

LITIGATION AS A TOOL IN FOOD ADVERTISING: A CONSUMER ADVOCACY VIEWPOINT

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I. INTRODUCTION

This Article is a counterpoint to the piece by two defense lawyers that also appears in this Symposium issue.¹

First, however, it is essential to know the consumer needs and the knowledge that companies depend on to market food products deceptively. In addition, it is important to know why organizations like the Center for Science in the Public Interest (CSPI), for which the author is Director of Litigation, and private lawyers as well, have started considering private lawsuits based on deceptive and unfair food marketing practices, including those aimed at children.

II. CONSUMER CONFUSION—LOST IN THE SUPERMARKET

Before discussing the current state of food-advertising regulation, it is first appropriate to start with the person who is the target of concern of consumer advocates and consumer products companies alike—the consumer herself.

After all, consumer advocates advocate for consumers; consumer-products companies produce for the consumers; Congress congregates for consumers. This continues through the whole feeding chain of interests that have been involved in these issues

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1. Joseph M. Price & Rachel F. Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277 (2006).

over the past decades.

Consumers repeatedly express preferences for healthful foods and their concerns with nutrition remain high.²

One problem with predicting actual consumer behavior based on polls of their expressed needs and desires is that sometimes consumers give in to the natural tendency (familiar to priests, psychiatrists, and police) to admit to somewhat higher aspirations than they in fact have.³ For example, consumers may indicate a preference for a low-sodium, non-fat hamburger in response to a mall-intercept pollster with a clipboard. But when subjected to a continuous onslaught of ads, commercials, and other marketing tools that urge the consumer to “have it your way,” sometimes the spirit may be willing, but the flesh is weak. And there is too much flesh as a result. This problem is compounded many times over with children. One study conducted by the American Psychological Association demonstrated a link between children’s advertising and obesity,⁴ in common with findings of the American Association of Pediatrics and the World Health Organization. In late 2005, the National Academies’ Institute of Medicine (IOM) detailed how food and beverage marketing adversely affects young Americans’ diets and health. The IOM, which undertook the most comprehensive review to date of the influence of food marketing on children, found that the “prevailing pattern of food and beverage marketing to children in America represents . . . a direct threat to the health of the next generation.”⁵ The IOM report also found that television food

2. See *Consumer’s Health and Nutrition Concerns Don’t Always Translate into Action, Res. Alert* (EPM Commc’n, New York, NY), Feb. 6, 2004, at 1.

3. See ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 34–35 (1989).

4. DALE KUNKEL ET AL., *REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN: PSYCHOLOGICAL ISSUES IN THE INCREASING COMMERCIALIZATION OF CHILDHOOD* 12 (2004), available at <http://www.apa.org/monitor/jun04/protecting.html> (follow “Read the task force’s report” hyperlink). Alan S. Levy et al., *Food & Drug Admin., Knowledge Levels about Dietary Fats and Cholesterol: 1983–1988*, 25 *J. NUTRITION EDUC.* 60, 60 (1993) (“Recent surveys show that many consumers are confused about fats and cholesterol, even though they express high levels of concern about these food components.”).

5. *INST. OF MED., FOOD MARKETING TO CHILDREN: THREAT OR OPPORTUNITY?* xiv (J. Michael McGinnis et al. eds., The National Academies Press 2006).

and beverage advertising influences consumption and is a contributor to less healthful diets.⁶

A second problem with predicting consumer behavior with respect to diet and health is the considerable gap between expressed consumer desires and actual consumer knowledge of the relative minutiae of nutrition.⁷ Thus, though most consumers report that health concerns have caused a major change in their diets⁸ and that they use food labels in their search for more healthful foods,⁹ they are also lacking in some of the most basic information necessary to make any significant change in their diet. For example, few consumers understand the relationship between HDL and LDL cholesterol,¹⁰ the saturated-fat level of coconut oil,¹¹ or what a complex carbohydrate is.¹²

6. *Id.* at ES6–7.

7. *Id.* at 60 (stating that recent surveys show that many consumers are confused about fats and cholesterol, even though they express high levels of concern about these food components).

8. *See, e.g.*, Paula Kurtzweil, *Taking the Fat Out of Food*, FDA CONSUMER MAG., July–Aug. 1996, http://www.fda.gov/fdac/features/696_fat.html (discussing studies about consumer's buying habits including one study that found three-fourths of consumers stopped buying certain foods because of the levels of fat listed on the nutrition label).

9. *See* Jean C. Buzby & Richard C. Ready, *Do Consumers Trust Food-Safety Information?*, FOOD REV., Jan.–Apr. 1996, at 43, 43, available at <http://www.ers.usda.gov/publications/foodreview/jan1996/frjan96h.pdf>.

10. *See, e.g.*, *Americans Know a Good Deal, But Not Enough, About the Risks of and Treatments to Prevent Heart Disease*, WALL ST. J. ONLINE, May 13, 2004, http://www.harrisinteractive.com/news/newsletters/wshealthnews/WSJonline_HI_Health-carepoll2004vol3_iss09.pdf (“The public understands that cholesterol matters when it comes to preventing heart disease, but their knowledge is limited. Many are unaware that changing HDL and LDL levels affect one’s risk or that cholesterol lowering treatments that impact HDL and LDL levels are effective in preventing heart disease . . .”).

11. *See* Coconut Research Center, *Coconut*, <http://www.coconutresearchcenter.org> (explaining the history of coconut oil and the different views about its beneficial and damaging health effects).

