Citizen Surveillance of Misleading Food Labeling

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ABSTRACT

At its core, a food label is a marketing device that food manufacturers use to display their product's most positive attributes in hopes of increasing product sales. In 1906, Congress charged the Food and Drug Administration with policing misleading labeling of food products to ensure that manufacturers present their products truthfully. As the number of food products on grocery store shelves has soared, the FDA has become a less effective enforcer of this statutory mandate. In lieu of government enforcement, state consumer protection statutes, modeled after the Federal Trade Commission Act, have given citizens the ability to directly hold food manufacturers accountable for their misleading marketing choices on food products. Consumers have taken up the mantle of surveilling food labeling claims, and food labeling litigation has skyrocketed in the last ten years. Nevertheless, one hurdle has consistently blocked litigants from holding companies accountable for their intentionally vague labeling: the reasonable consumer test.

Deferring to the Federal Trade Commission's Deception Policy, state consumer protection statutes uniformly require a plaintiff to prove that a reasonable consumer is likely to be misled by the product's labeling to succeed on a misleading labeling claim. In practice, this test has frequently prevented plaintiffs from succeeding beyond the motion to dismiss stage. Despite confirming that reasonableness is a fact question to be reserved for the jury, judges have inserted their own views of "reasonable" interpretations of labeling claims, even when those interpretations are in

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direct contravention with known consumer interpretations of the claim. As a result, citizen surveillance of misleading food labeling has been restricted.

This Article seeks to promote robust citizen surveillance of labeling claims by proposing that the FTC release guidance reframing the reasonable consumer test as a risk-utility analysis, similar to the factor test frequently applied in design defect litigation. A risk-utility analysis of food labeling claims would shift the focus of the inquiry from critiquing the reasonableness of the consumer's suggested interpretation. Instead, the risk-utility analysis would assess whether the labeling claim had a capacity to mislead given known consumer interpretations of the claim and disclaimers used by the manufacturer to clarify labeling ambiguities. This framework shift would obligate food manufacturers to be more judicious in examining known consumer interpretations and potential risks of deception when deciding whether to utilize labeling claims to sell their products. If food manufacturers conclude that a food labeling claim is subject to significant consumer confusion, the risk-utility analysis would require manufacturers to take steps to clarify the claim with disclaimers, further educate consumers on the meaning of the ambiguous claim, or halt the use of the claim altogether.

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INTRODUCTION

Walking through my local grocery store a few months ago, I was struck by the sanctioned chaos that is grocery shopping. I observed hundreds of shoppers collecting carts and beginning the march around the store. I saw these shoppers searching for produce, meats, and other miscellaneous ingredients to complete weekly meal prep or the night's chosen recipe. I turned down aisle after aisle, hoping to avoid a cart collision, and encountered parents doing their best to prevent their kids from tossing extra items into the cart or exploding into a tantrum. Throughout this hectic experience, the shoppers approached and visually scanned thousands of food product labels.

Each product in the store was decorated with a label claiming the product's superior attributes. These claims used various sized fonts, emphasis, color differentiation, and placement to grab shoppers' attention. But how many of those shoppers stopped to scrutinize and investigate the labeling claims being asserted, such as: "All-Natural," "Sustainably Produced," "100%," "Simple," and "Minimally Processed"? How many shoppers contemplated whether a government agency regulated or approved those claims? How many shoppers questioned the validity of the claims? The answer to these questions is likely almost none. While these are legitimate questions that many consumers should be asking, these questions rarely cross the mind of the average shopper.

Even if the average shopper did consider these questions, many claims on food product labels are undefined by Food and Drug Administration ("FDA") regulations—the agency charged with providing such direction.[1] Consequently, food manufacturers have broad discretion in deciding how to employ claims on product labeling.[2] Aside from the labeling claim "organic," which is heavily regulated by the United States Department of Agriculture's ("USDA") Agricultural Marketing Service,[3] most other product claims[4] indicating a product's wholesomeness or

1. *See* August T. Horvath et al., *Food Litigation Trends: New and Undefined Label Claims in 2017*, FOOD AND DRUG L. INST. (Nov./Dec. 2017), https://bit.ly/2VZNqbe; FOOD & DRUG ADMIN., A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY, U.S. HEALTH AND HUM. SERVS. (Jan. 2013), https://bit.ly/3u6n43S (detailing the regulated claims on food labeling and demonstrating a lack of regulation of a variety of claims frequently featured on product packaging).

2. *See* Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUDIES AT BROOKINGS 1 (June 26, 2014), https://brook.gs/3u7Snvf.

3. *See* AGRIC. MKTG. SERV., *National Organic Program*, U.S. DEP'T OF AGRIC., https://bit.ly/3zFyzAc (last visited Oct. 28, 2021).

4. This Article makes frequent reference to labeling "claims." A "claim" is a word or phrase used on the label to suggest positive attributes about the product. Most food labels

environmentally-friendly attributes remain unconstrained. The government's lack of standards and regulation has allowed food manufacturers to capitalize on consumer confusion surrounding these undefined terms. Misled citizens have taken to the courts to protect themselves and other confused consumers from pouring money into products that do not meet the high standards that the products' packaging implies.[5] However, citizen challenges to food labels have frequently been rejected by judges who conclude that the consumer's interpretation of the claim was "unreasonable."[6]

One claim that has consistently confounded consumers is the term "All-Natural."[7] In 2013, a class of plaintiffs challenged Kashi Co.'s use of the labeling claim "All Natural" on products containing synthetic ingredients.[8] The Southern District of California declined to certify the class because the plaintiffs failed to demonstrate that a "significant portion" of consumers would agree to a uniform definition of the claim to compare the product's ingredients against.[9] Some plaintiffs believed that "All Natural" meant that the product was "organic."[10] Another plaintiff defined "All Natural" as indicating that the product was "completely 'unprocessed.'"[11] A third plaintiff defined "natural" as "nothing bad for you in there."[12] Kashi Co. boldly admitted in its litigation documents that the company was aware of the claim's capacity to confuse consumers.[13] Nevertheless, because the plaintiffs were unable to articulate a consistent definition of the labeling claim, the court found that the plaintiffs failed to show that Kashi Co.'s labeling would have misled a "reasonable consumer."[14]

Under state consumer protection statutes, the determinative issue of whether a grocery store customer has an actionable claim against a food manufacturer based on misleading labeling is often whether the label

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contain several claims about a product. These claims and the precise language employed are the focus of misleading labeling lawsuits.

5. *See* Nicole E. Negowetti, *Defining Natural Foods: The Search for a Natural Law*, 26 REGENT U. L. REV. 329, 344 (2014).

6. *See id.* at 344–47.

7. *See* Edgar Chambers V et al., *What Is "Natural"? Consumer Responses to Selected Ingredients*, FOODS 1 (Apr. 23, 2018), https://bit.ly/3CIOK1F; Efthimios Parasidis et al., *Addressing Consumer Confusion Surrounding "Natural" Food Claims*, 41 AM. J. L. & MED. 357, 357 (2015).

8. *See* Astiana v. Kashi Co., 291 F.R.D. 493, 507 (S.D. Cal. 2013).

9. *See id.*

10. *See* Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification at 8, Astiana v. Kashi Co., 291 F.R.D. 493 (S.D. Cal. 2013) (No. 3:11-cv-01967-H-BGS) 2013 WL 3247206, at *7.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See Astiana*, 291 F.R.D. at 508.

would have misled a "reasonable consumer."[15] This determinative issue begs the question of who is the reasonable grocery store consumer? The "reasonable person" construct has deep origins in American common law.[16] In tort law, the legal fiction of the "reasonably prudent person" is designed to assess whether the defendant who caused harm demonstrated the care of a reasonable person.[17] The defendant only escapes tort liability for their harmful conduct if they engaged in actions mirroring those of a reasonably prudent person.[18] Tort scholars have engaged in continuous debate over who that reasonably prudent person is. For example, the revered Judge Learned Hand famously articulated his formula requiring "reasonable actors" to "tak[e] . . . precautions [to avoid harm] if the cost of the precaution [wa]s justified by the magnitude of risk it diminishe[d]."[19] There has been ample discourse over whether the reasonable person is: (1) a sheer statistical measure of how the average person in the community would act in a particular scenario or (2) an ideal moral and ethical actor in the community who considers not only his own interest but the interest of those around him.[20]

Regardless of the depiction of the reasonable person you subscribe to, the reasonable person analysis serves to ensure that *defendants* are held accountable to members of their community for the harm caused when these defendants act in abnormal or inappropriate ways based on community expectations. Since entering American jurisprudence in the late nineteenth century,[21] the reasonable person concept has spread into many other areas of American common law.[22] Progeny of the reasonable person concept can now be found in criminal law cases requiring juries to

15. *See* Gedalia v. Whole Foods Mkt. Servs., Inc., 53 F. Supp. 3d 943, 950 (S.D. Tex. 2014); Garcia v. Kashi Co., 43 F. Supp. 3d. 1359, 1383 (S.D. Fla. 2014).

16. *See* Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 295–96 (2018).

17. *See id.* at 298; Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2134 (2015) (noting that "[i]n the majority of cases, an actor is negligent when he or she fails to use ordinary care, and ordinary care is that which a reasonably prudent person, or a reasonably careful person, would take under like circumstances").

18. *See* Zipursky, *supra* note 17, at 2134.

19. *See id.* at 2151.

20. *See* Tobia, *supra* note 16, at 299.

21. *See* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1049 (stating that "[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do").

22. Some millennial lawyers might describe the encroachment of reasonableness into American common and statutory law as the lyrics of a recent Taylor Swift song, "Oh I can't stop you putting roots in my dreamland. My house of stone, your ivy grows and now I'm covered in you." TAYLOR SWIFT, *Ivy*, *on* EVERMORE (Republic Records 2020).

determine whether an individual was provoked to kill,[23] contract law disputes when a court determines what the reasonable belief of the parties was when agreeing to the terms of a deal,[24] and malpractice claims when a jury is asked to conclude whether the attorney's strategic actions on behalf of his client were "reasonable."[25]

Likewise, the reasonable person concept was introduced into misleading food labeling lawsuits under state consumer protection laws. State consumer protection statutes passed around the country in the 1960s and 1970s were critically important to citizen surveillance of food labeling and advertising. Most state consumer protection statutes were modeled after the Federal Trade Commission Act ("FTCA").[26] Unlike the FTCA, which vested sole authority in the Federal Trade Commission ("FTC") to sanction companies for deceptive business practices and the Food, Drug, and Cosmetic Act ("FDCA"), which charged the FDA with regulating misleading labeling—state consumer protection statutes delivered a private right of action to consumers to hold companies civilly liable for false or misleading practices.[27] Thus, with the advent of state consumer protection statutes, citizen surveillance of food labeling transparency was born.[28]

Emulating the FTCA, state consumer protection laws only permit a consumer cause of action against a company for misleading labeling when the plaintiff proves that: (1) the defendant company engaged in a deceptive act; (2) there is causation between the company's act or practice and the plaintiff's damages; and (3) the plaintiff suffered actual damages.[29] In

23. *See* Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1254 (2010).

24. *See, e.g.*, Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974).

25. *See* John M. Burman, *A Lawyer's Legal Duty to Clients*, 24-JUN WYO. LAW. 38 (2004).

26. *See* 15 U.S.C. § 45; Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 474 (7th Cir. 2020); James J. Scavo, *Marketing Resort Timeshares: The Rules of the Game*, 73 ST. JOHN'S L. REV. 217, 230 (1999).

27. *See Bell*, 982 F.3d at 474; Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 829 n.1 (2006).

28. The FDA is vested with the sole authority to prevent false and misleading labeling of food products under the Federal Food, Drug, & Cosmetic Act ("FDCA"). *See* 21 U.S.C. § 343. Just as the FTCA precluded a private right of action for consumers to hold companies accountable for their "unfair" business practices, the FDCA placed sole enforcement authority in the FDA to prevent false or misleading labeling nationwide. *See* 15 U.S.C § 45; 21 U.S.C. § 343. As a result, before the emergence of consumer class action litigation through state consumer protection statutes, consumers were left to rely on the FTC or the FDA to prevent food manufacturer labeling that was false or misleading. The USDA has similar enforcement authority over the labeling of meat and egg products. *See* 21 U.S.C. § 601; 21 U.S.C. § 453.

29. *See, e.g.*, Garcia v. Kashi Co., 43 F. Supp. 3d 1359, 1383 (S.D. Fla. 2014).

1983, the FTC altered its decades-long approach to determining whether a company engaged in a "deceptive act." Rather than examining whether the challenged labeling had the tendency or capacity to mislead a significant portion of the public, the FTC instead began considering whether a reasonable consumer was likely to be misled by the company's challenged business practices.[30] Subsequently, most states adopted this new approach either because their consumer protection laws require the state to defer to FTC guidance interpreting the FTCA or because the state's courts judicially adopted the reasonable consumer standard after its issuance by the FTC.[31] Consequently, the reasonable consumer test is now firmly entrenched in misleading food labeling litigation.

The shift to the "reasonable consumer" test in food labeling litigation has proved to be problematic for two core reasons. First, the reasonable consumer test oddly determines the deceptive nature of the food manufacturers' actions by analyzing whether the plaintiffs' suggested understandings of the labeling claims are reasonable. This analysis has placed an unrealistic burden on plaintiffs in food labeling cases to generate a consistent definition of undefined food labeling claims, even when survey data shows little to no consensus surrounding the labeling claim.[32] This unrealistic burden is particularly concerning in the food labeling context because of the well-established gap in understanding between the food manufacturer and the consumer regarding food production, food processing methods, and the nutritional value of foods.[33]

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30. *See* FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (1983).

31. *See* Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 851, 861–63 (1984).

32. *See* Chambers V et al., *supra* note 7, at 2.

