injunctive relief must show that the "representations 'have a tendency to deceive consumers.'"[79] Given the expense of pursuing a successful Lanham Act case, many manufacturers initiate less formal, less costly proceedings before the industry self-regulatory body, NAD.[80]

NAD does not require discovery or survey evidence and NAD proceedings are relatively quick compared to actual lawsuits, but the results of NAD decisions are non-binding on the parties.[81] Despite the voluntary nature of NAD proceedings, compliance is said to be high.[82] Both Lanham Act and NAD cases in the context of food products are based on allegations that a manufacturer utilized false, misleading, or deceptive claims to improperly draw consumers to its product based on faulty information, which allegedly hurt the plaintiff whose product the consumer might have otherwise chosen.[83]

---

[77] *See* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 224, 230–32 (3d Cir. 1990) (applying the Lanham Act to a dispute between direct commercial competitors); *see also* Leonetti's Frozen Foods, Inc. v. Am. Kitchen Delights, Inc., No. 11-6736, 2012 U.S. Dist. LEXIS 47815, at *29 (E.D. Pa. Apr. 4, 2012) (quoting EVCO Tech. & Dev. Co. v. Buck Knives, Inc. No. 05-CV-6198, 2006 U.S. Dist. LEXIS 68549, at *2 (E.D. Pa. Sept. 22, 2006)) (explaining that "'parties not in direct competition may have standing to sue if they meet the "reasonable interest" standard'").

[78] Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000).

[79] *Id.* (quoting Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d 683, 690 (6th Cir. 2000)).

[80] John E. Villafranco & Jennifer Ngai, *Making It Stop: A Practical Guide to Challenging Your Competitor's Advertising Claims*, METRO. CORPORATE COUNSEL, Oct. 2008, at 39, 39. NAD accepts consumer complaints, but the majority of the cases considered by the body are initiated by the Division itself or a competitor. *See* Andrew Strenio et al., *Self-Regulatory Techniques for Threading the Antitrust Needle*, ANTITRUST, Summer 2004, at 57, 57, 59; *Consumer Complaints*, ADVER. SELF-REGULATION COUNCIL, http://www.asrcreviews.org/2011/08/consumer-complaint-nad/ (last visited Mar. 20, 2014).

[81] Villafranco, *supra* note 80; Hugh Latimer & John W. Kuzin, *The NAD: A Primary Forum for Resolving Advertising Disputes*, METRO. CORPORATE COUNSEL, Jan. 2009, at 17, 17.

[82] Latimer & Kuzin, *supra* note 81. NAD states its purpose is to uphold "the integrity of advertising by ensuring that the claims and messages conveyed to consumers in advertising (including claims on product packaging) are accurate and properly substantiated." Nestle USA, Inc. v. Conagra Foods, Inc., Re: Marie Callender's Frozen Three Meat & Four Cheese Lasagna, NAD Case No. 5446, at 7 (Apr. 5, 2012).

[83] *See, e.g.*, Pom Wonderful v. Coca-Cola Co., 679 F.3d 1170, 1174–75 (9th Cir. 2012); *see also* Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 526, 536 (E.D. Pa. 2007) (claiming that "Merisant's positioning of its articficial sweeteners as 'natural'" was misleading); Campbell Soup Co. v. Dr. Pepper Snapple Grp., Inc., Re: Mott's Garden Blend

Because Lanham Act plaintiffs conduct surveys to prove that consumers have been misled by the label in question, there is sometimes a misconception that litigation under the Lanham Act acts as the "'vicarious avenger' of the public's right to be protected against false advertising."[84] Courts are clear that it is not.[85] Rather, "the public interest is presumed to be adequately represented by the FDA" instead of a party acting as "a private attorney general."[86] Thus, although a successful Lanham Act plaintiff can effectively remove a problematic claim from the marketplace, this is a side benefit predicated on winning the case and does not function to overhaul other questionable claims or industry-wide practices that do not harm competition. Litigation pursuant to the Lanham Act is also not a method to circumvent jurisdictional barriers.[87] Notably, Lanham Act litigants are not immune from the FDCA's preemption provision or the doctrine of primary jurisdiction, and thus have been unable to pursue claims.[88]

Lanham Act and NAD cases do reveal a business interest in factually-accurate labels to support honest competition. For example, Pom Wonderful brought a series of cases alleging that their competitors were selling adulterated pomegranate juice despite the label claim that it was "100% pomegranate" or "100% pure."[89] Pom tested the juices to discover one of its competitor's juices was in fact diluted, and thus the

---

Vegetable Juice, NAD Case No. 5413, at 1–2 (Jan. 6, 2012) (alleging that Mott's Garden Blend Vegetable Juice was tomato-based and not comprised of "garden fresh vegetables" as stated).

[84] Am. Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 145 (S.D.N.Y. 1987) (quoting John Wright, Inc. v. Casper Corp., 419 F. Supp. 292, 324–25 n.18 (E.D. Pa. 1976)) (internal quotation marks omitted).

[85] *Id. See also* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3d Cir. 1990).

[86] *Am. Home Prods.*, 672 F. Supp. at 145 ("If the intercession of a private attorney general is needed to press the FDA to perform that duty with respect to a particular product label, the quickest and most effective relief could be obtained through a direct petition to the agency and not through an unfair competition action against the manufacturer.").

[87] *See, e.g.*, *Pom Wonderful*, 679 F.3d at 1175–76; CytoSport, Inc. v. Vital Pharm., Inc., 894 F. Supp. 2d 1285, 1293–94 (E.D. Cal. 2012) (using a hybrid reason to dismiss the claims, stating that the FDA has primary enforcement authority and has already spoken on the labeling concern at issue).

[88] *See, e.g.*, Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th Cir. 1993) (dismissing plaintiffs' Lanham Act claims under a preemption theory); *see also* Healthpoint, Ltd. v. Ethex Corp., 273 F. Supp. 2d 817, 838 (W.D. Tex. 2001) (explaining that the FDA had primary jurisdiction to decide part of the Lanham Act claim).

[89] *See* Pom Wonderful v. Organic Juice USA, Inc., 769 F. Supp. 2d 188, 190–91 (S.D.N.Y. 2011); Pom Wonderful v. Purely Juice, Inc., No. CV-07-02633 CAS (JWJx), 2008 U.S. Dist. LEXIS 55426, at ¶¶ 12–16, 32 (C.D. Cal. July 17, 2008).

purity claim was literally false.[90] But not all cases produce positive outcomes. In another case initiated by Pom under the Lanham Act against a competitor for deceptively labeling and marketing juice, the jury found that although Pom proved its anti-competitive claims, it failed to prove that it suffered an injury.[91] Thus, Pom ostensibly won but did not actually obtain the relief it sought.[92] If attorneys general increased litigation under their state statutes to address such deceptive practices, companies like Pom would not need to police the marketplace to the magnitude they have. Attorney general action would be premised on fostering a fair marketplace,[93] which protects honest manufacturers as well.

B. Consumer Plaintiffs

Consumers and consumer advocates initiate litigation against manufacturers for questionable labeling practices pursuant to traditional theories of tort liability and the same state statutes utilized by the attorneys general.[94] Each state and the District of Columbia have statutes that are patterned after the FTC Act to varying degrees.[95] These laws are colloquially referred to as UDAP statutes. The name stems from the FTC Act's prohibition on "unfair or deceptive acts or practices."[96] The state statutes likewise generally prohibit "unfair or deceptive acts or practices" or UDAP.[97]

State consumer protection statutes permit consumers to recover for harm caused by unfair or deceptive practices.[98] However, there are preconditions that must be met in order for a private plaintiff to have standing to sue. At least forty-eight of these UDAP statutes require the

---

[90] *Purely Juice*, 2008 U.S. Dist. LEXIS 55426, at ¶¶ 53–56.