12. *See* Center for Food Safety and Applied Nutrition, FDA, *FDA Health and Diet Survey—2004 Supplement (2005)*, <http://www.cfsan.fda.gov/~comm/crnutri3.html> (reporting that seventy-six percent of Americans either do not know the difference between starches and sugars or think they have some effect on a person’s weight). Even many of the readers of this Article—certainly many of whom are above the curve on nutritional issues—would hesitate to volunteer certain knowledge of these same bits of information if any sizable amount of money rested on it.

Perhaps for this reason, consumers tend to express what would, at first glance, appear to be mutually exclusive desires. First, they want information to be conveyed in simple terms. Second, they want enough information to make an informed decision.¹³

Consumers indicate that their four primary sources of information regarding diet and health are (1) news stories, (2) health organizations, (3) physicians and other health professionals, and (4) food labels.¹⁴ As for the fourth source, food labels are generally considered viable and trustworthy sources of such information.¹⁵

To the intense regret of all of us on the consumer side of the fence and to great joy of food marketers, consumers nonetheless report that they believe informational statements in food advertisements.¹⁶ Presumably, if consumers believe a statement in an advertisement, they will use it in their search for the truth.

In 2003, CSPI issued its report, "Pestering Parents: How Food Companies Market Obesity to Children."¹⁷ This report describes the conduct of food marketers in far greater detail than this Article, but a summary of the issues is in order.

Food marketing to children will influence their eating decisions.¹⁸ In fact, one study found that children know what they should eat at a very young age, but whether they act on this knowledge when choosing a snack is partly a function of whether they have been exposed to commercials for candy.¹⁹ The World Health Organization found that, "[f]ood advertising affects food choices and influences dietary habits. Food and beverage advertisements should not exploit

13. Alan S. Levy et al., *More Effective Nutrition Label Formats Are Not Necessarily Preferred*, 92 J. AM. DIETETIC ASS'N 1230, 1234 (1992).

14. See Buzby & Ready, *supra* note 9, at 46–47.

15. Cf. Jeanne Malmgren, *Food Porn: As Director of the Center for Science in the Public Interest, Michael Jacobson Wants to Clean up Your Diet*, ST. PETERSBURG TIMES (Fla.), Jan. 26, 1989 at D1 (stating that CSPI has challenged ineffective and outmoded labeling requirements in an effort to make nutrition labels more useful to people).

16. See Buzby & Ready, *supra* note 9, at 46–47.

17. CTR. FOR SCI. IN PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN (2003), available at <http://www.cspinet.org/reports/index.html> (last visited Nov. 5, 2005).

18. *Id.* at Pt. 1, available at http://www.cspinet.org/new/pdf/pages_from_pestering_parents_final_pt_1.pdf.

19. Gerald J. Gorn & Marvin E. Goldberg, *Behavioral Evidence of the Effects of Televised Food Messages on Children*, 9 J. CONSUMER RES. 200, 204 (1982).

children's inexperience or credulity."²⁰

Food marketers have successfully targeted children through the use of cartoon characters, such as SpongeBob SquarePants, to create brand loyalty at a young age and to encourage children to eat high-sugar, high-fat foods.²¹ They have tapped into specific networks that aim programming at children. For example, Nickelodeon aims its weekday daytime "Nick Jr." block at preschoolers. As Nickelodeon brags, "the Nick Jr. block was created as a place preschoolers could call their own while their older siblings were in school."²² Advertisers have a built-in audience to target because of this special programming. All the while children's parents thought they were safely watching harmless television.

The nature and extent of food marketing aimed directly at children is a serious and severe problem because young children lack the cognitive development to understand that these are commercial efforts aimed at persuading them to buy junk foods.²³

Food marketers use Nickelodeon's SpongeBob SquarePants character to get kids to eat Burger King products, trans-fat-containing cookies, and ice cream. The United Kingdom, on the other hand, forbids companies to deliberately target the country's youngest children.²⁴ For instance, children's television personalities are prohibited from appearing in any advertisements before 9:00 p.m.²⁵ In addition, marketers may not advertise merchandise-based characters within two hours preceding or succeeding the character's program.²⁶ The BBC itself flatly prohibits the use of its own program personalities, such as the Teletubbies, in fast food

20. Fifty-seventh World Health Assembly, *Global Strategy on Diet, Physical Activity and Health*, at 13, WHA 57/17 (May 22, 2004), available at http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R17-en.pdf.

21. See Elizabeth Jensen, *A TV Channel Takes Aim at Toddlers*, N.Y. TIMES, Sept. 26, 2005, at C2 ("An additional enticement is the possibility of revenue from sales of licensed products featuring the TV characters, said Cyma Zarghami, president of Nickelodeon Television.").

22. Nick.com, Nick History, http://www.nick.com/all_nick/everything_nick/history_home.jhtml (last visited Oct. 11, 2005).

23. KUNKEL ET AL., *supra* note 4, at 6–9.

24. CORINNA HAWKES, *MARKETING FOOD TO CHILDREN: THE GLOBAL REGULATORY ENVIRONMENT* 19 tbl.4 (2004).

25. *Id.*

26. *Id.*

advertisements.²⁷ Many other countries have taken similar steps to stop food companies from deceiving young children through advertisements.²⁸

If we could rely on the kindness of food marketers, we would probably be able to provide consumers with exactly what they say they want—sufficient information that is simple to understand. However, we cannot.