33. *See* Jeff Gelski, *Sustainability Claims May Confuse Consumers*, FOOD BUS. NEWS (Dec. 31, 2020), https://bit.ly/3o61NpV; Rebecca Ellis, *What's Healthy at the Grocery Store? Shoppers are Often Confused, Survey Finds*, NPR: THE SALT (Jan. 24, 2019, 4:54 PM), https://n.pr/3CPBKrf ("[A survey by the American Heart Association and International Food Information Council Foundation found that] 95 percent of shoppers at least sometimes seek healthy options when grocery shopping[;] . . . yet, only a little over a quarter said they find it easy to determine which products are good for them and which should stay on the shelves . . . . A survey last year by the IFIC found 59 percent of respondents were somewhat or strongly confused by conflicting health advice."); *Are Consumers Confused About Whole Grain Nutrition?*, FOOD PROCESSING (Nov. 19, 2020), https://bit.ly/3ALQqHg ("'Our study results show that many consumers cannot correctly identify the amount of whole grains or select a healthier whole grain product[.] . . . Manufacturers have many ways to persuade you that a product has whole grain even if it does not. They can tell you it's multigrain or the can color it brown, but those signals do not really indicate the whole grain content.'"); *No Secret Ingredients: The Importance of Food Transparency*, FORBES: LIFESTYLE (Dec. 19, 2019, 2:44 PM), https://bit.ly/39EbOCb ("Most shoppers report[] feeling confused about the ingredients listed on a package, despite saying they're informed after reading a product label."); Victoria G. Myers, *Lost Connections: Bridging the Gap Between Consumers and Food Producers*, DTN: PROGRESSIVE FARMER (Jan. 17, 2020, 5:58 AM), https://bit.ly/3lZWVQB (highlighting a

Food innovations by producers and manufacturers have created a stark asymmetry of information between the food manufacturer designing the product and the consumer encountering the product on the grocery store shelf. This informational asymmetry presents a material challenge to the reasonable consumer analysis. Using the descriptivist numerical average of food consumers in America, it is almost impossible to consistently create a reasonable consumer to judge a shopper's interpretation or understanding of a labeling claim because of the widespread and varied consumer confusion over many challenged labeling claims.[34]

Applying the prescriptivist ideal average American consumer approach to determining whether a "reasonable consumer" would be misled when interpreting a food manufacturer's label would be illogical as well. Because food labeling claims brought under consumer protection statutes target whether the food manufacturers' labeling claim could have misled those actual consumers listed on the complaint, it would be strange to apply a prescriptivist view of a reasonable consumer. Ideally, the average consumer would be aware of the nutritional content of fifteen-letter ingredients listed on the nutrition facts panel and the meaning of hundreds of claims that may show up on the front packaging of any of the roughly 31,000 food products on the shelves of the average American grocery store.[35] However, that lofty goal is simply impractical.

The second core defect under the reasonable consumer test is the lack of theoretical guidance available to commissioners and civil courts regarding how to construct the reasonable consumer standard when applying the test. Use of the reasonable consumer test has allowed judges liberty to insert their own personal understandings of food labeling claims without regard to documented consumer interpretations of the claims. Although the reasonable consumer analysis is widely considered a fact question to be reserved for the jury,[36] judges have regularly blocked food labeling litigation by finding that the consumers' proposed interpretations of challenged labels were "unreasonable" as a matter of law.[37]

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report by the Center for Food Integrity finding that "65 [percent] of people . . . want to know more about where their food comes from").

34. *See* Negowetti, *supra* note 5, at 344, 349.

35. *See Supermarket Facts*, FMI FOOD INDUS. ASS'N, https://bit.ly/31hAob8 (last visited Nov. 3, 2021).

36. *See, e.g.*, Garcia v. Kashi Co., 43 F. Supp. 3d 1359, 1386 (S.D. Fla. 2014); Gedalia v. Whole Foods Mkt. Servs., Inc., 53 F. Supp. 3d 943, 950 (S.D. Tex. 2014).

37. Cary Silverman suggests that judges' continued efforts to dismiss class-action food labeling litigation at the motion to dismiss stage are due in part to these judges' disdain for predatory class action attorneys, who constantly search for ambiguous claims and plaintiffs who will sign on to actions against large food manufacturers in hopes of obtaining multi-million-dollar settlements with large attorney fee awards attached. *See* Cary

Those judges have used an array of reasonableness indicators to suggest that such consumers' reliance on food labeling was unrepresentative of the general consuming public. Such reasonableness indicators have included grammatical construction of the labeling claim,[38] labeling images that indicate certain claims regarding the composition and nutrition of the product,[39] and sheer common sense about the contents of certain food items and the reality of how those food ingredients impact the nutritional value of the product.[40] These cited reasonableness indicators often disregard surveyed consumer interpretations of the claim and require analytical reasoning that the average American is unlikely to perform while in the grocery store aisle.

In tandem, the lack of consumer consistency in defining nebulous labeling claims and judicial fiat of the reasonable consumer have thwarted citizens' ability to hold food manufacturers accountable for intentionally deceptive labeling on too many occasions. To remedy these deficiencies in the reasonable consumer test, the FTC should reframe its deception standard for food marketing challenges as a risk-utility analysis. This novel approach is inspired by the framework commonly employed in design defect cases that provides courts with clear guideposts to address in reaching the ultimate determination of whether the defendant's design of a product was "unreasonably dangerous." A risk-utility approach in misleading food labeling instructs courts to consider whether the defendant's label design was "unreasonable" due to its misleading nature.

Such an approach compels courts to consider both the recognized interpretations that consumers generate from the challenged labeling claim and alternative ways that the manufacturer could have suggested the

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Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. CIN. L. REV. 1, 6–8 (2018).

38. *See, e.g.*, *In re* 100% Grated Parmesan Cheese Mktg. & Sales Pracs. Litig., 275 F. Supp. 3d 910, 923 (N.D. Ill. 2017) (analyzing whether the 100% labeling claim placed in front of the words "Grated Parmesan" indicated that the parmesan cheese was 100% grated or 100% parmesan cheese); Campbell v. Freshbev, LLC, 322 F. Supp. 3d 330, 341 (E.D.N.Y. 2018) ("Plaintiff argues a reasonable consumer would interpret a 'cold-pressed' label to imply that nothing had been done to the juice except cold-pressing. Plaintiff's claim is implausible. There is no 'only' or 'exclusively' modifier before 'cold-pressed' to indicate that the juice has been subjected to no other process. A reasonable consumer would not mistake the cold-pressed claim to be a claim that pressure was never applied to the juice products.").

39. *See, e.g.*, Videtto v. Kellogg USA, No. 2:08-cv-01234, 2009 WL 1439086, at *3 (E.D. Cal. May 21, 2009) (finding that labeling on "Froot Loops" cereal containing images of actual fruit on the front of the cereal box was unlikely to mislead a reasonable consumer, even though no actual fruit ingredients were used to make the cereal, because the food product name was a "fanciful use of a nonsensical word" that could not "reasonably be interpreted to imply that the [p]roduct contains or is made from actual fruit").

40. *See, e.g.*, Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 475 (7th Cir. 2020); Bronson v. Johnson & Johnson, Inc., No. C 12-04184, 2013 WL 1629191, at *31–32 (N.D. Cal. Apr. 16, 2013).

benefits of their product in a less misleading manner. Courts applying the risk-utility analysis would appraise the known risk that food manufacturers accepted when opting to use a particular product label and consider the utility that the company calculated in choosing such a claim. Employing this approach would compel food manufacturers to consider all possible consumer interpretations of their preferred labeling claim and select the label design that would be the least misleading while maximizing the claim's utility. The risk-utility framework would provide the FTC and courts the ability to quickly dispense of litigation founded on capricious consumer interpretations. Simultaneously, the risk-utility framework would balance the scales of responsibility between food manufacturers who know their product, production methods, and target consumers intimately and consumers who seek education on products that align with their preferences.

This Article argues for a shift to a risk-utility analysis in misleading food labeling cases in four parts. First and most critically, Part I discusses the mechanics of federal misleading food labeling regulation. Part II explains how the FDA's current enforcement approach results in food labeling enforcement primarily occurring in the federal court system based on state consumer protection statutes and outlines the FTC's development of the reasonable consumer test in consumer claims. Part III analyzes why using the reasonable consumer test to determine whether a food manufacturer engaged in misleading labeling improperly screens out consumer claims before jury deliberation. Part IV recommends that the FTC amend its current deceptive practices policy to explicitly require the Commission and courts deferring to FTC policy to employ a risk-utility analysis that requires courts to address known consumer interpretations of the claim and alternative label design options when determining whether a defendant manufacturer's labeling was misleading.

I. FEDERAL REGULATION OF MISLEADING FOOD LABELING

In the early nineteenth century, oversight of the food supply, including food labeling and marketing, was primarily regulated on a state-by-state basis.[41] However, as food innovation and technology advanced, allowing food products to be shipped interstate, the need for federal regulation of food production, processing, and marketing became apparent. The first federal statute governing misleading food labeling was the Pure Food and Drug Act of 1906.[42]

41. *See* Gail H. Javitt, *Supersizing the Pint-Sized: The Need for FDA-Mandated Child-Oriented Food Labeling*, 39 LOY. L.A. L. REV. 311, 314 (2006).

42. *See* Amy-Lee Goodman, *A "Natural" Stand Off Between the Food and Drug Administration and the Courts*, 60 B.C.L. REV. 271, 278 (2019); JAMES T. O'REILLY & KATHARINE A. VAN TASSEL, FOOD AND DRUG ADMIN. § 12:4 (4th ed. 2021).

This Act was passed to prevent a rising trend of drug manufacturers marketing over-the-counter medications as "cure-alls" without disclosing the products' ingredients to the consumer.[43] A lack of food labeling regulation led to products that included "[d]angerous levels of alcohol, opium, and other narcotics" being promoted to unknowing consumers.[44] In 1906, Upton Sinclair also famously published his novel "The Jungle[,]" exposing the food safety horrors of the Chicago meatpacking industry.[45] The growing awareness of food and drug fraud spreading across the country and food safety issues resulting from the transport of food products over greater distances spurred Congress to enact the Pure Food and Drug Act of 1906.[46]

The Act prohibited misleading labeling, deeming a food product "misbranded" if the product was "labeled or branded so as to *deceive or mislead* the purchaser, or purport[ed] to be a foreign product when not so . . . ."[47] The 1906 Act, however, did not mandate any form of labeling. The Act's food labeling provisions only aimed to curb common misleading labeling practices of the time.[48]

In 1938, Congress repealed the 1906 Act and supplanted it with the Federal Food, Drug, and Cosmetic Act.[49] This Act was the first "comprehensive federal legislation designed to protect consumers from fraud and misrepresentation in the sale of food and drugs."[50] The FDCA specifically empowered the FDA to assure that food products were "properly labeled" and to promulgate and enforce any regulations necessary to accomplish that aim.[51] Under the FDCA, a food product is considered "misbranded" if "its labeling is false or misleading in any particular."[52] The FDCA specifically required food labels to include: "(1) the 'common [name] or usual name' of the food; (2) the net quantity of

43. *See* FRED KUCHLER ET AL., U.S. DEP'T OF AGRIC., ERR-239, BEYOND NUTRITION AND ORGANIC LABELS—30 YEARS OF EXPERIENCE WITH INTERVENING IN FOOD LABELS 2 n.2 (2017).

44. *See id.*

45. *See* Javitt, *supra* note 41, at 315.

46. *See* Federal Food and Drugs Act of 1906, 21 U.S.C. §§ 1–5, 7–14 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.); Javitt, *supra* note 41, at 315.

47. Federal Food and Drugs Act of 1906, § 8, 34 Stat. at 771 (repealed 1938) (emphasis added).

48. *See* Javitt, *supra* note 41, at 316.

49. *See* Ackerman v. Coca-Cola Co., No. CV-09-0395(RML), 2010 WL 2925955, at *2 (E.D.N.Y. July 21, 2010).

50. *Id.*; O'REILLY & VAN TASSEL, *supra* note 42, at §§ 3:4–5.

51. *See Ackerman*, 2010 WL 2925955, at *2 (citing 21 U.S.C. § 393(b)(2)(A)). The FDCA also made clear that meat and meat products are exempt from the requirements of the FDCA. The USDA was granted authority over the labeling of those products under the Meat Inspection Act. *See* 21 U.S.C. § 392.

52. 21 U.S.C. § 343(a).

contents; and (3) the name and address of the manufacturer, packager, or distributor."[53]

The FDCA also provided the FDA authority to draft definitions and standards for food products.[54] Furthermore, the FDCA expanded the remedies that the FDA could impose on food manufacturers for engaging in misleading labeling, including seizure of products,[55] imposition of criminal penalties,[56] and injunctive relief to prevent the distribution of misleading products.[57] Nevertheless, even after the passage of the FDCA, most food product labeling was discretionary, and the FDA lacked the authority to require comprehensive nutrition labeling on food products.[58] The FDCA was also devoid of a private right of action for consumers to hold food manufacturers accountable for false or misleading labels.[59]

Additionally, Congress made significant changes to another Act in 1938. The Federal Trade Commission Act, initially passed in 1914, was amended to prohibit businesses from engaging in "unfair or deceptive acts or practices."[60] In an address to a drug manufacturer trade group, R.E. Freer, an FTC Commissioner at the time, remarked that this amendment, known as the Wheeler-Lea Act, was passed in part to prevent "false advertisement for the purpose or with the likelihood of inducing the purchase . . . of food, drugs, devices[,] and cosmetics."[61] Recognizing that the broad sweeping language of the FTCA and the FDCA resulted in shared jurisdiction over misleading labeling and advertising of food products, in 1954, the FTC and the FDA agreed to a Memorandum of Understanding that allocated enforcement responsibility for the misleading actions of food manufacturers.[62] The FTC assumed responsibility for regulating food advertising.[63] The FDA and the USDA, on the other hand, assumed primary responsibility for food labeling regulation and enforcement.[64]

53. Javitt, *supra* note 41, at 317.

54. 21 U.S.C. § 341; *see also* Javitt, *supra* note 41, at 317; Goodman, *supra* note 42, at 278.

