WHAT THE JUDGE ATE FOR BREAKFAST: REASONABLE CONSUMER CHALLENGES IN MISLEADING FOOD LABELING CLAIMS

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"Tell me what you eat, and I will tell you what you are."[1]
Jean Anthelme Brillat-Savarin

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[1] See Brillat-Savarin, The Physiology of Taste, 25 (1854).

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ABSTRACT

Food, being an established aspect of global human culture and history, occupies a unique role in contemporary society. Given the massive market available for packaged and processed food, companies have taken deceptive marketing to new heights, resulting in a flurry of consumer litigation. The dominant test for evaluating the scope of these cases is the reasonable consumer standard, an amorphous assessment which requires a probability that a majority of the general public or targeted consumers would be misled by said deceptive marketing. By analyzing state and federal consumer protection statutes, landmark cases, and elements of human and cultural psychology, the authors argue that the reasonable consumer standard should consider the primary elements driving consumer behavior through an interdisciplinary lens rather than a legalistic approach. Such a broadened perspective would support long-established consumer protection goals, clarify legal standards across product types, provide context to heterogeneous consumer background and educational levels, and better align the judicial approach with the advanced marketing techniques employed in the food context.

I. INTRODUCTION

You swallow between 500 and 700 times each day— "once per minute while awake and even more during meals."[2] The simple act of swallowing melds the external world to ourselves, bridging the divide between "the pre-swallowing domain of behavior, culture, society, and experience," and "the post-swallowing world of biology, physiology,

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[2] *Swallowing Awareness Day*, SPEECH PATHOLOGY AUSTL., https://www.speechpathologyaustralia.org.au/SPAweb/whats_on/Swallowing_Awareness_Day/SPAweb/What_s_On/SAD/Swallowing_Awareness_Day.aspx?hkey=d40795b9-eba6-413b-939a-c3eb9a69084c, (last visited Nov. 23, 2020).

biochemistry and pathology."[3] Everyone must decide what they will purchase and consume multiple times a day, rendering the elements factoring into these decisions as varied as the people who make them.

The study of food is the study of human life. Eating is a performance of identity. The "Cradle of Civilization" rested upon unusually fertile soil capable of producing the grains necessary for humans to settle in permanent agricultural societies.[4] Religions like Christianity blame the Fall on Eve's consumption of the forbidden fruit, to which God responded by cursing the ground: "through toil you will eat of it all the days of your life."[5] Food catalyzes conflict and leads to death in more than a narrative form, driving the world to political instability repeatedly throughout history.[6] Even the American founding is closely associated with the taxes imposed by the British on tea and other agricultural commodities.[7] Given food's indispensable role in history so closely intertwined with our fate, when scholars contemplate food—whatever the intellectual arena—it should be done with careful attention to the nuance of its impact.

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[3] Treena Delormier, Katherine L. Frohlich & Louise Potvin, *Food and Eating as Social Practice—Understanding Eating Patterns as Social Phenomena and Implications for Public Health*, 31 SOCIO. OF HEALTH & ILLNESS 2, 215, 215 (2009).

[4] Jan van Der Crabben, *Agriculture in the Fertile Crescent and Mesopotamia*, WORLD HIST. ENCYCLOPEDIA (Nov. 15, 2021), https://www.worldhistory.org/article/9/agriculture-in-the-fertile-crescent—mesopotamia/.

[5] *Genesis* 3:17; *see also* Anna T. Höglund, *What Shall We Eat? An Ethical Framework for Well-Grounded Food Choices*, 33 J. of Ag. and Env't Ethics 283, 284 (2020) ("Regulations around food are . . . common in the Old Testament. The distinction between allowed and not allowed is central in the Hebrew Bible. For example, in Deuteronomy 14:3–7, it says that a Jew must not eat meat from animals that have cloven hoofs . . . . Food in the New Testament is a symbol of something sacred—as food should be blessed before intake—and of fellowship and solidarity, as for example signified in the Holy Communion.").

[6] *See, e.g.*, *Hunger and War*, NATIONAL GEOGRAPHIC, https://www.nationalgeographic.org/article/hunger-and-war/ (last visited Nov. 17, 2020). *See also* Henk-Jan Brinkman and Cullen S. Hendrix, *Food Insecurity and Violent Conflict: Causes, Consequences, and Addressing the Challenges*, WORLD FOOD PROGRAMME 4 (July 2011), https://ucanr.edu/blogs/food2025/blogfiles/14415.pdf ("Food insecurity, especially when caused by higher food prices, heightens the risk of democratic breakdown, civil conflict, protest, rioting, and communal conflict. The evidence linking food insecurity to interstate conflict is less strong, though there is some historical evidence linking declining agricultural yields to periods of regional conflict in Europe and Asia.")

[7] *See, e.g., The Tea Act*, US HISTORY, https://www.ushistory.org/declaration/related/teaact.html (last visited Nov. 17, 2020).

It is curious, then, why some describe the practice of food law is as "niche"[8] when even the American Bar Association acknowledges the vastness of the practice.[9] Unsurprisingly, however, what follows from this narrow perception of food law is a dearth of exposition by courts of the antiquity and entrenchment of food in human society. Such neglect of relevant context in the arena of food law has unquestionably disadvantaged consumers. If at the heart of food law is the consumer—in theory, a "reasonable" one, ascertained through a totality of the circumstances—why then do courts fail to consider the myriad of ways foods influence human life and behavior in both its overt and insidious expressions? The institution meant to remedy the deceived and misled consumer instead regularly enables this convolution.[10]

Often, we call what we eat "food" without much further thought. But what is "food"? In ways that many other elements in life do not, food reveals as much about one's health as their history—their religion, their culture, their daily habits, among many other personal characteristics. Food sustains both the body and the soul; it provides mental and physical energy, alters our brain chemistry, and fosters interpersonal connection. Our choices about the foods we eat regularly align with our moral and ethical stances on issues that impact the world around us, from the climate crisis to veganism.[11]

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[8] Michael R. Reese, *Starting a Niche Practice in Food Law*, ABA (Nov. 1, 2017), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/november-december/starting-niche-practice-food-law/.

[9] *Id.*

[10] Little scholarly analysis, if any, exists on the reasonable food consumer. As the state of the law stands, most claims brought by plaintiffs for misleading and deceptive practices by food companies are dismissed early in the legal proceedings, preventing further discovery and exposition of the "reasonable consumer" standard. *See, e.g.*, Williams v. Gerber Prods. Co., 439 F. Supp. 2d 1112 (S.D. Cal. 2006); Colucci v. ZonePerfect Nutrition Co., No. 12-2907-SC, 2012 U.S. Dist. LEXIS 183050 (N.D. Cal. Dec. 28, 2012); Jones v. Conagra Foods, Inc., 912 F. Supp. 2d 889 (N.D. Cal. 2012); Stemm v. Tootsie Roll Indus., 374 F. Supp. 3d 734 (N.D. Ill. 2019); Galanis v. Starbucks Corp., No. 16 C 4705, 2016 U.S. Dist. LEXIS 142380 (N.D. Ill. Oct. 14, 2016); Dvora v. Gen. Mills, Inc., No. CV 11-1074-GW(PLAx), 2011 U.S. Dist. LEXIS 55513 (C.D. Cal. May 16, 2011); Gedalia v. Whole Foods Mkt. Servs., Inc., 53 F. Supp. 3d 943 (S.D. Tex. 2014); In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig., 348 F. Supp. 3d 797 (N.D. Ill. 2018). For plaintiffs who are more than likely to be ordinary, "reasonable" consumers, prolonged litigation is both more expensive and time-consuming than most can afford (and, for class action plaintiffs, corrective action may come too late to be relevant).

[11] *See generally, e.g.*, PETER SINGER, ANIMAL LIBERATION (1975); Julia Moskin et al. *Your Questions About Food and Climate Change, Answered*, NEW YORK TIMES (Apr. 30, 2019), https://www.nytimes.com/interactive/2019/04/30/dining/climate-

Food plays a unique role in society. Unlike cultural structures such as fashion, literature, and cinema, food is material to human well-being and psyche. Individuals can exist without connections to those cultural elements but cannot exist without food. Research indicates that when participants are evaluated about their opinions on food, they highlight the central position of food in social events, cultural celebrations, and persistent traditional beliefs about health.[12] A 2020 study conducted in the multicultural society of Singapore emphasized traditional beliefs about the importance of foods for balancing levels of heat and cold within the body (thought to maintain physical and emotional homeostasis) and health effects of daily food practices.[13] Given the rapidly globalizing and developing world, it is vital to consider food in a multicultural context that captures the "embodied ways"[14] of experiencing belonging through sharing food practices in a diverse migrant society.

Migrants in unfamiliar food environments adopt new food habits as a part of their integration process while simultaneously maintaining traditional food practices to invoke memories of transnational connections to cultures they have physically moved away from.[15] This phenomenon can be seen in immigrants to the United States celebrating Thanksgiving through hosting or attending dinners featuring traditional American fare, including turkey and pumpkin pie. In addition to the traditional fare, migrant families may also include foods of their native countries or put their own, culturally-influenced flair on classic Thanksgiving cuisine.[16]

Religion and food are also fundamentally connected, with many religions prescribing dietary laws that exemplify the tenets of that faith. For example, abstaining from eating meat in certain religious

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change-food-eating-habits.html; Thomas Potthast, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT: ETHICAL PERSPECTIVES ON LAND USE AND FOOD PRODUCTION (Wageningen Academic Publishers 2012). *See also* Höglund, *supra* note 5 at 283-97 at 283–297 ("Four affected parties, relevant for both production and consumption of food, were identified, namely *animals, nature, producers* and *consumers*. Working from a bottom-up perspective, several values for these parties were identified and discussed. For animals: *welfare, not being exposed to pain* and *natural behavior*; for nature: *low negative impact on the environment* and *sustainable climate*; for producers: *fair salaries* and *safe working conditions*; and for consumers: *access to food, autonomy, health* and *food as part of a good life.*").

[12] Geetha Reddy & Rob van Dam, *Food, Culture, and Identity in Multicultural Societies: Insights from Singapore*, 149 APPETITE 104633, 104633 (2022).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

traditions including Buddhism, Hinduism, and Jainism stems from a doctrine of non-injury and nonviolence, which in turn ties into avoiding harming other living creatures.[17] Dietary practices may even vary across practitioners of the same faith and for differing reasons.[18] Through this, food conveys religious sentiments for different groups and is inherently tied to identity. Research indicates that multiculturalism is present at both the informal (daily experience) and formal (social policy) level, with both influencing food practices.[19] Additionally, religion, culture, and ethnicity are overlapping concepts that hold specific meanings in different contexts, while migration is a key social phenomenon that introduces changes in food practices.[20]

It is also essential to consider food in the context of those with lower socioeconomic backgrounds, particularly in the United States, where social stratification impacts every part of a person's life. Poor diet quality is consistently associated with lower household income.[21] Compared to those with higher income, lower income individuals consume fewer fruits and vegetables, more sugar-sweetened beverages, and overall, have lesser quality of food in their diet.[22] Individual dietary intake is shaped in part by household food purchases that create the home food environment, including processed and packaged foods.

Furthering the imperative nature of analyzing consumer food purchases has the potential to derive information on potential mediators of individual dietary intake and subsequently implement intervention strategies to improve dietary intake and quality.[23] In a 2019 study analyzing 202 urban Chicago households, lower income households spent less money on vegetables and dairy, and more money on frozen desserts.[24] , Other studies have indicated that lower income households' purchases were lower in dietary quality per thousand calories compared to higher income households' food purchases, and included fewer fruits, fiber, and vegetables than their wealthier counterparts.[25]

These purchases are not only influenced by socioeconomic status, but also because tastes are part of a social system differentiating

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[17] Vatika Sibal, *Food: Identity of Culture and Religion*, RESEARCHGATE 10908, 10910 (2020).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Simone French et al., *Nutrition Quality of Food Purchases Varies by Household Income: The Shopper Study*, 19 BMC PUB. HEALTH (2019).
[22] *Id.* at 1.
[23] *Id.*
[24] *Id.*
[25] *Id.*

people by socioeconomic status.[26] Pierre Bourdieu, a French sociologist, suggested in his seminal work, *Distinction: A Social Critique of the Judgement of Taste*, that higher income households favor having a myriad of options in comparison to lower income households, who preferred quantity over quality – for "foods that are simultaneously most 'filling' and most economical."[27] Later research on cultural capital in the United States found similar preferences for abundance.[28] Studies also indicate lower income households prefer corporate brands which produce widely marketed foods mass-produced in a factory or chain restaurant, emphasizing efficiency, cost-effectiveness, and predictability, citing familiarity and budget concerns as key reasons for these preferences.[29]

In the United States, prepackaged food plays a large role in American culture, as does "dining out."[30] American food culture has evolved so heavily toward pre-packaged foods such that most Americans are not aware of food production or food preparation.[31] Pairing this with the time crunch of hectic schedules shows that Americans today are more sedentary, eat more processed foods, and consume insufficient amounts of fresh fruits and vegetables.[32] Researchers have found rampant frustration among individuals over the knowledge requirements to implement a balanced diet, including what nutrients and ingredients are in different types of foods and how these foods must be consumed in order to maximize those nutrients and ingredients.[33]

An aspect of that knowledge involves being able to read food labels accurately and carefully. The potential for nutrition labels to impact the population in part depends on the consumers' ability to understand and use this information.[34] Consumer understanding of this information varies across sociodemographic groups and with different

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[26] Roza Meuleman, *Cultural Connections: The Relation Between Cultural Tastes and Socioeconomic Network Resources*, 86 POETICS 101540 (2021).

[27] Shyon Baumann, Michelle Szabo, & Josee Johnston, *Understanding the Food Preferences of People of Low Socioeconomic Status*, 9(3) J. OF CONSUMER CULTURE 316, 318 (2019).

[28] *Id.*

[29] *Id.*

[30] Jaclyn Tan, *Society's Health Reflects Changing Food Culture*, Strategic Discussions for Nebraska: University of Nebraska-Lincoln, https://sdn.unl.edu/healthfood2012 (last visited July 21, 2022).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Sally Moore et al., *Effect of Educational Interventions on Understanding and Use of Nutrition Labels: A Systematic Review*, 10 NUTRIENTS 1432 (2018).

design label formats. Studies have reported a statistically significant improvement in one or more outcomes of participant understanding or use of nutrition labels, warranting further research into general nutrition knowledge, health literacy, and program delivery format.[35] The onus to understand food labels and ingredients is not solely on consumers, of whom only fifty percent report reading this information.[36] Rather, the burden also lies with food manufacturers, distributors and retail establishments to effectively and accurately label foods in order to avoid deception of those who lack understanding.[37] Striking the appropriate balance between effective communication and appealing product advertisement, however, has proved difficult, as evidenced by exponentially rising litigation over misleading and deceptive food labeling claims.[38]

One may argue that this flurry of litigation has emerged after the COVID-19 pandemic to obtain compensation for harms suffered.[39] However, the rise in class-action lawsuits against food and beverage companies hitting a record high of 220 cases in 2020 versus 45 cases just a decade ago,[40] indicates that these cases contain more than a kernel of truth. Misleading and exaggerated marketing seduces customers into purchasing foods that incorrectly label ingredients and contain inadequate or wrong information regarding nutritional content.[41] Additionally, deceptive marketing persuades consumers into believing that they are supporting companies whose practices align with their values, but in reality are practices that harm the livelihoods and work environments of small farmers committed to animal husbandry and food processing workers.[42] It is therefore necessary to analyze current litigation and scholarship to propose alternatives to current food labeling law and policy.

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Elaine Watson, *Class Action Lawsuits vs Food and Bev Brands Surged in 2021, but Courts are "Growing Increasingly Impatient" with Some Litigants, says Perkins Coie*, FOOD NAVIGATOR USA (Apr. 30, 2022), https://www.foodnavigator-usa.com/Article/2022/04/30/Class-action-lawsuits-vs-food-and-bev-brands-surged-in-2021-but-courts-are-growing-increasingly-impatient-with-some-litigants-says-Perkins-Coie?utm_source=newsletter_daily&utm_medium=email&utm_campaign=12-Jul-2022&cid=DM1013840&bid=1989463158..