Food marketers are not out to inform the public; they are out to sell a product. One primary way they sell their product to the exclusion of others is by creating a point of difference.²⁹ A point of difference is a product or service's characteristic that differentiates it from other products or services recognizable by customers.³⁰ This point of difference may well be created out of the whole cloth, where no perceived difference has existed and where no meaningful difference does exist.³¹ Perhaps the best expression of advertising ethics in this regard is by that grand old man of advertising, David Ogilvy.³² Ogilvy bragged that "I could have positioned Dove as a detergent bar for men with dirty hands, but chose instead to position it as a toilet bar for women with dry skin. *This is still working 25 years later.*"³³

III. FEDERAL CONSUMER PROTECTION—DEAD AGAIN

With the advent of the Bush Administration's regulatory concept, which is best characterized as "he governs best who governs

27. Press Release, BBC Worldwide, BBC Worldwide Sets New Food Standards (Apr. 5, 2004), http://www.bbc.co.uk/pressoffice/commercial/worldwidestories/pressreleases/2004/04_april/food.shtml.

28. HAWKES, *supra* note 24, at 19 tbl.4 (noting that Norway, Sweden and the Canadian province of Quebec ban advertising to children under twelve years old, and that in Austria, Belgium, Greece and Italy, children's advertising cannot be shown during children's programming).

29. See THEODORE LEVITT, *THE MARKETING IMAGINATION* 85–93 (1986) (stating that many generically undifferentiated consumer goods are operationally differentiated by means of branding, packaging, advertising, styled features and pricing); see also JACK TROUT, *DIFFERENTIATE OR DIE: SURVIVAL IN OUR ERA OF KILLER COMPETITION* 65–72 (2000).

30. See TROUT, *supra* note 29, at 29.

31. See LEVITT, *supra* note 29, at 86–87.

32. DAVID OGILVY, *OGILVY ON ADVERTISING* 12 (1983).

33. *Id.* (emphasis added).

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least”³⁴ (except when a pal needs a little help) has come full circle from the Reagan era twenty years ago.³⁵

“Deregulation” was a byword of the Reagan Administration.³⁶ Conservative ideologues within the government firmly believed in the principles of New Federalism.³⁷ This meant getting the federal government out of the business of regulating Americans’ lives, and American business in particular, and leaving the business of regulation up to the individual states, to act, as described by Justice Brandeis, as laboratories of democracy.³⁸ Each state was free to experiment with differing manners and methods of governance, without interference from the federal bureaucracy.³⁹

So it went. The architect of President Reagan’s transition team at the Office of Management and Budget (OMB), James Miller, was dedicated to dismantling the federal system as rapidly as possible.⁴⁰ Miller was subsequently appointed chairman of the Federal Trade Commission (FTC) in 1981. As a result, the FTC under Chairman Miller was the antithesis of activist, fulfilling the role of deregulation

34. See e.g., EditorandPublisher.com, Colbert Lampoons Bush at White House Correspondents Dinner: President Not Amused? (Apr. 29, 2006), http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1002425363. “He prayeth best, who loveth best /All things both great and small; /For the dear God who loveth us, /He made and loveth all.” SAMUEL TAYLOR COLERIDGE, *RIME OF THE ANCIENT MARINER* pt. VII (1965).

35. See Bill Keller, *The Radical Presidency of George W. Bush; Reagan’s Son*, N.Y. TIMES, Jan. 26, 2003, (Magazine) at 26, 31 (stating that the Federal Communications Commission and the Securities and Exchange Commission have been as “antiregulation” as during Reagan’s era and that Bush is willing to brandish executive powers to accomplish deregulatory missions).

36. See Exec. Order No. 12,612, 52 Fed. Reg. 41,685, 41,686 (Oct. 30, 1987) (ordering Executive departments and agencies to refrain from establishing uniform, national standards for programs).

37. See generally C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93 (1983–1984) (describing the principles of “New Federalism” in the context of deregulation).

38. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

39. Exec. Order No. 12,612, 52 Fed. Reg. 41,686, 41,686 (“requiring executive agencies to “[e]ncourage States to develop their own policies . . . [and] defer[ing] to the States to establish standards”).

40. Susan F. Rasky, *Seeking a Narrower Mandate: James Clifford Miller 3d*, N.Y. TIMES, Mar. 24, 1984, at 33, 33 (“In general, Chairman Miller is an example of heavy-handed deregulation.”).

with enforcement marked more by avoidance than by observance.⁴¹

Cynics, unhappy with the prevailing winds at the White House during the eighties, saw this shift from enforcement less as a true ideological shift than as an intellectually-supportable favoritism towards corporate America.⁴² The deflated FTC took its place alongside other agencies, such as the Environmental Protection Agency and the Equal Employment Opportunity Commission, all of whose enforcement activities slowed to a standstill or went careening into reverse.⁴³

Whatever the Administration's true motivation most of the marketing community had an unhesitating and unequivocal reaction. They used federal deregulation as a "Get Out of Jail Free" card and as an uncategorical imperative to go forth and profit from deception at the expense of unprotected consumers.