[91] *See* Pom Wonderful v. Welch Foods, Inc., No. CV 09-567 AHM (AGRx), 2010 U.S. Dist. LEXIS 126323, at *2–3 (C.D. Cal. Nov. 18, 2010).

[92] *Id.*

[93] *See*, *e.g.*, ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, *supra* note 20 ("Law enforcement actions are taken by the Attorney General to protect the public good and to ensure a fair market place."); *see also* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 645 (2005).

[94] CAROLYN L. CARTER & JONATHAN SHELDON, NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 722 (8th ed. 2012).

[95] Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 275–76 (2000); CARTER & SHELDON, *supra* note 94, at 1.

[96] Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012).

[97] *See, e.g.*, Consumer Protection Act—Unfair or Deceptive Acts or Practices, WASH. REV. CODE § 61.24.135 (Westlaw through 2013 Legis.).

[98] CARTER & SHELDON, *supra* note 94, at 627–631.

plaintiff to have suffered actual injury (often monetary damages) in order to bring a claim for damages or even for injunctive relief.[99] This is a crucial point because such statutes bar suits where a plaintiff is acting as a private attorney general and only trying to protect the public.[100] Seven states additionally require that the action be in the public interest, which means that in addition to being personally injured, the plaintiff's action must also vindicate the public's right to be protected from such unfair or deceptive claims.[101] Ten states further require plaintiffs to engage in pre-litigation attempts to settle the dispute informally, such as sending a notice or demand letter or engaging in informal dispute resolution procedures.[102] Compliance with these legal requirements must be pleaded and proven to the court.[103]

Aside from these statutory limitations, there are still additional barriers to bringing suit. Manufacturers have avoided liability by arguing that a plaintiff lacks standing because the claim is preempted or that the court lacks jurisdiction based on the FDA's primary jurisdiction. An example illustrating a successful preemption defense is a case in which plaintiffs sought to impose a disqualifying level of trans fats that would preclude a manufacturer from making nutrient content claims.[104] Because these requirements on manufacturers were dissimilar to those required by the NLEA, such a mandate is preempted by the NLEA.[105] Similarly the doctrine of primary jurisdiction was successfully invoked when a plaintiff challenged the serving size on a breath mint container. The court found that "the FDA is currently engaged in rulemaking procedures to *change* its existing requirements for breath mints, and

---

[99] *See id.*

[100] Mason v. Coca-Cola Co., 774 F. Supp. 2d 699, 704–05 (D.N.J. 2011) (dismissing case because plaintiffs did not suffer an injury by Diet Coke Plus's violation of the NLEA).

[101] CARTER & SHELDON, *supra* note 94, at 651–664. These states overlap with the 49 states that require injury. *Id.* at 628–29.

[102] *Id.* at 667. This is a strategy employed by the Center for Science in the Public Interest as an attempt to urge companies to change their marketing practices prior to, and in lieu of, the initiation of litigation. *See About CSPI*, CTR. FOR SCI. IN THE PUB. INTEREST, http://www.cspinet.org/about/index.html (last visited Mar. 20, 2014); *Litigation Project–Closed Cases*, CTR. FOR SCI. IN THE PUB. INTEREST, http://www.cspinet.org/litigation/closed.html (last visited Mar. 20, 2014); *see also* Stephen Gardner, *Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint*, 39 LOY. L.A. L. REV. 291, 304–05 (2006).

[103] CARTER & SHELDON, *supra* note 94, at 626.

[104] Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1122 (N.D. Cal. 2010).

[105] *Id.* at 1123; *see also* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a)(5).

thus the doctrine of primary jurisdiction is appropriate" because activity in this area would usurp the FDA's expertise.[106]

Attorneys representing food companies urge their clients to additionally defend against these types of lawsuits by "invoking common sense and plausibility to challenge the sufficiency of plaintiffs' claims."[107] The "common sense and plausibility" defense is derived from the fact that consumer plaintiffs are bound by a "reasonable consumer standard."[108] This means that a court looks to determine as a matter of law if a reasonable consumer would be misled by the claims at issue. Courts have dismissed cases on this basis. For example, a court found that a box of crackers depicting vegetables and stating, "Made with Real Vegetables," was not misleading because a reasonable consumer would not "be deceived into thinking a box of crackers is healthful or contains huge amounts of vegetables."[109] Another court found that a reasonable consumer would not be misled to think that "crunchberries" were derived from real berries.[110]

Courts have allowed claims to go forward when the plaintiff seeks remedies under the state UDAP statutes that are identical to the FDA requirements, for example, when a manufacturer fails to make the required disclosure for nutrient content claims[111] or when the FDA has not defined a term, such as the word *wholesome*, and it is alleged to be misleading in the context of the overall nutritional quality of the food product.[112] Cases that are not dismissed tend to settle. For example, plaintiffs challenged Kellogg's labeling and advertising campaign that claimed that Frosted Mini-Wheats cereal was clinically shown to improve children's attentiveness and other cognitive functions.[113] The

---

[106] Ivie v. Kraft Foods Global, Inc., No. C-12-02554-RMW, 2013 U.S. Dist. LEXIS 25615, at *19, *21 (N.D. Cal. Feb. 25, 2013).

[107] *Food Labeling Litigation: Recent Decisions on Preemption and Primary Jurisdiction*, Goodwin Proctor Alert (Goodwin Proctor LLP, Boston, Mass.), May 14, 2013, at 1, *available at* http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/0514_Food-Labeling-Litigation_Recent-Decisions-on-Preemption-and-Primary-Jurisdiction.aspx?article=1.

[108] CARTER & SHELDON, *supra* note 94, at 219.

[109] Red v. Kraft Foods, Inc., No. CV 10-1028-GW(AGRx), 2012 U.S. Dist. LEXIS 164461, at *11–12 (C.D. Cal. Oct. 25, 2012).

[110] Sugawara v. Pepsico, Inc., No. 2:08-cv-01335-MCE-JFM, 2009 U.S. Dist. LEXIS 43127, at *8 (E.D. Cal. May 21, 2009).

[111] *Ivie*, 2013 U.S. Dist. LEXIS 25615, at *31–32.

[112] Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2010).

[113] Dennis v. Kellogg Co., No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *2 (S.D. Cal. Nov. 14, 2013); *Mini-Wheats Class Action Settlement*, CEREALSETTLEMENT.COM, http://www.cerealsettlement.com/ (last visited Mar. 20, 2014).

cereal company denied wrongdoing[114] but was reprimanded by the FTC for the advertising portion of the campaign,[115] and thereafter, the company settled for $4 million.[116]

One of the most common bases for consumer-based litigation is the term *natural*.[117] The FDA has not formally defined the term *natural*,[118] but the Agency's informal policy states that it will not "restrict the use of the term 'natural,' except for added color, synthetic substances, and flavors."[119] The FDA has noted "considerable interest to consumers and industry" in the use of the term *natural* but explained that due to limited resources and competing priorities, the FDA would not undertake rulemaking to define *natural*.[120] Consumers and advocacy groups have initiated considerable litigation over the term. For example, Ben & Jerry's was sued for calling its ice-cream *all natural* although it contained alkalized cocoa, which the plaintiffs argued was a synthetic ingredient.[121] In another case, consumers filed suit alleging AriZona Iced Teas were incorrectly labeled as *natural* because they contained high fructose corn syrup and citric acid.[122] Similarly, Snapple's products were allegedly mislabeled as *natural* because they contained high fructose corn syrup.[123] More recently, the *natural* claim has been challenged when products contain a genetically modified organism ("GMO") as an

---

[114] *Mini-Wheats Class Action Settlement*, *supra* note 113.