[39] *Id.*

[40] *Id.*

[41] *See, e.g., Enforcement Policy Statement on Food Advertising*, Fed. Trade Comm'n (May 13, 1994), https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising.

[42] *See, e.g.*, Spindel v. Gorton's Inc., No. 22-10599 (D. Mass., filed April 21, 2022).

One guiding principle that has paved the way for such litigation is that of the reasonable consumer standard or test. In order to state a claim for false advertising under California, New York, and other similar state consumer protection statutes, plaintiffs are required to demonstrate that the label is likely to be misleading to a "reasonable consumer."[43] Entrenched in tort law, the reasonable person is ""a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something."[44] In order to satisfy this standard, one must demonstrate more than a mere possibility that the seller's label might conceivably be misunderstood by consumers viewing it in an unreasonable manner. The reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[45] With much focus given to the "reasonableness" portion of the reasonable consumer standard, it seems that the "general consuming public or of targeted consumers" as well as a focus on the circumstances of food purchases and food behavior receive far less attention.

Compared to the broad influence of food on our lives, most definitions of food are exceedingly deficient. The law, in establishing the reach of "food," takes a slightly modified approach from standard dictionary definitions. The Food, Drug, and Cosmetic Act ("**FD&C Act**") distinguishes between "foods" and "drugs," providing that drugs are "articles (other than food) intended to affect the structure or any function of the body of man," while "foods" are defined as "articles used for food or drink for man."[46] However, if courts were to follow precedent that allows "[t]hat a product that is naturally occurring or derived from a natural food does not preclude its regulation as a drug . . . Nor does the fact that an item might, in one instance, be regarded as a food prevent it from being regulated as a drug in another," this distinction loses what little traction it may have in the quest of defining "food." [47] If even the legal definition of food is imprecise and

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[43] Jessica Guarino, Claire Dugard, & Bryan Endres, *Food Litigation's Search for the Reasonable Food Consumer: 2021 Update*, FARMDOC DAILY (11): 63, DEP'T OF AGRIC. AND CONSUMER ECON., UNIV. OF ILL. AT URBANA-CHAMPAGIN (Apr. 19, 2021).

[44] *Id.*

[45] *Id.*

[46] 21 U.S.C. § 321(f), (g)(1)(C) (2006).

[47] Nutrilab, Inc. v. Schweiker, 547 F. Supp. 880 (N.D. Ill. 1982); *see, e.g.*, United States v. "Vitasafe Formula M", 226 F. Supp. 266 (D.N.J. 1964), *rev'd on other*

ambiguous, then attention to the role of food in a particular consumer's life is the most important consideration in the realm of food law.

Focusing primarily on food's nutritional value, many dictionaries identify food as "any nutritious substances that people or animals eat or drink or that plants absorb in order to maintain life and growth,"[48] begging the question of what qualifies as "nutritious." Perhaps it is that food is simply any "material consisting essentially of protein, carbohydrate, fat, and other nutrients used in the body or an organism to sustain growth and vital processes and to furnish energy."[49] More robust definitions like that from Britannica suggests a marginally more holistic—though by no stretch of the imagination complete—view of food:

> [S]ubstance consisting of essentially protein, carbohydrate, fat, and other nutrients used in the body of an organism to sustain growth and vital processes and to furnish energy . . . Hunting and fathering, horticulture, pastoralism, and the development of agriculture are the primary means by which humans have adapted to their environments to feed themselves. **Food has long seared as a carrier of culture in human societies and has been a driving force for globalization** . . . As agricultural technologies increased, humans settled into agricultural lifestyles with diets shaped by the agriculture opportunities in the geography. Geographic and cultural differences have led to the creation of numerous cuisines and culinary arts, including a wide array of ingredients, herbs, spices, techniques, and dishes. As cultures have mixed through forces like international trade and globalization, ingredients have become more widely available beyond their

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grounds, 345 F.2d 864 (3d Cir. 1965); United States v. Nutrition Serv., Inc., 227 F. Supp. 375 (W.D. Pa.1964); United States v. 250 Jars, Etc., of U. S. Fancy Pure Honey, 218 F. Supp. 208 (E.D. Mich.1963), *aff'd.*, 344 F.2d 288 (6th Cir. 1965); Nat'l Nutritional Foods Assoc'n v. Mathews, 557 F.2d 325 (2d Cir. 1977).

[48] *Defining Nutrition, Health, and Disease*, MEDICINE LIBRETEXTS (Aug. 13, 2020), https://med.libretexts.org/Courses/American_Public_University/APUS%3A_An_Introduction_to_Nutrition_(Byerley)/APUS%3A_An_Introduction_to_Nutrition_2nd_Edition/01%3A_Nutrition_and_You-_An_Introduction_and_How_to_Achieve_a_Healthy_Diet/1.02%3A_Defining_Nutrition_Health_and_Disease.

[49] *Food*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/food (last visited Oct. 17, 2020).

> geographic and cultural origins, creating a cosmopolitan exchange of different food traditions and practices.[50]

Regardless of its formal definition, a person's food consumption is not only influenced by their own preferences and upbringings,[51] but also by the heavily manipulated environment of food sales.[52] Food advertisers spend over $10 billion each year on marketing food, especially toward children.[53] Research has shown that people who see food-related advertisements have higher reward activation during food commercials than other types of commercials.[54] Through colors, advertisers play with emotions to influence what a consumer purchases. For example, the colors red and yellow adorn fast-food restaurants, two colors shown to increase appetite.[55] When at grocery stores, green represents natural and healthy food choices.[56] By appealing to target consumers, brands manipulate their product packaging to increase the likelihood that a consumer will buy it and, in turn, increase the brand's profits.[57]

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[50] *Food*, BRITANNICA.COM, https://www.britannica.com/topic/food (last visited Oct. 17, 2020).

[51] *See generally, e.g.*, Leann Birch, Jennifer S. Savage, and Alison Ventura, *Influences on the Development of Children's Eating Behaviors: From Infancy to Adolescence*, 68 CAN. J. DIET PRACT. RES. 1 (2007).

[52] *See generally, The Science of Grocery Shopping: Why You Buy More*, BEST MARKETING DEGREES.ORG, https://www.bestmarketingdegrees.org/science-of-grocery-shopping/ (last visited Oct. 17, 2020).

[53] *See* Mariko Hewer, *Selling Sweet Nothings*, ASS'N FOR PSYCHOLOGICAL SCIENCE (Nov. 25, 2014), https://www.psychologicalscience.org/observer/selling-sweet-nothings.

[54] *Id.*

[55] *See* Lisa, *Color Psychology in Food Marketing*, AWG SALES SERVICES: BLOG, GRAPHIC DESIGN (Apr. 21, 2016), https://awgsalesservices.com/2016/04/21/color-psychology-in-food-marketing/.

[56] *Id.*

[57] This also is common in the alcohol industry. Wholesalers and manufacturers provide services to liquor and grocery stores to design setup schemes to be most appealing to consumers. *See generally* Aliza Kellerman, *Revealed: Liquor Shop Design Psychology,* VINEPAIR (July 17, 2015), https://vinepair.com/wine-blog/liquor-shop-design-psychology/. They provide "swag" and other low-value goods to retail stores, possibly even some reward for when a consumer decides to purchase their specific brand or product. *See, e.g.*, 235 ILCS 5/6-5, 6-6 (2019). While regulations exist to prevent a monopolization of a wholesaler or manufacturer, it can be said that those with more money make better and more enticing displays based on more thorough research and development. *See ILCS* 5/6-5, 6-6 (2019). These displays persuade the consumer of the brand's desirability and leave lasting impressions.

Manipulated food environments reach as far as the sale of food at restaurants. Buffet-style restaurants typically use smaller plates and smaller portions to lead the consumer to believe that they are, in fact, getting more than what they are putting on their plate, keeping costs within a specific margin.[58] Colors, placement, and labeling of the food either draws consumer attention away from or toward specific products.[59] More expensive foods might be placed farther down the buffet-line so that by the time the consumer reaches that specific product, their plate is already full, and they would have to come back in order to get it or take a smaller portion.[60] Anticipating that a full plate will "fill-up" many consumers and that they will not return to the line is a common hope of restaurant owners. By using products that cost less—say, noodles in a create-your-own stir-fry style restaurant—restaurants rely on their placement to fill up the bowl before a consumer will reach the meats, the most expensive part of the buffet-line. With less room for meat and expensive vegetables, consumers enforce these patterns.

But few shopping environments parallel the saturation of manipulation in grocery stores. How many of us have left the grocery store with far more products than those on our list? Upon walking through the doors of a supermarket, the senses are bombarded with carefully studied and crafted layouts to entice the customer further inside. A consumer likely first sees fresh produce, purposefully placed near the front of the store because "the bright colors and smells are designed to put you in a happy mood as soon as you enter."[61] Likewise, grocers place their bakeries in similar locations because "the smell of fresh-baked goods can make shoppers hungry and get them to buy more."[62] Though a consumer may not even venture down an aisle, they must walk by the end caps where "manufacturers pay more to have their products placed . . . [because] the positioning makes their products seem higher in prestige to consumers."[63] Common household items and pantry staples are generally placed at the back of stores, leading consumers to walk past processed food products in the hopes they

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[58] *See The Profitable Buffet*, REST. BUS., (Jan. 7, 2008), https://www.restaurantbusinessonline.com/profitable-buffet.

[59] Alyssa Pagano, *How All-You-Can-Eat Restaurants Don't Go Bankrupt*, BUS. INSIDER (Mar. 27, 2018), https://www.businessinsider.com/how-all-you-can-eat-restaurants-make-money-2018-3.

[60] *Id.*

[61] *The Science of Grocery Shopping: Why You Buy More*, BEST MARKETING DEGREES, https://www.bestmarketingdegrees.org/science-of-grocery-shopping/ (last visited Oct. 17, 2020).

[62] *Id.*

[63] *Id.*

will pick up something along the way. Bigger shopping carts tempt consumers to buy more; slow songs played over the speakers "get you in a lingering mood so you shop longer";[64] and manufacturers viciously fight over the precious shelf space known as the "bulls-eye" zone that "falls right in the shoppers' line of sight."[65]

The subtle but innumerable influences in food sales are difficult to comprehensively capture. Food companies are careful to utilize all means of persuasion, down to fractions of an inch in packaging design,[66] to convince a consumer of their brand's preferability. Research shows that "consumers make a subconscious judgement about a product in less than 90 seconds of viewing it, and 62-90% of them base that assessment solely on color, which could be attributed to the fact that color registers much faster than text or complex graphics. What's more, almost 85% of consumers say that color is the determining factor when purchasing a particular product."[67] Food companies, however, must still" provide consumers with a reason to buy . . . packaging must also reflect product quality and brand values in order to avoid consumer disappointment."[68] Brands must strike this balance or else their products remain lost in an overwhelming sea of product selection. Though not exclusive, one study named up to eight packaging themes manufacturers consider: "(1) packaging material; (2) pack size; (3) protection and preservation; (4) convenience; (5) price; (6) communication and information; (7) ethical perspectives; and (8) novelty and innovation."[69] The distinction between the feelings of comfort and health elicited by paper bags, as opposed to the thoughts of negative environmental consequences prompted by plastic, can make all the difference in a consumer's purchasing decision.

Up against companies who extensively research the most minute of alterations to shift the balance in their brand's favor, whether

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[64] *Id.*

[65] *Id.* Placement strategies are not unique to the grocery experience. Casinos also devote considerable attention to the strategic placement of various games to maximize revenue. The gaming floor area is considered a scarce resource similar to shelf-space in a grocery. *See generally* Barry L. Bayus et al., *Evaluating Slot Machine Placement on the Casino Floor,* 15 INTERFACES 22 (1985).

[66] USDA, A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY, 17 (January 2013), https://www.fda.gov/files/food/published/Food-Labeling-Guide-%28PDF%29.pdf.

[67] Nikki Clark, *How Food Packaging Color Influences Consumer Behavior*, HART, (Apr. 12, 2016), https://hartdesign.com/industry-news/food-packaging-color-influences-consumer-behavior/.

[68] Fredrik Fernqvist et al., *What's In It for Me? Food Packaging and Consumer Responses, a Focus Group Study*, 3 BRITISH FOOD JOURNAL 117 (2015).

[69] *Id.*

that is placement of the product or the product design itself, it is confusing at best and disenfranchising at worst, ascertaining what a consumer can reasonably be expected to know or how to act in decisions surrounding food. Few other consumer products are so heavily laden with the considerations of a consumer's background, economic status, cultural and religious beliefs, eating habits, and education levels.[70] When looking at the reasonable consumer in the context of food law, it is critical to note that food is a highly unique product. As opposed to sweepstakes, credit card agreements, and mortgages, food is a constant in a person's life from the moment they are born. Food celebrates the beginning of life as well as its end and most other social events and accomplishments in between.[71] Heavily shaped by the cultures and environments in which consumers are raised, the reasonable consumer necessarily takes on a special significance in the realm of food.

If food itself is hard to define, how then can we define with any confidence the reasonable consumer of that food? Despite the intricacies and depths of food, upon reviewing consumer claims of packaging and labeling deception, courts often take a reductionist approach to its analysis. Worse still, because of the innumerable circumstances that potentially influence a consumer's purchasing decision, courts lack consistency in defining what reasonable consumers should know and how they should act when buying food. Brands depend on human psychology to market food and appeal to the consumer, but at their core, each consumer is different. If what is reasonable for one consumer is not reasonable for another, who may both be part of the same litigation, how are courts to strike this balance? In an industry deliberately constructed to bypass reason in favor of a consumer's base, instinctual desires, the law cannot, as it does now, presume a consumer will act with purely conscious and reasoned decision-making.[72]

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[70] S. Dindyal & S. Dindyal, *How Personal Factors, Including Culture and Ethnicity, Affect the Choices and Selection of Food We Make*, 1 THE INTERNET J. OF THIRD WORLD MED., (2003).

[71] For example, birthdays, weddings, baptisms, funerals, etc. *See, e.g.*, R.I.M. Dunbar, *Breaking Bread: The Functions of Social Eating*, 3 ADAPTIVE HUMAN BEHAVIOR AND PHYSIOLOGY 198, 198–211 (2017).

[72] Williams v. Gerber Product Co., 523 F.3d 934, 940 (2008); Danone, US, LLC v. Chobani, LLC, 326 F. Supp. 3d 109, 123 (S.D.N.Y. 2019) ("As the Court noted at the preliminary injunction hearing, a parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow, is not likely to study with great diligence the contents of a complicated product package, searching for and making sense of fine-print disclosures in asterisked footnotes, and looking for flavors other the one(s) s/he wishes to buy (which may or may not be on the shelf) in order to perform multiple mathematical calculations—all in order to confirm the truth or falsity of a claim

The second part of this article will cover the legal history of incorporating consumer behavior into food law and policy through food labeling regulation, covering the three enforcement mechanisms available to regulators: (1) federal level statutory regulation through the Food, Drug, and Cosmetics Act, USDA regulatory authority, and the Lanham Act; and (2) civil suits under state consumer protection statutes, with a focus on California, New York, Illinois, and Washington D.C. Part III of this article will explore the numerous interpretations of consumer knowledge across legal disciplines, detailing perceived levels of consumer knowledge from the reasonable person to the ordinary consumer and compares these to the unsophisticated consumer standard, least-sophisticated consumer standard, and the test of "likelihood of confusion" amongst consumers. The fourth part of this article provides case studies detailing the primary procedural and substantive issues plaguing the reasonable food consumer analysis in misleading food labeling claims through two landmark cases, *Bell v. Publix* and *Moore v. Trader Joe's Company*. Part V of the article discusses prior attempts in scholarship to address the legal barriers installed by the current reasonable food consumer analysis and why those solutions only partially resolve the injuries suffered by plaintiff consumers. In part six, this article offers additional factors, psychological and social, that broaden legal understanding of food purchases and consumer behavior and proposes courts incorporate these factors in their reasonable consumer analyses. The article concludes with suggestions for further research and how the reasonable consumer standard can strive to better reflect true consumer food shopping behavior and allow for the remedy of harms suffered by plaintiffs.

