Lost in the Supermarket: Consumer Confusion and Marketing Mania

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I. Introduction

Those of us who do the family shopping know from painful experience that the Saturday morning rush through the supermarket aisles is not the ruminative experience we might wish it were. Our goal cannot be a studied contemplation of the contents and import of food labels. Instead, we are reduced to the more-restricted goal of getting out of the store with most of what we came there to get and little of the things the three-year-old grabs and throws into the cart.

American consumers have so little by way of leisure time that they welcome any way to improve their use of that time. This likely accounts for the fact that so many working parents opt for fast food instead of a home-cooked meal for dinner. On the other hand, they also express a desire to learn about and purchase healthy foods.

Where does this leave us? At a point where we have decided as a society to mandate improved food labels and to restrict some of the claims that can be made with respect to the benefits of the foods within those labels. The Nutrition Labeling and Education Act of 1990 (NLEA) is the manifestation of that societal decision as to the direction we want to go.[1]

This chapter will trace the genesis of NLEA from the unrestrained—and insupportable—claims made by some marketers in the 1980's, through both the predictable and the unanticipated regulatory responses, and ending with the adoption of the NLEA.[2]

The purpose of this chapter is to discuss food labeling issues from an unabashed, though not uncontrolled, consumer perspective. This article therefore relies to a great extent on—and is shaped to a significant degree by—the author's experiences as an assistant attorney general for the States of New York and Texas, two of the states that were at the forefront of state law enforcement initiatives in the Eighties. This, then, is a view from the Front of food labeling reform.

II.
How many grams in an inch?
Consumer needs and desires for food labels.

Before embarking on the somewhat disheartening journey through the depths to which food marketing sank in the Eighties, it is first appropriate to start with the person who is the target of concern of consumer advocates and consumer products companies alike—the consumer herself.[3]

After all, it is the consumer that all the labeling hullabaloo is about. It is for the consumer that we consumer advocates advocate. It is for the consumer that consumer products companies produce. It is for the consumer that Congress congregates. And so on, through the whole feeding chain of interests that have been involved in these issues over the past ten years.

Repeatedly, consumers express preferences for healthier foods. Consumer concerns with nutrition remain high, although demands for greater amounts of information have apparently peaked.[4] This peaking of the demand for more information could presage a peaking in consumer interest in all nutritional information.[5] It could also portend simply that consumers have received the maximum level of information they find useful.

One problem with predicting actual consumer behavior based on polls of their expressed needs and desires is that sometimes consumers give in to the natural tendency (familiar to priests, psychiatrists, and police) to admit to somewhat higher aspirations than they in fact have.[6] That is, consumers may indicate a preference for a low-sodium, non-fat hamburger in response to a mall-intercept

pollster with a clipboard. When faced with an actual choice, however, they opt instead for two all-beef patties, special sauce, lettuce, cheese, pickles, onions, on a sesame-seed bun—in all its salt-soaked, fat-dripping tasty glory.

A second problem with predicting consumer behavior with respect to diet and health is that there is a considerable gap between expressed consumer desires and actual consumer knowledge of the relative minutiae of nutrition. Thus, though most consumers report that health concerns have caused a major change in their diets[7] and that they use food labels in their search for healthier foods,[8] they are also lacking in some of the most basic information necessary to make any significant change in their diet—such as the relationship between HDL and LDL cholesterol,[9] the saturated-fat level of coconut oil,[10] and what a complex carbohydrate is.[11] (One suspects that many of the readers of this book—certainly themselves far above the curve on nutritional issues—would hesitate to volunteer certain knowledge of these same bits of information if any sizable amount of money rested on it.)

Perhaps this is the reason that consumers tend to express what would at first glance appear to be mutually-exclusive desires. First, they want simple means of conveying information. Second, they want enough information to make an informed decision.[12]

The challenge to marketers, regulators, and consumers alike as we move forward in these post-NLEA days is how to walk the tightrope between sufficient information presented in an understandable manner, and too much information, which will lead to information overload and a shutdown of consumer interest. For example, the oat bran bubble was beginning to deflate of its own accord when it was fully burst by one study that said that oat bran was not proven to work in reducing cholesterol.[13] This shows that consumers are willing to listen to only so much when it comes to claims for the beneficial effects of foods. Once their credibility is strained past the breaking point, they give up pretty quickly. It also would seem to indicate that consumers were only grudgingly eating foods containing oat bran and were all too happy to abandon the stuff without a backward glance as soon as just one study debunked the benefits of oat

bran.[14] Yet they remain willing at the present to attempt to make the journey to more healthful eating.