[115] FTC Investigation of Ad Claims, *supra* note 49.

[116] *Dennis*, 2013 U.S. Dist. LEXIS 163118, at *9; *Mini-Wheats Class Action Settlement*, *supra* note 113.

[117] *See* Nestle USA, Inc. v. LALA-USA, Inc., Re: La Crème Real Dairy Creamer, NAD Case No. 5359, at 1–2, 6–7 (Aug. 8, 2011) (challenging the claim that a dairy creamer containing disodium phosphate, sodium citrate, carrageenan, and lactase is *natural*). Another example is a suit brought by the company that manufactures the artificial sweeteners Equal and NutraSweet, in which it sued the maker of Splenda under the Lanham Act, alleging that Splenda's advertising claims that it is "Made From Sugar" and is *natural* were false, misleading, and confusing to consumers. Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 514 (E.D. Pa. 2007).

[118] Erik Benny, Essay, *"Natural" Modifications: The FDA's Need to Promulgate an Official Definition of "Natural" that Includes Genetically Modified Organisms*, 80 GEO. WASH. L. REV. 1504, 1508 (2012); Watson, *GMOs and Natural Claims*, *supra* note 57.

[119] Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101).

[120] *Id.*

[121] Astiana v. Ben & Jerry's Homemade, Inc., Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 U.S. Dist. LEXIS 57348, at *1–2 (N.D. Cal. May 26, 2011).

[122] Ries v. Hornell Brewing Co., No. 10-1139-JF (PVT), 2010 U.S. Dist. LEXIS 86384, at *2–3 (N.D. Cal. July 23, 2010).

[123] Holk v. Snapple Beverage Corp., 575 F.3d 329, 332 (3d Cir. 2009).

ingredient.[124] For example, consumers alleged that Wesson vegetable oils made from GMOs are not "100% natural" despite the company's claims to the contrary.[125] The presence of GMOs compounds the labeling confusion because the FDA does not require that companies disclose bioengineered food,[126] but also has not indicated whether the Agency considers GMOs to be *natural*.[127]

The *natural* cases have mixed results.[128] Courts have dismissed *natural* claims based on the doctrine of primary jurisdiction,[129] or stayed the case to seek clarification from the FDA,[130] even though the Agency repeatedly declines to intervene or further define the term.[131] One court's decision was exacting and found that the claim that high fructose corn syrup is not *natural* because it "cannot be grown in a garden or field, it cannot be plucked from a tree, and it cannot be found in the oceans or seas of this planet," is "rhetoric" and not based on any evidence.[132] Two cases were recently settled where the *natural* claims were linked to questionable GMO claims. Barbara's Bakery, which produces Puffins

---

[124] *See In re* Frito-Lay N. Am., Inc., No. 12-MD-2413 (RRM)(RLM), 2013 U.S. Dist. LEXIS 123824, at *1 (E.D.N.Y. Aug. 29, 2013); Alison Frankel, *Labeling Genetically Modified Food: Regulation Via Litigation Is Back*, REUTERS (Oct. 16, 2013), http://blogs.reuters.com/alison-frankel/2013/10/16/labeling-genetically-modified-food-regulation-via-litigation-is-back/.

[125] Briseno v. Conagra Foods, Inc., No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750, at *4–5 (C.D. Cal. Nov. 23, 2011).

[126] FDA, *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance* (Jan. 2001), http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm.

[127] *See generally* Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 U.S. Dist. LEXIS 97207, at *5 (N.D. Cal. July 11, 2013); Maggie Hennessey, *Timing Right for Federal Standard on GMO: AHPA*, FOOD NAVIGATOR-USA.COM (Nov. 8, 2013), http://www.foodnavigator-usa.com/Regulation/Timing-right-for-federal-standard-on-GMO-AHPA.

[128] Mike Esterl, *The Natural Evolution of Food Labels,* WALL ST. J., Nov. 6, 2013, at B1.

[129] *See* Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1016–17 (N.D. Cal. 2012).

[130] *See* Holk v. Snapple Beverage Corp., No. 07-3018 (MLC), 2010 U.S. Dist. LEXIS 81596, at *8 (D.N.J. Aug. 10, 2010).

[131] *See id.* at *1, *3; Watson, *GMOs and Natural Claims*, *supra* note 57. The failure of plaintiffs to certify a class also arises as a barrier to plaintiff suits. Watson, *GMOs and Natural Claims*, *supra* note 57. However, a successful individual plaintiff could effectively remove a problematic claim from the marketplace, making class certification a moot benchmark for success in consumer protection cases.

[132] Ries v. Ariz. Beverages USA, No. 10-01139 RS, 2013 U.S. Dist. LEXIS 46013, at *15 (N.D. Cal. Mar. 28, 2013) (quoting Plaintiffs' [Redacted] Consolidated Opposition to Defendants' Motion for Summary Judgment and Motion for Decertification at 16, *Ries*, 2013 U.S. Dist. LEXIS 46013, ECF No. 184).

cereal, and PepsiCo, owners of Naked Juice, settled similar claims for $4 million and $9 million respectively.[133] Furthermore, some manufacturers have reportedly started to pull the *natural* claim, especially when they use GMOs, due to the influx of litigation and the uncertainty of the FDA's position.[134] Admittedly, companies' voluntary withdrawals of *natural* claims as a matter of practice or due to a settlement are a mark of success. However, of the scores of lawsuits filed, there are still only a handful of companies voluntarily discontinuing the claim and two large settlements to date.[135] After years of effort, this only represents a victory for the removal of just one term from a limited number of products.

On rare occasions, consumers successfully win a food-labeling case in court. In the seminal case on this topic, the Ninth Circuit held that Gerber's fruit snacks would "likely deceive a reasonable consumer" because "the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product."[136] The court found that "reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list . . . on the side of the box."[137] Such a success effectively requires the company to change the package label, protecting all consumers. It is noteworthy that the California Attorney General wrote an amicus brief in support of the plaintiffs in the *Gerber* case.[138]

The promising win in *Gerber* has not been replicated widely, nor have individual settlements resulted in a significant positive shift in the food-labeling environment as a whole. Consumers simply cannot and should not be expected to police food labels to the extent necessary to correct the food-labeling environment or fill the gaps in regulatory enforcement.

III. ATTORNEY GENERAL ACTIONS

The authority of attorneys general "lies at the intersection of law and public policy" specifically for the purpose of protecting their states' interests.[139] They have two powers relevant to addressing food labels

---

[133] Esterl, *supra* note 128.

[134] *Id.*

[135] *Id.*

[136] Williams v. Gerber Prods. Co., 552 F.3d 934, 939 (9th Cir. 2008).

[137] *Id.*

[138] *Id.* at 937.

[139] Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 425 (2011); *see also* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General,* 6 U. FLA. J.L. & PUB. POL'Y 1, 3–4 (1993).

through litigation. Attorneys general may bring an action pursuant to states' UDAP statutes or vindicate states' "quasi-sovereign" interests under states' *parens patriae* authority.[140] Each is addressed below.