II. THE LEGAL HISTORY OF CONSUMER BEHAVIOR AND FOOD LABELING REGULATION

Many legal mechanisms act in concert to regulate food labeling in the United States. Paths of enforcement primarily fall under two categories: (1) federal level statutory regulations via (A) the Food, Drug, and Cosmetic Act with FDA enforcement, which are oriented toward public health and safety; (B) the Lanham Act, through which companies sway regulations through challenges to false advertising and protect their commercial interests; and (C) USDA regulatory enforcement powers and labeling review; and (2) private civil consumer-plaintiff

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that is of dubious veracity, and that could easily have been replaced with the simple and truthful statement, 'My product has less sugar per ounce than his product.' Nor does the law expect this of the reasonable consumer.").

suits brought under state consumer protection statutes. The following section provides a brief overview of this regulatory web that addresses false and misleading food labeling claims.

Federal Level Statutory Regulation

Food, Drug, and Cosmetic Act

The Pure Food and Drug Act, passed in 1906, was the first federal law in the United States to prohibit false or misleading statements on food labeling and represents the FDA's consumer protection origins.[73] In 1913, the Gould Amendment to the Pure Food and Drug Act required that the contents of a food package be plainly marked on the outside.[74] Twenty years later, as scientific discoveries revealed the harms of chemical additives and other organisms in food, the Food, Drug, and Cosmetic Act ("FDCA") took effect in 1938.[75] It was the FDCA that deemed products misbranded "if its labeling is false or misleading in any particular."[76]

The language of the FDCA "is intended to be comprehensive in character. It is designed to apply to all misrepresentations of whatever kind, whether of origin, identity, quality, effect, or other description or property; whether made as averments of fact or statements of opinion; whether conveyed directly, or by implication."[77] The FDCA includes provisions, among others, deeming food misbranded if: (a) it has a false or misleading label; (b) is offered for sale under another food's name; (c) is an imitation of another food, unless it label clearly and immediately thereafter bears the word "imitation"; (d) is packaged in a misleading container; and (g) represents itself as conforming to a SOI definition that it does not meet.[78] The FDA is the agency primarily charged with enforcing the FDCA in conjunction with the Department

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[73] M. Moore, *Food Labeling Regulation: A Historical and Comparative Study*, HARV. LIBR. OFF. FOR SCHOLARLY COMMC'N (2001), http://nrs.harvard.edu/urn-3:HUL.InstRepos:8965597.

[74] *Id.* at 21.

[75] *Id.* at 21-22.

[76] *Id.* at 22.

[77] *Id.* at 22; DUNN, CHARLES, FEDERAL FOOD, DRUG, AND COSMETIC ACT: A STATEMENT OF ITS LEGISLATIVE RECORD, 244 (1938).

[78] Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C.A. § 343 (2010).

of Justice.[79] In doing so, a policy of broad enforcement is followed to ensure the "safety, efficacy, and truthful labeling of products."[80]

Lanham Act

The Trademark Act of 1946, 60 Stat. 441, commonly referred to as the Lanham Act, provides an alternative means of restricting the use of deceptive product packaging. Specifically, Section 43(a) establishes a federal cause of action for unfair competition arising from misleading advertising or labeling .[81] Businesses may seek civil damages as well as an injunction arising from a competitor's use of a false designation of origin, description, or representation about a product that results in an injury to the plaintiff's commercial interest in its reputation or loss of sales.[82] Although businesses may invoke the protections of the Lanham Act, consumers, as in the FDCA described above, are excluded. The purpose of the Lanham Act is to regulate unfair competition. Therefore, a mere consumer "hoodwinked into purchasing a disappointing product" as a result of false advertising, does not fall within the zone of interests protected by the statute.[83]

In the food context, application of the Lanham Act's unfair competition protections is complicated by the voluminous rules and industry guidance issued by the FDA and USDA under their various statutory authorities. As a result, early Lanham Act lawsuits between competitors in the food and beverage industries often related to trademark disputes or false representations regarding product origins.[84] In Lanham Act cases in which plaintiffs referred or relied on FDA regulations such as standards of identity to demonstrate false or misleading advertising, an alleged violation of the FDCA or FDA rule could not be the sole basis for the claim.[85] Rather, the alleged violation must be of the Lanham Act and the attendant prohibited conduct the

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[79] KATHRYN B. ARMSTRONG AND JENNIFER A. STAMAN, CONG. RSCH. SERV. R43609, ENFORCEMENT OF THE FOOD, DRUG, AND COSMETIC ACT: SELECT LEGAL ISSUES (2018) at 2, https://sgp.fas.org/crs/misc/R43609.pdf.

[80] *Id.*

[81] Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 648 (1958).

[82] Lexmark Int'l, Inc. v. Static Control Components, Inc. 572 U.S. 118, 132 (2014).

[83] *Lexmark* at 132; *see also* POM Wonderful LLC v. The Coca-Cola Co., 573 U.S. 102, 107 (2014).

[84] *See, e.g., Parkway Baking Co.*, 255 F.2d at 644-45 (alleging violation of Section 43(a) by selling a trademarked low-calorie bread beyond the geographic area authorized by the license).

[85] Grove Fresh Distributors, Inc. v. Flavor Fresh Foods, Inc., 720 F. Supp. 714, 716 (N.D. Ill. 1989).

misrepresentation and false description of the product. The FDA regulation merely served to establish the standard or duty which the defendant allegedly failed to meet.[86] For example, an orange juice distributor brought a Lanham Act claim against a competitor that distributed a product labeled "100% Orange Juice from Concentrate," but which allegedly contained additives and adulterants. As a result, defendant's product allegedly did not comply with the FDA's standard of identity for "orange juice from concentrate." The court rejected defendant's motion to dismiss as the plaintiff was not attempting to enforce the FDA's standard of identity under the FDCA, but rather use the standard as evidence to support its Lanham Act claim of misrepresentation that caused commercial harm in the form of lost sales.[87]

In *POM Wonderful LLC v. Coca-Cola Co.*,[88] the Supreme Court clarified the parallel operation of the Lanham Act and the FDCA. POM Wonderful (POM) filed a Lanham Act claim against Coca-Cola (Coke) alleging a deceptive and misleading label on a pomegranate blueberry juice blend. Coke defended its label as compliant with, or at least not prohibited by, the FDA's juice-blend rules. The District Court[89] and Court of Appeals[90] agreed with Coke's argument that the FDCA precluded POM's Lanham Act claim. The Supreme Court reversed, holding that the two federal statutes "complement each other in the federal regulation of misleading food and beverage labels."[91] Market competitors, with their more detailed knowledge of consumer responses to deceptive sales and marketing strategies may be more aware of misleading labels than federal regulators and able to take more immediate corrective action.[92] Therefore, allowing Lanham Act actions in the highly regulated food and beverage context, has the potential for synergistic effects with the FDCA—providing enhanced protection for competitors and consumers.[93]

In clarifying that the FDCA and accompanying FDA regulations do "not create a ceiling that bars still better protections against the capacity of the representations to mislead,"[94] the Court's *POM*

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[86] *Id.*
[87] *Id.*
[88] 573 U.S. 102 (2014).
[89] Pom Wonderful LLC v. The Coca-Cola Company, 727 Supp. 2d 849 (C.D. Cal. 2010).
[90] Pom Wonderful LLC v. The Coca-Cola Company, 679 F.3d 1170 (9th Cir. 2012).
[91] *Pom Wonderful LLC*, 573 U.S. at 106.
[92] *Id.* at 115.
[93] *Id.* at 115-16.
[94] Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmBH, 843 F.3d 48, 63 (2d Cir. 2016).

Wonderful ruling cleared the way for further litigation in the food and beverage context, with defendants far less successful in pretrial motions to dismiss Lanham Act claims.[95] In regard to advertising statements that are literally true but misleading, the Lanham Act generally requires plaintiffs to provide evidence of actual consumer that "had the tendency to deceive a substantial segment of its audience."[96] But at the preliminary injunction stage, consumer surveys or other hard evidence of actual confusion is not required.[97] Rather, the judge may consider the presented evidence, assess the likelihood of success on the merits, including whether the complained of advertisements are likely to mislead consumers, and enter an injunction.[98]

Although at first glance robust application of the Lanham Act may seem to provide a more direct approach to weeding out deceptive labels from the market than reliance on the bureaucratic mechanizations of the FDCA, at least one Court of Appeals has cautioned that "misleading is not a synonym for misunderstood."[99] In *Mead Johnson & Co. v. Abbott Labs*, the Seventh Circuit examined competitors challenging labels that do not sufficiently disclose all potentially relevant details that might eliminate possible consumer confusion.[100] A recent example is the corn syrup dispute between beer giants Molson Coors and Anheuser-Busch.[101] Molson Coors complained that because Anheuser-Busch advertisements criticized Molson Coors' use of corn syrup as an ingredient in their beer (in contrast to the rice-based recipe used by Anheuser-Busch), Anheuser-Busch falsely implied that Molson Coors' finished beer product actually contained corn syrup.[102] Although a competitor's knowledge that some consumers will

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[95] Rachel Simon, *After the Juice Wars: The Post-POM Wonderful Legal Landscape and its Implications for FDA-Regulated Industries*, 75 FOOD & DRUG L.J. 430, 452 (2020).

[96] Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 382 (7th Cir. 2018) (quoting Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819-20 (7th Cir. 1999)).

[97] *Eli Lilly Co.*, 893 F.3d at 382.

[98] *Id.* at 382-83.

[99] Mead Johnson & Co. v. Abbott Lab'ys, 209 F.3d 1032, 1034 (7th Cir. 2000).

[100] *Id.* (noting that at some point adding more details would be too costly and potentially burdensome to eliminate all information—an action that would not be for the consumer's benefit).

[101] Molson Coors Beverage Co. USA LLC v. Anheuser-Busch Cos. LLC, 957 F.3d 837 (7th Cir. 2020). In yet another beverage case among lesser-known brands, Far Away Springs asserted a Lanham Act claim against Niagara Bottling Co., Ice River Springs Water Co., and Crossroads Beverage Group (among others) for falsely claiming their product was "spring water" as defined by the FDA. Frompovicz v. Niagara Bottling LLC, 313 F. Supp. 3d 603 (E.D. Pa. 2018).

[102] *Id.*

misunderstand advertising may be equivalent to an intent to deceive,[103] in this case Molson Coors listed corn syrup as an ingredient on its label, thereby creating the same inference that it complains Anheuser-Busch is amplifying through its advertising campaign.[104] The solution, according to the court, is better advertising by the plaintiff to counter the "sneering tone" of rice-based beers, not more litigation.[105] Despite the caveats discussed above, the Lanham Act provides competitors in the market a robust option to protect their commercial interests from false or misleading labels and thereby indirectly protect the consuming public.[106]

USDA Regulation

The United States Department of Agriculture has similar enforcement authority in labeling meat and egg products.[107] The USDA is statutorily obligated with ensuring that meat and poultry products in interstate and foreign commerce, or that impact such commerce, are pure and unadulterated, as well as being properly marked, labeled, and packaged.[108] Responsibility of the development and application of these labeling requirements for meat and poultry products lies with the USDA's Food Safety and Inspection Service ("FSIS").[109] Food manufacturers are responsible for compliance with FSIS labeling rules and adherence to the evaluation and approval process of meat and poultry product labels.[110]

FSIS has primary responsibility for the regulation of food labeling for meat and poultry products under the Federal Meat Inspection Act ("FMIA") and the Poultry Products Inspection Act ("PPIA").[111]

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[103] *See Eli Lilly*, 893 F.3d at 383 (noting that defendant's advertisements did not provide FDA's recommended context for statements about use of rBST and the safety of dairy products produced from cows given rBST).

[104] *Molson Coors*, 957 F.3d at 839 (discussing how consumers infer that the final product contains the things listed in the "ingredients").

[105] *Molson Coors*, 957 F.3d at 839. *See also* Int'l Dairy Foods Assoc. v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (recommending additional advertising and market competition rather than additional product labeling regulations).

[106] *See Danone*, 362 F. Supp. 3d at 112-14 (explaining Dannon's allegations that Chobani engaged in deceptive labeling of the sugar content in drinkable yogurt products marketed for children in violation of the Lanham Act).

[107] U.S. DEP'T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS (2007).

[108] *Id.* at 1.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 4.

These two acts define the food "label" as "a display of written, printed, or graphic matter upon the immediate container of any article."[112] The term "labeling" includes all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[113] The USDA is authorized under FMIA and the PPIA to regulate marketing, labeling, or packaging of meat, poultry, or processed parts to prevent the use of any false or misleading mark, label, or container.[114] Establishing a broad definition makes FSIS regulations applicable to product labels and materials that accompany a product but are not attached to it.[115]

The FMIA highlights twelve specific circumstances under which products may be misbranded.[116] This includes if the labeling is false or misleading in any way, or if it is an imitation of another food, but is not adequately labeled as such.[117] Under the PPIA, FSIS has similar authority for poultry products.[118] If a product is deemed misbranded, its manufacturer can face a variety of penalties that can be imposed by FSIS.[119] These include withholding the use of labeling, prohibiting shipment of the product, prohibiting sale of the product anywhere in a chain of commerce, product recall, press releases, fines, and criminal prosecution.[120] The facility that produced the misbranded product can face repercussions such as inspection suspension or withdrawal.[121]

FSIS must pre-approve all labels used for meat and poultry products before those products are marketed in interstate commerce.[122] FSIS establishes specific categories of prior approval that dictate the way a label is approved.[123] This authority for label approval is derived from the provision in the Acts that states that no food article will be sold or offered for sale without established trade names and other marking and labeling and containers which are not false or misleading

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[112] Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601(o), (p); Poultry Products Inspection Act (PPIA), 21 U.S.C. § 453(s).
[113] FMIA, 21 U.S.C. § 601(o), (p); PPIA, 21 U.S.C. § 453(s).
[114] U.S. Department of Agriculture, *supra* note 106, at 5.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 6.
[120] *Id.*
[121] FMIA, 21 U.S.C. § 671; PPIA, 21 U.S.C. § 467.
[122] U.S. Department of Agriculture, *supra* note 106, at 7.
[123] *Id.*

and which are approved by the Secretary.[124] The USDA has interpreted this statutory language to mandate the preapproval of all food labels before products that bear the mark of inspection may be offered for sale.[125]

The FSIS Administrator is responsible for the USADA's pre-market label.[126] Requirements for the content and design of labeling is enforced by regulations and policies, which ensure that labeling is "truthful, accurate, and not misleading," to avert product misbranding. [127] Annually, FSIS reviews approximately 60,000 labels before they are used for commercial products.[128] Many other labels are subject to prior approval, but are not submitted first for evaluation by the Agency, provided that manufacturers ensure that such final labels fall within the conditions specified in generic labeling regulations.[129] In particular circumstances, labels that are already approved may be modified by FSIS, without having to resubmit them for FSIS approval.[130] Food manufacturers may only apply labeling to meat and poultry products pre-approved by FSIS, with some exceptions. [131]

Civil Suits Under State Consumer Protection Statutes

Each state has consumer protection laws that prohibit deceptive practices, and many of these prohibit unfair practices as well.[132] These statutes are commonly known as Unfair and Deceptive Acts,[133] or UDAP statutes, and provide foundational protections to consumers as the main source of protection against predatory businesses and immoral practices. Despite their value, however, the strength of consumer protection available varies from state to state.[134] Many of these statutes

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See* 9 C.F.R. § 317 (1970) (setting forth labeling and marketing regulations for meat products); *see also* 9 C.F.R. § 381.155 (setting forth inspection regulations for poultry products).
[128] U.S. Department of Agriculture, *supra* note 106, at 7.
[129] *Id.* at 7-8.
[130] *Id.* at 8.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] An example of this would be the fact that Colorado and Oregon do not include broad prohibitions of deceptive practices entirely, whereas in South Dakota, the prohibition is burdened by a requirement to show knowledge and intent. In contrast, in Mississippi, Texas, and Tennessee, the prohibition of deception cannot be enforced by consumers. *See generally*, NATIONAL CONSUMER LAW CENTER, CONSUMER

were enacted in the 1970s and 1980s.[135] Before that time, consumers and state agencies lacked adequate protection against fraud and abuse in the market, despite the presence of the 1938 Federal Trade Commission Act, which passed a broad moratorium against "unfair and deceptive acts or practices."[136]

UDAP statutes are critical to food labeling regulation because they provide consumers justice at the state, local, and individual level. These statutes also allow agencies to protect their citizens by acting quickly in light of emerging frauds and put power in the hands of consumers so they may invoke effective remedies to protect themselves. By providing marketplace benefits, UDAP statues deter unfair and deceptive behavior, allowing honest businesses to compete with one another.[137] UDAP statutes are primarily civil statutes. Some of these statutes allow criminal penalties for extreme violations, but almost all enforcement is through the civil courts.[138] The state statutes of four states are discussed in detail below: California, Illinois, New York, and Washington D.C., as the bulk of consumer protection litigation occurs in those states.