The burgeoning growth of unfounded and illegal claims for foods' health and nutritional benefits was a prime example of the results of deregulation fever.⁴⁴ As with many floods, this began with a chink in the dam. The Kellogg Company developed an understated and mild campaign promoting the use of one of its cereals as part of a diet to help prevent some forms of colon cancer.⁴⁵ Even though the National Cancer Institute carefully developed and reviewed this campaign prior to its publication,⁴⁶ the campaign was thoroughly

41. See *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 54 (1989) [hereinafter *ABA Special Committee*] ("[T]he public has not always received the message that the FTC believes it is important to move aggressively against deceptive advertising . . .").

42. See generally Marian Burros, *Eating Well*, N.Y. TIMES, Feb. 27, 1991, at C3 (explaining that the deregulation of the Reagan administration allowed companies, such as Kellogg, to use health claims in advertising products).

43. See Steve Nelson, *Reagan Enforcement Report: Early Figures Show Decline*, LEGAL TIMES, Apr. 19, 1982, at 1 (explaining how the EPA referred 252 cases to the Justice Department in 1980 and only 79 cases in 1981).

44. See Burros, *supra* note 42. See generally U.S. COMM. ON GOV'T OPERATIONS, H.R. REP. NO. 100-561, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA 2-3 (1988) (providing an excellent summary of the activities and inactivities of the various federal players during this period, issued under the chairmanship of the late Congressman Ted Weiss of New York).

45. *Contra* H.R. REP. NO. 100-561, at 3 (1988) (calling Kellogg's campaign "explicit").

46. Bruce A. Silverglade, *A Comment on Public Policy Issues in Health*

illegal.⁴⁷ The Food, Drug, and Cosmetic Act, as it existed at the time, strictly prohibited promoting a food for prevention of disease without the Secretary of Health and Human Services' approval.⁴⁸ This is precisely what Kellogg did, with the National Cancer Institute as, perhaps, its unwitting accomplice. The Food and Drug Administration (FDA)⁴⁹ took exception and began enforcement steps that would have stopped Kellogg's claims.⁵⁰

The FDA never had the opportunity to finish its job. Instead, the deregulation mavens stepped in. Officials at the OMB effectively muzzled the FDA and prevented it from enforcing the law.⁵¹ For instance, the FDA created a policy statement in May 1986 to combat the use of health claims on food labeling, but the OMB refused to discuss the policy statement until March 1987 because of the OMB's dissatisfaction with the statement as "excessively restrictive."⁵²

Once Pandora's cereal box had been opened a crack, pandemonium ensued. Companies of every ilk and repute began making a variety of disease-based claims, all without the scientific support Kellogg had amassed.⁵³ Nor did these companies have the cooperation and oversight of the National Cancer Institute or any other regulatory or nonprofit body that did not have a financial stake

Claims for Foods, 10 J. PUB. POL'Y & MARKETING 54, 55 (1991) (arguing that Kellogg's careful adherence to many criteria advanced by health professionals, consumer advocates and regulatory officials made its advertising campaign both informative and effective, although unfortunately unique in this regard).

47. See H.R. REP. NO. 100-561, at 2-3; see also Bruce A. Silverglade, *Preemption—The Consumer Viewpoint*, 45 FOOD DRUG COSMETIC L.J. 143, 146 (1990) (describing how the Kellogg's campaign disregarded the FDA's traditional prohibition on disease-prevention claims for foods and thereby changed the entire enforcement arena).

48. See 21 U.S.C. § 321(g)(1)(B) (2004) (classifying a food used for the prevention of disease in man as a "new drug"); § 355(a) (declaring that "no person shall introduce or deliver for introduction into interstate commerce any new drug" unless approved by the Secretary of Health and Human Services).

49. As readers may remember, the FDA are those wonderful folks who gave you Vioxx.

50. H.R. REP. NO. 100-561, at 3.

51. *Id.* at 22-26.

52. *Id.*

53. See, e.g., Alan S. Levy & Raymond C. Stokes, *Effects of a Health Promotion Advertising Campaign on Sales of Ready-to-Eat Cereals*, 102 PUB. HEALTH REP. 398, 402 (1987) (discussing the increase in sales of high fiber cereals as a result of the "heavy advertising and promotional campaigns" by Kellogg and their competitors).

in the claims' truthfulness and legality.⁵⁴

The synchronous apex and nadir of these claims was probably oat bran beer. The very idea of promoting beer to the public as a way to fight cholesterol without having to do more than pull a ring-tab caused even some marketers to stop short.⁵⁵ And consumer advocates stopped a lot shorter still.

The result of this free-for-all market was a call by consumer advocates and marketers alike for renewed federal activity.⁵⁶ Unfortunately, this call fell on plugged ears as there continued to be an enforcement vacuum at the federal level.⁵⁷

Among the other forces of nature that abhor a vacuum are the state attorneys general. Before the eighties, the attorneys general focused their consumer protection efforts on problems in their own states, leaving most national consumer protection enforcement to their federal counterparts at the FDA and FTC.⁵⁸ But with the advent of deregulation at the federal level came a rise in activity at the state level. The attorneys general had already come together to deal with deception in automotive repair,⁵⁹ discount airline advertising,⁶⁰ and

54. See, e.g., Charles S. Fuchs et al., *Dietary Fiber and the Risk of Colorectal Cancer and Adenoma in Women*, 340 NEW ENG. J. MED. 169, 172 (1990) (illustrating why leaving it up to food marketers to cure disease is a bad idea because this study found no evidence that dietary fiber reduces the risk of colorectal cancer).