A. Consumer Protection Authority

Attorneys general have the ability to protect consumers and the public interest by bringing actions pursuant to state UDAP statutes.[141] To date, attorneys general have not utilized this authority to address food-labeling deficiencies to a significant degree. Examples below are drawn from a diverse range of consumer protection activity related to labeling generally and, when available, food-related actions are referenced. The goal of attorney general action in the context of food labels (and related marketing campaigns) should specifically be to protect the public from false, deceptive, and misleading claims. This is the critical piece that has not been and cannot be accomplished to the same extent through private litigation on the same topic. Moreover, engagement by attorneys general in the topic would send an industry-wide message that they consider this an important consumer protection issue, which would likely provide an element of deterrence that does not exist under the FDA.

Although attorneys general do not want to interfere with the FDA's primary jurisdiction over food labels or pursue an action potentially preempted by the NLEA, attorneys general have access to unique strategies of the office and can pursue litigation to a greater extent than any other party. The FDCA has a section that permits an attorney general to bring proceedings in the state's name for violations of certain provisions of the NLEA,[142] directly vitiating primary jurisdiction issues. Notably excluded from this allowance is the clause which prohibits false and misleading labels; however, other relevant provisions such as guidelines for nutrition information and health-related claims are captured by this section.[143] Regardless, the attorneys general can bring actions to vindicate deceptive practices pursuant to their state UDAP statutes.[144] Misleading claims are still prohibited by the FDCA, and attorneys general can pursue this topic under their traditional consumer

---

[140] *See* CARTER & SHELDON, *supra* note 94, at 146; Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1867 (2000).

[141] Kaplan & Smith, *supra* note 95, at 325.

[142] Food, Drug, and Cosmetic Act, 21 U.S.C. § 337(b)(1) (2012).

[143] *Id.* Section 337 allows attorneys general to bring claims under twelve specific sections of the NLEA but § 343(a), the section that addresses false or misleading labels, is not one of those twelve. *Id.*

[144] *See* CARTER & SHELDON, *supra* note 94, at 146.

protection authority. Further, they can pursue questionable labeling practices through pre-litigation means and by collaborating with the FDA. These powers are unique to the office of attorney general and allow the attorneys general to avoid barriers to standing faced by other parties, as discussed below.

Attorneys general can also bring actions based on broader advertising campaigns, which include the misleading or deceptive labels at issue in this Article.[145] When the marketing campaign captures the language of the label, whether by utilizing the same claim or by including the image of the package in the advertisement, attorney general activity against the marketing campaign avoids concerns over usurping the FDA's authority or interfering with the regulatory scheme and is not preempted by the FDCA.[146] Because companies often seek to settle with the attorney general, a settlement can include reforms to broader marketing campaigns in addition to labeling practices.

There are several strengths associated with the office of attorney general that support litigation by attorneys general rather than by private parties. First, attorneys general possess broader authority to pursue UDAP claims than consumers and can bring a case when private plaintiffs are limited by the requirements of the statutes.[147] Attorneys general do not face any of the preliminary standing requirements of private plaintiffs because their authority is premised on their ability to bring actions to vindicate the public interest. Thus, they do not need to rely on the presence of an actual injury. This is especially relevant when food labels are misleading but do not necessarily result in a cognizable injury.

Second, attorneys general do not need to argue that a "reasonable consumer" would be deceived by the claim, but rather that the food label has the capacity to deceive the public.[148] Despite the fact that research indicates that reasonable consumers are confused by current food-labeling practices,[149] courts are not always convinced that this is the case in the context of consumer suits.[150] Courts are, however, more deferential to attorney general-initiated suits because attorneys general have the additional authority to protect the greater citizenry, which includes vulnerable persons such as the elderly and children, who may be more

---

[145] *See id.* at 831; Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1124–25 (1967).

[146] Additionally, the FTC Act has a savings clause. 15 U.S.C. § 57b(e) (2012).

[147] CARTER & SHELDON, *supra* note 94, at 846.

[148] *Id.* at 832–33.

[149] Harris et al., *Nutrition-related Claims on Children's Cereals*, *supra* note 6, at 2207–09; *see also* Drewnowski et al., *supra* note 6, at 692–93.

[150] *See supra* Part II.B.

susceptible to questionable labeling practices than a "reasonable consumer."[151]

Third, by virtue of their position, attorneys general can work in a variety of methods using different strategies of the office. They can work independently or together, and can simultaneously work with federal agencies.[152] Working in concert makes sense when the actionable practice occurs nationally (such as through labeling or marketing campaigns) and impacts states similarly. In one such example, thirty-eight attorneys general brought a lawsuit against Janssen Pharmaceuticals, Inc., charging it with improper marketing and advertising of its anti-psychotic drugs, which resulted in the "largest multi-state consumer protection-based pharmaceutical settlement in history."[153] Multi-state action also fosters non-monetary outcomes such as increased disclosures by the company. In another case, nineteen attorneys general investigated alleged misrepresentations by Pfizer related to its drug Zithromax.[154] As part of the settlement, the drug company agreed to make specific, factual disclosures aimed at protecting and educating consumers about antibiotic resistance in its future marketing materials.[155]

Attorneys general also collaborate with federal regulatory agencies.[156] These "State-Federal Partnership[s]" utilize the authority and expertise of both offices and can effectuate positive policy objectives

---

[151] CARTER & SHELDON, *supra* note 94, at 833. In addition, courts may be more deferential to novel theories of unfairness when brought by an attorney general. *Id.*

[152] An attorney general might decide to pursue an issue that is particularly relevant to his or her state's population. For example, the Louisiana Attorney General pursued claims on his own against the health care giant, GlaxoSmithKline, for Medicaid fraud and deceptive marketing practices in order to obtain a larger settlement for the state than by joining a parallel multi-state action. *See Attorney General Recovers $45 Million for Louisiana in Litigation with GSK*, KLAX-TV ABC 31 (July 29, 2013, 10:21 AM), http://klax-tv.com/attorney-general-recovers-45-million-for-louisiana-in-litigation-with-gsk/ ("By pursuing GSK on our own, we have recovered 20 times more money for the state of Louisiana than we would have in the multi-state settlement approved last November." (internal quotation marks omitted)).

[153] Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Settles $181 Million Deceptive Marketing Case with Janssen Pharmaceuticals and Johnson & Johnson (Aug. 30, 2012), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-settles-181-million-deceptive-marketing-case-janssen-pharmaceuticals.

[154] Press Release, Md. Attorney Gen., Attorneys General Announce Settlement with Pfizer over Zithromax Advertising (Jan. 6, 2003), *available at* http://www.oag.state.md.us/Press/2003/0106a03.htm.

[155] *Id.*

[156] *See* Dina ElBoghdady, *Skechers Agrees to $40 Million Settlement*, WASH. POST, May 17, 2012, at A11 (describing how forty-four attorneys general and the FTC settled a lawsuit against Skechers, the makers of rocker-bottom athletic shoes, for unsubstantiated health-related claims in the advertising of the shoes).

to a greater extent than working in silos towards the same goal.[157] For instance, thirty-nine states and the FTC worked cooperatively to pursue the Dannon Company for making unsubstantiated claims (not backed by adequate scientific proof) of health benefits associated with consuming its Activia and DanActive products.[158] The parties settled, and Dannon was forced to pay $21 million to the states, which was "the largest payment to date in a multistate settlement with a food producer."[159] Collaborating with the FDA to enforce the FDCA is also a method for attorneys general to work towards the common goal of increased enforcement without eliciting primary jurisdiction issues.