To start down that road, consumers indicate that their four primary sources of information regarding diet and health are (1) news stories, (2) health organizations, (3) physicians and other health professionals, and (4) food labels.[15] But for the fourth, these various sources have never been seriously challenged as viable and trustworthy sources of such information. And whatever doubts we may have had about labels should have been effectively laid to rest by NLEA and the subsequent Food and Drug Administration (FDA) and Agriculture Department regulatory response. So far, so good.

However, to the intense regret of all of us on the consumer side of the fence and to great joy of marketers and advertisers, consumers also report that they find informational statements by food companies—*advertising*—to be believable.[16] Presumably, if consumers believe a statement in an ad, they'll use it in their search for the truth.

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

Marketers are not out to inform the public. Instead, they are out to sell a product. One primary way they sell their product over all others is positioning their product by creating a point of difference.[17] This point of difference may well be created out of the whole cloth where no perceived difference had existed and where no meaningful difference does exist.[18] Perhaps the best expression of the ethics of advertisers in this regard is by that grand old man of advertising, David Ogilvy, who bragged that:

> I could have positioned Dove as a detergent bar for men with dirty hands, but chose instead to position it as a toilet bar for women with dry skin. *This is still working* 25 years later.[19]

Jockeying for positioning by food companies has been the prime cause of the excesses of health-related advertising in the past decade. What was once just oatmeal, or margarine, or soup became the number one ingredient in the battles against heart disease and cancer. Or so some companies wanted consumers to believe, when they positioned their products as just that.

It is in fact advertising, far more than labeling, that was the bone of contention in all of the food fights between the state attorneys general and the food manufacturers discussed in Section IV, below. And it is likely to be in the area of advertising that we will see the future issues affecting health-related claims in the future, as discussed in Section VI, below.

III.
Regulatory gridlock and dead-end streets.

The cause and effect of federal non-response to burgeoning deceptive health claims.

"Deregulation" was a byword of the Reagan Administration.[20] Conservative ideologues within the government firmly believed in the principles of new federalism—getting the federal government out of the business of regulating the lives of Americans, and American business in particular, and leaving the business of regulation up to the individual states, to act, as described by United States Supreme Court Justice Brandeis, as laboratories of democracy.[21] Each state was free to experiment with differing manners and methods of governing, without interference from the federal bureaucracy.[22]

So it went. The architect of President Reagan's transition team at the Office of Management and Budget, dedicated to dismantling the federal system as rapidly as possible, was James Miller, who was subsequently appointed chairman of the Federal Trade Commission (FTC) in 1981. The FTC under Chairman Miller was the antithesis of activist, fulfilling the role of deregulation by enforcement marked more by avoidance than by observance.[23]

Cynics, unhappy with the prevailing winds at the White House during the Eighties, saw this shift from enforcement less as a true ideological shift than

as an intellectually-supportable denial of protection to the average consumer in favor of corporate America.[24] The deflated FTC took its place alongside other agencies, such as the Environmental Protection Agency and the Equal Employment Opportunity Commission, all of whose enforcement activities slowed to a standstill or went careering into reverse.

Whatever the true motivation of the Administration, the reaction of much of the marketing community was unhesitating and unequivocal. They took federal deregulation as a "Get Out of Jail Free" card and as an uncategorical imperative to go forth and profit by deception at the expense of consumers, who were left unprotected.

The prime example of the results of deregulation fever was the burgeoning growth of unfounded and illegal claims for the health and nutritional benefits of foods. As with many floods, this began with a chink in the dam. The Kellogg Company developed an understated and mild campaign that promoted one of its cereals for use as part of a diet that could be used to help prevent some forms of colon cancer.[25] Kellogg's campaign was carefully-developed and had the collaboration and endorsement of the National Cancer Institute.[26] It was also thoroughly illegal.[27] The Food, Drug, and Cosmetic Act as it existed at the time strictly prohibited promotion of a food for prevention of disease without approval by the Secretary of Health and Human Services.[28] This is precisely what Kellogg did, with the National Cancer Institute as its perhaps-unwitting accomplice. The FDA, which enforces federal food and drug laws, took exception and began enforcement steps that would have stopped the claims made by Kellogg.[29]

It would have done so, that is, had FDA had the chance to do its job. Instead, the deregulation mavens stepped in. Officials at the Office of Management and Budget effectively muzzled the FDA and prevented it from enforcing the law.[30]

Once Pandora's cereal box had thus been opened a crack, all pandemonium then ensued. Companies of every ilk and repute began making a variety of

disease-based claims, all without the scientific support Kellogg had amassed and without the cooperation and oversight of the National Cancer Institute or any other regulatory or non-profit body that did not have a financial stake in the truthfulness and legality of the claims.