California

In California, consumers who file a class action lawsuit have standing in two powerful laws. The first is the Unfair Competition Law ("UCL"), and the Consumers Legal Remedies Act ("CLRA").[139]

UNFAIR COMPETITION LAW

"Unfair competition" is defined in the UCL as any one of the following wrongs: (1) an "unlawful" business act or practice, (2) an "unfair" business act or practice, (3) a fraudulent business act or practice, (4) "unfair, deceptive, untrue, or misleading advertising", and (5)

PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (2018).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] CAL. BUS. & PROF. § 17200 (West 2019). The UCL also expressly prohibits "unfair, deceptive, untrue or misleading advertising" and incorporates California's False Advertising Law (FAL), CAL. BUS. & PROF. § 17500 (West 2019).

any act prohibited by sections 17500 through 17577.5.[140] These actions operate independently of one another, so a behavior may be prohibited as 'unfair' or 'fraudulent' even if not unlawful, and vice versa.[141] The intention of the state when crafting this legislation was to be as broad and expansive as possible and to permit courts to enjoin ongoing wrongful business conduct, regardless of context, which can be especially beneficial to consumer-litigants.[142] With respect to the terms "act" or "practice", the UCL has been interpreted to encompass most business conduct, with even a one-time action being deemed sufficient to allege a UCL claim.[143] This plaintiff-friendly statute does not exempt from coverage any specific industry, such as highly regulated industries including finance, but applies to any entity that qualifies as a "person," excluding governmental entities.[144] In the same vein, claims may be brought by any "person," which encompasses "natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons."[145] However, certain California courts have interpreted limitations for the ability of corporate plaintiffs and competitor actions.[146]

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[140] The full text of section 17200 reads: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

[141] State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1102 (1996), abrogated on other grounds by Cel-Tech v. Los Angeles, 973 P.2d 527 (1999).

[142] Comm. On Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 667 (1983), superseded by statute on other grounds, as recognized by Branick v. Downey Sav. & Loan Ass'n, 138 P.3d 214 (2006).

[143] *See, e.g.,* Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 451 (1988) (determining that defendant's conduct relating to single contract constituted a "practice" under the UCL).

[144] *See, e.g.,* Townsend v. California, No. CVF10-0470LJOSKO, 2010 WL 1644740, at *14-16 (E.D. Cal. Apr. 21, 2010) (finding the state of California and the California Highway Patrol were not "persons" under the UCL); People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd., 125 Cal. App. 4th 871, 875 (2005) (holding that California Milk Advisory Board was not a "person" that could be sued under the UCL); Bay Area Consortium for Quality Health Care v. Alameda Cty., No. A148430, 2018 WL 2126559, at *27 (Cal. Ct. App. May 9, 2018) (unpublished) (holding Alameda County was not a "person" that could be sued under the UCL).

[145] CAL. BUS. & PROF. CODE §§ 17201, 17204 (West 2019).

[146] Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. th115, 135 (2007) (citing Rosenbluth Int'l, Inc. v. Super. Ct., 101 Cal. App. 4th 1073, 1079 (2002)); *see also* Pierry, Inc. v. Thirty-One Gifts, LLC, No. 17-CV-03074-LB, 2018 WL 1684409, at *11 (N.D. Cal. Apr. 5, 2018) (dismissing UCL claim between two

In 2004, the state enacted Proposition 64, which stated in part that relief would only be granted to those who have suffered injury in fact and had lost money or property as a result of unfair competition.[147] Prior to this enactment, actions were brought without any regard to procedural standard or notice of due process requirements, resulting in cases that were frivolous and abusive.[148] Another consequence of the amended statute is a requirement that private cases involving aggregated claims—as many class action lawsuits do—comply with California's class-action standards.[149] The relevant section reads, in part:

> Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of section 17204 and complies with Code of Civil Procedure section 382, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.[150]

The reasonable consumer standard applied for UCL class action certification purposes, unlike the individual reliance requirement, is not a standing requirement.[151] Courts avoid subjective inquiries into each class member's experience with the product. Instead, they focus on a defendant's representations about the product through a single, objective standard—that of the reasonable consumer.[152] Under this

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"relatively sophisticated" business entities given that there was no harm to the public at large or to consumers generally).

[147] CAL. BUS. & PROF. CODE § 17204 (West 2019).

[148] *See* Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126 (2000) (discussing, among other things, these actions, and the unique, attendant due process concerns), superseded by statute on other grounds, as recognized in Arias v. Super. Ct., 46 Cal. 4th 969 (Cal. 2009); *see also* Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699, 715-21 (1989) (reversing the trial court's restitution order based on certain due process considerations potentially affecting non-parties).

[149] CAL. BUS. & PROF. CODE § 17203 (West 2019).

[150] *Id.*

[151] Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015) (district court erred when it evaluated consumer standing requirement under a "reasonable consumer standard").

[152] Dei Rossi v. Whirlpool Corp., No. 2:12-CV-00125-TLN-CKD, 2015 WL 1932484, at *7 (E.D. Cal. Apr. 28, 2015) (holding that defendant's nationwide marketing campaign and prominent display of the energy star logo on all its appliances created a presumption of material reliance by the class upon those representations).

standard, as highlighted under *Bruno v. Quten Research Institute, LLC* (2011):[153]

> [A] misrepresentation [is] material ... if a reasonable [person] would attach importance to its existence or nonexistence in determining [their] choice of action in the transaction in question. Simply because some consumers may have purchased the product for other reasons does not defeat the finding that a product was marketed with a material misrepresentation, which *per se* establishes an injury.[154]

To plead a UCL claim based on an unlawful practice, the plaintiff must allege facts sufficient to show a violation of the underlying law and demonstrate the resulting harm, as outlined under the 2004 amendment.[155] The liability standard for fraudulent conduct indicates

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[153] Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 535 (C.D. Cal. 2011).

[154] *See Bruno*, 280 F.R.D. at 535 (quoting *Tobacco II*, 46 Cal. 4th at 312) (internal quotation marks omitted). In order to establish an injury, courts have adopted a six-factor test, derived from the landmark case *Tobacco II*. In order to plead an advertising campaign in line with that case, the following elements must be satisfied: (1) plaintiffs must allege: "[the individual named plaintiffs] actually saw or heard the defendant's advertising campaign," (2) "the advertising campaign must be sufficiently lengthy in duration, and widespread in dissemination, that it would be unrealistic to require the plaintiff to plead each misrepresentation she saw and relied upon," (3) "the plaintiff must describe in the complaint, and preferably attach to it, a representative sample of the advertisements at issue so as to adequately notify the defendant of the precise nature of the misrepresentation claim...," (4) "the plaintiff must allege, and the court must evaluate, the degree to which the alleged misrepresentations contained within the advertising campaign are similar to each other," (5) "each plaintiff must plead with particularity and separately, when and how they were exposed to the advertising campaign, so as to ensure the advertisements were representations consumers were likely to have viewed, rather than representations that were isolated or more narrowly disseminated," and (6) "the court must be able to determine when a plaintiff made his or her purchase or otherwise relied on defendant's advertising campaign, so as to determine which portion of that campaign is relevant."

[155] *Cel-Tech*, 20 Cal. 4th at 184; *see also* Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016) (safe harbor doctrine barred claim that an accurate net weight statement for lip balm was deceptive, but did not bar separate omission claim regarding product accessibility because omitting supplemental statements on cosmetic labels was not affirmatively permitted by statute); McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016), aff'd, No. 16-15794 (9th Cir. July 10, 2018); Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 741 (1980); *see also* Thompson v. Am. Tow Serv., No. A114373, 2007 WL 3045195, at *4 (Cal. Ct. App. Oct. 19, 2007) (unpublished) (holding that a municipal ordinance cannot establish safe harbor under the UCL); Ramirez v. Balboa Thrift & Loan, 215 Cal. App. 4th 765, 774, 77-78, 780-

that UCL claims premised on fraudulent conduct do not require proof of intent, reliance, or damages.[156] Rather, the plaintiff must only indicate that members of the public were likely to be deceived.[157] In *Lavie v. Procter & Gamble Co.*,[158] the Court of Appeals held that trial courts faced with fraudulent or false advertising claims must apply an "ordinary consumer acting reasonably under the circumstances" standard, rather than a "least sophisticated consumer" standard.[159] The court most notably held that a representation does not become false and deceptive simply because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is directed.[160] The court also stated that when advertising was directed towards a specific class of consumers, who may be more or less sophisticated than the average consumer, the question of whether it is misleading to the public will be assessed from the viewpoint of members of the targeted group, not to a general consumer.[161]

Consumer Legal Remedies Act

The Consumers Legal Remedies Act ("CLRA") was enacted to remedy social and economic issues derived from deceptive business practices and stemmed from a desire to protect California consumers.[162] The CLRA prohibits 24 specific unfair business actions and

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81 (2013) (reversing denial of class certification because defendant was not entitled to assert the Rees-Levering Act's safe harbor that it properly denied reinstatement of defaulted auto loans as a basis for opposing certification); Rojas v. Platinum Auto Grp., Inc., 212 Cal. App. 4th 997, 1005 (2013) (reversing demurrer because plaintiff "need not have suffered actual damage from Platinum's violation of the [Rees-Levering Act's] disclosure requirements" where alleged disclosure violations were "trivial").

[156] *Tobacco II*, 46 Cal. 4th at 320-21.

[157] *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 512 (2003).

[158] *Id.*

[159] *Id.* at 504-5.

[160] *Id.* at 507.

[161] *Id.* at 512.

[162] *See, e.g.*, Cort v. St. Paul Fire & Marine Ins. Cos., 311 F.3d 979, 987 (9th Cir. 2002) (holding that general liability insurance policy that covered payment of damages and certain associated fees did not provide coverage for UCL cause of action); Upland Anesthesia Med. Grp. v. Doctors' Co., 100 Cal. App. 4th 1137, 1144 (2002) (holding that insurance policy exclusion for intentional acts precluded insurance defense or coverage for UCL claim); Am. Cyanamid Co. v. Am. Home Assurance Co., 30 Cal. App. 4th 969, 976 (1994); Chatton v. Nat'l Union Fire Ins. Co., 10 Cal. App. 4th 846, 863 (1992).

practices.[163] The state legislature intended for courts to construe the CLRA liberally.[164] Specifically, this act enables consumers with a private right of action for "unfair methods of competition" and "unfair or deceptive acts or practices" in connection with a "transaction intended to result or that results in the sale or lease of goods or services."[165] The CLRA applies to both actions and material omissions by a defendant.[166]

A "consumer," in contrast to a "person," is defined as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."[167] This definition is strictly enforced and does not include individuals who purchase items for a business purpose.[168] Relief is limited to who suffer damage, causation must be proven, and the violation of the act must take place prior to the sale at issue in order to be the basis for a claim.[169] In other words, in order to establish basis for a claim, the consumer must be persuaded, through false or deceptive advertising, to purchase a product.[170]

California courts have recognized that damage under the CLRA is not synonymous with actual damages, and may include

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[163] Consumers Legal Remedies Act (CLRA), CAL. CIV. CODE § 1760 (West 2022).
[164] *Id.*
[165] CLRA, CAL. CIV. CODE § 1770(a) (West 2022); CLRA, CAL. CIV. CODE § 1780(a) (West 2010).
[166] *See, e.g.,* Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141-42 (9th Cir. 2012) (stating that CLRA claims may be based on fraudulent omissions if the omissions are contrary to representations made by the defendant or are omissions of fact that the defendant was obliged to disclose) (citing Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 835 (2006)).
[167] CLRA, CAL. CIV. CODE § 1761(d) (West 2013).
[168] *See, e.g.,* Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003) (holding the CLRA inapplicable to commercial or government contracts, or to contracts formed by non-profit organizations and other non-commercial groups); Frezza v. Google Inc., No. 12-CV-00237RMW, 2012 WL 5877587 (N.D. Cal. Nov. 20, 2012) (dismissing CLRA claim where plaintiff had enrolled in service for business purpose); Zepeda v. PayPal, Inc., 777 F. Supp. 2d 1215, 1221 (N.D. Cal. 2011) (finding individuals who primarily used website to sell goods or services did not constitute "consumers" under the CLRA).
[169] CLRA, CAL. CIV. CODE § 1780(a) (West 2010).
[170] Moore v. Apple, Inc., 73 F. Supp. 3d 1191, 1201 (N.D. Cal. 2014) (determining that representations made after sale cannot be the basis of a CLRA claim); *see also* Durkee v. Ford Motor Co., No. C 14-0617 PJH, 2014 WL 4352184, at *3 (N.D. Cal. Sept. 2, 2014) ("[A] CLRA claim cannot be based on events following a sales transaction."); Hensley-Maclean v. Safeway, Inc., No. CV 11-02130 RS, 2014 WL 1364906, at *6 (N.D. Cal. Apr. 7, 2014) ("[T]he CLRA only applies to representation and omissions that occur during presale transactions.").

harms other than pecuniary damages.[171]The CLRA provides for actual damages, with a $1,000 minimum in class actions, injunctive relief, restitution, and punitive damages.[172] Additionally, a statutory award of up to $5,000 may be awarded to a disabled or senior consumer where the trier of fact 1) determines such consumer faced substantial physical, emotional, or economic damage resulting from the defendant's conduct, 2) makes an affirmative finding as to at least one of the factors outlined in Section 3345(b) of the CLRA, and 3) finds that additional award is appropriate.[173] This approach is also applied in class action lawsuits.[174]

New York

New York's consumer protection statute prohibits only deceptive, not unfair acts.[175] Only the State Attorney General, not a consumer, is permitted to bring suit in "repeated fraudulent or illegal acts," which are defined narrowly as "unconscionable contract provisions."[176] In comparison to California, New York law is not as strong due to consumers lack of ability to bring suit for unfair acts, and the New York statute's lack of provision for rulemaking authority to state

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[171] Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 640 (2009) (elaborating on what constitutes "damage" under the CLRA).

[172] CLRA, CAL. CIV. CODE § 1780 (West 2010) ("Any consumer who suffers any damage . . . may bring an action . . . to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000). (2) An order enjoining the methods, acts, or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief that the court deems proper.").

[173] CLRA, CAL. CIV. CODE § 1780(b)(1)(B) (West 2010). The factors in Section 3345(b) include: (1) "[w]hether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons"; (2) whether the defendant's conduct caused the "loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person"; or (3) whether the plaintiffs "are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct." CLRA, CAL. CIV. CODE § 3345(b) (West 2022).

[174] CLRA, CAL. CIV. CODE § 1780(b)(2) (West 2010).

[175] N.Y. GEN. BUS. LAW § 349 (McKinney 2014); N.Y. GEN. BUS. LAW § 350 (McKinney 2000).

[176] N.Y. EXEC. LAW § 63(12) (McKinney 2022).

agencies.[177] Thus, consumers cannot enforce the prohibition of repeated fraudulent acts within their contract provisions.[178] This law may cause a gap in consumers' ability to enforce the statute.[179]

However, reliance is not required, which can facilitate consumers ability to file suit. Under New York law, a showing of a broader impact on consumers at large is required in order to file the suit, although this can be difficult to prove.[180] Consumers are permitted to assert UDAP claims in class actions.[181] In regard to punitive damages, Section 349(h) allows treble damages, capped at $1,000.[182] A narrower statute is applicable only to false advertising - Section 350-e(3) – allowing treble damages with a $10,000 cap.[183] These statutes focus heavily on providing equitable relief and restitution for consumers, as well as allowing public enforcement without requiring a showing of the defendant's intent or knowledge.[184]

A recent development arose in June 2021 regarding an interpretation of Section 349. In *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, et al. v. Matthew Bender & Co.*, the New York Court of Appeals established that the statute extends to products typically used in business settings, protecting businesses and professionals from deceptive business practices.[185] In this case, legal professionals filed a suit against the publisher of a treatise, claiming that the publisher misrepresented the treatise's scope and that several provisions relating to rent laws and regulations were missing or inaccurate.[186] To

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[177] NATIONAL CONSUMER LAW CENTER, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws,* at 65 (2018).