Fourth, attorneys general have pre-litigation powers unavailable to private parties or other government entities. Attorneys general can issue civil investigative demands and subpoenas, both of which are investigative tools to obtain documents and responses to targeted inquiries.[160] An attorney general can use these tools to determine if a UDAP violation exists prior to, or instead of, formally bringing a lawsuit.[161] This method has proven effective in bringing about change even when there might have been standing issues had the attorneys general pursued litigation. For example, without resorting to litigation, thirty-four attorneys general settled with Santa Fe Natural Tobacco Company over an argument that the company's *organic* label potentially misled consumers to believe organic tobacco was less harmful than other tobacco products.[162] Part of the agreed-upon terms required all future

---

[157] Thurbert Baker, *Attorneys General Spring Meeting: "State-Federal Partnership" Theme Is the Message*, POL., L. & POL'Y BLOG (Mar. 12, 2012), http://www.politicsandlawblog.com/2012/03/12/attorneys-general-spring-meeting-state-federal-partnership-theme-is-the-message/ (stating that the theme of the 2012 Spring National Association of Attorneys General (NAAG) meeting was "'State-Federal Partnership,' [which shows that] the work of State Attorneys General is clearly a growth area in public policy, given the likelihood of extensive collaboration between federal agencies and State AGs."). Thurbert Baker is a former attorney general and President of NAAG. *Id.*

[158] Press Release, Attorney Gen. of Mass., Massachusetts Attorney General Martha Coakley and 38 Other States Settle with Dannon for $21 Million Regarding Deceptive Advertising of Activia and DanActive Yogurt Products (Dec. 15, 2010), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2010/ag-coakley-and-38-other-states-settle-with.html.

[159] *Id.*

[160] CARTER & SHELDON, *supra* note 94, at 835.

[161] *See id.* (explaining that attorneys general may determine whether UDAP violations exist by using administrative subpoenas).

[162] Press Release, Cal. Attorney Gen., Brown Secures Agreement with American Spirit Cigarettes Maker Over Alleged Misleading Marketing of Organic Tobacco Products (Mar. 1, 2010), *available at* http://oag.ca.gov/news/press-releases/brown-secures-agreement-american-spirit-cigarettes-maker-over-alleged-misleading; *see also* Assurance of Voluntary Compliance, Agreement Between Santa Fe Natural Tobacco Co. and State Attorneys

organic cigarette advertisements to prominently warn that "[o]rganic tobacco does NOT mean a safer cigarette."[163] This effectively changed the labels to protect consumers. Another example stemmed from a 2009 investigation by the Connecticut Attorney General of the food industry's Smart Choices program.[164] This involved an industry-generated symbol that labeled food as a "smart choice[]" despite a questionable nutrition profile.[165] The FDA thereafter initiated an investigation, but the program was discontinued within weeks of the Attorney General's request for information.[166]

Sometimes attorneys general engage in less formal requests to agencies or companies pursuant to their consumer protection authority. For example, in May 2013, forty-three attorneys general requested that the FDA require warning labels for pain relievers "to alert pregnant women that use of such drugs may harm infants."[167] This is particularly relevant when current labeling regulations do not require increased information but such a disclosure could protect and inform consumers.[168] Attorneys general may also send letters to agencies seeking broader action. For example, attorneys general have recently asked the FDA to regulate the entire product category of electronic cigarettes. Forty attorneys general cited the Tobacco Control Act as the authority for the FDA to regulate electronic cigarettes as "tobacco products" and requested that the FDA "ensure that all tobacco products are tested and regulated."[169]

Similarly, attorneys general issue letters to industry leaders requesting them to change their practices, which attorneys general may do as either a precursor to stronger actions or as an alternative for a

---

General 1 (Mar. 1, 2010) [hereinafter Santa Fe Assurance of Voluntary Compliance], *available at* http://oag.ca.gov/system/files/attachments/press_releases/n1865_santa_fe_natural_tobacco_co_agreement.pdf (memorializing the reasons for the settlement).

163 Santa Fe Assurance of Voluntary Compliance, *supra* note 162, at 5–6.

164 William Neuman, *Connecticut to Scrutinize Food Labels*, N.Y. TIMES, Oct. 15, 2009, at B1.

165 *Id.*

166 Julie Gallagher, *Companies to Discontinue Smart Choices*, SUPERMARKET NEWS (Oct. 29, 2009), http://supermarketnews.com/news/smart_choices_1029.

167 Andrew Zajac & Anna Edney, *Attorneys General Ask FDA to Require Warning for Pain Drugs* (*2*), BLOOMBERG BUSINESSWEEK (May 13, 2013), http://www.businessweek.com/news/2013-05-13/attorneys-general-ask-fda-to-require-warning-for-pain-drugs-2.

168 Kaplan & Smith, *supra* note 95, at 317–18 (discussing the authority of the attorneys general to issue regulations and noting that if such state regulations are preempted, "[a] state attorney general is more likely to lobby the federal agencies to take action in these circumstances in lieu of taking on such a regulatory burden directly").

169 Letter from Nat'l Ass'n of Attorneys Gen., to the Honorable Margaret Hamburg, Comm'r, FDA (Sept. 24, 2013), *available at* www.tn.gov/attorneygeneral/cases/ecigarettes/ecigaretteletter.pdf.

topic area where attorneys general might not have the authority or inclination to pursue further.[170] The latter often occurs when a company is not technically breaking the law but is still not being a "good corporate citizen" and when attorneys general seek to persuade self-corrective action.[171] Whether companies comply with such requests likely depends on whether the attorney general could pursue a stronger case through enforcement mechanisms.[172]

One example combining several of the aforementioned practices over a period of three years involved caffeinated alcoholic beverages.[173] About half of the attorneys general wrote letters to two different companies that produced caffeinated alcoholic beverages warning them that the products were dangerous,[174] and eighteen attorneys general also petitioned the FDA to take action.[175] Thereafter, both the FDA and FTC initiated action, warning the companies that their products were adulterated and that the advertisements may be unfair and deceptive.[176] Two leading producers voluntarily discontinued producing the products, and others were subject to further state actions.[177]

B. Food Label Actions

New false, deceptive, and misleading food labels are continuously emerging. However, aside from a few instances, attorneys general have

---

[170] *See* Press Release, Fla. Office of Attorney Gen., Attorney General Pam Bondi and Two Other Attorneys General Urge Kitson, Inc. to End Clothing Line Glamorizing Prescription Drugs (Sept. 5, 2013), *available at* http://www.myfloridalegal.com/newsrel.nsf/newsreleases/FDFCFA1F590A5C8685257BDD006F38E4.

[171] *See* Press Release, Md. Attorney Gen., Attorney General Gansler Calls on Pabst Brewing to End Production of Blast: "Binge-in-a-Can" Targets Youth; Flavored Malt Beverage Poses Serious Health Risks (Apr. 21, 2011), *available at* http://www.oag.state.md.us/Press/2011/042111.html. In a letter sent to the Pabst Brewing Company, eighteen attorneys general entreated the company that produces Blast by Colt 45 to change its marketing practices. *Id.* The attorneys general called the fruit flavored malt beverage that comes in 23.5 ounce cans, a "'binge-in-a-can' [that] targets youth." *Id.* This effort did not seem to change the company's practices: Pabst Blast still exists in fruit flavors and 23.5 ounce cans. *See Pabst Brewing Company Beer Portfolio*, PABST BREWING CO., http://pabstbrewingco.com/beers/ (last visited Mar. 20, 2014).