55. *See* 21 U.S.C. § 334(b); Javitt, *supra* note 41, at 317.

56. *See* 21 U.S.C. § 333(a)(2); Javitt, *supra* note 41, at 317.

57. *See* 21 U.S.C. § 332(a); Javitt, *supra* note 41, at 317.

58. *See* Javitt, *supra* note 41, at 320.

59. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 806–07 (1986).

60. 15 U.S.C. § 45(a)(2); Hon. R. E. Freer, Comm'r, Fed. Trade Comm'n, Address at the Annual Convention of the Proprietary Association 1–2 (May 17, 1938); Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1, 2 (1992).

61. *See* Freer, *supra* note 60, at 1–2.

62. *See* FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON FOOD ADVERTISING (1994).

63. *See id.*

64. *See id.*

The next three decades saw very little change in misleading food labeling regulation and enforcement.[65] In 1973, the FDA issued regulations requiring nutrition labeling on foods containing more than one added nutrient or whose label included claims about the food's nutritional properties or usefulness in the daily diet.[66] Otherwise, food manufacturers were only required to label their products with the name and address of the manufacturer, the net quantity of contents, a statement of ingredients, and the name of the food.[67] All other nutrition labeling remained optional.[68]

Before 1984, the FDA required food products with labels claiming the product supported disease prevention to undergo the label review process required for drug labels because, in the agency's view, the food manufacturer was suggesting through its labeling that the food product was a "drug."[69] However, in the mid-1980s, the FDA relaxed enforcement of food labeling regulations under the Reagan administration and began allowing creative food manufacturers to feature health claims for their food products on labels without pre-approval.[70]

Moreover, the FDA began permitting food manufacturers to place nutrient content claims such as "light," "high," and "low" on their products without fear of punishment, notwithstanding that the agency had not promulgated nutrition standards such products must satisfy to display the product claim.[71] Unsurprisingly, health-related nutrient content claims proliferated.[72] In 1988, the United States Surgeon General released a report indicating that Americans' diets were poor and that these poor diets negatively affected Americans' overall health.[73] In 1990, the Food and Nutrition Board of the National Academy of Sciences considered how food labeling could improve Americans' diets.[74] The Government's recognition of the rising dietary issues in the country and food manufacturers' increasingly brazen food labeling techniques collided,

65. *See* Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 44 FOOD DRUG COSM. L.J. 2, 67 (1984) ("The basic mandatory information, required by the 1938 Act to appear on all food labels, remained virtually unchanged from 1938 to the 1970s.").

66. *See* INST. OF MED. OF THE NAT'L ACADS., FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PHASE I REPORT 20 (Ellen A. Wartella et al., eds., 2010), https://bit.ly/2W0YW60.

67. *See* Barton Hutt & Barton Hutt II, *supra* note 65, at 67–68.

68. *See* Javitt, *supra* note 41, at 320.

69. *See* Pearson v. Shalala, 164 F.3d 650, 653 (D.C. Cir. 1999).

70. *See* 136 CONG. REC. 35,095 (1990); Diana R. H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815, 817 (2005).

71. *See* 136 CONG. REC. 35,095 (1990).

72. *See* INST. OF MED. OF THE NAT'L ACADS., *supra* note 66.

73. *See* KUCHLER ET AL., *supra* note 43, at 18.

74. ELISE GOLAN ET AL., U.S. DEP'T OF AGRIC., ERR-793, ECONOMICS OF FOOD LABELING 1 (2021).

prompting Congress to bring major change to food labeling regulation.[75] In 1990, Congress amended the FDCA with the Nutrition Labeling and Education Act ("NLEA") to "clarify and . . . strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods."[76] One of the key underlying goals of the NLEA was to improve the transparency of nutrition in food products, thus empowering consumers to "make educated and intelligent choices about their food."[77] The NLEA also made significant strides in nationalizing food labeling requirements. Congress explicitly inserted a preemption provision preventing states from imposing distinctive food labeling constraints on food manufacturers that differ from the constraints required under the FDCA.[78] Accordingly, so long as food manufacturers comply with the food labeling regulations promulgated by the FDA, these manufacturers cannot be sued in state court for state law requirements beyond the minimum requirements set forth by the FDCA.[79] This preemption provision was a compromise between Congress and the food industry, reached so that national food manufacturers would not be subject to a patchwork of federal and state regulations that may call for different labeling requirements on an identical product labeling claim.[80]

The NLEA produced three significant changes to prior food labeling requirements. First, the NLEA expanded the coverage, form, and substance of nutrition labeling requirements.[81] Second, the NLEA

75. *See id.*; *see also* INST. OF MED. OF THE NAT'L ACADS., *supra* note 66, at 20–21.

76. Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 278 (S.D.N.Y. 2014); *see also* Ackerman v. Coca-Cola Co., No. CV-09-0395, 2010 WL 2925955, at *7–8 (E.D.N.Y. July 21, 2010).

77. Winters, *supra* note 70, at 817.

78. *See* Amy Elizabeth Semet, *Toward National Uniformity for FDA-Regulated Products* 2 (2000) (Third Year Paper, Harvard University), https://bit.ly/3r7j6In.

79. A frequent defense that food manufacturers raise when sued for false or misleading labeling under state consumer protection laws is that the labeling claim has been standardized under regulations implementing the FDCA and any state law action on the labeling claim is preempted. However, this defense generally fails when the FDA has not defined the standards necessary for a food manufacturer to use a claim, such as "natural." Several scholars have considered the breadth and appropriateness of preemption of state law food labeling claims. *See* Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and The Battle Over Restricting High Fructose Corn Syrup from Food and Beverages Labeled 'Natural*,*'* 5 J. FOOD L. & POL'Y 145, 159–60 (2009); Winters, *supra* note 70, at 848.

80. *See* 136 CONG. REC. 35,095 (1990). Senator Madigan declared that the passage of the NLEA was supported by the food industry because the amendment to the FDCA "g[a]ve [the food industry] some types of preemption of some burdensome State laws that interfered with [companies] ability to do business in all 50 States." *Id*.

81. *See* AM. BAR ASSOC., *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

significantly limited the use of health claims.[82] Finally, the NLEA mandated more uniform serving sizes.[83] The NLEA targeted three specific types of food labeling claims: (1) health claims, (2) nutrient content claims, and (3) structure and function claims.[84] A health claim "characterizes the presence or absence of a nutrient linked to a disease or condition."[85] The FDA allows health claims when there is "significant scientific agreement" surrounding the claim.[86] Even when there is insufficient scientific consensus on the labeling claim, the FDA authorizes manufacturers to make qualified health claims.[87] A qualified health claim is a claim that is supported by "some scientific evidence" but fails to meet the "significant scientific agreement" standard needed for a traditional health claim.[88] Qualified health claims must be accompanied by "qualifying language to accurately communicate the level of scientific evidence supporting the claim."[89] A nutrient content claim characterizes the level of a nutrient found in a food, such as "low fat."[90] Finally, a structure/function claim describes "the role of a nutrient or dietary ingredient intended to affect the normal structure or function of the human body."[91] Eighty-five percent of food labeling claims are nutrient content or implied nutrient content claims.[92] Unlike claims asserted on drug labels, no food product health claim requires pre-approval by the FDA.[93]

82. *See id.*

83. *See id.*

84. *See* Goodman, *supra* note 42, at 282; KUCHLER ET AL., *supra* note 73, at 22 n.17.

85. KUCHLER ET AL., *supra* note 73, at 22 n.17. One example of a health claim is when a product label, such as a milk label, wants to highlight its heightened levels of calcium by noting that "[a]dequate calcium throughout life, as part of a well-balanced diet, may reduce the risk of osteoporosis." *Id.*

86. *See* Pearson v. Shalala, 164 F.3d 650, 653 (D.C. Cir. 1999); FOOD & DRUG ADMIN., *Questions and Answers on Health Claims in Food Labeling*, FOOD: FOOD LABELING AND NUTRITION (Dec. 13, 2017), https://bit.ly/3keo6HC.

87. For example, the FDA may allow a claim such as "Psyllium husk may reduce the risk of type 2 diabetes, although the FDA has concluded that there is very little scientific evidence for this claim." *See* KUCHLER ET AL., *supra* note 73, at 22 n.17.

88. *See* FOOD & DRUG ADMIN., *supra* note 86.

89. *Id.*

90. *See* KUCHLER ET AL., *supra* note 73, at 22 n.17.

91. *Id.*

92. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS (2011); Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labeling*, 39 AM. J.L. & MED 617, 622 (2013).

93. Alternatively, the USDA, through the Food Safety and Inspection Service, surveils labels utilizing "special statements and claims," by requiring health and process claims to receive staff approval before being placed into stores. This approval process has limited the number of misleading labeling civil claims generated by USDA regulated products. *See* Greg Margolis & Maren Messing, *All "Cluck" and No Bite? Preemption and Challenges to Poultry and Meat Labels*, JDSUPRA (June 8, 2021), https://bit.ly/3tUQW3d; Gene Markin, *Misleading Food Labeling and Advertising Under the Lanham Act and the FDCA*, GPSOLO (Nov. 1, 2017), https://bit.ly/3uecZBM.

As interest in the nutrition of food products increased, consumer interest in food production and the associated environmental impacts also flourished.[94] Food manufacturers channeled this increasing consumer interest in food production processes into growing product sales by showcasing food process claims on labels. A process claim suggests how the product was produced or processed prior to being presented on the grocery store shelf.[95] These claims, such as "sustainably sourced" or "locally produced," have largely evaded definition.[96]

Health and process claims continue to multiply, and manufacturers continue to stretch the meaning of undefined claims to increase their bottom line. Yet, the FDA's enforcement of misleading labeling claims has lagged behind.[97] The Center for Food Safety and Applied Nutrition is the sub-agency within the FDA that has primary authority to regulate food labeling and is tasked with ensuring that food products are properly labeled.[98] The Center for Food Safety and Applied Nutrition generally relies on warning letters and enforcement actions to ensure that food labeling is not false or misleading.[99] However, the FDA has often chosen not to dispatch warning letters or pursue correction of labels that are only considered "misleading."[100] The FDA is only authorized to condemn and seize products with misleading food labels after giving the company proper notice and an opportunity to respond.[101] In addition to the required process, the FDA can only condemn and seize products if it has "probable cause to believe . . . that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent or would be in a material respect misleading to the injury or damage of the purchaser or consumer."[102]

The FDA also holds the authority to coordinate with the Department of Justice ("DOJ") to seek an injunction or initiate a criminal

94. *See* ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., AIB-777-42, RECENT GROWTH PATTERNS IN THE U.S. ORGANIC MARKET 1 (2002).

95. *See* ECON. RSCH. SERV., *supra* note 94, at 3.

96. *See* RENÉE JOHNSON, CONG. RSCH. SERV., R44390, THE ROLE OF LOCAL AND REGIONAL FOOD SYSTEMS IN U.S. FARM POLICY 1 (2016); *Local Foods*, NAT'L AGRIC. LIBR. U.S. DEP'T. OF AGRIC., https://bit.ly/3lHiDbQ (last visited Sept. 22, 2021).

97. *See* Negowetti, *supra* note 2, at 4; *See* Pomeranz, *supra* note 92, at 633–35.

98. *See What We Do at CFSAN*, U.S. FOOD & DRUG ADMIN. (Sept. 16, 2019), https://bit.ly/3zoiZJe.

99. *See* Markin, *supra* note 93, at 18, 19; O'REILLY & VAN TASSEL, *supra note* 42, § 10:46; Pomeranz, *supra* note 92, at 619.

100. *See* Pomeranz, *supra* note 92, at 632. The FDA Warning Letter Database only reflects that one warning letter related to misleading food labeling has been issued since 2017. *See also Warning Letters*, U.S. FOOD & DRUG ADMIN. (Sept. 14, 2021), https://bit.ly/3knGa27.

101. *See* 21 U.S.C. § 334(a)(1).

102. *Id*.

prosecution.[103] Yet, the FDA rarely employs this tool against food manufacturers.[104] Scholars have offered several reasons why misleading food labeling enforcement has waned. A common theme in food labeling enforcement literature is the FDA's lack of necessary resources to properly police the thousands of misleading claims sitting on grocery store shelves.[105]

Professor Jennifer Pomeranz argues that the FDA has been far less likely to engage in enforcement actions for misleading food labeling after *Pearson v. Shalala*.[106] In *Pearson*, the D.C. Circuit Court of Appeals held that the FDA's pre-approval process for dietary supplements barring manufacturers from using health claims on product labels unless the claim was supported by "significant scientific agreement" violated the First Amendment.[107] The court reasoned that the First Amendment commands disclosure of clarifying information rather than outright suppression of information with the potential to mislead consumers.[108] Thus, under the D.C. Circuit Court of Appeals' view in *Pearson*, the FDA must permit health claims so long as manufacturers include disclaimers to cure confusion over the lack of scientific consensus on the claim.

Consequently, although there is both a statutory mandate and a clear regulatory structure in place to police the misleading labeling of food products, the FDA's regulatory center is hollow. Thus, "citizen surveillance" of food labeling claims has become critical in guaranteeing that food manufacturers are appropriately acting to inform rather than mislead.[109] The FDA's regulatory enforcement vacuum explains the sharp uptick in misleading food labeling lawsuits. Competing companies, through the Lanham Act, and consumers, through state consumer protection statutes, are stepping in the place of the FDA to ensure that food manufacturers are being transparent about their product's nutritional values and production impacts.

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103. *See* Pomeranz, *supra* note 92, at 632.

104. *See id*.