[178] N.Y. EXEC. LAW § 63(12) (McKinney 2022) ("Consumers cannot enforce the prohibition of "repeated fraudulent or illegal acts," including "unconscionable contract provisions.").

[179] *Id.*

[180] Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.Y.S. 2d 20 (N.Y. 1995), (stating that reliance is not required); *accord* Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005) (section 349 does not require proof of actual reliance); Stutman v. Chem. Bank, 731 N.E.2d 608 (N.Y. 2000); Small v. Lorillard Tobacco Co., 720 N.E.2d 892 (N.Y. 1999) (indicating that reliance is unnecessary, but plaintiff must show materiality and actual harm).

[181] *National Consumer Law Center*, *supra* note 178.

[182] N.Y. GEN. BUS. LAW § 349(h) (McKinney 2014) (allowing treble damages, but capped at $1,000).

[183] N.Y. GEN. BUS. LAW § 350-e(3) (McKinney 2000), (allowing treble damages with a $10,000 cap, applying only to false advertising).

[184] *National Consumer Law Center*, *supra* note 178 ("Nothing in the statute requires a showing of the defendant's intent or knowledge").

[185] Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., 37 N.Y.3d 169, 177 (N.Y. Ct. App. 2021).

[186] *Id.* at 174.

succeed on a 349 claim, a plaintiff must allege that the defendant's conduct was consumer-oriented, materially deceptive, and resulted in injury to the plaintiff.[187] The Court of Appeals rejected the trial court's definition of "consumer", which had been drawn from influential Appellate Division precedent, determining that the intention of Section 349 did not support the Appellate Division's narrow reading of "consumer" based on a consumer's particular use of a product.[188] The Court held that legal professionals are a "subclass of consumer", and conduct need not be direct at all members of the public to be consumer-oriented – an extension of prior interpretations.[189] This decision is a major expansion of Section 349, interpreting it to include goods and services sold to businesses and professionals for use in business, not simply products or services sold for personal use, emphasizing the legislature's commitment to protect the public against all forms of deceptive business practices.[190]

Illinois

The Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA") was put in place to offer consumers a remedy for wrongs committed against them in the marketplace, as well as serve as a deterrent from partaking in deceptive conduct for those engaged in trade or commerce.[191] The CFA explicitly prohibits the use of any deception, fraud, false pretenses or promises, concealment, suppression, or omission of any fact that is material to a business dealing or transaction.[192] Consumers may bring a claim even if they were not in fact misled, deceived, or damaged by the wrongful conduct, a benefit not featured in prior iterations of the law.[193] The CFA is broad in scope and provides state agencies with substantive rulemaking authority.[194] Additionally, the statute does not preclude consumers from enforcing any of its major substantive provisions or from enforcing the statute against any major type of business that the statute otherwise covers.[195] The

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[187] *Id.* at 176.
[188] *Id.* at 177.
[189] *Id.* at 178.
[190] *Id.*
[191] 815 ILL. COMP. STAT. ANN. § 505/2.
[192] 815 ILL. COMP. STAT. ANN. § 505/4.
[193] *Id.*
[194] 815 ILL. COMP. STAT. ANN. § 505/4. Illinois has adopted a number of regulations: ILL. ADMIN. CODE tit. 14 § 460.10 et seq.
[195] *See, e.g.,* 815 ILL. COMP. STAT. ANN. § 505/2 (indicating that the statute does not preclude consumers from enforcing any of its major substantive provisions, or from

CFA requires indication that the defendant acted with "intent that others rely" on the concealment of a material fact, yet the Illinois Supreme Court held, in 1996, that actual reliance by the consumer is unnecessary.[196] The Act does not require pre-suit notice to the defendant, nor does it require a showing of public interest or public impact, and does not prohibit class actions.[197]

Multiple or punitive damages may be awarded to the consumer, if they acted in bad faith, and attorneys may obtain fee awards.[198] There is a statutory civil penalty amount for initial violations, up to $50,000 per violation, if intent to defraud is shown.[199] Nothing in the statute requires a showing of the defendant's intent or knowledge. In comparison to other statutes, the CFA provides strong support to consumers.[200]

Washington D.C.

In recent years, the District of Columbia ("D.C.") has become a hotbed of consumer litigation, with its courts being famous for adopting plaintiff-friendly standards.[201] Its flagship consumer protection law, which prohibits a variety of deceptive and unconscionable business practices, is known as the Consumer Protection Procedures Act ("CPPA").[202] The CPPA is codified in the DC Official Code §§ 28-3901 to 28-3913.[203] The CPPA broadly prohibits unfair, unconscionable, and deceptive acts, as well as providing the mayor with substantive rulemaking authority.[204] The CPPA does not prevent consumers from

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enforcing the statute against any major type of business that the statute otherwise covers).

[196] 815 ILL. COMP. STAT. ANN. § 505/2 (requiring a showing that the defendant acted with "intent that others rely" on the concealment of a material fact). The Illinois Supreme Court has held that actual reliance by the consumer need not be shown. *See, e.g.,* Connick v. Suzuki Motor Co.,675 N.E.2d 584 (Ill. 1996) (holding that proximate cause, but not reliance, must be shown).

[197] Allen v. Woodfield Chevrolet, Inc., 802 N.E.2d 752 (Ill. 2003) (requiring a showing of public impact in suits against motor vehicle dealers under 815 ILL. COMP. STAT. ANN. § 505/10(a) is unconstitutional).

[198] 815 ILL. COMP. STAT. ANN. § 505/7(a).

[199] 815 ILL. COMP. STAT. ANN. § 505/7(b).

[200] *National Consumer Law Center*, *supra* note 178, at 28.

[201] Andrew Jacobs, *Lawsuits Over 'Misleading' Food Labels Surge as Groups Cite Lax U.S. Oversight*, NY TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/09/07/science/food-labels-lawsuits.html.

[202] D.C. CODE §§ 28-3901 through 28-3913.

[203] *Id.*

[204] *See, e.g.*, D.C. CODE § 28-3904(r) and (e); D.C. CODE § 28-3913.

enforcing any of its major substantive provisions, or from enforcing the statute against any major type of business otherwise covered.[205] Also, the statute does not require a showing of public interest or public impact, nor of reliance.[206] There is also no requirement of pre-suit notice for the defendant, and class action suits are not prohibited. Both treble and punitive damages are authorized, as are attorney fees for consumers in the case of fraud.[207]

There is a strong focus on equitable relief and restitution for consumers, as well as public enforcement without requiring an indication of the defendant's intent or knowledge.[208] However, one area in which the CPPA is lacking, is the civil penalty limitation of $1,000 for initial violations, which the Department of Consumer and Regulatory Affairs may recover $1,000 of.[209] Overall, the CPPA does an excellent job of providing support to consumers, but further reform concerning rulemaking authority and civil penalties require consideration.[210]

III. THE MANY LEGAL LENS OF CONSUMER KNOWLEDGE

In looking at food labeling cases brought under these state consumer protection statutes, one notices a variety of attempts by courts to draw parallels to other areas of consumer protection law to inform the food purchasing decisions of the alleged "reasonable consumer". Recent decisions reflect courts' efforts to consult debt collection, trademark, and false advertising practices.[211] To fully grasp the lens through which the legal profession views consumers and reasonableness—both in misleading food labeling cases and other products, one must consider the drastically variable perceptions of consumer

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[205] *National Consumer Law Center*, *supra* note 178, at 18. ("The statute does not preclude consumers from enforcing any of its major substantive provisions, or from enforcing the statute against any major type of business that the statute otherwise covers.").

[206] Nothing in the statute requires a showing of public interest or public impact, and courts have not imposed this requirement. *See also* Athridge v. Aetna Cas. & Sur. Co., 351 F.3d 1166, 1175 (D.D.C. 2003) (stating it is a violation of the UDAP statute "whether or not a consumer is in fact misled [or] deceived").

[207] D.C. CODE § 28-3905(k)(1)(A), (C) (authorizing both treble and punitive damages).

[208] D.C. CODE § 28-3909(a).

[209] *Id.*; D.C. CODE § 28-3905(i)(3) (authorizing the Department of Consumer & Regulatory Affairs to recover $1,000 per violation).

[210] *Id.*

[211] *See, e.g.*, v. Publix Super Markets, Inc., 982 F.3d 468 (7th Cir. Bell 2020); Raney v. Taylor, No. 21-cv-485-bbc, 2022 U.S. Dist. LEXIS 15672 (W.D. Wis. Jan. 28, 2022).

intelligence across these areas of the law. Depending upon the product, courts view the capacity of consumer knowledge at strikingly distinct levels, ranging from the assumption consumers are "helpless"[212] to erudite and self-reliant. The following section describes how courts view consumer knowledge across a variety of products while comparing how courts view the reasonable food consumer, in contrast.

The Reasonable Person and the Ordinary Consumer

The reasonable person—a term etched into the fabric of American common law—is pervasive enough to be a foundational concept throughout many areas of the law. A reasonable person is defined as "a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something."[213] In the context of product litigation the "reasonable person" standard transforms into the "reasonable consumer" standard. Often found in tort law, a reasonable consumer is thought to weigh the benefits and risks of their purchasing decisions and behave in a "logical" and "reasoned" manner. In general, most of the cases involving the "reasonable consumer" stem from a plaintiff who had purchased a product and had been deceived or could likely have been deceived by the packaging or labeling on the product.[214] Because there is no widely accepted definition or explanation of the reasonable consumer, courts are left to apply a test that is largely shaped by its own opinions and experiences, with the ability to vary wildly from jurisdiction to jurisdiction.[215] The

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[212] Margot J. Pollans, *Eaters, Powerless by Design*, 120 MICH. L. REV. 643, 667 (2022) ("According to the myth, the responsible consumer uses information to make food choices that reflect personal preferences and identity and that protect individual health and well-being. The responsible consumer also established food security for herself. Finally, the responsible consumer makes food choices that protect the environment, food system workers, and animals used in food production. While the myth of the helpless consumer contradicts narratives about consumer freedom, the myth of the responsible consumer relies on them. The responsible consumer is free to choose whatever foods they want and can therefore be deemed to have chosen freely whatever consequences follow . . . By contrast to the helpless consumer, the responsible consumer is self-possessed, influential, and capable.").

[213] *Reasonable Person*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/legal/reasonable%20person (last visited Nov. 12, 2022).

[214] *See, e.g.*, Perkins Coie, *Food & Consumer Packaged Goods Litigation*, 2020 Year in Review, https://www.perkinscoie.com/images/content/2/4/241153/2021-Food-CPG-Litigation-YIR-Report-v4.pdf.

[215] *Id.*

reasonable consumer is, in this way, defined not by how "reasonable" consumer behave, but instead by how they *do not* behave.

While this happens with many consumer standards as discussed below, food law encompasses innumerable forms of food and unique claims about product packaging and labeling. When looking at the reasonable consumer in the context of food law, it is vital to remember that food is a highly unique product. As opposed to things like sweepstakes, credit card agreements, and mortgages, food is a constant element in a person's life from its conception and takes on a multitude of various forms and products. Heavily shaped by the cultures and environments people grow up in, the reasonable consumer takes on a special significance in the realm of food. That said, other areas of reasonable consumer law may offer insight as to how to assess whether the conduct of a consumer of food is indeed reasonable or not, even if only plausibly so.[216]

Unsophisticated Consumer

One standard applied to consumer behavior is that of the "unsophisticated consumer," found in The Fair Debt Collection Practice Act. As many courts have defined the "unsophisticated consumers," they are consumers who are "uniformed, naïve and trusting, but not completely ignorant; possessing a rudimentary knowledge about the financial world; wise enough to carefully read a collection notice; reasonably intelligent; capable of making basic logical deductions and inferences; and, unlikely to interpret debt collection letters in bizarre or idiosyncratic ways."[217] This standard could, conceivably, describe just about every and any individual. However, these factors do little to inform an analysis in which a court must determine what constitutes "naïve" behavior, what behavior may be ignorant—though not completely so—and so on. This is, presumably, why courts allow for admission of expert testimony and consumer surveys to aid the court's determination of reasonableness.

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[216] Most litigation ceases at the motion to dismiss stage, where consumer allegation need only be plausible to survive the court's dismissal standard. Bell Atl. Corp. V. Twombly, 550 U.S. 544, 555 (2007); Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

[217] *See* Laurie A. Lucas & Alvin C. Harrell, *Consumer Standards under the Fair Debt Collection Practices Act: A Case for Regulatory Expansion*, 62 CONSUMER FIN. L.Q. REP. 232, 239 (2009) (providing a thorough doctrinal explication of the consumer standards under the FDCPA and the resulting split in the federal circuits).

All this evidence, of course, needs to clear the hurdles set forth in *Daubert*[218], but often even the very little evidence courts presently consider does not aid in decision-making that accurately reflects realistic or "reasonable" consumer behavior. Case law additionally states that consumer surveys alone do not make probable an allegation that reasonable consumers are misled where the complaint does not plausibly allege deception. Yet again, then, reasonable consumer plaintiffs find themselves in a Catch-22 of non-development in reasonable food consumer law—consumers cannot know what a plausible allegation of deception is without knowing in the first place what the court is likely to even consider and accept as evidence of widespread deception.

Despite the evidentiary issues that haunt the reasonable consumer analysis, the overall perception of consumer sophistication in debt collection practices in notably lower than that assumed in food law. In *Evory v. RJM Acquisitions Funding LLC,* the Seventh Circuit defined the potential pool of unsophisticated consumers as "the average consumer in the lowest quartile of consumer competence."[219] Though the average consumer and the reasonable consumer may not equate to the same standard as the unsophisticated consumer—"reasonable" connotes an added level of cognitive processing in comparison to the terminology "average,"—what the analysis of the test and its rhetoric make clear is the need for a more nuanced analysis of the "reasonable" consumer in the context of food law. Whether this comes in the form of a baseline assumed knowledge that is explicitly stated by the court (such as in the Fair Debt Collection Practices Act) or based off evidence admitted in the case rather than the court's own assumptions, revisions are critical for clarified guidance in reasonable food consumer jurisprudence.

Least-Sophisticated Consumer

The least sophisticated consumer standard comes from circuits concerned with ensuring that consumers are protected by the Fair Debt Collection Practices Act ("FDCPA") regardless of their sophistication level.[220] While the name "least sophisticated" might signal to consumers and the courts alike that quite literally the most naïve consumer should be how the courts view issues dealing with the FDCPA, most courts assume a certain level of knowledge or "rudimentary amount of information about the world."[221] Although the standard may vary

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[218] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90 (1993).
[219] Evory v. RJM Acquisitions Funding, L.L.C., 505 F.3d 769, 774 (7th Cir. 2007).
[220] Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993).
[221] Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994).

slightly in different circuits, according to the Seventh Circuit, "[a]n unsophisticated consumer is 'uniformed, naïve, or trusting,' but nonetheless possesses 'reasonable intelligence,' basic knowledge about the financial world, and 'is wise enough to read collection notices with added care.'"[222] This standard generally should not be dismissed at the pleading phase because it is a question of fact.[223] Further, the Seventh Circuit has stated that federal judges who must decide such motions are "not necessarily good proxies for the 'unsophisticated consumers."[224] However, judges may decide on a motion to dismiss if no significant number of people would be deceived by the collection letter.[225]

Some claim that the least sophisticated consumer is more akin to an "average consumer" standard than it is to a least sophisticated consumer standard.[226] This idea is further bolstered by the fact that when judges decide these cases, they are bringing their own consumer tendencies and biases into their decision-making rather than focusing on those of the "uninformed, naïve, or trusting" consumer.[227] But, some argue that this "average consumer" standard, or some other seemingly higher standard against the consumer, is needed because if a least sophisticated consumer standard was universally applied, protections for companies are rendered non-existent.[228]

"Likelihood of Confusion" Amongst Consumers

Under the common law, a "likelihood-of-confusion" test controls unfair competition allegations for trademark infringement. Any use of a registered mark that "is likely to cause confusion, or to cause mistake, or to deceive" creates a private right of action.[229] In the factual analysis that this standard requires, courts may look at several factors including: the degree of care likely to be used by consumers, the strength of the trade dress, evidence of actual confusion, and intent to pass off product as that of the alleged infringed product.[230] When

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[222] Koehn v. Delta Outsource Grp., Inc., 939 F.3d 863 (7th Cir. 2019) (citations omitted).
[223] Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632, 636 (7th Cir. 2012).
[224] *Koehn*, 939 F.3d at 864.
[225] *Id.*
[226] Jason Cohen, *Bringing Down the Average: The Case for a "Less Sophisticated" Reasonableness Standard in US and EU Consumer Law*, 32 LOY. CONSUMER L. REV. 1, 30 (2019).
[227] *Id.*
[228] *Id.* at 30.
[229] 15 U.S.C. § 1114(1) (2018).
[230] *See Publix*, 982 F.3d 468.

applying this standard, courts often presume that consumers buying "low-priced, everyday items" will not prompt a "careful analysis of the product prior to purchase."[231]

Many claim this test causes uncertainty among both consumers and those trying to comply with the trademark law.[232] With various factors applied through various circuits, what has weight in one may not have weight in another.[233] Additionally, when applied by so many different judges, different but regularly unarticulated factors into whether a judge may find a likelihood of confusion.[234] Through various applications, broad interpretations of trademark law can be used which can lead to erroneous decisions and consumer confusion.[235] In fact, while this test focuses on consumer confusion, proof of such confusion is not necessary.[236] As a result, various circuits disagree on whether violations of trademark law are questions of law or questions of fact.[237] This is not unlike what occurs when courts attempt to draw lines between deceptive labeling behavior and unreasonable decisions on the part of food consumers. Without this key part of analysis, it is clear why confusion runs rampant in both areas of the law. The next section will expound upon this phenomena and other trends within reasonable food consumer litigation.