[172] Attorneys general have additional non-litigation powers that are relevant in the context of misleading food labels. They can conduct education programs and write amicus briefs, such as the California Attorney General did in the *Gerber* case. *See supra* note 138 and accompanying text.

[173] *See* Dennis Cuevas, *Law Enforcement Takes Action Against Caffeinated Alcoholic Beverages*, NAAGAZETTE, Dec. 2010, at 3–4, *available at* http://www.naag.org/assets/files/pdf/gazette/4.12.Gazette.pdf.

[174] *Id.*

[175] *Id.* at 3.

[176] *Id.*

[177] *Id.* at 4.

not utilized their vast consumer protection authority in the context of food labels. Attorneys general devoting attention to food labels would have short and long-term benefits for consumers. First, there are many food-labeling corollaries to the above noted issues that likely warrant the collective attention of attorneys general; a few obvious ones are noted below.[178] Attorneys general have the power of their office to pursue these and other individual cases, and even distinct wins by attorneys general would have broader-reaching implications than individual successes brought by private plaintiffs. Attorney general involvement tends to induce companies to respond quickly.[179] For instance, it would not likely have taken years of litigation and a hundred lawsuits for attorneys general to engender company and industry changes on the *natural* claims. Further, if the attorneys general collectively address food labels as a regular part of their consumer protection authority, this would send an industry-wide message that they are dedicating the resources and authority of their office to the issue of food labels. Companies would be more likely to consider the legal ramifications of utilizing a questionable label prior to launching the campaign.

Some examples of individual food issues can be analogized to the cases noted above. Recall the Smart Choices example.[180] Without coming to a conclusion about its potential for deception or whether it qualifies as unfair, another industry-generated symbol manufacturers pay to display on their food packages is the Whole Grain Stamp.[181] It is unclear if consumers understand that the stamp is not a government-initiated program or if consumers perceive it to indicate stricter nutrition standards than utilized.[182] A recent study found that products bearing the Whole Grain Stamp had the most sugar of 545 whole grain products

---

[178] This section provides some of the more obvious examples. Steve Gardner from the Center for Science in the Public Interest and Jennifer Harris from the Rudd Center presented other examples at an October 28, 2013 meeting at NAAG.

[179] *See, e.g.*, *supra* notes 164–66 and accompanying text (discussing Connecticut Attorney General Blumenthal's successful work to end the food industry's deceptive use of "Smart Choices" labeling).

[180] *See, e.g.*, *supra* notes 164–66 and accompanying text.

[181] *See* Kathleen Doheny, *Not All Whole Grain Products Are Created Equal, Study Claims*, HEALTHDAY (Jan. 17, 2013), http://consumer.healthday.com/vitamins-and-nutritional-information-27/dietary-fiber-health-news-308/not-all-whole-grain-products-are-created-equal-study-claims-672502.html (stating that companies pay dues to belong to the Whole Grains Council that created the Whole Grains Stamp). The Whole Grain Stamp is a very popular labeling tool. *See generally* Elaine Watson, *The Rise and Rise of Whole Grain: Whole Grain Stamp Now On 7,600+ Products in 35 Countries*, FOOD NAVIGATOR-USA.COM (Oct. 18, 2012), http://www.foodnavigator-usa.com/Markets/The-rise-and-rise-of-whole-grain-Whole-Grain-stamp-now-on-7-600-products-in-35-countries (describing the acceleration in popularity of the label in the eleven years following 2000).

[182] *See* Doheny, *supra* note 181.

assessed.[183] Attorneys general could investigate this stamp to determine if issues exist similar to that of Smart Choices and the extent to which consumers understand the realities behind its usage.

Another example involves two related categories of products in need of increased FDA regulation and enforcement: energy drinks and caffeinated food. Energy drinks are beverages that proclaim to provide the user increased energy through the addition of caffeine and approved and unapproved food additives, and have been linked to adverse health events.[184] Energy drinks are sometimes labeled by companies as dietary supplements instead of beverages and contain excessively more caffeine than recognized as safe through the FDA's "Generally Recognized as Safe" ("GRAS") protocol.[185] Senators[186] and physicians[187] wrote letters to the FDA requesting the Agency to increase regulation of energy drinks. The related product category, caffeinated food, is exactly that—food, such as waffles and syrup, with added caffeine.[188] The FDA explained that "[e]xisting rules never anticipated the current proliferation of caffeinated products."[189] The Agency said it is prepared to regulate but concurrently expressed "hope" that the industry would voluntarily regulate itself.[190] Attorneys general can investigate and actually bring actions against the companies for violating FDA regulations and GRAS safety recommendations for caffeine. The attorneys general can seek industry agreement to include warning labels on these products and also work with and urge increased FDA attention to the issue, as they did with caffeinated alcoholic beverages.

---

[183] Rebecca S. Mozaffarian et al., *Identifying Whole Grain Foods: A Comparison of Different Approaches for Selecting More Healthful Whole Grain Products*, 16 PUB. HEALTH NUTRITION 2255, 2261 (2013).

[184] Barry Meier, *Caffeinated Drink Cited in Reports of 13 Deaths*, N.Y. TIMES, Nov. 15, 2012, at B1.

[185] Jennifer L. Pomeranz et al., *Energy Drinks: An Emerging Public Health Hazard for Youth*, 34 J. PUB. HEALTH POL'Y 254, 256–57 (2013).

[186] Laurie Tarkan, *Lawmakers Urge FDA to Regulate Energy Drinks*, FOXNEWS.COM (Nov. 16, 2012), http://www.foxnews.com/health/2012/11/16/lawmakers-urge-fda-to-regulate-energy-drinks/.

[187] Barry Meier, *Doctors Urge F.D.A. to Restrict Caffeine in Energy Drinks*, NYTIMES.COM (Mar. 19, 2013), http://www.nytimes.com/2013/03/20/business/doctors-urge-fda-to-restrict-caffeine-in-energy-drinks.html?_r=0.

[188] *FDA to Investigate Added Caffeine,* FDA CONSUMER HEALTH INFO., May 2013, at 1–2, *available at* http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM350740.pdf.

[189] *Id.* at 2.

[190] *Id.*; *see also* Saundra Young, *Wrigley Halts Production of Caffeine Gum*, CNN HEALTH (May 8, 2013), http://www.cnn.com/2013/05/08/health/wrigley-caffeine-gum-production/. Although Wrigley halted its production of caffeine gum, Wrigley may, unfortunately, be the exception in that respect.

Attorney general attention could still be helpful in the context of the controversial terms *natural* and *all natural*.[191] Manufacturer surveys during Lanham Act litigation[192] and independent research indicate that consumers are in fact confused by the term.[193] Concerted attorney general action in this context would address the confusion. Attorneys general could investigate food manufacturers that label a product *natural* in the vein of the Santa Fe *organic* tobacco case.[194] One goal could be a settlement that requires a disclosure to alert consumers that the term *natural* does not mean that the product or ingredient was "grown in a garden or field," or "plucked from a tree."[195] Another disclaimer could alert consumers that the term *natural* is not regulated by the FDA.[196]

There are a wide range of current and emerging food-labeling issues that are ripe for attorney general involvement.[197] Attorneys general can work with advocacy groups that track food marketing practices and consumer responses. Further, attorneys general can urge action by the FDA to strengthen and enforce its regulations. Perhaps most importantly, attorneys general can urge Congress to strengthen the NLEA. In 2013, two United States Congressmen introduced such a bill aimed at revising food labeling laws.[198] Attorneys general can join together to support such legislation aimed at overhauling food-labeling regulations which would also reduce the need to litigate. The collective consumer protection action of attorneys general could effectuate real change in the food information environment.