105. *See* O'REILLY & VAN TASSEL, *supra* note 42, § 10:46; Winters, *supra* note 70, at 857; Terence J. Centner, *Differentiating Animal Products Based on Production Technologies and Preventing Fraud*, 22 DRAKE J. AGRIC. L. 267, 287 (2017); Pomeranz, *supra* note 92, at 636–37.

106. *See* Pomeranz, *supra* note 92, at 624 ("Since Pearson, there has been a recognizably more lax environment for all claims, likely due in part to the court's strong language supporting the manufacturer's First Amendment rights . . . [t]ruthful labeling is considered commercial speech, protected by the First Amendment. However, false, deceptive, and misleading speech on a product label is not protected and may be regulated.").

107. *See* Pearson v. Shalala, 164 F.3d 650, 659 (D.C. Cir. 1999); Pomeranz, *supra* note 92, at 624.

108. *See Pearson*, 164 F.3d at 659; Pomeranz, *supra* note 92, at 624.

109. *See* Winters, *supra* note 70, at 859–60; Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 937 (2015).

II. CIVIL SURVEILLANCE OF MISLEADING FOOD LABELING

Even when the FDA opts not to pursue an enforcement action against a company employing a false or misleading label, the company may still be held answerable for its deceptive tactics through two main channels. First, Section 45 of the Lanham Act offers a cause of action *for competitors* injured by a business's deceptive and misleading conduct.[110] One of the purposes of Section 45 is to "protect persons engaged in such commerce against unfair competition."[111] The Lanham Act is a useful alternative accountability mechanism to government enforcement of misleading labeling because competitors have an incentive to ensure that competing businesses are playing fairly to prevent a company from gaining market share by using deceptive tactics.[112]

For example, in 2014, Unilever, the parent company of Hellman's and Best Foods mayonnaise, sued Hampton Creek, the producer of Just Mayo, a mayonnaise substitute, arguing that Just Mayo's product name and labeling were misleading.[113] Unilever argued that the product's name and labeling suggested that the product was equivalent to mayonnaise, even though Just Mayo was made with a yellow pea base rather than eggs, contravening the defined standard of identity requirement that mayonnaise be made with eggs.[114] Although Unilever ultimately dropped its lawsuit, the media attention surrounding the product labeling generated by the action led the FDA and Hampton Foods to reach an agreement.[115] This agreement allowed Just Mayo to retain its name but required the company to modify its product labeling to ensure that consumers are aware that the product is "egg-free" and is a "[s]pread and [d]ressing[.]"[116]

The second non-enforcement avenue through which food manufacturers are held accountable for their false or misleading labeling is state consumer protection lawsuits commenced by consumers. State consumer protection statutes are frequently referred to as "Little-FTC Acts" because these statutes were devised using the FTCA as a template.[117] These statutes prevent companies from using deceptive acts to sell their

110. *See* 15 U.S.C. § 45 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *see also* Markin, *supra* note 93, at 19.

111. 15 U.S.C. § 45; Pom Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107 (2014).

112. *See* Markin, *supra* note 93, at 19.

113. *See* Stephanie Strom, *Hellman's Maker Sues Company Over Its Just Mayo Substitute Mayonnaise*, N.Y. TIMES: BUS. (Nov. 10, 2014), https://nyti.ms/3nzU6If.

114. *See id.*

115. *See* Heather Kelly, *Just Mayo Will Get to Stay 'Just Mayo,'* CNN BUS. (Dec. 17, 2015, 3:51 PM), https://cnn.it/3mE98Mo.

116. *Id.*

117. *See* Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 474 (7th Cir. 2020).

products. One of the ways a defendant engages in a deceptive practice under these statutes is when the defendant employs a business practice, such as labeling, that "[is] likely to *mislead the consumer acting reasonably* in the circumstances, to the consumer's detriment."[118]

Although the reasonable consumer test arises when food manufacturers are sued in state court under a state's consumer protection statute, these actions are primarily resolved in federal court.[119] Actions under a state's consumer protection statute, filed in state court as class-action lawsuits, are ripe for removal to federal court under the Class Action Fairness Act provided that: (1) any class member is a citizen of a state different from any defendant; (2) there are more than 100 class members; and (3) the aggregate amount of damages claimed exceeds $5,000,000.[120] This form of surveillance of misleading food labeling is the one that occurs most frequently. Notably, the "reasonable consumer" question that this Article addresses arises within federal courts' analyses of state consumer protection statutes.

A. Development of the Reasonable Consumer Standard in Consumer Actions - The FTC

The phrase "likely to mislead a consumer acting reasonably" does not appear in the FTCA. However, in 1983, the FTC published a policy statement establishing that the test to decide if a consumer was misled by a business's advertising was whether the consumer's interpretation or reaction was reasonable.[121] The FTC emphasized that the business's advertising claim must be *likely* to deceive a reasonable consumer.[122] To many, this policy statement, and the newly announced deception standards within, marked a stark departure from the FTC's previous approach to analyzing deception claims.[123]

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118. *See, e.g.*, Garcia v. Kashi Co., 43 F. Supp. 3d 1359, 1384 (S.D. Fla. 2014) (emphasis added) (quoting PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)); *see also* FLA. STAT. ANN. § 501.204 (West 2020) ("It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2017."); Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000); CAL. BUS. & PROF. CODE § 17200 (West 2020).

119. *See Bell*, 982 F.3d at 475 ("While these are all state statutes, the federal Class Action Fairness Act of 2005 has pushed many class actions under them into federal courts."); Silverman, *supra* note 37, at 6 ("The Class Action Fairness Act (CAFA) results in the transfer of many multistate class actions filed in state courts to the federal judiciary.").

120. *See* 28 U.S.C. § 1332(d).

121. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984) 1984 WL 565319.

122. *See id.*

123. *See* Jack E. Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399, 407–20 (1988); Bailey & Pertschuk, *supra* note 31, at 850–51.

For decades, and in a majority of cases, the FTC had assessed a business's advertising to determine whether the advertising had a *tendency or capacity* to deceive a substantial number of consumers in a material way.[124] The FTC was not required to find that the challenged practices actually misled consumers.[125] Rather, the Commission's task in evaluating deceptive practice claims was to "protect the public" and intervene "in the public interest to stop any deception at its incipiency."[126] Because of a belief that FTC Commissioners had extensive experience and expertise in defining the public's expectations and beliefs, the Commission was given free rein to interpret challenged deceptive practices and evaluate the challenged practices' capacity to deceive the consuming public.[127] The Commission could find that a challenged practice was deceptive without any extrinsic evidence of the capacity to deceive.[128]

However, when James Miller was appointed as Chairman of the FTC by President Reagan, Miller championed a new approach to regulating deceptive business practices. Miller took immediate steps to reign in what he believed was unnecessary action and a waste of federal government resources by the FTC against companies based on the advertising interpretations of a small, "unreasonable" minority of consumers.[129] In 1980, Congress requested that the Commission majority draft a clarification of the FTC's deception policy.[130] This clarification document was intended to lay out the Commission's prior jurisprudence in deception cases and explain the need for a statutory definition of deception.[131] In response, Chairman Miller submitted a policy statement regarding deception to the Committee on Energy and Commerce.[132] In this policy statement, Miller argued that Congress should amend Section 5 of the Federal Trade Commission Act to define a "deceptive act" as a "material representation that is likely to mislead consumers, acting reasonably in the circumstances to their detriment."[133] Miller believed that the "reasonable consumer" standard was appropriate because "consumers generally are capable of protecting themselves from unscrupulous trade practices."[134] In the policy statement, the Commission suggested that less government regulation of business advertising was appropriate because "sellers do not

124. *See Cliffdale Assocs.*, 103 F.T.C. at 171–74.
125. *See* Bailey & Pertschuk, *supra* note 31, at 875–76.
126. *Id.* at 876.
127. *See id.* at 881–82.
128. *See id.* at 882.
129. *See* Karns, *supra* note 123, at 406–07.
130. *See id.* at 402.
131. *See id.* at 407.
132. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984) 1984 WL 565319.
133. Karns, *supra* note 123, at 401.
134. *Id.* at 411.

benefit from deceiving consumers where the product can be easily evaluated, is inexpensive, and is frequently purchased."[135]

Congress rejected the Commission and Miller's asserted need for a statutory definition of consumer deception.[136] Accordingly, Congress requested that the Commission submit a second clarification document that was less argumentative and focused on a more factual recitation of the FTC's previous decisions analyzing alleged consumer deception.[137] Undeterred by Congress's rejection of their suggested deception definition, the Commission majority took matters into their own hands in *Cliffdale Associates, Inc.*, explicitly adopting the reasonable consumer test for deception cases and attaching the recently drafted policy statement as support for the adoption of this standard.[138] In *Cliffdale Associates, Inc.*, the Commission majority characterized the FTC's previous approach to deception as "circular" and declared that a new approach was needed to "articulate a clear and understandable standard for deception."[139] Pointing back to the policy statement on deception that he submitted to Congress in 1983, Chairman Miller, writing for the majority, asserted that the more appropriate standard for deception was "an act or practice [that] . . . is *likely* to mislead consumers *acting reasonably* under the circumstances . . . ."[140]

The Commission majority contended that this standard would provide more certainty for future Commissions and courts to apply in a variety of cases.[141] However, two commissioners, who concurred in *Cliffdale Associates, Inc.*, foresaw the negative implications that switching to a reasonable consumer standard would cultivate in deceptive business practice actions. Commissioners Pertschuk and Bailey argued that the Commission's shift from requiring FTC attorneys to prove a business's marketing had a tendency or capacity to deceive consumers to a likelihood of deception would significantly raise the evidentiary threshold for new deception cases.[142] Consequently, the number of business practices that could be found to violate the FTC's deception standard would be diminished.

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135. *Id.*

136. *See* Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 400 (1997).

137. *See id*.

138. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110, 166 (1984); Karns, *supra* note 123, at 401–02.

139. *Cliffdale Assocs.*, 103 F.T.C. at 164.

140. *Id.* at 196.

141. *See id.* at 174.

142. *See* Karns, *supra* note 123, at 417–18; *see also Cliffdale Assocs.*, 103 F.T.C. at 184 (Pertschuk, Comm'r, concurring in part and dissenting in part).

Commissioner Pertschuk further appraised that the majority's opinion slyly shifted the burden of reasonability from the Commission, who was historically tasked with considering reasonable interpretations of business marketing claims, to evaluating whether the consumer's suggested interpretation was reasonable.[143] This shift from analyzing reasonable interpretations of a business's marketing to critiquing the proposed interpretation of the consumer is the genesis of the problems that have surfaced in misleading food labeling litigation. Commissioner Pertschuk noted that a segment of society takes financial advantage of *uneducated* and *unsophisticated* consumers, whose actions may be considered unreasonable in many cases.[144] This point has proven true in food labeling litigation as consumers become less and less aware of food production and processing methods. Rather, consumers rely on the truthfulness and transparency of food advertising claims. Finally, Commissioner Pertschuk foresaw the critical issue in using the inherently subjective "reasonable consumer" standard, noting that "what strikes me as 'unreasonable' consumer behavior may not seem so to other commissioner[s]."[145]

Nevertheless, Chairman Miller's efforts to shift the deception standard were successful. The "likely to mislead reasonable consumers" standard was further cemented by the Ninth Circuit in *Federal Trade Commission v. Pantron I Corp.*, where the court found that "[t]he new standard became binding on the [FTC] when it was adopted in *Cliffdale Associates, Inc*."[146] To determine whether a business's advertising had a tendency to deceive a consumer, the FTC customarily applied the "substantial portion" test, requiring the Commission to find that the defendant's advertising had the tendency to deceive a "substantial portion" of the consuming public.[147] The "substantial portion" or "substantial numbers" test provided the "Commission with a flexible sliding scale," allowing it to infer "whether or not a significant number of consumers could be deceived from its own examination of the conduct at hand and

143. *See Cliffdale Assocs.*, 103 F.T.C. at 198.

144. *See id.* at 186–87 ("The sad fact is that a small segment of our society makes its livelihood preying upon consumers who are very trusting and unsophisticated. Others specialize in weakening the defenses of especially vulnerable, but normally cautious, consumers. Through skillful exploitation of such common desires as the wish to get rich quick or to provide some measure of security for one's old age, professional con men can prompt conduct that many of their victims will readily admit—in hindsight—is patently unreasonable.").

145. *Id.*

146. F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994); *see also* Budnitz, *supra* note 136, at 431.

147. *See* Karns, *supra* note 123, at 405; *see also* Bailey & Pertschuk, *supra* note 31, at 883–84.

surrounding circumstances . . . ."[148] The 1983 Policy Statement retained the substantial portion test, which is still used today in FTC actions.[149] Although the FTC has never defined what the "substantial portion" standard requires, some commentators have noted that as little as 14% of the consuming public has been considered a "substantial portion" of the public warranting protection.[150] Evidence of physical injury or significant monetary losses may lower the percentage of consumers required to satisfy this threshold.[151]

B. Development of the Reasonable Consumer Standard in Consumer Actions - The FDA

Until 2002, the FDA was reticent on the proper standard for analyzing deceptive food labeling claims. The vacuum created by the agency's silence on the issue allowed courts to interpret the scope and capacity of consumers protected by the FDCA's broad prohibition against misleading labeling in various ways. Some federal courts interpreted the FDCA to protect "the ignorant, . . . unthinking, and the credulous consumer" because these courts believed that Congress intended the FDCA to protect *all* consumers from dangerous products and unscrupulous business practices in food labeling.[152] Other courts interpreted the FDCA to require evaluation of claims from the perspective of the "ordinary person" or the "reasonable consumer."[153]

In 2002, the FDA clarified that it believed the reasonable consumer standard was the "appropriate standard" to determine whether a food product's labeling was misleading because it "more accurately reflect[ed] [the] FDA's belief that consumers are active partners in their own health

148. *Cliffdale Assocs.*, 103 F.T.C. at 56.

149. *See* FED. TRADE COMM'N, *supra* note 30, at 2 n.20 ("An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a *significant minority* of reasonable consumers is deceptive.") (emphasis added).