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

IV.
The chow hounds.

The inception and activities of
state attorneys general in the health claims area.

The result of this free-for-all market was a call by consumer advocates and marketers alike for renewed federal activity. Unfortunately, this call fell on plugged ears—there continued to be an enforcement vacuum at the federal level.[31]

Among the other forces of nature that abhor a vacuum are the state attorneys general. Before the Eighties, the attorneys general had focused their consumer protection efforts on problems in their own states, leaving most national consumer protection enforcement to their federal counterparts at the FDA and FTC. But with the advent of deregulation at the federal level came a rise in activity at the state level. The attorneys general had already come together to deal with deception in automotive repair,[32] in discount airline advertising,[33] and in rental car practices,[34] among other things. As they worked together, they learned that they could have a significant impact on the practices of major national companies that deceived the citizens of their states. Even if the federal agencies charged with consumer protection were out of commission, the state attorneys general were willing to pool their resources to protect their own citizens.[35]

Well before the adoption of NLEA, several state attorneys general banded together to bring enforcement actions against a number of companies, including the makers of Campbell's soups, Sara Lee pastries, and Nabisco's

Fleischmann's margarine, for a variety of health-related but deceptive claims for foods.[36]

Industry, which had reacted so positively to the new federalism when it meant no law enforcement at the federal level, began to raise all manner of objections to the several states that fulfilled the promise of the new federalism by enforcing their own consumer protection laws when necessary.[37] Charges of preemption, commerce clause problems, and First Amendment infringement began to be leveled against the states that chose to act against deceptive claims for foods.[38] They all proved fruitless.[39] The state attorneys general didn't go away. The cumulative effect of the rise in state activities was a renewed cry by marketers for the renascence of the FDA, the FTC and other federal agencies.[40]

The Chicago-school economic theories that had fueled the deregulation fever on the Potomac in the Eighties had been running on empty for some time. In its simplest form, the Chicago-school hypothesis applied to marketing practices was that information is good, the more the better. If the information contains falsehoods, that is bearable, because the marketplace will step in to correct the falsehoods. This hypothesis was rejected. In fact, the marketplace did adjust to deceptive claims. But it adjusted down—honest marketers sank to the level of their dishonest competitors just to be able to compete.

V.
They fought the law and the law won.

Free speech and costly lies.

In the heat of the battle over deceptive and illegal health and nutrition claims for foods, many in the food industry decided that the First Amendment was a handy sword and shield with which to fight to protect their right to deceive with half-truths. However, First Amendment law does not avail these arguments, as can be seen from a brief overview of the relevant cases.[41]

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.[42]

NLEA only regulates speech relating to marketing specific products.[43] The fact that these claims address health and nutrition concerns that are the subject of public debate does not take them out of the definition of commercial speech. As one federal court succinctly put it: "Kellogg's invocation of the protections of the First Amendment is misplaced."[44]

NLEA does not make it impossible to sell a product without making a health or nutrition claim. Nor does it make it impossible to inform consumers about health and nutritional issues without endorsing a particular product. NLEA thus does not inextricably intertwine commercial speech, which may be regulated, with non-commercial speech deserving of full First Amendment protection.[45]

Therefore, the claims regulated by NLEA are solely commercial speech. As commercial speech, these claims are entitled to lesser protection than other constitutionally-guaranteed expression.[46] Most importantly, the Constitution does not protect false, misleading or deceptive commercial speech.[47] Thus, the government may prohibit or restrict it, as Congress has done in this instance.

From a consumer standpoint, the excesses of the Eighties prove that a reasonable amount of government regulation is essential to protect consumers from questionable or groundless claims made by food marketers. Health, nutrition, and disease-prevention claims for foods are not such as can be tested by average consumers to determine their accuracy.[48] Therefore, the role of regulating these claims for truth and accuracy must fall to government.