55. Michele Fairchild & Virginia Utermohlen, *Adopting a Healthful Diet*, in YALE UNIVERSITY SCHOOL OF MEDICINE HEART BOOK 53 (Genell J. Subak-Sharpe et al. eds., 1992) ("In the late 1980s, oat bran replaced fish oil as a painless way to lower serum cholesterol; . . . [w]ithin months, supermarket shelves were stocked with everything from oat bran beer to oat bran potato chips.").

56. Jeanne E. Saddler, *FTC, Under Industry Pressure, Shows New Life in Backing Deceptive-Ad Laws*, WALL ST. J., Apr. 17, 1989, at B4.

57. During this period, the author was an assistant attorney general and frequently observed publicly that the problem was that the FDA and FTC were, in this author's opinion, understaffed, underfunded and under Reagan.

58. Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST, Jan. 12, 2005 at A1 ("In the 1970s, federal officials . . . gave grants to states to beef up consumer and investor protections . . . [thus] states began cooperating and finding new targets.").

59. See Kathryn Casey et al., *Big Suits: Texas v. AAMCO*, TEX. LAW., Mar. 2 1987, at 12, 12 (discussing a settlement between attorneys general of fourteen states and AAMCO Transmission, Inc.).

60. *Report and Recommendations of NAAG Task Force on Air Travel Industry: Guidelines for Air Travel Advertising*, [July-Dec.] 53 Antitrust &

rental car practices,⁶¹ among other things. As they worked together, they learned that they could have a significant impact on the practices of major national companies that deceived the citizens of their states. Even if the federal agencies charged with consumer protection were out of commission, the state attorneys general were willing to pool their resources to protect their own citizens.⁶²

During the Reagan era, several state attorneys general banded together to bring enforcement actions against a number of food marketers, including the makers of Campbell's soups, Sara Lee pastries, and Nabisco's 100% Bran Cereal, for a variety of health-related but deceptive food claims.⁶³

Several states fulfilled the New Federalism's promise by enforcing their own consumer protection laws.⁶⁴ The food industry began to object to this enforcement, despite having reacted so positively when new federalism equated with no law enforcement at the federal level.⁶⁵ The food industry began to level claims of

Trade Reg. Rep. (BNA) No. 1345, at S-3 (Supp. Dec. 17, 1987). *But see* *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992)..

61. *Final Report and Recommendations of the National Association of Attorneys General Task Force on Car Rental Industry Advertising and Practices*, [Jan.–June] 56 Antitrust & Trade Reg. Rep. (BNA) No. 1407, at S-3, (Supp. Mar. 16, 1989).

62. *ABA Special Committee*, *supra* note 41, at 71–72.

63. Burros, *supra* note 42; Carole Sugarman, *The New Chow Hounds: States Join Forces to Monitor Product Claims*, WASH. POST, Sept. 21, 1998, at E1.

64. Sugarman, *supra* note 63.

65. Probably the finest example of these arguments can be found in JOHN E. CALFEE & JANIS K. PAPPALARDO, BUREAU OF ECON., FTC, HOW SHOULD HEALTH CLAIMS FOR FOODS BE REGULATED? AN ECONOMIC PERSPECTIVE (1989), which serves as a paradigm of the FTC carrying the industry's water. As an artifact of a failed regulatory approach, this piece is a must read. One way for those who opposed consumer protection efforts in the 1980s to advance an intellectual justification for their inactivity was to use a cost-benefit analysis. *See* Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87, 125027 (1985). As for this breed of economists, they found any inconvenience to industry a major cost and found no benefit to a deception-free marketplace. *See id.* at 128-29 (explaining that cost-benefit analysis eliminates necessary ethical, moral, and political considerations in the regulatory process by favoring an abstract economical model that overemphasizes costs of compliance). Thus, the cost-benefit battles were over before they began. Calfee and Pappalardo's attempt to quantify that which is essentially metaphysical reached its charmingly nutty peak when they put forth the

preemption, commerce clause problems, and First Amendment infringement against states that chose to act against deceptive food marketers' claims for foods.⁶⁶ All the claims proved fruitless.⁶⁷ The state attorneys general did not go away.⁶⁸ The rise in states' activities caused marketers to renew their demands that the FDA, FTC and other federal agencies take action.⁶⁹

The Chicago-school economic theories that fueled the deregulation fever on the Potomac in the eighties had been running on empty for some time.⁷⁰ In its simplest form, the Chicago-school hypothesis, as applied to marketing practices, was that information is good; the more the better.⁷¹ If the information contains falsehoods, that is bearable, because the marketplace will step in to correct the falsehoods.⁷² This argument was flawed. In fact, the marketplace adjusted to deceptive claims; unfortunately, it adjusted down—

proposition that the best justification for the FDA failing to act on illegal health claims was derived from the formula: $EV = P_t B_t - (1-P_t)C_f$, where EV is the expected value of allowing a health claim, P_t is the probability that the claim will turn out to be true, B_t is the estimated net benefit of allowing the claim if it turns out to be true, and C_f is the estimated net cost of allowing the claim if it turns out to be false. *Id.* at 39–44.

66. See generally Richard L. Cleland, *The Regulation of Food Labeling: An Effective, Uniform National Standard Without More Preemption*, in AMERICA'S FOODS HEALTH MESSAGES AND CLAIMS: SCIENTIFIC, REGULATORY, AND LEGAL ISSUES 91 (James E. Tillotson ed., 1993) (discussing how national uniformity of food labeling standards, to the extent that it is needed to protect consumer and food industry interests, should be based on a composite of state and federal regulations); Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSMETIC L.J. 123 (1990) (discussing of the evils of preemption and the lack of legal underpinnings for it); .