150. *See* Bailey & Pertschuk, *supra* note 31, at 890 n.185; Ivan Preston, *The Definition of Deceptivenes in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1044–45 (1990).

151. *See* Bailey & Pertschuk, *supra* note 31, at 891–92; *see also* Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 558 (1991).

152. *See* United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 75 (9th Cir. 1951); United States v. An Article of Food . . . 'Manischewitz . . . Diet Thins,' 377 F. Supp. 746, 749 (E.D.N.Y. 1974); United States v. Strauss, 999 F.2d 692, 696–97 (2d Cir. 1993); United States v. An Article . . . Consisting of 216 Individually Cartoned Bottles, More or Less, of an Article Labeled in Part: Sudden Change, Etc., Hazel Bishop, Inc., Appellee, 409 F.2d 734, 740 (2d Cir. 1969).

153. *See* United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage, 187 F.2d 967, 971 (3d Cir. 1951); Postum Cereal Co. v. Am. Health Food Co., 119 F. 848, 852 (7th Cir. 1902).

care who behave in health promoting ways when they are given accurate health information."[154] The FDA also hinted at *Pearson v. Shalala*'s lasting influence on the agency's regulatory activity, pronouncing that "the reasonable consumer standard is consistent with the governing First Amendment case law precluding the Government from regulating the content of promotional communication so that it contains only information that will be appropriate for a vulnerable or unusually credulous audience."[155]

Initially crafted by the Miller-led Commission and later adopted by the FDA, the FTC's deception standard is frequently controlling in cases filed under state consumer protection statutes.[156] For example, the Florida Consumer Protection Statute, known as the Florida Deceptive and Unfair Trade Practices Act, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ."[157] The statute then expresses the state legislature's intent to give "due consideration and great weight" to "the interpretations of the Federal Trade Commission and . . . federal courts" when construing its deceptive and unfair practices act.[158] California follows a very similar approach.[159] Although the reasonable consumer requirement is not explicitly written into the California statute,[160] California courts have consistently required plaintiffs to show that a reasonable consumer would have been misled by the defendant business's labeling, just as the FTC requires.[161]

Consequently, although the FDA has broad power to rein in misleading labeling of food products, the agency has largely relinquished this power. Citizens and food manufacturers' competitors alike have stepped in to police misleading food labeling. When consumers attempt to hold food manufacturers accountable under state consumer protection statutes, the determinative question in deciding if a plaintiff's deceptive

154. Guidance for Industry: Qualified Health Claims in the Labeling of Conventional Foods, 67 C.F.R. § 78004 (2002).

155. *Id.*

156. *See* Bailey & Pertschuk, *supra* note 31, at 862 n.67 (citing twenty-two state statutes that require and encourage state courts to defer to FTC decisions and policies).

157. FLA. STAT. § 501.204(1) (2021).

158. *See* FLA. STAT. § 501.204(2) (2021).

159. Here, I chose Florida and California as examples because they are two of the most common jurisdictions for misleading food labeling class action filings. California's Northern District, in particular, was once known as the nation's "[f]ood [c]ourt" because a vast majority of misleading food labeling claims were being filed in that court. *See* Diana R. H. Winters, *Inappropriate Referral: The Use of Primary Jurisdiction in Food-Labeling Litigation*, 41 AM. J.L. & MED. 240, 248 (2015).

160. *See* CAL. BUS. & PROF. CODE §§ 17200, 17500.

161. *See* Hadley v. Kellogg Sales Co., 273 F. Supp. 3d 1052, 1067 (N.D. Cal. 2017); Ariz. Cartridge Remanufacturers Ass'n, Inc. v. Lexmark Int'l, Inc., 290 F. Supp. 2d 1034, 1041 (N.D. Cal. 2003) ("Judicial interpretations of the Federal Trade Commission Act have persuasive force for purposes of interpreting California's Unfair Competition Statutes.").

practice suit has merit is whether the challenged labeling claim was likely to deceive a reasonable consumer.

III. REASONABLE CONSUMER OR JUDGE'S INTERPRETATION?

Because most deceptive food labeling actions are brought in state court, state consumer protection statutes and state law interpretations control when these claims are litigated in federal court.[162] Most consumer protection statutes governing deceptive food labeling require the plaintiff to prove that reasonable consumers are likely to be deceived by the product's labeling.[163] Following the previous Section of this Article, this standard should sound nauseatingly familiar because this language echoes the language advocated for and established by the Miller-led FTC. As a general matter, the determination of whether a reasonable consumer would be misled is a fact question reserved for the jury.[164] Most courts even declare that dismissal is appropriate *only* in "rare situations at the motion to dismiss stage" when the "pleadings do not plausibly allege that a reasonable consumer would be deceived."[165] Some courts, however, permit dismissal on the pleadings when "plaintiffs base [their] deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising . . . ."[166]

Plaintiffs in such an action need not prove that "every consumer shares the same definition of" the labeling claim.[167] However, many courts require plaintiffs to demonstrate that a "reasonable consumer" would likely be misled by establishing that "a significant portion of the general consuming public or of target[] consumers, acting reasonabl[e] in the circumstances[] could be misled."[168] Some courts add to this test that the "reasonable consumer" is not required to be "versed in the art of inspecting and judging a product, [or] in the process of its preparation or

162. *See, e.g.*, Janney v. Mills, 944 F. Supp. 2d 806, 814 (N.D. Cal. 2013).

163. *See* Bailey & Pertschuk, *supra* note 31, at 862–63; *see, e.g.*, Garcia v. Kashi Co., 43 F. Supp. 3d 1359, 1384 (S.D. Fla. 2014); Gedalia v. Whole Foods Mkt. Servs., Inc., 53 F. Supp. 3d 943, 950 (S.D. Tex. 2014); Lam v. Gen. Mills, Inc., 859 F. Supp. 2d 1097, 1103 (N.D. Cal. 2012); Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 474 (7th Cir. 2020).

164. *See, e.g.*, *Gedalia*, 53 F. Supp. 3d at 950.

165. *See* Newton v. Kraft Heinz Foods Co., No. 16-CV-04578, 2018 WL 11235517, at *3 (E.D.N.Y Dec. 18, 2018) (quoting Podpeskar v. Dannon Co., Inc., No. 16-CV-8478, 2017 WL 6001845, at *3 (S.D.N.Y. Dec. 3, 2017)); Silverman, *supra* note 37, at 11.

166. *See Bell*, 982 F.3d at 477.

167. *See* Garrison v. Whole Foods Mkt. Grp., Inc., Case No. 13-CV-05222, 2014 WL 2451290, at *2 (N.D. Cal. June 2, 2014).

168. *See* Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016) (quoting Lavie v. Procter & Gamble Co., 129 Cal. Rptr. 2d 486, 495 (Cal. App. 2003)); *In re* 100% Grated Parmesan Cheese Mktg. & Sale Pracs. Litig., 275 F. Supp. 3d 910, 921 (N.D. Ill. 2017) (quoting *Ebner*, 838 F.3d at 965); *Gedalia*, 53 F. Supp. 3d at 950 (quoting *Lavie*, 129 Cal. Rptr. 2d at 495).

manufacture."[169] Most courts have reached a consensus that the context of the entire food label is relevant when engaging in this inquiry.[170] A food manufacturer cannot utilize a misleading claim on the front-of-package labeling and then expect the accurately-stated nutrition facts panel on the side or back of the packaging to remedy the misleading claim.[171] The Seventh Circuit has also suggested that "what matters most [in the reasonable consumer analysis] is how real consumers understand and react to the advertising."[172]

However, despite the promise of having a jury of six to twelve *actual consumers* render judgment on whether the plaintiff's misleading labeling claim has merit, time and again, courts find it implausible that a "reasonable consumer" could have been deceived by the challenged labeling claim.[173] For example, in *Campbell v. Freshbey*, *LLC*, the Eastern District of New York found that a reasonable consumer could not mistake a claim that the juice was "cold-pressed" to mean that pressure was never

169. *See* Negowetti, *supra* note 5, at 333–34; Viggiano v. Hansen Nat. Corp., 944 F. Supp. 2d 877, 885 (C.D. Cal. 2013) (quoting Colgan v. Leatherman Tool Grp., Inc., 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App., 2006)).

170. *See* Stoltz v. Fage Dairy Processing Indus., S.A., No. 14-CV-3826, 2015 WL 5579872, at *16 (E.D.N.Y Sept. 22, 2015); *In re* 100% Grated Parmesan Cheese Mktg. & Sales Pracs. Litig., 275 F. Supp. 3d 910, 926; *In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12–MD–2413, 2013 WL 4647512, at *16 (E.D.N.Y. Aug. 29, 2013).

171. *See* Williams v. Gerber Prods. Co., 552 F.3d 934, 939–40 (9th Cir. 2008); *Ebner*, 838 F.3d at 966; *Bell*, 982 F.3d at 476.

172. *Id.*

173. *See Gedalia*, 53 F. Supp. 3d at 954 ("Some lower courts have dismissed claims along similar common-sense lines, rejecting claims requiring the reasonable consumer to leap to conclusions about the healthfulness or the fruit and vegetable content of common grocery items. McKinniss v. Kellogg USA, No. CV 07-2611, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) ('Natural Fruit Flavors' in Froot Loops); Werbel *ex rel.* v. Pepsico, Inc., No. C 09–04456, 2010 WL 2673860, at *5 (N.D. Cal. July 2, 2010) (Cap'n Crunch 'Crunchberries'); Red v. Kraft Foods, Inc., No. CV 10–1028, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) ('The fact remains that the [Kraft Vegetable Thins] is a box of crackers, and a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables.'); Henderson v. Gruma Corp., No. CV 10–04173, 2011 WL 1362188, at *12 (C.D. Cal. Apr. 11, 2011) (Mission Guacamole 'With Garden Vegetables,' i.e. dehydrated vegetables, "does in fact contain vegetables that can be grown in a garden."); Rooney v. Cumberland Packing Corp., No. 12–CV–0033, 2012 WL 1512106, at *4 (S.D. Cal. Apr. 16, 2012) (reasonable consumers were not deceived by 'Sugar in the Raw,' which did not indicate it was 'unprocessed and unrefined' but was processed according to 'industry standards.')."); *see also* Workman v. Plum Inc., 141 F. Supp. 3d 1032, 1036 (N.D. Cal. 2015) ("The products at issue do not display any affirmative misrepresentations. They merely show pictures of featured ingredients contained in the puree pouch and fruit bars. No reasonable consumer would expect the size of the flavors pictured on the label to directly correlate with the predominance of the pictured ingredient in the puree blend."); Parks v. Ainsworth Pet Nutrition, LLC, 377 F. Supp. 3d 241, 247 (S.D.N.Y. 2019) ("A reasonable consumer would not be so absolutist as to require that 'natural' means there is no glyphosate, even an accidental and innocuous amount, in the Products.").

applied to the juice product.[174] In *Newton v. Kraft Heinz Foods Co.*, the court found that sour cream products labeled as "All Natural" and "Pure & Natural" were not misleading as a matter of law because:

> whatever [the] connotations a consumer might associate with the product through the use of the word "natural," they are values or meanings that are solely within the province of the individual consumer's individualized experience. There can be no "one size fits all" meaning . . . where a term is always subject to individualized and fluid interpretation.[175]

Similarly, the Northern District of Illinois found that a label stating that a cheese was "100% Grated Parmesan" when it contained a preservative was not misleading because "reasonable consumers are well aware that pure dairy products spoil, grow blue, green, or black fuzz, or otherwise become inedible if left unrefrigerated for an extended period of time."[176] The Central District of California dismissed a misleading labeling action against Kraft Foods for Roasted Vegetable Ritz Crackers and Vegetable Thins that were labeled "Made with Real Vegetables" because "a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables."[177]

These cases present just a few examples of numerous courts that, despite confirming that the question of whether a reasonable consumer would be misled is a fact question to be resolved by the jury, chose to dismiss food labeling litigation based on common sense or, as one court put it, the "well-known facts of life."[178] But whose "facts of life" are being analyzed? As the Eastern District of New York suggests in *Newton*, a food consumer's understanding of food production and technology is highly individualized.[179] Although the modern consumer is well aware that technology has changed how food is produced and processed, few consumers truly understand the food science behind most of the products they consume.[180]

When judges choose to impose personal rationale and logic into determining whether a "reasonable consumer" would find a label

174. *See* Campbell v. Freshbev, LLC, 322 F. Supp. 3d 330, 341 (E.D.N.Y. 2018).

175. Newton v. Kraft Heinz Foods Co., No. 16-CV-04578, 2018 WL 11235517, at *8 (E.D.N.Y. Dec. 18, 2018).

176. *In re* 100% Grated Parmesan Cheese Mktg. and Sale Pracs. Litig., 275 F. Supp. 3d 910, 923 (N.D. Ill. 2017).

177. *Red*, 2012 WL 5504011, at *3.

178. *See id.*

179. *See Newton*, 2018 WL 11235517, at *8.

180. *See* Danielle Robertson Rath*, What the Food Health Survey Says About Food Science and Trust*, SCI. MEETS FOOD (June 13, 2018), https://bit.ly/3AmVn99; Sheril Kirshenbaum & Douglas Buhler, *Americans Are Confused About Food and Unsure Where to Turn for Answers, Study Shows*, ALL. FOR SCI. (Mar. 9, 2018), https://bit.ly/3tTyh7F.

"misleading," food labeling litigation outcomes become inconsistent and inaccurate.[181] A judge's rationale and logic are not representative of the average American's understanding of food production and nutrition. Although it may be incomprehensible to a highly educated judge that a consumer would believe that a "100% Grated Parmesan" labeling claim suggests that the cheese is 100% grated rather than 100% parmesan because the term "100%" modifies the word "grated," many consumers are unequipped to take such an analytical and discerning approach toward scrutinizing a food label while in the grocery store.