IV. EXEMPLARY CASES IN REASONABLE FOOD CONSUMER LITIGATION

Though litigation spreads across a variety of products found at the supermarket, snack foods and processed foods are the most common.[238] The precise allegations against these products vary, yet recent claims can be grouped into three distinct categories: (1) products

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[231] Roulo v. Russ Berrie & Co., 886 F.2d 931, 937 (7th Cir. 1989); *see also Publix*, 982 F.3d 468.

[232] Robert G. Bone, *Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NORTHWESTERN L. REV. 1307 (2012).

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721 (2004).

[237] *Id.*

[238] Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 1, 5 (2017), https://instituteforlegalreform.com/wp-content/uploads/2020/10/TheFoodCourtPaper_Pages.pdf.

claiming to be "healthy" or "natural", (2) "slack fill" products, and (3) discrepancy about where a product was made.

Complaints challenging products marketed as "natural" comprise the largest category, encompassing approximately one-third of food litigation.[239] These cases primarily allege that the good sold does not qualify as "natural" for either the inclusion of ingredients such as citric acid, genetically modified corn or soy, or more generally, "unnatural" processing. Products marketed as "healthy" are constantly being challenged.[240] Some of these litigants allege that manufacturers make misrepresentations about the "healthy" nature of a product by overstating health benefits or not providing sufficient scientific backing, amongst other factors.[241] Other litigants argue that some products labeled as "healthy" are not actually nutritious.[242]

Even true statements and images which emphasize aspects of the product displayed on its packaging may lead a consumer to believe that a product is healthier than it is.[243] For example, a fruit snack consisting of primarily sugar, fruit juice concentrate, and pectin or gelatin as a binder may have images of fruits and vegetables on its package, leading consumers to believe that the product is healthy, when it may contain more than ten to fifteen grams of sugar.[244] Such marketing can be particularly insidious when marketed to those who may lack the requisite knowledge for making these decisions.[245] Another example of a misleading "true" statement concerns products that list "evaporated cane juice" as an ingredient; some consumers have argued that the term disguises sugar content, even if the nutritional facts list the total grams of sugar.[246] Some firms have focused on challenging any product, claiming to be "healthy", that contains partially hydrogenated oils, claiming that any amount of this ingredient renders a product unfit for consumption.[247]

Second, "slack fill" claims have become increasingly popular.[248] These lawsuits allege that a product's packaging includes nonfunctional, extra space that may lead a consumer to believe that they

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[239] *Id.* at 2, 7.
[240] *Id.* at 2.
[241] *Id.* at 6.
[242] *Id.*
[243] *Id.* at 2, 19.
[244] *Id.*
[245] *Id.*
[246] *Id.* at 33.
[247] *Id.* at 3.
[248] *Id.* at 2.

will receive more of the product than the package actually contains.[249] Any product that clatters, particularly cereal, is a potential target of these "shake-the-box and sue" claims.[250]

Lastly, another commonly litigated category concerns misrepresentation regarding the location a product was made.[251] Many beer manufacturers have faced suits claiming that consumers would be misled to believe that their products are imported when they are brewed in the United States.[252] Litigants have even alleged that they believe "Greek yogurt" was produced in Greece.[253] In a similar category, lawsuits challenging specific representations on a product as potentially misleading or untrue have emerged.[254] Some litigants have argued that cheese sold as "100% grated Parmesan" should not be marketed as such, because it contains cellulose, an anti-clumping agent, and that bread is not "baked in store" when it reaches frozen and is then baked.[255] A common misconception is that the recent surge of litigation targets only large food companies with "deep pockets".[256] However, an increasing number of family-owned businesses and startups, particularly those specializing in selling "healthy" snacks, are being named in these types of lawsuits as well.[257]

As this surge in food litigation has continued to develop, one question that litigants continue to face is where they should file their lawsuits.[258] The Northern District of California has earned a reputation as the nation's "food court".[259] One study of court dockets revealed that California's federal courts remain the center of food litigation, hosting one-third of food class actions in the federal system, despite lawyers bringing cases in other areas of the country, most notably New York.[260] Federal courts in New York now host over twenty percent of the nation's food litigation. [261]Other notable jurisdictions include the

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[249] *Id.* at 21.
[250] *Id.*
[251] *Id.* at 6.
[252] *Id.*
[253] *Id.*
[254] *Id.* at 2.
[255] *Id.*
[256] *Id.* at 15.
[257] *Id.*
[258] *Id.* at 8.
[259] *Id.* ("A 2013 report from the U.S. Chamber Institute for Legal Reform estimated that, at that time, approximately 60% of food marketing class action lawsuits were filed in or removed to federal courts in California.").
[260] *Id.*
[261] *Id.*

Southern District of Florida and the Northern District of Illinois.[262] Cumulatively, U.S. District Courts in California, New York, Florida, and Illinois host nearly seventy-five percent of the food class action lawsuits in the federal systems.[263] Combined with food class actions in Missouri, Pennsylvania, and New Jersey, the federal cases in these seven states account for ninety percent of the federal total.[264]

Class action law firms may choose to file in these jurisdictions due to a variety of factors, including: "plaintiff-friendly" state consumer protection laws with relaxed standards for liability, statutory damages, mandatory attorney's fee awards, or lengthy statutes of limitations.[265] Plaintiffs' attorneys may view a certain district's judges as disfavoring motions to dismiss or prone to certify class actions.[266] Lawyers may also be more likely to file in these states because of their large populations from which they can draw larger classes and settlements.[267]

It is also important to consider the relevance of statutory law in making these filing decisions. The Class Action Fairness Act (CAFA) results in the large transfer of state filed, class actions filed in state courts to the federal judiciary.[268] Over one hundred food and beverage marketing class action lawsuits in the federal courts have been consolidated for pre-trial purposes in multi-district litigation.[269] There are also many class actions pending in state courts.[270] These lawsuits may attempt to avoid federal jurisdiction by seeking less than $75,000 per plaintiff and no more than $5 million aggregately – amounts necessary to trigger federal jurisdiction under CAFA.[271] The District of Columbia, which uniquely authorizes individuals and advocacy groups to sue as private attorneys general without fulfilling class certification requirements, is increasingly hosting consumer litigation.[272] Similarly, the City of St. Louis Circuit Court in Missouri has become a hub for

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[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 9 ("For example, in addition to its large size, California is an attractive state for filing food litigation because of its plaintiff-friendly consumer protection law, known as the Unfair Competition Law.").
[266] *Id.*
[267] *Id.*
[268] *Id.* at 10.
[269] *Id.* at 5, 10.
[270] *Id.* at 10.
[271] *Id.*
[272] *Id.*

food class actions, with its reputation for "fast trials, favorable rulings, and big awards."[273]

With a dramatic increase over the past several years in claims regarding false and misleading food labeling,[274] much of the food and beverage litigation news cycle's attention has focused on a legal landscape rife with discussion of the reasonable consumer. Particularly revealing are the numerous articles describing the reasonable consumer test as, instead, the "reasonable consumer defense," describing the way courts have regularly found against plaintiff consumers in the test's application.[275] According to a recent publication about food labeling cases by global law firm, Perkins Coie, misleading claims encompassed a broad array of legal theories, including:

> allegations that 'made with real fruit,' 'salt and vinegar potato chips,' and 'all butter pound cake' misleadingly suggested premium ingredients (fruit/vinegar/butter); 'slightly sweet' suggests to consumers that a product contains minimal sugar; 'made with real fudge' claims are false/misleading because the products lack the ingredients essential to fudge; and allegations that the food was not made in the manner suggested by the label (e.g., 'smoked' label misleading because product contains smoke flavor).[276]

Though major appellate decisions favorable to the plaintiff consumer continue to compel further investigation, most cases brought under false and misleading labeling are dismissed early in the litigation with little exploration of the intricacies of the reasonable food consumer's behavior.[277] The following sections analyze two exemplary federal cases of issues in reasonable consumer litigation and the primary approaches courts are taking to repair the reasonable consumer analysis.

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[273] *Id.* at 10.

[274] *Food & Consumer Packaged Goods Litigation 2021 Year in Review*, PERKINS COIE 1, 5 (Feb. 2022), https://www.perkinscoie.com/images/content/2/5/250755/2022-Food-CPG-Litigation-YIR-Report.pdf.

[275] *See, e.g.*, Mital Patel and Jennifer Yoo, *The Scoop on the "Vanilla" Class Action Jurisprudence*, FOOD AND DRUG L. INST. (2021), https://www.fdli.org/2021/06/the-scoop-on-the-vanilla-class-action-jurisprudence/.

[276] *Perkins Coie*, *supra* note 274.

[277] *Id.*

Bell v. Publix et al.

The 2021 case of *Bell v. Publix et al.*[278] from the Seventh Circuit Court of Appeals was one of the first cases to dissect lower court applications of the reasonable consumer test. In *Publix*, the Seventh Circuit reversed an Illinois district court's dismissal[279] of Plaintiffs' consumer protection claims over numerous manufacturers' use of labels advertising parmesan cheese products as "100% Grated Parmesan Cheese."[280] Plaintiffs alleged that the label's use of "between four and nine percent added cellulose powder and potassium sorbate" (to prevent caking and molding) renders the use of the "100%" claim deceptive under state consumer-protection laws.[281] Plaintiffs' claims all focused on "Little-FTC Acts," designed to "broadly prohibit unfair business practices, including deceptive advertising."[282] These state consumer protection statutes "'require plaintiffs to prove that the relevant labels are likely to deceive reasonable consumers,'" which "'requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[283]

Defendants set forth several theories that the Seventh Circuit did not find persuasive: (1) that any ambiguity as to the "100% Grated Parmesan Cheese" claim could easily be dispelled upon a look at the ingredient/back label; (2) that common sense defeats the Plaintiffs' claims because the reasonable consumer is "well aware that pure dairy products spoil, grow blue . . . or otherwise become inedible if left unrefrigerated for an extended period of time"; and (3) that Plaintiffs' claims were federally pre-empted[284] by the Food, Drug, and Cosmetic

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[278] *Publix*, 982 F.3d at 475.

[279] *Id.* at 492-93 (applying the Rule 12(b)(6) standard - the standard under the dismissal rule is that plaintiffs' claims must be "plausible," as opposed to a demonstration by the non-movant, during summary judgment proceedings, that there is no "genuine issue of material fact.").

[280] *Id.* at 493.

[281] *Id.*

[282] *Id.* at 474.

[283] *Id.* at 474-75.

[284] *Id.* at 475 ("First, [defendants] point out that the federal Food, Drug, and Cosmetic Act (FDCA) and its accompanying regulations expressly bar states from imposing labeling requirements that are not "identical" to the FDCA's, and they contend plaintiffs seek to use state law to impose different labels on them. Second, defendants say the FDA approved Kraft's use of the '100% Grated Parmesan Cheese' label in 1999 and 2000, thus rendering the plaintiffs' challenge both conflict-preempted and barred by state-law safe harbor provisions. These arguments do not persuade us. The first reads the FDCA's express preemption provision too broadly. The second fails at the

Act ("FDCA") labeling requirements and the FDA's power to set forth the standard of identity for "grated cheese."[285]

The district court originally concluded, following a string of cases in other jurisdictions, that because the ingredient label on the back of the package "would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure the ambiguity and defeat the claim."[286] The Seventh Circuit, however, disputed this logic and joined three other circuits "in holding that an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers. Many reasonable consumers do not instinctively parse every front label or read every back label before placing groceries in their carts."[287]

The question of what a reasonable consumer should know and contemplate when purchasing food products prompted the court to apply an altered version of the reasonable consumer standard. The Seventh Circuit recognized that "Lots of advertising is aimed at creating positive impressions in buyers' minds, either explicitly or more subtly by implication and indirection. And lots of advertising and labeling is ambiguous. Deceptive advertisements often intentionally use ambiguity to mislead consumers while maintaining some level of deniability about the intended meaning."[288] The opinion compared the relative forgiveness with which the law treats the average consumer in debt collection, trademark, and false advertising contexts to the much more stringent standard held against the reasonable food consumer.[289] Under the Lanham Act, courts factor in the "likelihood of confusion test,"[290] and further recognize that "even literally true claims may deceive, that implied messages in advertising may deceive, and that what matters is

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first step because defendants have not shown that the FDA approved Kraft's '100%' labeling as nondeceptive.").

[285] *Id.* at 480 ("The defense theory seems to be that if the FDA defines 'grated cheese' in a way that allows added cellulose and potassium sorbate, their products with those additives thus qualify as '100% grated cheese.' We have no quarrel with defendants' ability to call their products 'grated cheese.' The problem lies in the '100%,' especially since the pleadings provide reason to think that consumers understand '100% grated cheese' to mean that the cheese does not have the additives. And how could a manufacturer of grated cheese without those additives differentiate its product from these defendants' products if, pace George Orwell, the courts said the products with the additives could lawfully claim to be '100% cheese'?").

[286] *Id.* at 475.

[287] *Id.* at 476.

[288] *Id.* at 477.

[289] *Id.* at 478-80.

[290] *Id.* at 478 (". . . an intensely factual question based on real market conditions and real consumers' behavior.").

how consumers actually understand the advertising."[291] Consumer ambiguity under the Fair Debt Collection Practice Act similarly analogizes the standard to which shoppers are held to the "unsophisticated consumer." [292] Though the court did not articulate the content or definition of the reasonable food consumer standard, it did call into question the existing analysis and held "[p]laintiffs are entitled to present evidence on how consumers actually understand these labels."[293]

Judge Kanne's concurring opinion expounded upon the perplexities underlying the present usage of the reasonable consumer standard and its stark departure from the reality of food consumer behavior:

> [The standard] is impractical because, while lawyers and judges can find ambiguity in just about anything, that's not what we expect of the reasonable consumer . . . That, at bottom, is the flaw in the district court's rule: a court could decide as a matter of law that a statement is not deceptive even where it could deceive reasonable consumers as a matter of fact. . .. Just as important, however, is the corollary to this principle: that if a plaintiff's interpretation of a challenged statement is not facially illogical, implausible, or fanciful, then a court may not conclude that it is nondeceptive as a matter of law. The determination of likelihood of deception 'is an impressionistic one more closely akin to finding of fact than a conclusion of law'.[294]

The concurring opinion reasoned that reversal was especially warranted because of the district court's erroneous analysis of ambiguity's relation to the reasonable consumer standard.[295] The district court "did not conclude that Plaintiffs' interpretation of the '100% Grated Parmesan Cheese' statement is illogical, implausible, or fanciful," but rather "necessarily found the opposite: that reasonable

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[291] *Id.* at 479.

[292] *Id.* at 480.