67. See, e.g., *Kellogg Co. v. Mattox*, 763 F. Supp. 1369 (N.D. Tex. 1991), *aff'd*, 940 F.2d 1530 (5th Cir. 1991) (denying vehemently Kellogg's motion against the Texas Attorney General, Jim Mattox, for a preliminary injunction for the right to violate state food labeling laws on several constitutional grounds, including the Commerce Clause and the First Amendment).

68. Burros, *supra* note 42 (stating that Attorneys General continue to do most of the litigating against food companies for their deceptive marketing practices).

69. *FTC's Welcome Return*, ADVERTISING AGE, Feb. 6, 1989, at 16; Saddler, *supra* note 56.

70. See A Critique of the Chicago School of Economics, <http://www.huppi.com/kangaroo/L-chiintro.htm> (last visited Nov. 4, 2005) (discussing the Chicago School of Economics and its short-comings).

71. See *id.*

72. See *id.*

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honest marketers sank to the level of their dishonest competitors just to be able to compete.⁷³

Belatedly following on the heels of the state attorneys general, FDA and FTC activity increased in the late eighties and through the nineties. FDA Commissioner David Kessler was an outstanding example of leadership at the top of the administration.

Then came the 2000 election. As a candidate, George W. Bush portrayed himself as an ardent Federalist and opponent of federal control over state activities.⁷⁴ He apparently overcame his professed opposition to federal control of state activities long enough to get himself made President, by seeking federal interference with Florida's electoral process.⁷⁵ As President, Bush continued to retreat from Federalism when it served his purposes.⁷⁶

Federal enforcement has in fact fallen below the prior nadir in the Reagan era, which is no mean feat. Unlike the Reagan deregulators, however, the Bush administration is not following an ideology of decreased federal activity. Instead, the current effect of much federal regulation has been to try to accommodate big companies.⁷⁷ The FDA, in particular, has sinned most grievously. It has abandoned its long-time deference to state health officials and state food and drug enforcement in favor of an active program of intervention by its General Counsel office in private and public suits alike, urging that those suits are preempted by federal regulation (or the lack thereof).⁷⁸ Even the Institute of Medicine of the National Academies proposed to turn federal regulatory efforts over to industry, donning blinders to conclude that "[t]here is not enough evidence of food, beverage, and entertainment advertising's adverse impacts on children to support calling for a ban on all such

73. See Burros, *supra* note 42 (discussing the proliferation of lawsuits against food companies due to the deregulation of the Regan era).

74. See Bruce Fein, *Bogus Federalism*, WASH. TIMES, June 2, 2004, at A15.

75. See *Bush v. Gore*, 531 U.S. 98 (2000).

76. See Fein, *supra* note 74 ("President Bush honors federalism more in the breach than in the observance, contrary to his vocal celebration of states' rights as a candidate in the 2000 campaign.").

77. See *supra* note 57. In this author's opinion, the correlative term to the 1980s "understaffed, underfunded, and under Reagan" would be that federal agencies are now "Bushwhacked."

78. E.g., Robert Cohen, *FDA Stepping into Liability Lawsuits on Side of Drug Makers it Regulates*, SEATTLE TIMES, May 11, 2004, at A2.

advertising to kids.”⁷⁹ Instead of governmental action, the Institute of Medicine favored allowing food marketers to police themselves: “Industry should develop and strictly adhere to marketing and advertising guidelines that minimize the risk of obesity in children and youth.”⁸⁰

It is in this atmosphere of federal complicity and the deception by food marketers and others that we now find ourselves confronting the childhood obesity epidemic.

IV. CSPI’S RESPONSE TO FEDERAL SLACKING

Although other advocacy groups and private lawyers have also responded to federal inactivity, a brief history of CSPI’s entry into private litigation is instructive.

For decades, CSPI both publicly criticized food companies for their deceptive marketing practices and sought to convince them to produce more healthful foods.⁸¹ While these efforts sometimes succeeded, the companies would often ignore CSPI’s entreaties.⁸² CSPI would then turn to the FTC, the FDA, or some other public enforcement agency to achieve sometimes mixed, but often positive, results.⁸³

In the new millennium, however, the federal regulators went to ground,⁸⁴ emerging from their holes only to file an amicus brief or two that urged courts to ignore state law and pay attention solely to

79. INST. OF MED., FACT SHEET: ADVERTISING, MARKETING AND THE MEDIA: IMPROVING MESSAGES (2004), *available at* www.iom.edu/includes/DBFile.asp?id=22609.

80. COMM. ON PREVENTION OF OBESITY IN CHILDREN & YOUTH, INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 177 (Jeffrey P. Koplan et al. eds., 2005); *see also* INST. OF MED., REPORT BRIEF: PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE, (2000) *available at* <http://www.iom.edu/Object.File/Master/25/858/0.pdf> (summarizing the above report).

81. *See* Malmgren, *supra* note 15 (outlining CSPI’s entreaties to the FDA to stop food companies’ deceptive marketing practices).

82. *See id.*

83. *Id.*

84. *See* Masters, *supra* note 58 (“Americans once relied primarily on an alphabet soup of federal agencies—SEC, FTC, EPA—to protect investors, consumers and the environment. But state regulators and attorneys general are bringing legal action and launching investigations in these and other areas where they say federal regulators have fallen down on the job.”).