For instance, the most recent U.S. Census found that only 39.4% of Americans have obtained education beyond a high school diploma.[182] Only one in five Americans live in rural America, where food is most commonly produced.[183] Merely 10.9% of Americans work in agriculture or related industries.[184] Thus, for many Americans, their understanding of the behind-the-scenes aspects of food production and processing is minimal and shaped only by food manufacturer disclosures and media narratives. As Commissioner Pertschuk feared in his concurrence in *Cliffdale Associates, Inc.*,[185] consumers' lack of understanding of food production and common food marketing claims makes it easy for food manufacturers to persuade consumers to purchase products labeled with misunderstood or undefined terms, thus increasing corporate profits under the guise of improving healthy diets and saving the environment.

Broad consumer understanding of labeling claims may seem unreasonable given FDA regulations or dictionary definitions. Still, the documented understandings of how consumers interpret labeling claims are not made any less real.[186] The cases highlighted above feature judges substituting their personal knowledge, collected through their varied experiences and superior education, for consumers with less education and

181. *See* Negowetti, *supra* note 5, at 349; Petty, *supra* note 60, at 11 (noting that the FTC struggles to apply the "reasonable consumer" standard because it "allows the FTC to ignore evidence concerning audience interpretations of an advertisement" and allows the Commission to "substitute its own opinion about how the mythical 'reasonable consumer' would act").

182. *See* U.S. CENSUS BUREAU, U.S. CENSUS BUREAU RELEASES NEW EDUCATIONAL ATTAINMENT DATA (Mar. 30, 2020), https://bit.ly/3zhCIu5.

183. *See* U.S. CENSUS BUREAU, ONE IN FIVE AMERICANS LIVE IN RURAL AREAS (Aug. 9, 2017), https://bit.ly/3AoRFfs.

184. *See Ag and Food Sectors and the Economy*, ECON. RSCH. SERV., U.S. DEP'T AGRIC., https://bit.ly/3zl8NBt (last visited Jan. 28, 2022).

185. *See In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 132–33 (1984) (Pertschuk, Comm'r, concurring in part and dissenting in part).

186. *See* Michael D. Bernacchi, *A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration*, 47 U. CIN. L. REV. 43, 48 (1978) ("Empirical research has demonstrated that perception is reality; a product is nothing more than a bundle of perceptual cues.").

minimal understanding of agricultural and food production.[187] Consumer actions vital to citizen surveillance have been deflated as a result of judges choosing to reason plaintiffs out of misleading labeling claims at the motion to dismiss stage.

Although it would be easy only to criticize judges' application of the reasonable consumer standard during food labeling litigation, jurors are also unlikely to be equipped to consistently and fairly determine whether a reasonable consumer would be misled under the current standard. In the design defect context of food tort litigation, Professor Katharine Van Tassel has observed that applying a reasonable consumer expectations test led to jury verdicts that relied on "an individual's idiosyncratic beliefs."[188] As several courts analyzing food labeling claims have confirmed, every individual has varying levels of understanding of food labeling claims. This varied understanding creates a wide degree of uncertainty in how jurors will interpret the challenged labels or find an interpretation of that label as "reasonable." Jury uncertainty is the reason why misleading food labeling claims rarely make it to trial, even when these claims succeed at the motion to dismiss stage.[189] Food manufacturers seek to avoid the risk of potentially significant liability and expenditure of exorbitant amounts of litigation expenses when each jury verdict is dependent on six to twelve members of the jury's personal views on the challenged labeling claim.

IV. THE RISK-UTILITY APPROACH TO MISLEADING FOOD LABELING

Until now, this Article has concentrated on the core flaws of the reasonable consumer test when applied in misleading food labeling litigation. This Section offers a viable solution to the subjective and inconsistent application of the existing framework. Rather than continuing to utilize the reasonable consumer test, the FTC should release guidance shifting its deception analysis in food marketing cases from the reasonable consumer test to a risk-utility analysis. The risk-utility analysis is not an extraordinary leap from evaluating the reasonableness of consumer interpretations. However, such an approach appropriately refocuses the label evaluation to consider the reasonableness of the food manufacturer's labeling actions in light of the manufacturer's knowledge of consumer

187. *See* Stoltz v. Fage Dairy Processing Indus., S.A., No. 14-CV-3826, 2015 WL 5579872, at *20 (E.D.N.Y. Sept. 22, 2015) ("As the Honorable Jack Weinstein has recognized, at least in some cases, '[a] federal trial judge, with a background and experience unlike that of most consumers, is hardly in a position to declare' that reasonable consumers would not be misled." (citing Verizon Directories Corp. v. Yellow Book USA, Inc., 309 F. Supp. 2d 401, 407 (E.D.N.Y 2004))).

188. *See* Katharine Van Tassel, *The Introduction of Biotech Foods to the Tort System: Creating a New Duty to Identify*, 72 U. CIN. L. REV. 1645, 1670 (2004); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 480 (1979).

189. *See* Silverman, *supra* note 37, at 23.

understandings of the claim rather than prosecuting the reasonableness of the plaintiff's interpretation of the claim. A risk-utility analysis provides clear guideposts to assist judges and juries in concluding whether the food manufacturer's labeling was misleading.[190] The risk-utility analysis also reflects the practical reality that labeling claims will always generate some confusion regardless of companies' best attempts. Label interpretations that are unrecognized by retail experts, consumer surveys, and research should not subject manufacturers to liability.[191]

A. A Shift from Consumer Expectations to Risk Utility

The risk-utility approach is hardly a new innovation.[192] In fact, in product design defect litigation, most jurisdictions have already shifted from a reasonable consumer expectation test to a risk-utility analysis.[193] Under the reasonable consumer expectations test utilized in product design defect actions, a product has a "defective" design if the product was "dangerous to an extent beyond which would be contemplated by the *ordinary consumer* who purchases it, with the ordinary knowledge common to the community as to its characteristics."[194] This test, similar to the reasonable consumer test currently utilized in misleading food labeling actions, relies on plaintiffs' exhibiting what a "reasonable" or "ordinary consumer" knew and expected from the product. On the other hand, courts adopting the risk-utility test for design defects consider a consumer product "defective" if the "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable

190. *See* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 598 (1980) ("Nonetheless, by grounding the [consumer expectations test] on a risk-utility base, some courts have recognized the need to define for the jury exactly which factors should be considered in discerning what the objective ordinary consumer expects."); Patrick F. Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 478 (1977) ("'Reasonableness' . . . is so vague that some delimitation of its meaning is necessary. However, all attempts to define the concept in substantive terms founder in our ability to provide some clear, precise, mechanical form of reasonableness. Instead, all we can do is propose or identify the items or factors that are relevant to reasonableness and then select (or hope for) some institutionalized method for considering those factors to determine reasonableness.").

191. *See* Birnbaum, *supra* note 190, at 598 (commenting that all products have inherent potential to cause harm if misused).

192. *See id*. at 605 ("To be sure, risk-utility analysis is not a novel approach in strict liability cases. In fact, the vast majority of courts have for some time employed balancing tests in one form or another.").

193. *See* Aaron D. Twerski, *An Essay on the Quieting of Products Liability Law*, 105 CORNELL L. REV. 1211, 1212 (2020); Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REFORM 197, 207 (1997).

194. Van Tassel, *supra* note 188, at 1677 (emphasis added) (citing Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 531–32 (S.D.N.Y. 2003)); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998).

alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe."[195] In effect, courts adopting the risk-utility approach for design defects analyze whether the defendant's product design created "unreasonable risk."[196] In jurisdictions applying the risk-utility framework, the plaintiff has the burden of proving that "a reasonable alternative was, or reasonably could have been, available at the time of sale or distribution."[197]

Many jurisdictions have shifted to a risk-utility analysis for defective design claims because of a growing recognition of the difficulties in concretely defining the ordinary consumer[198] and belief that product liability should be premised on the "ideal balance of product usefulness, cost, and safety."[199] Further, Professors Henderson and Twerski argue that a risk-utility analysis appropriately imposes liability on the product manufacturer because the manufacturer is in a better place to minimize product-related risks.[200] A risk-utility analysis also places joint responsibility on consumers by ensuring that "careless users and consumers [are not] subsidized by more careful users and consumers, when the former are paid damages out of the funds to which the latter are forced to contribute through higher product prices."[201] Most courts employing a risk-utility analysis for design defect claims agree that "for [a] liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk avoidance techniques reasonably attainable at the time of distribution."[202]

In food tort litigation, many jurisdictions and the Restatement Third of Torts distinguish food and non-food product defect cases.[203] In many instances, even courts moving to a risk-utility analysis for design defect claims have chosen to retain the consumer expectations test for food products liability claims because of the underlying belief that food is made by nature rather than by hand.[204] Courts resist the notion that food

195. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998).

196. *See id*.

197. *Id*.; *see* Twerski, *supra* note 193, at 1212.

198. *See* Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1236–37 (1993).

199. David Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 754 (1996) (emphasis omitted); *see generally* Twerski, *supra* note 193, at 1212.

200. *See generally* James A. Henderson, Jr. & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

201. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998).

202. *Id*.

203. *See id.* at § 7.

204. *See* Van Tassel, *supra* note 188, at 1673.

processors "make" food, suggesting that processors only "gather it, remove any deleterious substances . . . , add chemicals for both flavoring and preserving the food, prepare it for storage, and package it for delivery to consumers."[205] Consequently, courts have been hesitant to hold food manufacturers strictly liable for the design of food products because of the belief that food manufacturers are not food product designers and cannot always remove every deleterious substance naturally occurring in produce or protein.

Although courts and the Third Restatement have retained the reasonable consumer expectations test for products liability claims in the food context, these authorities' premise for why this test is suitable no longer rings true for a majority of biologically engineered or processed food products. Today's food manufacturers are food product designers. Food production companies spend millions of dollars in research and development, seeking to perfect their production and processing of genetically superior plants and animals.[206] Food manufacturers often hand-select various ingredients to impact the processed foods' appearance, taste, texture, smell, and nutritional qualities. In other words, today's food products are highly designed.

The Third Restatement further justifies the deployment of the reasonable consumer expectations test in food design defect cases by remarking that "the consumer expectations test . . . relies upon culturally defined, widely shared standards that food products ought to meet."[207] The Restatement supports this idea by contending that "assessments of what consumers have a right to expect in various commercial food preparations are sufficiently well informed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard."[208] However, as Professor Van Tassel argues and this Article has previously discussed,[209] unlike with traditional and unprocessed foods, consumers frequently struggle to define and articulate standards for innovative and

205. *Id.*

206. *See Beyond Meat Versus Peers in R&D Spending*, STOCK DIVIDEND SCREENER (July 1, 2021), https://bit.ly/3zzn2Tg (indicating that the Kellogg Company spent $150 million per year in research and development of products for each year between 2016 and 2020); Nick Skillicorn, *Top 1000 Companies That Spend the Most on Research & Development (Charts and Analysis)*, IDEA TO VALUE (Aug. 28, 2019), https://bit.ly/3lOrIQ7 (finding that the food and beverage industry spent 6.9 billion dollars in research and development in 2018).

207. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (AM. L. INST. 1998); Van Tassel, *supra* note 188, at 1679.

208. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7; Van Tassel, *supra* note 188, at 1678.

209. *See* sources cited *supra* note 33.

highly-processed food products and these products' correlating labeling claims.[210]

Thus, even in the food products liability context, courts should extend the use of the risk-utility analysis to highly designed, processed food products. Likewise, the risk-utility framework is apt for analyzing misleading food labeling claims for several reasons. First, the risk-utility analysis appropriately balances the scales between the less knowledgeable food consumer and the food manufacturer who has spent millions of dollars on research and development of the product and is in the best place to ensure that consumers receive accurate depictions of food products.[211] Employing the risk-utility approach would allow the FTC and courts to objectively assess whether the food manufacturer designed the product label in a way that sought to reduce the risk of misleading the consumer. Utilizing this approach would bring the analysis closer to the traditional FTC deception approach, giving commissioners, judges, and juries the ability to identify all legitimate interpretations of the challenged label in deciding whether the labeling claim has the tendency to mislead a significant segment of the consuming public. This approach would also take into account the food manufacturer's efforts to limit the label's risk of deception and the legitimate cost that using an alternative label would impose on the manufacturer.

B. Risk-Utility Guideposts for Misleading Labeling Litigation

Courts that apply risk-utility balancing to ascertain whether a product design is "unreasonably dangerous" use guideposts to ensure that the determination is objective. Common factors that courts have advanced when applying risk-utility balancing are: (1) the magnitude and probability of the foreseeable risks of harm; (2) the instructions and warnings accompanying the product; (3) the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; (4) the likely effects of the alternative

210. *See* Van Tassel, *supra* note 188, at 1679 ("Not only are biotech foods too novel, most consumers are not even aware that they are consuming biotech food.").

211. *See* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1324–25 (2015) ("Today's retailers are not just large versions of the mom-and-pop hardware store of the past; they are data-driven, psychologically-informed institutions that systematically tailor prices and products to consumers' shopping shortcomings."); Norman I. Silver, *Reasonable Behavior at the CFPB*, 7 BROOK. J. CORP. FIN. & COM. L. 87, 101 (2012) ("Departments of consumer research at most major corporations devote substantial effort to learning how to seek their products more effectively than their competitors . . . .").

design on production costs; (5) product longevity, maintenance, repair, and esthetics; and (6) the range of consumer choices among products.[212]

Utilizing these factors as a template, relevant factors that the FTC should adopt as guideposts for judges, juries, and FTC commissioners when analyzing misleading labeling actions include: (1) the nature and strength of consumer understanding of the product claims asserted; (2) the foreseeable risks of misleading consumers by employing the labeling claim; (3) the disclaimers present on the front label of the product and the prominence of these disclaimers; and (4) the benefits of using the labeling claim for the business. The remainder of this Section considers the significance of each factor in reaching the goal of objectively assessing whether the food manufacturer's labeling was misleading.