---

[191] *See supra* Part II.B.

[192] Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 526, 536 (E.D. Pa. 2007).

[193] JENNIFER L. HARRIS ET AL., RUDD CTR. FOR FOOD POL'Y & OBESITY, SUGARY DRINK F.A.C.T.S.: EVALUATING SUGARY DRINK NUTRITION AND MARKETING TO YOUTH 112 (2011), *available at* http://sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf (highlighting the prevalent use of labels such as *natural* on unhealthy sugary drinks, which misleads even many parents to think that such drinks are healthy).

[194] *See supra* notes 162–63 and accompanying text.

[195] Ries v. Ariz. Beverages USA, No. 10-01139 RS, 2013 U.S. Dist. LEXIS 46013, at *15 (N.D. Cal. Mar. 28, 2013) (quoting Plaintiffs' [Redacted] Consolidated Opposition to Defendants' Motion for Summary Judgment and Motion for Decertification at 16, *Ries*, 2013 U.S. Dist. LEXIS 46013, ECF No. 184).

[196] *See* Holk v. Snapple Beverage Corp., No. 07-3018 (MLC), 2010 U.S. Dist. LEXIS 81596, at *8 (D.N.J. Aug. 10, 2010).

[197] *See, e.g.*, Watson, *supra* note 17 (describing how the newest wave of lawsuits challenge the term "evaporated cane juice," which violates FDA guidance documents).

[198] *See* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. (as introduced in the House, Sept. 19, 2013), *available at* http://beta.congress.gov/113/bills/hr3147/BILLS-113hr3147ih.pdf.

C. Parens Patriae

No discussion of attorney general litigation would be complete without mentioning their *parens patriae* authority. *Parens patriae*, meaning "parent of the country," is an authority held by states and exercised by the attorneys general to protect state interests.[199] Attorneys general can use this authority to vindicate the state's "quasi-sovereign" interests in the physical and economic health, safety, and welfare of the residents in the state.[200] Historically, this common law power was recognized as a method for states to prevent or repair harm caused to property, air, or water rights by another state.[201] Courts later recognized states' standing to sue private parties to seek vindication of similar rights.[202]

The boundaries of *parens patriae* authority are evolving, but actions pursuant to it have a strong foundation in protecting the public's health. Perhaps the most well-known use of *parens patriae* authority for public health occurred during the tobacco litigation of the late 1990s, whereby attorneys general joined together with plaintiffs' attorneys to allege that the tobacco companies violated their states' quasi-sovereign interests.[203] Due to the Master Settlement Agreement, the cases ended without trials on the merits.[204] Legal scholars posit that attorneys general using *parens patriae* in a concerted action may have great implications for joint action in other contexts. Richard Ieyoub, Attorney General of Louisiana when that state sued the tobacco industry, and Theodore Eisenberg, law professor at Cornell and consultant to Louisiana's trial team when it sued the tobacco industry, explain that although this "modern use of *parens patriae* is in its early stages," it is likely appropriate when the interest sought by the state is beyond that of an ordinary tort victim.[205] This means that the state must have an independent interest of its own and seek to address a "behavior that adversely affects a substantial number of the state's citizens."[206]

---

[199] *See* Ieyoub & Eisenberg, *supra* note 140, at 1863.

[200] *See* Maryland v. Louisiana, 451 U.S. 725, 737–38 (1981); Ieyoub & Eisenberg, *supra* note 140, at 1867–68.

[201] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 258 (1972).

[202] *See id.* at 259–60.

[203] *See* Ieyoub & Eisenberg, *supra* note 140, at 1860–62; Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 935 (2008).

[204] *See* Ieyoub & Eisenberg, *supra* note 140, at 1862. *But see* Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962–63 (E.D. Tex. 1997) (finding the state may maintain action pursuant to its quasi-sovereign interests found at common law).

[205] *See* Ieyoub & Eisenberg, *supra* note 140, at 1859 nn.*, †, 1880.

[206] *Id.* at 1875.

The question is thus whether attorneys general could and should utilize their *parens patriae* authority to launch a multi-state lawsuit against the food industry to mimic the theory utilized during the tobacco litigation. Obesity and food-related nutrition issues are among the foremost public health issues of the day,[207] and "[o]besity's health and economic effects are on a par with those of smoking."[208] Ieyoub and Eisenberg posit that this authority may prove to be particularly relevant when an industry is "seemingly beyond the reach of traditional state regulation, such as consumer protection laws, and too powerful to be subject to federal regulation. For example, the tobacco industry resisted federal and state regulation through massive lobbying as well as lack of candor about the health risks of smoking."[209] One could argue that the same situation exists in the context of food companies and their relationship to the modern food environment. The food industry may very well be beyond traditional state regulation: first, because the NLEA preempts state labeling laws that are stricter than federal law, and second, because the food industry engages in massive lobbying against federal and state regulations.[210] Public health experts have identified additional food industry practices that replicate the highly criticized

---

[207] *See* Risa Lavizzo-Mourey & Jeffrey Levi, *Introduction* to JEFFREY LEVI ET AL., TRUST FOR AMERICA'S HEALTH & THE ROBERT WOOD JOHNSON FOUND., F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE 2013, at 3–4 (2013), *available at* http://healthyamericans.org/assets/files/TFAH2013FasInFatReportFinal%209.9.pdf (summarizing obesity report findings); *Childhood Obesity Facts*, CDC, http://www.cdc.gov/healthyyouth/obesity/facts.htm (last updated July 10, 2013) (noting nationwide prevalence of childhood obesity).

[208] *Making Healthy Choices Easy Choices*, *Obesity Prevention Source*, HARV. SCH. OF PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/policy-and-environmental-change/ (last visited Mar. 20, 2014).

[209] Ieyoub & Eisenberg, *supra* note 140, at 1879–80. *But see* Gifford, *supra* note 203, at 915–16, 923 (opposing the expanded use of *parens patriae* authority and arguing contrary to the assertion that the attorneys general needed to act in the face of government inactivity, but rather "[w]hat frustrated public health and anti-smoking activists and some attorneys general was that the regulatory schemes adopted by the federal and state legislative branches did not go as far as they would have liked").