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the federal government's refusal to enforce the law.⁸⁵

CSPI turned to the courts to stop deceptive labeling, fraudulent advertising and the use of dangerous food additives.⁸⁶ To do so, it created its Litigation Project in 2004.⁸⁷ Within its first year, CSPI settled claims of deceptive labeling against Tropicana for its Peach Papaya, Aunt Jemima for its Frozen Blueberry Waffles, Quaker for its Fruit and Cream Instant Oatmeal and other food companies.⁸⁸ In several instances, CSPI was able to resolve the problem through informal negotiations with the company. When those efforts failed CSPI's Litigation Project became involved in private lawsuits on behalf of consumers.

For example, CSPI joined a pending case against Arizona Rx beverages for introducing a new line of drinks that claimed to have near-miraculous health effects achieved by using ginkgo biloba, panax ginseng, Echinacea and other substances.⁸⁹ The amounts of these ingredients in the beverages were miniscule, sometimes undetectable, and it was unclear if any dose of the herbs would deliver the promised benefits.⁹⁰

CSPI's Litigation Project also helped an injured consumer bring an action against Whole Foods Company and Quorn Foods for the manufacturing and sale of a meat substitute.⁹¹ Quorn Foods acknowledged that this product caused "allergic and adverse reactions."⁹² However, both Quorn Foods and Whole Foods rejected CSPI's and consumers' requests to put a simple warning on the label (like those required for peanuts, milk or wheat allergies) so that consumers would know of the possible reaction.⁹³ CSPI had already

85. See *supra* notes 77–78 and accompanying text.

86. Press Release, Ctr. for Sci. in Pub. Interest, Food Watchdog Group Announces Litigation Initiative (May 3, 2005), available at <http://www.cspinet.org/new/200505031.html>.

87. *Id.*

88. Press Release, Ctr. for Sci. in Pub. Interest, Crackdown on Fraudulent Food Labels Urged (Oct. 27, 2005), available at <http://www.cspinet.org/new/200510272.html>.

89. Press Release, Ctr. for Sci. in Pub. Interest, *supra* note 86.

90. See *id.*; Press Release, Ctr. for Sci. in Pub. Interest, Arizona Rx Teas: Prescription for Lawsuits (Apr. 29, 2003), available at <http://www.cspinet.org/new/200304291.html>.

91. Press Release, Ctr. for Sci. in Pub. Interest, *supra* note 86.

92. *Id.*

93. *Id.*

asked the FDA to ban the proprietary soil fungus that serves as the primary ingredient of Quorn products, or at least to require a warning, but the FDA went along with the company, leaving the consumer no option but to file his own lawsuit.⁹⁴

Thus, the private approach often worked, but when it did not, CSPI was willing to extend its own activity into the courts, to help consumers try to stop deception.

V. THE PROMISED COUNTERPOINT

As promised, this Article serves as a counterpoint to *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*.⁹⁵ That piece successfully (though far from impartially) describes some of the problems with, and the limited case law in the area of, food marketing. The article weakens, though, in Part II, which purports to show why litigation is just a bad idea (ironic given that both the authors are lawyers).⁹⁶ As Bond and Price's article focuses its critical review on marketing to children, this Article will as well, by comparing each perceived cost to its corresponding reality.

PERCEPTION: "Litigation is always uncertain."⁹⁷

REALITY: Life is also uncertain, but we do not give up on it. What is certain is that litigation, or even the threat of it, can succeed where all else has failed. CSPI's own recent experience with its Litigation Project has shown that.

PERCEPTION: "Litigation is narrow and often case-specific."⁹⁸

REALITY: Although judges do tend to insist that a lawsuit involve specific facts and specific violations of specific laws, impact litigation, such as actions against junk-food companies for marketing to kids, can often have an influence far beyond the case at hand. For example, the *Pelman* lawsuit, discussed by the Bond and Price article, has absolutely raised the bar in the debate about the link between junk food and childhood obesity, taking the discussion far beyond the two plaintiffs and one lawyer involved.⁹⁹

94. *Id.*

95. Price & Bond, *supra* note 1.

96. *Id.*

97. *Id.* at 285.

98. *Id.*

99. *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005); Price & Bond, *supra* note 1, at 282-83.

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PERCEPTION: “Counsel are inevitably influenced by the availability of attorneys fees.”¹⁰⁰

REALITY: Pot, meet kettle. Contrary to reports spread by business interests, the possibility of fees is not the only motivator in public interest litigation. In fact, its perforce comes in second to stopping illegal practices and forcing deceptive defendants to yield at least some of the fruits of their deception because monetary or injunctive relief is a prerequisite to an award of fees. Moreover, the Price and Bond article acknowledges this possibility by quoting one of the leading lawyers in this field as saying he does not “profit from these suits. . . .”¹⁰¹ Of course, private lawyers must get paid, but—in case no one has noticed—the courts are not overflowing with food marketing lawsuits. In fact, the Price and Bond article only came up with three lawsuits to support its seven bullets of possible allegations by plaintiffs.¹⁰² It appears that there have, in fact, been more seminars sponsored by defense lawyers to talk about these lawsuits than actual lawsuits.¹⁰³

PERCEPTION: “Litigation can be expensive and time-consuming.”¹⁰⁴

REALITY: Pot, meet kettle, part II. Although efficient litigation need not be expensive, defense counsel consume cost and time by filing multiple motions to prevent the merits of lawsuits from ever coming before a jury.¹⁰⁵ Defense counsel use these dilatory and obstructionist tactics during the lawsuit’s discovery phase to keep the truth from the plaintiff.¹⁰⁶

PERCEPTION: “Litigation is not always a quick fix.”¹⁰⁷

REALITY: In this area, there is not a quick fix, as proven by the years of complacency of food marketers and federal agencies alike. Although some lawsuits drag on for years, usually because of

100. Price & Bond, *supra* note 1, at 285.

101. *Id.* at 286 n.66.