1. Nature and Strength of Consumer Understanding

Any determination of whether a food manufacturer's advertising or labeling claim was misleading must include the nature and strength of consumer understanding of the claim at the time the manufacturer chose to use the claim.[213] The most common hurdle that plaintiffs fail to clear in class action food labeling lawsuits is articulating a consistent definition of the labeling claim consumers adhere to that courts can compare against the potential meanings that could be implied from the manufacturers' claim.[214] This hurdle naturally arises due to the individual nature of consumers' agricultural and nutrition education and experiences.[215] The individualized nature of consumer labeling claim interpretation makes objective and consistent evaluation of "reasonable consumer" interpretations and whether all consumers commonly relied on the same interpretation fundamentally difficult.[216] Thus, rather than requiring plaintiffs to articulate one consistent definition, this factor would permit plaintiffs to submit evidence displaying the spectrum of consumer interpretations of the challenged food labeling claim through expert testimony or consumer surveys.

Evidence of consumer understanding of food marketing claims should extend beyond the food label itself. Food companies spend billions

212. *See* Van Tassel, *supra* note 188, 1692 n.211; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1:4 (AM. L. INST. 2021); RESTATEMENT (SECOND) OF TORTS: SPECIAL LIAB. OF SELLER OF PROD. FOR PHYSICAL HARM TO USER OR CONSUMER § 402A (AM. L. INST. 1965).

213. *See* Bernacchi, *supra* note 186, at 49 ("[C]ourts too often posit empirical questions and then proceed to answer those questions with guess work."); Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 481 (7th Cir. 2020) ("What matters here is how consumers actually behave – how they perceive advertising and how they make decisions.").

214. *See* Astiana v. Kashi Co., 291 F.R.D. 493, 507–08 (S.D. Cal. 2013).

215. *See* Negowetti, *supra* note 5, at 344.

216. *See id.*

of dollars advertising on social media platforms, in cell phone applications, and during television commercial breaks to convince consumers to buy their product before the consumer enters the store.[217] Consumer understandings built through these interactions should serve as additional evidence of valid interpretations that consumers might draw from the claim.

For example, the court in *Janney v. Mills* alluded to how consumer understandings of a labeling claim can be generated in part by a manufacturer's out-of-store advertising.[218] One of the plaintiffs' main arguments addressed by the court was that Nature Valley's use of the term "natural" was misleading because their products contained processed sweeteners despite the plaintiffs' belief that a "natural" product would not include artificial and synthetic ingredients.[219] The plaintiffs contended that this belief was reinforced by Nature Valley's use of images "of forests, mountains, and seaside landscapes" on its social media and corporate website to connect Nature Valley products with a "wholesome way of life."[220] Consumers frequently interpret labeling claims in part by considering impressions that the company has made on them through out-of-store marketing. Those additional marketing techniques should be used to shape a court's view of valid interpretations of the claim.

Pelayo v. Nestle USA, Inc. is an example of a case in which requiring the court to address consumer understanding of the challenged claim would have assisted the plaintiffs in advancing their suit past the motion to dismiss stage.[221] In *Pelayo*, the court granted the defendant's motion to dismiss the plaintiffs' claim that Buitoni Pasta's label presenting its pasta as "natural" was misleading because the pasta was produced using artificial and synthetic ingredients including xanthan gum, soy lecithin, sodium citrate, maltodextrin, and sodium phosphate.[222] The district court found that the plaintiffs failed to state a claim because they were unsuccessful in "offer[ing] an objective or plausible definition of the phrase 'All Natural'" that would be deceptive in this context.[223] The plaintiffs suggested several interpretations of the term that would make a deception claim credible.[224] Nonetheless, the court dismantled each proffered interpretation. First, the court found that the ingredients could not be considered by "reasonable consumers" as "artificial" because FDA

217. *See How Can Advertisements Influence Your Food Choices?*, CTR. FOR NUTRITION IN SCHS. (Jan. 22, 2020), https://bit.ly/2XKArdG.

218. *See* Janney v. Mills, 944 F. Supp. 2d 806, 809 (N.D. Cal. 2013).

219. *See id.*

220. *Id.*

221. *See* Pelayo v. Nestle USA, Inc., 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013).

222. *See id.* at 979.

223. *See id.* at 978.

224. *See id.* at 979.

regulations defining "artificial" ingredients only applied to flavor additives.[225]

Additionally, the court attacked the plaintiffs' interpretation of the label to exclude "synthetic" ingredients.[226] The court supported its attack by remarking that the challenged "synthetic" ingredients are permitted under the National Organic Program, which consumers often hold to a higher standard.[227] However, the court's opinion is void of any evidence of current consumer understandings of "natural" products or recognition of how consumer understandings are frequently untethered from regulatory standards. If the court had applied the risk-utility framework instead, the plaintiffs in *Pelayo* would only have had to substantiate that a significant segment of the population would interpret the labeling claim that the pasta was "All-Natural" to mean that the pasta included no artificial or synthetic ingredients to reach a jury resolution of the matter.

Lee v. Conagra Brands, Inc. presents another instance where permitting plaintiffs to submit evidence of all known understandings of the labeling claim would allow the plaintiffs' challenge to a misleading label to proceed to a jury. In *Lee*, the United States District Court for the District of Massachusetts considered whether the claim that Wesson Oil was "100% Natural" was misleading because the product contained GMO ingredients.[228] The court found that the "100% Natural" labeling claim was not misleading because it considered a "natural" claim to suggest only that the product included "nothing artificial or synthetic" or anything "added to the product that would not normally be expected to be there."[229] Based on the court's interpretation of an FDA statement of policy permitting food manufacturers' non-disclosure of GMO ingredients on food labels, the court reasoned that the "reasonable consumer" could not interpret the "100% Natural" label to mean that the product was made without GMOs.[230] In its terse order, the court omitted any discussion of consumer understandings of the claim "natural" or whether a significant segment of consumers equated the claim "natural" with non-GMO products.

On review, the First Circuit Court of Appeals overturned the lower court's determination and placed great weight on the plaintiffs' allegations that many scientists and consumers interpret the "natural" claim to exclude the use of non-GMO ingredients.[231] *Lee* is yet another example illustrating the importance of requiring judges and juries at the trial court level to

225. *See id.*
226. *See id.*
227. *See id.*
228. *See* Lee v. Conagra Brands, Inc., No. 1:17-CV-11042-RGS, 2017 WL 6397758, at *1 (D. Mass. Oct. 25, 2017).
229. *Id.*
230. *See id.*
231. *See* Lee v. Conagra Brands, Inc., 958 F.3d 70, 76–78 (1st Cir. 2020).

consider current consumer understandings of labeling claims before deciding whether the claim is "misleading" to the general public.

2. Foreseeable Risks of Misleading Consumers

By using evidence of current consumer understandings of food labeling claims, courts can also more accurately ascertain the foreseeable risks that the manufacturer chose to assume in proceeding with the claim. Due to the increase in class action food labeling litigation over the last two decades, food companies are on high alert for labeling claims that are ripe for litigation.[232] However, food companies are still thinking creatively about how to suggest positive attributes of their food product while escaping the strict requirements of labeling claims defined by the FDA.

One food manufacturer has considered shifting from suggesting wholesome products through the use of the claim "All Natural" to using claims such as "simple," "wholesome," "nutritious," and "minimally processed."[233] It is in food manufacturers' best interest to promote their product against market competitors by suggesting that their product contains positive attributes that differentiate their product from the competitors on the shelf. Consequently, these types of creative labeling strategies will continue, and manufacturers are almost certainly engaging in market research to calculate the value of including such undefined labeling claims on their products.[234]

A court's analysis of this factor would likely include evidence presented by the plaintiff demonstrating that the defendant-manufacturer knew of current consumer understandings of the claims the manufacturer chose to use on its product label, such as internal research and development documents, marketing analyses, and corporate emails. Certain claims would not even require those types of extrinsic evidence. Claims such as "All-Natural" and "100%" have been so frequently litigated and researched that plaintiffs would not need to discover internal company documents to show that the company was well aware of the known risk of large groups of consumers being misled by using the claim on products that include artificial ingredients or GMOs.[235]

232. *See* Negowetti, *supra* note 2, at 1.

233. *See* Negowetti, *supra* note 5, at 365.

234. *See Food Marketing*, UCONN RUDD CTR. FOR FOOD POL'Y AND OBESITY, https://bit.ly/3CL4Wzp (last visited Sept. 26, 2021) ("Food, beverage[,] and restaurant companies spend almost $14 billion per year on advertising in the United States.").

235. *See* Negowetti, *supra* note 5, at 333–34 (noting that at least "one hundred" lawsuits have been filed challenging the misleading nature of natural claims on food labels).

3. Disclaimers Displayed on the Food Label

In conjunction with considering the labeling claim's risk of deception, courts should contemplate how the food manufacturer attempted to minimize that risk through additional front-of-package clarifications. As discussed in Section II, FDA enforcement of misleading food labeling has diminished in part due to the Supreme Court's reading of the First Amendment requiring commercial speech regulation to encourage explanation of marketing claims rather than total suppression of such claims.[236] Accordingly, the use of disclaimers and clarifying claims is a central part of enabling manufacturers to exercise their commercial speech rights. One concern of both former FTC Chairman Miller and American businesses is that federal agencies and courts will impose financial liability on businesses for deceptive labeling and advertisement that misleads only the "credulous" or "unthinking consumer."[237] This concern, premised behind minimizing litigation for capricious interpretations of labels, is not wholly misguided. In practice, industry and alternative agriculture advocates' have made numerous attempts to stretch possible interpretations of food labeling claims to slow consumer consumption of competing food products.[238]

For instance, in *Gitson v. Trader Joe's Co.*, the plaintiffs argued that Trader Joe's soymilk products were misleading because consumers might mistake soymilk for "actual milk from a cow" and that labeling the product to include the term milk suggested that the product has a "similar nutritional content to cow's milk."[239] As that court found, the disclaimer contained within the product name dispels any notion that the consumer is buying traditional cow's milk squeezed from the udder.[240] In fact, many consumers intentionally select the milk alternative from the dairy case because of its positive, distinct nutritional attributes.[241] The FTC and courts must have the ability to point to a food manufacturer's disclaimers and strategic clarification of labeling claims to ensure that litigious food

236. *See supra* Section II.

237. *See id*.

238. *See* Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 45 (1984) (noting that "in 1886, Congress enacted another specialized food law to control the manufacture of oleomargarine in the United States" and that "the dairy industry attacked it both as a 'cheap imitation' of butter and as a 'vehicle for infecting the human system with trichinae and other internal parasites'"); Gitson v. Trader Joe's Co., No. 13-CV-01333-VC, 2015 WL 9121232, at *1 (N.D. Cal. Dec. 1, 2015); Turtle Island Food SPC v. Soman, 424 F. Supp. 3d 552, 573–75 (E.D. Ark. 2019).

239. *Gitson*, 2015 WL 9121232, at *1.

240. *See id.*

241. *See id*.

advocates cannot stamp out competing, innovative alternative food products under the guise of misleading labeling.

Including this factor within the risk-utility analysis also incorporates a fundamental tenant of American competition and deception law—consumer responsibility.[242] FTC deception policy and recent FDA deception guidance have repeatedly stated that American consumers must play an active role in interpreting food advertisements in sensible ways.[243] The FTC's deception framework should encourage consumers to educate themselves on food labeling claims and food production processes. This education will enable consumers to appropriately use food labeling claims and the nutrition facts panel to select products that align with individual consumer preferences. Consumers cannot ignore clear labeling claims and expect to receive a financial payout.

Consider, for instance, a product's label that alleges the product to be "Made With Fruit" but contains sixteen-point bold font, just beneath the "Made With Fruit" claim, stating that the product is made only from fruit extracts. With its clear disclaimer, this product is far less likely to create a risk of misleading a consumer to believe that the product was made solely with fresh fruit products versus a label without such a disclaimer or a disclaimer written in a barely legible font.[244]

This factor offers food manufacturers the opportunity to demonstrate, as a defense, how their food labeling team considered various mockups of labels before ultimately choosing the label that maximized the product's selling points while also maintaining a high degree of consumer transparency.

4. Benefits of Employing Preferred Label Design

Rounding out the risk-utility analysis of a manufacturer's food labeling design, courts should consider evidence of the benefits that the manufacturer receives by employing the manufacturer's preferred label design. Courts should consider manufacturer evidence of the predicted sales differential between the manufacturer's actual product labeling and any suggested alternative designs. Product labeling claims play a significant role in product sales growth and deliver considerable utility to food manufacturers. For example, "organic" and "natural" products have become a billion-dollar segment of the food industry.[245] Food companies

242. *See* Karns, *supra* note 123, at 411.

243. *See id.*; Guidance for Industry: Qualified Health Claims in the Labeling of Conventional Foods and Dietary Supplements; Availability, 67 Fed. Reg. 78,002-01 (Dec. 20, 2002).

244. *See* Lam v. Gen. Mills, 859 F. Supp. 2d 1104 (N.D. Cal. 2012).

245. *See* Maggie McNeil, *U.S. Organic Sales Soar to New High of Nearly $62 Billion in 2020*, ORGANIC TRADE ASS'N (May 25, 2021), https://bit.ly/3AxvCmF; *Packaged Facts:*

generate significant value by positioning their product as part of that segment.

Nonetheless, a company's desire to move its product more quickly through the use of desired labeling claims cannot overcome an established risk that consumers will be misled to believe that the product contains non-existent health and environmental benefits. Consequently, this factor should never be determinative. However, this factor may be extremely significant to a food manufacturer's defense when the plaintiff presents minimal evidence that substantial portions of the population are being misled by the claim and there is scant indication that the corporation was aware of a significant risk that consumers would be misled.