[210] *See* Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 773 (2008) (explaining how the NLEA preempts more restrictive state and local labeling laws); Christine Spolar & Joseph Eaton, *Food Lobby Mobilizes, As Soda Tax Bubbles Up*, HUFFINGTON POST (May 25, 2011, 3:35 PM), http://www.huffingtonpost.com/2009/11/04/soda-tax-mobilizes-food-l_n_345840.html (detailing lobbying efforts against soda tax initiatives); Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 9:03 AM), http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427 (detailing the food industry's lobbying efforts).

practices utilized by the tobacco industry that could serve as a basis for *parens patriae* standing.[211]

One could thus argue that use of states' *parens patriae* authority by attorneys general, based on the theories utilized during the tobacco litigation, would be appropriate to address the food-labeling deficiencies identified in this Article. However, both Ieyoub and Eisenberg, as well as opponents of the expanded use of *parens patriae*, caution limitations. Ieyoub and Eisenberg suggest that "actions in *parens patriae* should be reserved for substantial and serious harm to the citizenry" when other available remedies and doctrines are wanting or limited, for example, because citizens could not reasonably be expected to seriously take on the case and the state independently suffered harm.[212] Further, Donald Gifford, an opponent of the expanded use of *parens patriae* authority even in the tobacco context, warns that attorneys general should lack standing when the harms sustained by the state are "too remote" or "derivative" and when the victims' identities are not necessarily predicated on their citizenship of a particular state.[213]

In the context of food labeling, it would be difficult to argue that citizens of one state are harmed by such practices due to their identities as citizens of that state. Stated another way, packaged food is subject to the same federal regulations nationally, solidified by the NLEA's preemption provision. Therefore, the entire country of consumers suffers similarly, rather than this resulting in a particular state-specific problem. However, the same would be true of the tobacco companies under the tobacco litigation (as also argued by Gifford).[214] Would this mean that when a perpetrator harms a nation of citizens the result is that the perpetrator is protected against attorney general action, but if the perpetrator harms only one state's citizens it would be subject to an attorney general's *parens patriae* authority?

In a footnote, Gifford admits that the Supreme Court's opinion in *Massachusetts v. Environmental Protection Agency* might suggest that the *parens patriae* standing in that case can be interpreted broadly enough to support standing against a product manufacturer in the context of broadly-caused harms.[215] In that case, twelve states, four local governments, and several private organizations alleged that the EPA

---

[211] Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?* 87 MILBANK Q. 259, 260–62 (2009).

[212] Ieyoub & Eisenberg, *supra* note 140, at 1880.

[213] Gifford, *supra* note 203, at 935–36.

[214] *Id.* at 937.

[215] *Id.* at 937 n.179.

"abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide."[216] The Court found that, of the states, Massachusetts alleged a particularized injury related to coastal waters swallowing coastal land owned by the state.[217] The Court acknowledged that these "climate-change risks are 'widely shared,'" but it explained that this "does not minimize Massachusetts' interest in the outcome of this litigation" because the "harm is concrete" to that state.[218] The Court also made the point that Massachusetts, like other states, surrendered "certain sovereign prerogatives" by entering the Union.[219] Thus, the Court explained that critical to its "standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[220] The Court noted, however, that the state cannot do certain things as a state in the nation, including, "in some circumstances[,] the exercise of its police powers to reduce in-state motor-vehicle emissions [which] might well be pre-empted."[221] Conversely, the dissent found that the majority created a special concession for Massachusetts because it could not "establish standing on traditional terms."[222] The dissent explained that "[t]he very concept of global warming seems inconsistent with this particularization [of an injury] requirement."[223]

The concept of *parens patriae* authority is evolving.[224] Whether the majority paid lip-service to the individualized injury requirement or whether such an individualized injury within a larger harm plainly supports *parens patriae* standing, it makes little sense that a broadly caused harm cannot be remedied by attorneys general. This case supports the idea that *parens patriae* standing can be appropriate in both the tobacco and food contexts. In terms of food labeling, like under the Clean Air Act,[225] the states are preempted from enacting and enforcing stricter labeling guidelines.[226] Moreover, independent state harm could similarly be predicated on the economic and physical health

---

[216] Massachusetts v. EPA, 549 U.S. 497, 505 & nn.2–4 (2007).
[217] *Id.* at 522.
[218] *Id.*
[219] *Id.* at 519.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 540 (Roberts, C.J., dissenting).
[223] *Id.* at 541 (Roberts, C.J., dissenting).
[224] *See* Ieyoub & Eisenberg, *supra* note 140, at 1880.
[225] *See supra* note 220 and accompanying text.
[226] *See supra* notes 53–56 and accompanying text.

harms stemming from current food industry practices that harm citizens in one state, among those in other states.

Where *parens patriae* might be lacking, however, is the causal relationship between the labeling deficiencies alone and poor health outcomes. Obesity, diabetes, and other nutrition-related deficiencies in the United States are the result of the modern food environment, arguably perpetrated by some of the same food companies responsible for deceptive labeling.[227] However, despite the fact that the food environment includes questionable food-labeling practices, it also includes broader marketing campaigns, disparities in food access, and the relative cost of healthy and unhealthy food.[228] Such a broad *parens patriae* action to address food industry practices that shape our modern food environment is thus promising, but a closer examination is beyond the scope of this Article. It is likely an issue that will garner increased attention in the near future.[229] In the context of labeling alone, the attorneys general should address such deficiencies through the remedy available: using their consumer protection authority under state UDAP statutes.

CONCLUSION

Consumers are increasingly seeking to purchase healthier food products. A key method to determine which foods are healthy is by referring to nutrition-related information on the food label. Independent research studies and the increase in private litigation indicate that labels are not providing straightforward factual information about food products. Rather, many are deceptively declaring positive nutritional

---

[227] This notion could be predicated on a market share liability theory given that there has been a consolidation of food companies nationally (and internationally). Arguments that the cause of obesity is multi-factorial, including things such as genetics, are not convincing beyond a small amount of obese persons who would have been obese regardless of the food environment. *See Genes Are Not Destiny*, *Obesity Prevention Source*, HARV. SCH. OF PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/genes-and-obesity/ (last visited Mar. 20, 2014). Further, people's personal responsibility has not changed over the last several decades. What has changed is the modern food environment.

[228] *See* LAUREN DINOUR ET AL., CITY UNIV. OF N.Y. CAMPAIGN AGAINST DIABETES & PUB. HEALTH ASSOC. OF N.Y., REVERSING OBESITY IN NEW YORK CITY: AN ACTION PLAN FOR REDUCING THE PROMOTION AND ACCESSIBILITY OF UNHEALTHY FOOD 7–8 (2008), *available at* http://www.phanyc.org/wp-content/uploads/2012/11/2008unhealthyfoodreport.pdf.

[229] *Compare* Divya Srinath, *A New Weapon in the Obesity Battle: Coordinated State Attorneys General* Parens Patriae *Consumer Protection Lawsuits*, 4 J.L. & SOC. DEVIANCE 40, 118–19 (2012), *available at* http://www.lsd-journal.net/archives/Volume4/Volume4.pdf (arguing in favor of expanded use of *parens patriae* to fight obesity), *with* John B. Hoke, Note, Parens Patriae*: A Flawed Strategy for State-Initiated Obesity Litigation*, 54 WM. & MARY L. REV. 1753, 1757–58 (2013) (arguing against the same).

qualities despite an overall poor nutrition profile. Attorneys general are in a unique position to protect consumers from questionable food labels.

Given the promising but deeply underutilized authority of attorneys general to address misleading food labels, there might be a lack of political will for attorneys general to engage on this topic.[230] Identical issues exist in the food-labeling area, with relatively little attorney general response, as compared to other labeling areas which have garnered concerted attorney general action. Attorneys general are charged with protecting consumers and conditions for fair competition. Current food-labeling practices are a barrier to both objectives. Attorneys general are in the best position to address food labeling through litigation and pre-litigation means and to urge action by the federal government. Attorneys general can accomplish more through litigation than any other party. They can and should also use their bully pulpit to urge federal action to close the regulatory gap that enables the current, misleading food label environment to exist.

[230] Note that forty-four attorneys general are elected by popular vote. *About NAAG: Information on the Association*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Mar. 20, 2014).