[293] *Id.* ("This evidence, the court noted, might include consumer surveys or affidavits from linguists to prove deception.").

[294] *Id.* at 493 (Kanne, concurring).

[295] *Id.* at 476. (The binding opinion noted the same, stating, "Under the district court's ambiguity rule, as a matter of law, a front label cannot be deceptive if there is any way to read it that accurately aligned with the back label. And this would be so even if the label actually deceived most consumers, and even if it had been carefully designed to deceive them.").

consumers may interpret the statement multiple, plausible ways," which the concurrence noted was the very definition of ambiguity.[296]

In sum, the court's rejection of a rule imposing on the average consumer an obligation to legalistically parse prominent front-label claims by examining the fine print on the back provides some clarity on what claims may survive a motion to dismiss and aligns the Seventh Circuit with similar rulings in the First, Second and Ninth Circuits.[297]

Moore v. Trader Joe's Company:

Another recent landmark case came from a claim against Trader Joe's, which sells jars of Manuka honey promoted as "100% New Zealand Manuka Honey" or "New Zealand Manuka Honey".[298] In a lawsuit brought in federal court in California, the plaintiffs alleged that Trader Joe's falsely advertised this product as "Manuka Honey," since samples of the product showed that the honey contained less than seventy-five percent of Manuka pollen.[299] This is because when honey is made, bees visit multiple flowers; consequently, the honey produced was not one hundred percent derived from Manuka flower pollen.[300] The Ninth Circuit acknowledged ambiguity as to the phrase "100% New Zealand Manuka Honey" and questioned whether the language indicated that the product contained only honey imported from New Zealand or if it indicated that the honey was purely derived from the Manuka flower.[301] The court wrote that "reasonable consumers would necessarily require more information before they could reasonably conclude Trader Joe's label promised a honey that was 100% derived from a single, floral source."[302] In assessing whether the ambiguity would potentially mislead a reasonable consumer, the court applied the standard set forth by the lower court: with respect to deceptive advertising claims, the trier of fact should consider all the information available to consumers and their relevant context.[303]

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[296] *Id.* at 493-494.
[297] *See* Domont v. Reily Foods Co., 934 F.3d 35 (1st Cir. 2019); Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018); Williams v. Gerber Prods. *Co.*, 552 F.3d 934 (9th Cir. 2008).
[298] Moore v. Trader Joe's Co., 4 F.4th 874, 876 (9th Cir. 2021).
[299] *Id.*
[300] *Id.*
[301] *Id.* at 882.
[302] *Id.*
[303] *Id.*

The court ruled against Trader Joe's for three reasons.[304] First, a reasonable consumer would understand that it is impossible to produce honey that is derived exclusively from a single source.[305] Second, the fact that the honey cost $13.99 would indicate that to a reasonable consumer that the product has a lower concentration derived from manuka flower nectar, as honey of this variety often costs hundreds of dollars an ounce.[306] Third, the "10+" notation on the label serves as a Unique Manuka Factor rating that indicates the concentration of manuka flower nectar in the product puts consumers on notice that it is representative about something about the product.[307] The court ultimately concluded that "a reasonable consumer could not be left with the conclusion that '100% New Zealand Manuka Honey' represents a claim that the product consists solely of honey derived from Manuka."[308]

What is exceptional about this matter is the court's view about what a reasonable consumer is, and what contexts that consumer should be taking into consideration. According to the Ninth Circuit, it seems that the reasonable consumer isn't simply reading the front and back of labels and then making a determination before purchasing.[309] Rather, this reasonable consumer is examining and considering the label critically, and drawing inferences based on prior information, such as knowledge on how bees produce honey.[310] What is also remarkable about this case is that the Ninth Circuit assumed that a consumer, when presented with a notation such as "10+" to acknowledge that this information communicates "something" to the consumer, even if they may not be aware of what it signals.[311] This could potentially indicate that the court may be expecting a consumer to review advertising holistically and perhaps conduct research on whether the label is fully understood.[312] It is within this context that other cases can be potentially analyzed. One circumstance under which the reasonable consumer standard comes into play is at the motion to dismiss stage.[313]

However, applying this standard at this time can be burdened with difficulties and can lead to inconsistent results in cases involving

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[304] *Id.* at 883-84.
[305] *Id.* at 883.
[306] *Id.* at 884.
[307] *Id.*
[308] *Id.* at 885.
[309] *Perkins Coie*, *supra* note 274 at 5.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.* at 6.

similar facts.[314] The initial record before the court is a pre-discovery pleading, in comparison to the high amounts of evidence that would be at trial. Additionally, applying the test at this stage does not consider the plaintiff's testimony, background, and experience purchasing the allegedly deceptive product, resulting in the court dismissing the complaint and holding that the plaintiff was being dishonest about the deception and being the reasonable consumer of the product.[315] This lack of consideration in evaluating the plaintiff's background is likely to harm the outcome, as the reasonable consumer test inherently relies on the consumer's subjective experience. Courts must also make numerous determinations of fact, which it may not be capable of doing, in determining how a consumer, or a group of them, made a purchasing decision while in a grocery store aisle.[316] Federal and state judges may not possess the life experience or background that mirrors that of the plaintiff, resulting in a disconnection between the two. Most importantly, application of the reasonable consumer test may result in inconsistencies, failing to provide manufacturers with guidance on what may or may not be deceptive labeling.

V. REMEDYING THE REASONABLE CONSUMER ANALYSIS: FIT FOR FOOD

Courts alone are not the answer to remedying the pervasive consumer confusion that floods the food product market, but they do (or should) play a vital role in defining the boundaries by which industry and consumers operate in product marketing and purchasing. As the law stands, because food necessitates a strikingly different analysis from non-edible products, and because courts are given carte-blanche by the lack of a substantive reasonable consumer standard, industry is free to dabble in the realm of deceptive marketing without much consequence. Judicial review of claims on food packaging in conjunction with agency regulation and legislative reform must work together to hold industry accountable—when one of those means for consumer relief and guidance is choked off, food law is no longer in alignment with its hallowed goals of transparency and consumer protection.

One article from 2018 made the below observations about court perceptions of the reasonable consumer, including:

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[314] *Id.* at 9.
[315] *See id.* at 5-10.
[316] *Id.*

- A reasonable consumer reads words in context;[317]
- A reasonable consumer would not be misled when a plaintiff implausibly defines or interprets a term;[318]
- A reasonable consumer would not be misled by a product's marketing when clear text on the package would resolve any potential misunderstanding;[319]
- When a statement of image on a product's packaging leaves ambiguity as to its content, a reasonable consumer would read the ingredients list;[320]
- A reasonable consumer would not buy a product simply because an aspect of its labeling does not conform to FDA regulations or guidance;[321]
- A reasonable consumer is not misled by common, understood packaging;[322]
- A reasonable consumer would not be misled by statements that are wholly truthful and accurate absent some additional factor.[323]

Since the publication of this 2018 article, courts have both affirmed and rejected some of these observed tendencies of reasonable consumer behavior. The court in *Bell v. Publix,* for example, rejected the logic that "a reasonable consumer would not be misled by a product's marketing when clear text on the package would resolve any potential misunderstanding"[324] as well as the notion that "when a statement of image on a product's packaging leaves ambiguity as to its content, a reasonable consumer would read the ingredients list."[325] Instead, the *Bell* court emphasized that—in accordance with three other appellate courts—reasonable consumers will *not* examine the fine print on the back of labels or find one non-deceptive interpretation to cure

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[317] Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. OF CINCINNATI L. REV. 1, 11-12 (2018).
[318] *Id.* at 12-15.
[319] *Id.* at 16-17.
[320] *Id.* at 17-19.
[321] *Id.* at 19-20.
[322] *Id.* at 20-21.
[323] *Id.* at 21-22.
[324] *Publix*, 982 F.3d at 477.
[325] *Id.*

front-label ambiguity.[326] Additionally, the court in *Moore v. Trader Joe's* affirmed the principles that a reasonable consumer considers "contextual inferences regarding the product itself and its packaging,"[327] does not implausibly interpret terms,[328] and is not mislead by commonly understood packaging.[329] As demonstrated by these fluctuating notions of reasonable consumer behavior in court opinions, solidification of these standards is necessary for confidence in and reliance on the law surrounding reasonable consumer claims.

Nascent scholarly discussion on how to remedy this narrow perception and application of the reasonable consumer analysis and court behavior offers potential solutions. In *Citizen Surveillance of Misleading Food Labeling*, the most recent and one of the only modern scholarly attempts to describe the issue, Clay Sapp argues that this test used in consumer litigation is lacking for two specific reasons.[330] He argues that the test unfairly places the burden on plaintiffs in food labeling cases to determine a consistent definition of undefined food labeling claims.[331] This is of concern because there is a marked discrepancy between consumer understanding of food production, processing methods, and nutritional value of foods, and how that has been manipulated by food manufacturers.[332] Given the complexities surrounding these perceptions, it is nearly impossible to consistently establish a reasonable consumer to judge shoppers' interpretations or recognition of a labeling claim because of widespread confusion.[333]

The second flaw, Sapp states, is that there is a dearth of guidance for commissioners and civil courts to adhere to in constructing the reasonable consumer standard when applying the test.[334] Using this test has allowed judges to include their own views and biases of food labeling claims, without taking documented consumer interpretations into consideration.[335] Additionally, the lack of consumer consistency in defining these claims result in citizens' inability to hold food manufacturers accountable for their deceptive labeling.[336]

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[326] *Id.*
[327] Moore v. Trader Joe's Co., 4 F.4th 874, 822 (9th Cir. 2021).
[328] *Id.* at 884.
[329] *Id.* at 885-86.
[330] Clay Sapp, *Citizen Surveillance of Misleading Food Labeling*, 126:2 PENN ST. L. REV. 389, 395-97 (2021).
[331] *Id.* at 395.
[332] *Id.*
[333] *Id.*
[334] *Id.* at 396.
[335] *Id.*
[336] *Id.* at 397.

To combat this issue, Sapp proposes a multi-faceted solution.[337] The FTC should reframe its deception standard for food marketing matters as a risk-utility analysis, rather than as a static, perception-based test.[338] This approach would compel courts to consider both the documented interpretations that consumers generate from the challenged labeling claim, as well as alternative ways that the manufacturer could have marketed the product to consumers.[339] In relying on the history of federal regulation of misleading food labeling, Sapp illustrates the importance of the FDA rising to the occasion to ensure that companies are being transparent about their product's nutritional content and production impacts – two things which consumers are exceptionally concerned about.[340] Sapp also highlights the processes and flaws within those methods, in which companies may held answerable for deceptive tactics through the Lanham Act and state consumer protection statutes. In doing so, Sapp indicates the urgency of reforming this test.

Since most deceptive food labeling actions are brought in state court, state consumer protection statutes and their interpretations control when a claim is litigated in federal court. As a judge decides to impose their own beliefs and rationale into making determinations of whether a reasonable consumer would find a label misleading, food labeling litigation outcomes become inconsistent and inaccurate. Judges, unlike majority of the population, are highly educated. This can result in discrepancies in the approaches in which labels are scrutinized. Jurors are also unequipped to consistently and fairly determine whether a reasonable consumer would be misled in utilizing the current standard, as every individual has varying levels of understanding when analyzing food labeling claims.

To resolve these issues, Sapp proposes a risk-utility analysis, which premises product liability on an ideal balance of product usefulness, cost, and safety. Scholars state that relying on this analysis would impose liability on the product manufacturer, as they are best equipped to minimize product-related risks, while placing joint responsibility on consumers to ensure that careless ones are unsubsidized by cautious ones. Employing this approach would allow the FTC and courts to objectively assess whether food manufacturers designed their labels in a way that sought to reduce the risk of misleading the consumer,

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[337] *Id.* at 397-98.
[338] *Id.*
[339] *Id.*
[340] *Id.* at 398-406.

considering the efforts the manufacturer would take to limit the label's risk of deception.

Sapp also proposes relevant factors which the FTC should adopt as guideposts for its commissioners, judges, and juries analyzing misleading labeling actions.[341] These include the nature and strength of consumer understanding of the product claims asserted, the foreseeable risks of misleading consumer by employing the relevant labeling claim, the disclaimers present on the products' front label and their prominence, and the benefits of using the labeling claim for the business.[342] The risk-utility approach would place a greater emphasis on actual consumer interpretations of the label and considers how the food manufacturer considered the potential risk to mislead that its label posed.[343] It would also provide manufacturers with the opportunity to explain why their labeling strategy was appropriate while allowing consumers to express their expectations of common food labeling claims.[344]

Indeed, this type of solution offers partial and important remedies to prevent judges from generalizing their personal opinions to the reasonable consumers and shift the burden of proof to the food manufacturer, but even further guidance is required for a comprehensive solution. The solutions proposed by existing literature do not fully capture the nature and role of food in the lives of the consumer. From the consumer's perspective, food purchases arise from a number of factors—" personal taste, family preferences, cultural influences, emotional reasons, health concerns, societal pressures, convenience, cost, and variety and quantity of the available offerings," among others.[345] While solutions like those currently proposed by scholarship considers the "known expectations,"[346] it does not reach beyond the most obvious aspects of food sales. A risk-utility analysis does well to capture the explicit and reasoned portions of labeling design and purchasing choice, but ignores a massive portion of what drives consumer behavior, particularly psychological and cultural influences. As some scholars have observed of even the most rigorous reasonable consumer analyses,

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[341] *Id.* at 418.
[342] *Id.* at 418-22.
[343] *Id.* at 418.
[344] *Id.* at 418-19.
[345] Kathleen Zelman, *Why We Eat the Foods We Do*, WEBMD, https://www.webmd.com/diet/features/why-we-eat-the-foods-we-do#:~:text=Personal%20taste%2C%20family%20preferences%2C%20cultural,food%20supplies%20in%20the%20world. (last visited Aug. 15, 2022).
[346] Sapp, *supra* note 324, at 434.

> [j]udges . . . typically acknowledge none of these cognitive constraints and limitations. Despite its important to consumer decision-making, courts rarely, if ever, take financial literacy into account when considering the characteristics of the 'average consumer.' Nor does the prevailing judicial interpretation of a reasonable consumer usually recognize a sophistication gap between consumers and counterparties, or the incentive firms have to engage in such exploitative behavior. And, with respect to consumer cognition, judges generally adhere to rational choice presumptions and assume a relatively high degree of attentiveness, forbearance, and critical thinking.[347]

At the very least, lack of attention to cognitive constrains, education gaps, and food manufacturer exploitation should be drawn into the context of the court's analysis to realign judicial thinking with the reality of food purchase and consumption behavior amongst consumers. These considerations should, in fact, be at the forefront of the reasonable consumer analysis, especially during early stages of litigation during which the court is legally required to view the complaint in the light most favorable to consumer plaintiffs.[348]

VI. FROM THE ENTIRE CONTEXT OF THE LABEL TO THE ENTIRE CONTEXT OF THE PERSON

If food law-the heart of the FDCA and consumer protection statutes- is to ever protect consumers adequately from false and deceptive food labeling, courts must consider first and foremost the multidimensional nature of food purchases and the role food consumption plays in consumer lives. Though the contents and presentation of a food label are central to the analysis of how a "reasonable" consumer may behave in response, equally compelling to the consumer are their personally held beliefs and practices toward food, as is the shopping environment in standard retail grocery stores so carefully designed to tempt and sway the psyche.

Regardless of the form a "reasonable" food consumer analysis takes in response to scholarly and judicial criticisms, the analysis must not reduce "reasonable" behavior to an approximation between an imaginary range of the least and most sophisticated consumers. Rather

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[347] Cohen, *supra* note 226.