The courts have repeatedly upheld government prohibitions on deceptive advertising and labeling of foods and drugs.[49] More significantly, courts have

also upheld prohibitions against the use of specific terms in commercial speech unless required governmental standards are met.

In what is perhaps the most on-point decision relating to the right of government to control the content of a food label without running afoul of the First Amendment, a federal district court held that the State of Texas could prohibit labeling claims made by Kellogg Company for a new cereal. Kellogg had introduced a cereal that it chose to call Heartwise, which contained a significant level of psyllium, a high-fiber grain that is the active ingredient in laxatives such as Metamucil.[50] Texas health officials detained shipments of Heartwise because of labeling statements linking consumption of Heartwise and prevention of heart disease.[51] Recognizing that the State could impose an outright ban on the sale of food products containing psyllium, the court held that it was a less restrictive alternative for the State instead to insist that its labeling laws be met when a company chose to lace its cereal with laxative, without imposing on Kellogg's First Amendment rights.[52] Drawing an important distinction between speech and marketing, the Court noted that "[t]here is nothing about the detentions that restrains Kellogg's right to *say whatever it wants about the health benefits of a high-fiber diet in general or psyllium in particular*."[53]

In another case, a different federal district court rejected a First Amendment challenge to labeling regulations. As with the NLEA, those FDA regulations required foods to meet a specific standard before using a defined term on the label.[54] The trade group that brought that case specifically complained of FDA's regulation of "frozen heat and serve dinners" because the permitted use of that term required a listing of components that had to be in the product in order for that term to be used. The court noted:

> The obvious objective was to provide to consumers sufficient information on the labels of food products so that reasoned and informed shopping decisions could be made.[55]

Rejecting a First Amendment challenge, the court concluded:

> These regulations constitute the conclusion by the Commissioner that *labeling which fails to meet the requirements of the regulations is misleading* or otherwise not in compliance with the Act.[56]

The potential to mislead consumers is even greater when consumers have difficulty in evaluating the claims independently. One federal court of appeals considered "the difficulty for the average consumer to evaluate such claims through personal experience, and the consequent tenacity of advertising-induced beliefs about superiority" in deciding to hold claims to a high level of substantiation. The court stated:

> Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise be.[57]

The Grocery Manufacturers of America (GMA) has recognized the value of NLEA. Regarding FDA's regulations issued pursuant to the NLEA regarding nutrient descriptors (*e.g.*, "low fat," "light," and "high fiber"), GMA explained:

> Prior to the NLEA, analysis of the meaning of these terms depended on the meaning that consumers would attach to them, but because different consumers could interpret the claims differently, there was no universal standard. The purpose of FDA's rulemaking was to arrive at consistent, objective measures to describe the nutrient characteristics of the labeled foods. This the rulemaking accomplished.[58]

Thus, even GMA conceded the value of regulating claims that consumers do not have the scientific expertise to evaluate independently.[59]

The question now remains as to what form that regulation will take in the future.

VI.

Tanned, rested, and ready.

The return of the FDA and the FTC to enforcement activity.

It is incontrovertible that both FDA and FTC activity has increased over the past few years. FDA's activity in the enforcement area has been largely put on hold in favor of the mammoth task—now concluded—of coming up with the implementing regulations necessary to make NLEA work. FTC on the other hand has certainly increased its individual case activity, as witness recent investigations of health-related claims by various liquid diets, Nestle for Coffee-Mate non-dairy creamer, Bertolli for claims about olive oil, and Kraft for claims for the milk content of its Singles slices.

However, there is some reason to doubt the depth of FTC activity, despite its seeming breadth. Although the FTC's enforcement numbers are indeed up, most of the cases are brought against small companies that operate on the fringe of health claims—bee pollen, baldness cures, diet patches, weight loss creams, and the like. Few of the companies that become the subject of investigations are exactly household names, nor do their activities seem likely to influence the purchasing decisions of any but the ignorant, the unthinking, and the credulous. Granted, even those unfortunates deserve help from the Government, but it appears that FTC efforts have been and will continue to be focused on the fringe and not on those who set the standards.

The state attorneys general learned in the Eighties that the quickest and most effective way to have an effect on deceptive advertising was not to scratch away at the fringe but instead to go to the root of the problem—the prominent, well-heeled national companies that had chosen to engage in deceptive and illegal behavior in order to position their products as the best thing since sliced, high-soluble-fiber, low-fat, no-cholesterol bread. Whatever those in the industry who were engaged in these activities might have thought about the propriety of these actions, there was no doubting the effectiveness of them.