102. *See id.*

103. Evan Schaeffer’s Legal Underground, <http://www.legalunderground.com> (Apr. 19, 2005).

104. Price & Bond, *supra* note 1, at 286.

105. *See* Symposium, *Selected Tort and Civil Justice Issues Before the 117th Ohio General Assembly*, 48 OHIO ST. L.J. 365, 373 (1987).

106. *See id.*

107. Price & Bond, *supra* note 1, at 287.

defense tactics,¹⁰⁸ others result in true gains in a short time. For example, the *Tropicana Peach Papaya* lawsuit, brought by private counsel and CSPI's Litigation Project, took a little over six months to settle.¹⁰⁹ In addition, advocates are not looking for a "quick fix" but rather an effective, long-term cure.

PERCEPTION: "Litigation may not expedite broad public benefits."¹¹⁰

REALITY: This claim essentially depends on who determines public benefits-advocacy groups and lawyers who work for free unless they win, or multinational companies and their lawyers who get paid by the month.

PERCEPTION: "The legislative and executive branches are better equipped."¹¹¹

REALITY: Correct. That is why CSPI went to legislatures and agencies for decades before giving up and starting its Litigation Project. The other two branches of government have fallen asleep at the wheel,¹¹² leaving the courts as the only option in some cases.

PERCEPTION: "[S]ociety . . . [can] address the issues raised by food advertising to children."¹¹³

REALITY: One of the Price and Bond article's icons of "society" is the Children's Advertising Review Unit (CARU),¹¹⁴ a trade group that is so weak and so ineffective that its parent, the National Advertising Review Council, announced plans in the summer of 2005 to consider changes in CARU's policies.¹¹⁵ In the fall of 2005, CARU

108. Symposium, *supra* note 105, at 373.

109. See Stipulation and Agreement of Compromise and Settlement, *Gray v. Tropicana Corp.*, No. CAM-L-1393-05 (N.J. Super. Ct. Aug. 11, 2005), available at http://www.cspinet.org/new/pdf/tropicana_agreement.pdf (stating that plaintiffs filed the case on February 24, 2005 and dating the stipulation to settle on August 11, 2005).

110. Price & Bond, *supra* note 1, at 287.

111. *Id.* at 288.

112. See *supra* Part II.

113. *Id.* at 289.

114. See About the Children's Advertising Review Unit (CARU), <http://www.caru.org/about/index.asp> (last visited Mar. 14, 2006) (noting that CARU is the children's arm of the advertising industry's self-regulation program and was founded in 1974 as part of a strategic alliance with the major advertising trade associations through the National Advertising Review Council).

115. C. Manly Molpus, President & CEO, Grocery Mfrs. Ass'n, Remarks at the Perspectives on Marketing, Self-Regulation and Childhood Obesity

sent a letter to the Federal Trade Commission outlining minor procedural changes.¹¹⁶ Whether CARU actually makes significant changes is less than certain. Its process is heavily dominated by those whom it purports to control. For example, marketers or their advertising agencies comprise eighteen of the twenty-two positions on CARU's advisory board.¹¹⁷ Perhaps this is why its process is glacial. As former Director of Commercial Clearances for MTV Networks, Lisa Slythe, said, "By the time they take action, the commercial has usual [sic] finished running as scheduled and been viewed by millions of children."¹¹⁸ CARU is not only a slow-moving creature of industry, it has no enforcement powers.¹¹⁹ Thus, it is less a watchdog than a chicken guarding the foxhole.

VI. CONCLUSION

Kids are getting fatter because of the foods that food marketers sell directly to children. With obesity come severe health risks, as well as social opprobrium.

Lawsuits are not the best way to resolve a dispute, but sometimes they are the only way. Private litigation is on the rise only because there is a near-complete failure of federal consumer protection. Congress does not even consider consumer protection laws, and the industry, as a result, has run rampant.

There is a simple step that food marketers can take to prevent litigation—stop deceptive and unfair marketing practices aimed to get kids to eat even more junk food.

Workshop 128–30 (July 15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf).

116. Letter from James R. Guthrie, President & CEO, Nat'l Adver. Review Council, to Donald S. Clark, FTC, and C. Manly Molpus, President & CEO, Grocery Mfrs. Ass'n (Sept. 15, 2005), available at <http://www.ftc.gov/os/comments/FoodMarketingtoKids/516960-00072.pdf>. Most of the letter consists of either reiteration of current CARU policy or announcement of an intent to think more about future changes. *Id.* The sole concrete change was the decision to put a complaint form on its Web site—by no means a radical revision or improvement. *Id.* at 2.

117. Lisa Flythe, Problems with Self-Regulation, Commercial-Free Childhood, <http://www.commercialfreechildhood.org/articles/3rdsummit/flythe.htm> (last visited Oct. 20, 2005).

118. *Id.*

119. *See id.*