[348] *Twombly*, 550 U.S. at 555; *Cuvillier*, 503 F.3d at 401; *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

than hardly considering consumer surveys submitted alongside complaints and supplementing their own common sense as public perception, courts should consider consumer surveys that meet methodological standards to be extremely relevant. Consumer surveys offer opportunities for the court, plaintiff, and food manufacturers alike to see current consumer understandings of their products as well as identify points of ambiguity, confusion, or blatant falsity amongst the labeling. Surveys can also reveal trends in consumer behavior that better inform the group of consumers the challenged claim targets. A 2019 survey by the International Food Information Council Foundation, for example, found that deliberately seeking healthy options when shopping is a behavior more commonly found among "younger, highly educated consumers and those with children in the household."[349] Further, the study concludes that "taste is the primary consideration when making a food purchase, followed by price."[350] This type of information about consumer behavior is vital to understanding the reality of consumer decisions when it comes to food purchases, and is especially informative in lawsuits which analyze whether "healthy" claims are as false or misleading. At the very least, consumer surveys provide a sounder source of evidence than the unsupported assertions about "common sense" consumer behavior that abound in current cases.[351]

Consumers that abide by strict ethical guidelines for purchasing and consuming foods lend additional insight as to why the reasonable consumer analysis must consider the context of the person, environment, *and* the label contents and presentation. As the standard currently reads, the reasonable consumer

> might believe that "cage free" means simply that the chickens were not caged. If so, the deplorable conditions in which hens that lay "cage free" eggs are kept—thousands of birds crammed so tightly into a shed devoid of sunlight that they can barely move—might be neither false nor misleading. Yet it is virtually unquestionable that consumers who buy "cage free" eggs, and pay a premium in doing so, choose that product because they believe—whether "reasonably" or not—that the eggs were produced using hens that were humanely treated. Consumers who care about the humane treatment of hens would not consider the conditions under which "cage

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[349] *Food Labeling Survey, January 2019*, INTERNATIONAL FOOD INFORMATION COUNCIL FOUNDATION, https://foodinsight.org/wp-content/uploads/2019/01/IFIC-FDN-AHA-Report.pdf (last visited Aug. 15, 2022).

[350] *Id.* at 11.

[351] *See, e.g.*, Moore v. Trader Joe's Co., 4 F.4th 874, 876 (9th Cir. 2021).

> free" hens are confined to be humane–yet they buy these eggs because they believe the hens are humanely treated. Otherwise, why would these consumers be willing to pay a premium for the product labeled "cage free"?[352]

The current reasonable consumer analysis does not make much room for more subjective considerations of consumers like these—or in entirely different circumstances, for example, where brand trust may be a decisive purchasing factor—creating a more mechanistic and less representative analysis of what the reasonable consumer may believe when looking at a particular label.[353]

More akin to a comprehensive standard is the "purchasing consumer" standard, suggested by some scholars, that "would judge production method claims in reference to what the consumer purchasing the product—who undoubtedly care about the production method, given that she is willing to pay a premium for such products—believes it means."[354] While the plaintiff's individual perception alone in these types of cases cannot and should not represent the standard for false and deceptive labeling claims, the weight of the plaintiff's claims should be granted greater attention, especially in early stages of litigation like motions to dismiss. In doing so, the court focuses more on "how the consumer who seeks out and purchases the product assesses them."[355] This type of analysis would include marketing and research efforts on behalf of the food manufacturer with respect to the challenged product; the psychological impacts of the product's placement in stores, both its location physically on the stores and its location on the shelf; the target consumer audience's education level and sociodemographic information; and finally the traditional interpretation of product packaging and labeling form and content.

It is not uncommon and, in fact, is widely recognized that food manufacturers utilize "information base power asymmetries" to sway consumer behavior in favor of purchasing their product. One report notes that marketing practices to influence consumer behavior include actions such as "the use of words with no legal or formal meaning (e.g. natural), the use of unfinished claims (e.g. '25% less added salt' without stating a comparator), irrelevant claims, the use of healthy

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[352] Selena Hoffman, *The Ethics of Food Production and Regulation of "Misbranding"*, Harvard Library Digital Access to Scholarship (April 5, 2010), at 12-13 https://dash.harvard.edu/bitstream/handle/1/8965624/Hoffman,%20Selena%20L.pdf?sequence=1.

[353] *Id.*

[354] *Id.* at 14.

[355] *Id.* at 15.

sounding brand names (e.g. 'Go Natural'), and the use of 'greenwashing' labels (i.e., the practice of marketing a product as being ethical and ecologically friendly without it truly being so)."[356] Decisions such as these by food manufacturers are based on a wealth of research and development solely committed to influencing consumer behavior, with some studies identifying three major types of research:

> First . . . testing and deploying new marketing platforms, especially social and mobile media techniques, to reach consumers. Second, . . . creating new research methods to probe consumers' responses to marketing, such as neuromarketing research to analyze users' deep cognitive and emotional reactions to advertising. And third . . . developing new means to assess the impact of new digital research on marketers' profits through analysis of sales, branding, and by developing new measurement metrics.[357]

If food manufacturers devote considerable time and money to discovering and attempting to predict consumer food purchasing behaviors in relation to a product, this information should be similarly analyzed by courts to determine the scope and extent of knowledge targeted consumers may have and, subsequently, how "reasonable" food consumers will act.

Food occupies a central position in the lives of consumers without regard to reasonableness. It serves multiple purposes – nutrition, social and cultural experiences, and composes a major share of consumer expenditure.[358] Research surrounding consumer behavior is complex, and requires an understanding of science and social science disciplines.[359] Jan-Benedict Steenkamp proposed a model in 1997 mapping consumer behavior focused on three central factors shaping the consumer food purchasing decision process.[360] This includes person-related factors (biological, psychological, and demographics), food properties (physiological effects and sensory perception), and

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[356] Benjamin Wood et al., *Market Strategies Used by Processed Food Manufacturers to Increase and Consolidate Their Power: A Systematic Review and Document Analysis*, 17:17 GLOB. HEALTH 1, 13 (2021).

[357] Jeff Chester et al., *Peeking Behind the Curtain: Food and Marketing Industry Research Supporting Digital Media Marketing to Children and Adolescents*, CTR. FOR DIGIT. DEMOCRACY 1, 3 (2011).

[358] Jan-Benedict E. M. Steenkamp, *Dynamics in Consumer Behavior with Respect to Agricultural and Food Products*, AGRICULTURAL MARKETING AND CONSUMER BEHAVIOR IN A CHANGING WORLD, 143, 143 (1997).

[359] *Id.*

[360] *Id.* at 144-45.

environmental influence (economic, cultural, and marketing).[361] Courts must factor these psychological elements of the shopping experience into their decision-making, as they fundamentally shape purchasing decisions.[362] Deceptive marketing can weaken consumer decision-making power, depriving them of their ability to purchase products which are beneficial for themselves and their families.[363]

Steenkamp highlights the importance of need recognition for the consumer, in which there is a discrepancy between the desired and actual state of being.[364] This is impacted by dissatisfaction of the current food product, such as fruit rotting early, or depletion of the available supply of the food product.[365] This state can be influenced in a variety of ways, including culture or lifestyle changes, or changes in sociodemographic characteristics, including the birth of a child, a marriage, or divorce.[366] Another influence is new product experiences – for example, products popular in one area that tourists visited became in demand when those tourists returned to their residences, because they enjoyed those products.[367] Marketers harness this need recognition through advertising, in-store and online promotions, music, and ensuring shelf space so the consumer adopts brand recognition.[368] These activities remind the consumer that they may need this product, but is less effective in creating needs.[369]

The next step in the consumer's decision-making process involves the search for alternative solutions.[370] The most important information source was the consumer's previous experience with food products.[371] External searching for information about foods in general is limited, with prior research indicating that consumers took less than twelve seconds in deciding to purchase cereal, coffee, margarine, and toothpaste, with nearly half spending five seconds or less.[372] Factors such as prior purchase experience, involvement with the product category, time pressure, quality variation between products, and product

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[361] *Id.* at 145.
[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] *Id.* at 146.
[371] *Id.*
[372] *Id.*

stability inhibit an extensive search for information in the context of food products.[373]

The customer then evaluates alternatives to assess if they fulfill the same need.[374] The consumer decides the criteria on which the alternatives are evaluated, integrating the perceptions of these alternatives into an overall attitude about the attractiveness of each product.[375] The evaluative criteria depends on several factors, including quality labeling, brand names, and geographic origin of the food product, and can be broken into three categories: attributes, consequences, and values.[376] Attributes are directly related to the product, consequences are the outcomes of product use for the consumer, and values are mental representations of important life goals that consumers hope to achieve.[377] Attitudes towards products can be constructed by the consumer, based on descriptive or informational perceptions.[378] For example, marketing chocolate as being from Switzerland or France can lead the consumer to assume that the chocolate will taste good.[379]

The last step of the decision-making process is choice.[380] Theory posits that the product alternative with the most positive attitude will be chosen, but the final decision is much more complex.[381] Choice is influenced by social environment, the consumer's level of behavioral control, product seasonality, habit, and desire for variety, among other elements.[382] In addition to all these factors, emotions are often harnessed by companies in order to motivate customers to make purchases.[383] Consumers may not even be aware of emotional motivators, and are neither uniform nor constant.[384] Research indicates that companies should not focus on customer satisfaction, but rather, customer attachment to a brand.[385] By utilizing common feelings such as freedom, thrill, and belonging, companies prey on vulnerable consumers to push them to purchase products.[386]

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[373] *Id.*
[374] *Id.*
[375] *Id.*
[376] *Id.* at 148-49.
[377] *Id.* at 150.
[378] *Id.*
[379] *Id.*
[380] *Id.* at 144 fig. 1.
[381] *Id.* at 152.
[382] *Id.* at 152-53.
[383] *Id.*
[384] *Id.* at 152-53, 203-04.
[385] *Id.* at 148, 150-51.
[386] *Id.* at 170.

Branding is an essential element of marketing, with companies making decisions between curating a national versus a global brand.[387] The importance of a product's country of origin is also noteworthy, as many companies may use this for emphasis, or even as a substitute for a brand name, if a positive correlation is strong enough.[388] Distribution also plays a key role – increasingly, supermarkets and online stores have replaced mom-and-pop shops.[389] This has had a profound impact on consumer behavior, because research has indicated that supermarkets facilitate impulse buying.[390] Their assortment is much greater than smaller stores, stimulating variety seeking and impulsive behavior.[391] They have floor space for in-store promotions, equipment to store products with unique technical specifications, and faster turnaround time to ensure quality.[392] While consumer behavior is influenced by the retail environment, it is a two-way street. Consumers tend to purchase from stores with attractive branding, while avoiding those that do not.[393] Effort has been devoted to improving consumers' quality perceptions of fresh products offered in store, because if a store lacks quality, its image deteriorates.[394]

Understanding reasonable food consumer behavior requires a probe into all elements affecting food product purchasing decisions, not simply the label or packaging of the product.[395] Manipulation of consumer behavior in the retail grocery environment, especially in the United States, is no modern revelation.[396] However, many are not conscious of the ways their minds are influenced—whether greatly or only marginally—by psychological elements of the food shopping experience.[397] Though theories of psychological utilization in marketing are numerous and question *how* it occurs, the literature agrees that primary in the mind of the consumers purchasing food products are taste, price, and healthfulness.[398] Many food manufacturers focus on product type,

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[387] *Id.* at 152, 170-72.
[388] *Id.* at 172.
[389] *Id.*
[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] *Id.* at 177.
[394] *Id.* at 177-78.
[395] Calvin Brinkworth, *Supermarket Savvy: An Analysis of Psychological Exploitation within Grocery Stores*, SCH. FOR INT'L TRAINING 1, 47-50 (2017).
[396] *Id.* at 22-28.
[397] *Id.*
[398] *Id.* at 24.

price, placement, and promotion to market to these consumer preferences.[399]

For example, "the food industry can appeal to price-conscious consumers by emphasizing the bargain, appeal to health-conscious consumers with smaller packages and food lower in calories, fat, and added sugars, or appeal to taste-based consumer through the use of colorful and descriptive pictures of food."[400] Additionally, food manufacturers pay particular attention to product placement, as store layouts are designed to keep shoppers engaged and inside the store.[401] As one study has identified:

> The store entrance, in particular, is filled with neatly stacked, recently misted, and brightly colored produce . . . In combination with fresh produce, grocers often utilize brightly colored and pleasant-smelling floral arrangements. Placing these products near the front entrance is meant to function as a "slow-down zone" and to set the pace for the rest of the shopping experience . . . Research has demonstrated that utilization of slow, gentle background music can result in shoppers walking 12% slower and spending 38% more money.[402]

"Anchor" products like dairy, meat, product, and frozen foods are placed in the back and sides of stores that are inaccessible unless shoppers pass numerous aisles tempting them along the way.[403] Everything about the shopping experience from promotional caps at the ends of isles to the final moments of the shopping experience with impulse-purchase sections at checkout is saturated by subconscious—but intentional—manipulation. Analyses of how consumers *actually* react to these environments better predicts the behavior of a "reasonable" consumer than the rather fictional erudite and discerning consumer legal minds often conjure.[404]

Finally, if a reasonable food consumer analysis is to be accurately representative of how consumer purchasing behavior operates, it will be critical to emphasize the diversity of consumer backgrounds and education levels. Even some of the most well-educated individuals are deceived by food packaging, including judges. Additionally, not all may speak English or be accustomed to eating the highly processed

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[399] *Id.* at 24-25.
[400] *Id.* at 25.
[401] *Id.*
[402] *Id.* at 30.
[403] *Id.* at 31-32.
[404] *Id.* at 34, 48.

and refined foods that define the Western diet.[405] It cannot be assumed that the "reasonable consumer" will be able to follow "common sense" in food purchasing decisions—especially not when deliberate and intentional efforts are made by food manufacturers to circumvent consumer inclinations. While it may be appropriate to narrow a reasonable consumer analysis to target market groups where that evidence is available, all consumers must be otherwise accounted for when determining what decisions are and are not "reasonable" according to a significant portion of the general consuming public.

Thus, for court's to accurately ascertain what may be "reasonable" food consumer behavior, in addition to the label and packaging, courts should consider implementing the following factors to the reasonable consumer analysis:

- Address cognitive constrains and limitations of consumers, both internal to the individual and external as to shopping environment;
- Consider financial and food literacy;
- Note the sophistication gap that exists between food manufacturers with unlimited research resources as compared to rushed consumer partaking in real-time shopping decisions;
- Assume compromised attentiveness, forbearance, and critical thinking for consumers during the shopping experience;
- Contemplate personally held beliefs and practices of targeted food consumers;
- Require consumer surveys at the beginning of the litigation; and
- Explicitly describe efforts by food manufacturers to research and market to consumer psyches.

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[405] Varundeep Rakhra et al., *Obesity and the Western Diet: How We Got Here*, 117(6) THE J. OF MO. STATE MED. ASS'N 536, 536-538 (2020) ("The typical Western (American) diet is low in fruits and vegetables, and high in fat and sodium. Moreover, this diet consists of large portions, high calories, and excesses sugar.").

Absent these central elements driving consumer behavior and food purchases, reasonable consumer analyses are nothing more than a culmination of guessing.

VII. CONCLUSIONS AND FURTHER RESEARCH

The reasonable consumer analysis, in the context of food purchases and as it is presently applied, neither achieves adequate consumer protection nor offers industry guidance. Judicial decisions regularly prevent a meaningful analysis of reasonable food consumer behavior when dismissing cases early in the litigation process. When judges do engage in discussion of how consumers interpret food product labeling and packaging, much is left to be desired when seeking a more robust analysis that goes beyond that presiding judges' individual experiences with and perceptions of food, and what constitutes "common sense."

Though many forms of evidence may constitute reliable and relevant representations of targeted consumer behavior in particular cases, what is certain is that courts must engage with a broader understanding of food, as well as the critical and unique role it plays in consumers' lives, most critically in the realm of food law. Beyond this, courts should specifically consider the ways in which food marketing efforts influence consumer behavior away from what may be consider the "reasonable" food purchasing decision under those circumstances. Creating a reasonable consumer analysis that accurately considers the primary elements driving consumer behavior will require further research and cross-discipline cooperation to help develop consumer surveys and inquiries of food manufacturers that reveal true motives for both. Doing so will help align food law with the consumer protection goals the regulatory structure boasts and clarify the applicable legal standards for consumer knowledge levels and behaviors across all products, not just food.[406]

How consumers interpret labels depends on far more than the label and packaging of the food product. If courts are to declare reasonableness of shopping behavior, particularly when it comes to purchasing food, they therefore must consider the broader context and view consumer claims of deception with greater favorability than they currently grant plaintiff consumers. Equity and greater understanding require legal minds to look beyond language and see through the eyes of the consumer reading the label.

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[406] Some products may require differing assumptions about consumer knowledge levels to accurately reflect consumer behavior in practice.

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