Unfortunately, the FTC either willingly or ignorantly has refused to profit by this experience and continues to focus its efforts on those companies operating on the edge. Nonetheless, it appears that its efforts will continue along this road, with a significant level of activity and an occasional strong action against a company that matters.

Even more unfortunately, it appears that the opposite effect has happened—the FTC's regulatory approach has been largely adopted by the state attorneys general. Increasingly in the past few years, the attorneys general have become a force to be ignored, just as they had been before the heady days of the Eighties. Whether this is due to a desire to shift national labeling and advertising regulation to the FDA and the FTC, to the loss of several leading attorneys general,[60] to a simple change in philosophy, or to more base political reasons, the end result is the same.

VII.

Conclusion

Many of the battles of consumer advocates for better regulation of health-related claims for foods were won with the passage of NLEA, which contained most of the specifics and all of the precepts that lay behind the complaints of advocates about marketing activities in the Eighties.

The past is always prologue. The industry practices, regulatory policies, and law enforcement prosecutions discussed above will serve as a basis for what we see going forward. But the most important part of this puzzle is yet to be found—how consumers react when they find that they have to a large degree gotten their wishes.

Footnotes

[1] The author asks the reader's willing suspension of disbelief to the point that Congress is deemed to have some degree of credibility as the expression of our goals as a society. Otherwise, put down this book and go watch TV.

[2] Although this chapter purports to be a consumer perspective on these issues, it is not a summary of NLEA's specific responses to the issues. For details on the specific requirements of NLEA and the regulations adopted pursuant thereto, look to Chapter ___, "_____," by _____.

[3] The use of the feminine pronoun herein is intended to indicate no more than would the use of the masculine.

For another viewpoint on consumer perceptions and desires, see Chapter ___, "_____," by Brenda Derby, Ph.D., and Sarah Fein, Ph.D. Drs. Derby and Fein are with FDA and bring a federal regulatory approach to bear on this issue.

[4] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 7 (1992). This study, written by the same Brenda M. Derby, Ph.D. to whose chapter the reader was cited in the preceding footnote, is an excellent summary of research on consumer preferences, knowledge, and behavior.

[5] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 8 (1992).

[6] Robert B. Settle and Pamela L. Alreck, WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 34-35 (1989).

[7] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 22 (1992).

[8] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 8 (1992).

[9] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 21 (1992).

[10] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 20-21 (1992).

[11] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 21 (1992).

[12] Levy, Alan S. and others, *More Effective Nutrition Label Formats Are Not Necessarily Preferred,* 92 J. AMER. DIETETIC ASSN. 1230, 1234 (1992).

[13] Swain, *Comparison of the Effects of Oat Bran and Low-Fiber Wheat on Serum Lipoprotein Levels and Blood Pressure*, 322 NEW ENG. J. MED. 147 (1990); Liesse, *America's Oat Bran Craze on the Wane*, Advertising Age, Jan. 22, 1990, at 1, col. 2.

[14] It is also worthy of mention that the study that caused the bubble to burst—while an adequate and well-controlled study—was probably no better as studies go than the many tests funded by industry grants that tended to show the opposite. One conclusion to be drawn from this clear consumer reaction is that people will only go so far to keep healthy and will abandon all efforts in that direction at the least pretext. On the other hand, one could equally conjecture that this wholesale rejection of oat bran precipitated by the one study instead demonstrates that consumers had reached their limit of credibility and simply didn't know whom to trust. Faced with informational overload (at least some of it of questionable scientific validity), they just threw up their hands. And very likely their oat bran, as well.

[15] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 7 (1992).

[16] Center for Food Safety and Applied Nutrition, Food and Drug Administration, *Summary of Consumer Research on Health and Diet Attitudes and Knowledge and Use of Food Labels* 19 (1992).

[17] Theodore Levitt, THE MARKETING IMAGINATION 85 *et seq.* (Expanded Ed. 1986).

[18] *See, e.g.*, Theodore Levitt, THE MARKETING IMAGINATION 86 (Expanded Ed. 1986).

[19] David Ogilvy, OGILVY ON ADVERTISING 12 (1983) [emphasis added].

[20] *See* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987).