C. Applying the Risk-Utility Framework to Recent Misleading Labeling Cases.

Using the risk-utility guideposts for deceptive labeling challenges discussed above, this Section demonstrates how three main types of misleading food labeling challenges would be evaluated under the risk-utility analysis: (1) The Easy Case; (2) The Difficult Case; and (3) The Most Common Case. Each Sub-Section illustrates the facts of a recent misleading labeling case and explains how courts would employ the recommended risk-utility guideposts to resolve whether the defendant's labeling design was misleading.

1. The Easy Case – Turtle Island Foods SPC

In *Turtle Island Foods SPC v. Soman*, Tofurky, an alternative protein company, challenged Arkansas's meat labeling statute under the First Amendment protections for commercial speech articulated in *Central Hudson* because the statute made Tofurky's labeling of alternative meat products using traditional meat product names illegal.[246] *Central Hudson* makes clear that misleading or untruthful speech by commercial entities is unprotected by the First Amendment and may be curtailed by government regulation.[247] As a result, the Eastern District of Arkansas, in resolving the case, first tackled our old familiar friend—the reasonable consumer analysis—to determine "whether 'an ordinary consumer would [] be deceived' as to the nature of the product."[248]

Natural, Organic Segments Are a Multi-Billion Dollar Business, MEAT + POULTRY (Oct. 17, 2016), https://bit.ly/3nQN3eB.

246. *See* Turtle Island Foods SPC v. Soman, 424 F. Supp. 3d 552, 571–72 (E.D. Ark. 2019).

247. *See id.* at 572 (citing Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002); *In re* R.M.J., 455 U.S. 191, 203 (1982)).

248. *Id.* at 574 (quoting Howard v. Bayer Corp., No. 4:10-cv-1662, 2011 WL 13224118, at *2 (E.D. Ark. July 22, 2011)).

Tofurky's product line includes items labeled as a "Veggie Burger" with the disclaimer "all vegan" and "Chorizo Style Sausage[,]" with the disclaimers "all vegan" and "made with pasture raised plants[.]"[249] The State of Arkansas's primary argument for why such labels were misleading and could be prohibited was that the use of the word "burger" or "sausage" leaves the typical consumer confused because those terms have traditionally been associated with naturally produced protein products.[250] After considering the labels as a whole, the Eastern District of Arkansas found that "the labels' repeated indications that the food products contained in the[] packages contain no animal-based meat dispel consumer confusion and render the speech not inherently misleading."[251] The judge in this case reached the proper conclusion. Moreover, because this is a relatively straightforward case of non-misleading labeling, the same result would be reached under the risk-utility analysis.

First, consumer understandings are likely to lean strongly in favor of the plaintiff's argument that its label does not generate consumer confusion.[252] Although the court's opinion does not offer evidence of consumer surveys and expert witnesses documenting consumer understandings of "vegan burger" or "veggie sausage" products, when consumers are met with the claim "vegan" or "veggie" in the grocery store, there are few who can honestly assert that they were unaware that the product was a non-animal protein.

Second, Tofurky clearly considered the potential risks of labeling its products as a "Veggie Burger" or "Chorizo Style Sausage" because its product's vegan and plant protein features are explicitly indicated on the front of package labeling.[253] Tofurky asserted in its suit that it invested "significant resources in [the] marketing and packaging of its products" and that the company could be at risk for "civil penalties by continuing its current marketing and packaging practices" if its labeling is considered misleading.[254] To prevent consumer confusion between its alternative protein products and traditional meat offerings, Tofurky added disclaimers such as "veggie" and "made with pasture raised plants" to offset any misconceptions that may have arisen regarding the distinction between Tofurky's products and the products of its traditional meat competitors.[255]

249. *Id.* at 574.
250. *See id.* at 574.
251. *Id.*
252. *See* Jareb A. Gleckel, *Are Consumers Really Confused by Plant-Based Food Labels? An Empirical Study*, 12 J. ANIMAL & ENV'T L. 2, 18 (2021) (finding that "plant-based labels such as 'Plant-Based Beef' and 'Vegan Butter' do not confuse consumers about whether the products contain animal ingredients").
253. *See Turtle Island Foods SPC*, 424 F. Supp. 3d at 573–74.
254. *Id.* at 578 (citations omitted).
255. *See id.* at 573.

Finally, in considering the benefit that Tofurky received from using the common meat product names, Tofurky could likely show the devastating effects of being unable to market its alternative protein products using the well-known product classifications.[256] Thus, analyzing each risk-utility guidepost, judges and juries should easily conclude that Tofurky's labeling is non-deceptive and the utility of using the claims "Veggie Burger" or "Vegan Sausage" outweighs any potential risks of deception to consumers.

2. The Difficult Case – "Made With Real Vegetables"

If all cases alleging misleading food labeling were as straightforward as *Turtle Island Foods SPC*, a shift from the reasonable consumer standard would be less urgent. However, the factual scenario presented in *Red v. Kraft Foods, Inc.* exemplifies the need for courts to rely on established consumer understandings of a claim rather than dismissing food labeling challenges by relying on the court's own notions of what the claim suggests.[257] In *Red*, the Central District of California held that Vegetable Thin's labeling indicating that the product was "Made With Real Vegetables" and displaying images of vegetables was not misleading, despite evidence that the product contains negligible amounts of vegetable ingredients.[258] The plaintiffs argued that the product packaging "suggests the product is healthy and contains a significant amount of vegetables . . . ."[259] However, the court disagreed, asserting that "the fact remains that the product is a box of crackers, and a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables."[260] In the court's view, "it strain[ed] credulity to imagine that a reasonable consumer [would] be deceived into thinking a box of crackers is healthful or contains huge amounts of vegetables simply because there are pictures of vegetables and the true phrase 'Made with Real Vegetables' . . . ."[261]

Applying the risk-utility analysis to this case may result in a different outcome. First, the FTC or the court would consider consumer understandings of the labeling claim. The Central District of California's analysis in *Red* of whether a "reasonable consumer" would be misled includes no discussion of current consumer understandings around the "Made With Real Vegetables" claim. Under the risk-utility analysis, the plaintiffs' task would be to prove that claims such as "Made with Real

256. *See id.* at 578.

257. *See* Red v. Kraft Foods, Inc., No. CV 10-1028, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012).

258. *See id.* at *4.

259. *Id.* at *3–*4 (emphasis removed) (citation omitted).

260. *Id.*

261. *Id.* at *4 (citing Henderson v. Gruma Corp., No. 10-4173, 2011 U.S. Dist. LEXIS 41077, at *33–*34 (C.D. Cal. Apr. 11, 2011)).

Vegetables" and label images of vegetables create a consumer perception that Vegetable Thins are a healthy alternative to traditional crackers. Consumer surveys or expert witness testimony evidencing these consumer understandings of such labeling representations would be critical to plaintiffs' success. Alternatively, if consumer surveys and expert witnesses indicate that most consumers never consider crackers to be healthy, regardless of the inclusion of vegetable ingredients, then as the judge in *Red* suggests,[262] the plaintiffs' claim would fail.

Evidence suggesting that many consumers believe that the claim "Made With Real Vegetables" signals a healthier product would also indicate that the food manufacturer likely knew of the risk that a segment of the population would interpret the product's labeling claim to suggest the product is a healthy alternative and is made with a significant amount of vegetables. Any evidence that plaintiffs obtain through discovery of the defendant's knowledge of consumer purchasing habits regarding products touting vegetable ingredients would weigh in favor of a finding that the defendant was aware of a risk of deception. The plaintiff could also offer alternative designs of the product's labeling clarifying that the product was "Partially Made with Real Vegetables" or that "25% of Ingredients Are Real Vegetables." Certainly, such an alteration of the challenged food label would impact the product's sales. Under the fourth factor, the court would consider the impact that removing or altering the vegetable images and claim would have on product sales. Nevertheless, this case would likely turn on evidence indicating consumer understanding of the labeling claim.

3. The Common Case – "All Natural"

Finally, it is essential to consider how shifting from the reasonable consumer test to a risk-utility analysis would impact the most common labeling claim litigated—"All-Natural." In *Newton v. Kraft Heinz Foods Co.*, the Eastern District of New York dismissed the plaintiffs' suit that argued, inter alia, that Kraft Foods' "All Natural" claim and Daisy's "Pure and Natural" claim on sour cream was "deceptive" because the sour cream originated from cows that "might" have been fed GMO products.[263] The plaintiffs argued that the "natural" labeling was misleading because "[they] would not have purchased [the product]" if they knew that it "was derived . . . from animals that ate genetically modified feed . . . ."[264] The plaintiffs also claimed that products resulting from animals fed GMOs could not be labeled as "organic" under USDA standards, and "reasonable

262. *See id.* at *4.

263. *See* Newton v. Kraft Heinz Foods Co., 16-CV-04578, 2018 WL 11235517, at *1 (E.D.N.Y Dec. 18, 2018) (emphasis removed).

264. *Id.*

consumers" equated "organic" foods to "natural" foods.[265] The plaintiffs supported this contention by submitting consumer surveys indicating that consumers frequently equate the term "organic" with "natural."[266] However, the court rejected the plaintiffs' arguments. The court held that if the sour cream products did not include "detectable foreign, synthetic, toxic, or artificial elements or ingredients," the plaintiffs would be unable to state a viable case that the term "natural" was misleading.[267]

Employing the risk-utility analysis in this case would likely deliver a different result. First, rather than picking apart the logic of the plaintiff's asserted interpretation of the claim, the court would consider known consumer understandings of the food manufacturer's labeling claim. Here, the plaintiff submitted multiple consumer surveys suggesting that consumers often expect products labeled "natural" to be completely free of GMOs, both in the feeding of the animal producing the raw products and in the ingredients used to process the final product. These consumer surveys evidence the risk that Kraft and Daisy were aware of when these companies opted to use the "natural" claim. Kraft and Daisy's knowledge of the risk of deception is further strengthened by the numerous cases in which companies were sued for using the "natural" labeling claim when the product included GMO ingredients.[268]

The plaintiffs' exhibition of a feasible alternative design of the challenged labeling would also be crucial when evaluating this factor. The plaintiffs could easily display how the defendants could place a disclaimer near the "natural" claim explaining that the cows producing the cream were fed GMO ingredients. Such a disclaimer would go a long way in ensuring that Kraft and Daisy dispelled common consumer confusion surrounding GMOs in these companies' dairy products labeled as "natural." Finally, the defendant would have the chance to explain to the court how alternative label designs would diminish the claim's utility. However, if the weight of consumer understanding demonstrates that consumers are interpreting "natural" to mean "organic" or non-GMO, then Kraft or Daisy would be liable for their misleading labeling.

These recent case examples reveal how applying the risk-utility framework to food manufacturers' labeling claim design in both the constitutional and tort law contexts provides concrete guidelines for the FTC, the FDA, judges, and juries to assess when evaluating whether a company's labeling was misleading. A risk-utility approach places a greater emphasis on actual consumer interpretations of the label and contemplates how the food manufacturer considered its label's potential

265. *See id.*
266. *See id.* at *1 n.3.
267. *See id.* at *8.
268. *See* Negowetti, *supra* note 5, at 333–34.

risk to mislead. The proposed approach allows the manufacturer to explain to the court why the manufacturer felt its labeling strategy was the most appropriate and fair option.

The lasting impact of this proposed framework shift is that food manufacturers would be compelled to market their products in ways that increase consumer education regarding labeling claims. The current application of the reasonable consumer test disincentivizes food manufacturers from educating confused consumers about common labeling claims because manufacturers can capitalize on consumer confusion surrounding labeling claims by arguing that a reasonable consumer would not have interpreted the claim in the way the plaintiff has suggested. By refocusing the deception analysis to consider the manufacturer's conduct in designing the label, food manufacturers will be obligated to carefully consider present consumer interpretations of labeling claims, employ disclaimers to clarify consumer confusion when necessary, or remove the claim altogether to avoid financial liability.

CONCLUSION

Food labeling, at its core, is a marketing device that food manufacturers use to display their product's most positive attributes to increase product sales. Since 1906, Congress has charged the FDA with policing misleading labeling. As the number of food products on grocery store shelves has increased, the FDA has become a less effective enforcer of its statutory mandate. However, the establishment of state consumer protection statutes has afforded citizens the power to hold food manufacturers accountable for these manufacturers' misleading marketing choices on food product labels. As a direct result, food labeling litigation has soared in the last decade. Nevertheless, the reasonable consumer test has consistently blocked litigants from vindicating citizens who have been misled. The reasonable consumer test's origins in consumer protection actions trace back to the FTC. Under Chairman James Miller's leadership, the FTC sought to intensely reduce its enforcement actions against businesses engaging in deceptive tactics that beguiled only gullible or unsuspecting consumers.

Chairman Miller successfully established the FTC Deception Policy that is still in use today. Under the FTC Deception Policy, FTC attorneys must prove to the Commission that a business's practices were likely to mislead an ordinary consumer, acting reasonably. The FTC Deception Policy spread far and wide, being adopted by the FDA in 2002 and regularly inserted into state consumer protection actions around the country. Accordingly, the FTC's reasonable consumer test has cemented itself in misleading food labeling litigation. The reasonable consumer test's application has prevented plaintiffs from succeeding past the motion

to dismiss stage by permitting judges to insert personal views of the reasonable consumer, even though almost all courts agree that the question of whether a reasonable consumer was misled is a question to be resolved by six to twelve actual consumers on the jury. Consequently, citizen surveillance of misleading food labeling and the transparency of food product production and nutritional values has been limited.

A practicable solution to remove the barriers created by the reasonable consumer test is for the FTC to reframe the reasonable consumer standard as a risk-utility analysis. By utilizing this analysis, the FTC and federal courts evaluating the validity of food labeling challenges would explicitly consider the known expectations of consumers for common food labeling claims and the actions taken by food manufacturer labeling teams in ensuring that their label was as transparent as possible while maximizing product sales.