This section is derived in large part from a law review article written by the author. Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, UNIVERSITY OF TOLEDO LAW REVIEW, Volume 23, No. I (1991), to which the author wisely retained copyright. There is indeed nothing new under the sun.

[21] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[22] Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987).

[23] *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission,* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1410, at S-11 to S-12 (Apr. 6, 1989).

[24] Burros, *Eating Well,* N.Y. Times, Feb. 27, 1991, at C3, col. 1.

[25] U.S. HOUSE COMM. ON GOVERNMENTAL RELATIONS, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA, H.R. REP. NO. 561, 100th Cong., 2d Sess. 2-3 (1988). This report, issued under the chairmanship of the late Congressman Ted Weiss of New York, provides an excellent summary of the activities and inactivities of the various federal players during this period.

[26] At least one person in the consumer-activist fold has posited that it was indeed Kellogg's careful adherence to many criteria advanced by health professionals, consumer advocates, and regulatory officials that made its advertising campaign both informative and effective, although unfortunately unique in this regard. Bruce Silverglade, *A Comment on Public Policy Issues in Health Claims for Foods,* 10 J. PUBLIC POLICY & MARKETING 54, 55 (1991).

[27] U.S. HOUSE COMM. ON GOVERNMENTAL RELATIONS, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA, H.R. REP. NO. 561, 100th Cong., 2d Sess. 2-3 (1988). *See also* Bruce Silverglade, *Preemption—The Consumer Viewpoint,* 45 FOOD DRUG COSM. L.J. 143, 146 (1990). This article

contains an excellent overview of the causes and effects of the mania for health claims, written from the perspective of the legal director of the Center for Science in the Public Interest, the consumer-interest group that played perhaps the most significant role in getting NLEA through Congress relatively undiluted.

[28] Under then-existing 21 U.S.C. § 321(g)(B) any "article[] intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man" is a "new drug." 21 U.S.C. § 355 prohibited the introduction of "new drugs" into commerce without prior approval. 21 U.S.C. §§ 321(f, p), 343 and 355. *See also* U.S. HOUSE COMM. ON GOVERNMENTAL RELATIONS, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA, H.R. REP. NO. 561, 100th Cong., 2d Sess. at 6-11.

[29] U.S. HOUSE COMM. ON GOVERNMENTAL RELATIONS, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA, H.R. REP. NO. 561, 100th Cong., 2d Sess. 2-3 (1988).

[30] U.S. HOUSE COMM. ON GOVERNMENTAL RELATIONS, DISEASE-SPECIFIC HEALTH CLAIMS ON FOOD LABELS: AN UNHEALTHY IDEA, H.R. REP. NO. 561, 100th Cong., 2d Sess. at 22-26.

[31] One consumer advocate commented that the problem was that the FDA and FTC were "understaffed, underfunded, and under Reagan."

[32] *Big Suits. Texas v. AAMCO*, TEXAS LAWYER, Mar. 2, 1987, at 12, col. 1.

[33] National Association of Attorneys General, *Report and Recommendations of NAAG Task Force on Air Travel Industry: Guidelines for Air Travel Advertising, 53* Antitrust & Trade Reg. Rep. (BNA) No. 1345 (special supp.) (Dec. 17, 1987). This particular state enforcement effort came for naught when the United States Supreme Court held that states were preempted from enforcing state laws against deceptive airline advertising. *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992).

[34] National Association of Attorneys General, *Final Report and Recommendations of the Task Force on Car Rental Advertising and Practices,* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1407 (special supp.) (Mar. 16, 1989).

[35] *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade*

Commission, 56 Antitrust & Trade Reg. Rep. (BNA) No. 1410, at S-12 (Apr. 6, 1989).

[36] Sugarman, *The New Chow Hounds. States Join Forces to Monitor Product Claims,* Wash. Post, Sept. 21, 1988, at El, col. 3; Burros, *Eating Well,* N.Y. Times, Feb. 27, 1991, at C3, col. 1.

[37] Probably the finest example of these arguments can be found in an instance of the FTC carrying the industry's water. John E. Calfee and Janis K. Pappalardo, HOW SHOULD HEALTH CLAIMS FOR FOODS BE REGULATED? AN ECONOMIC PERSPECTIVE, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION (1989). As an artifact of a failed regulatory approach, this piece is must reading. One way for those opposed to consumer protection efforts in the Eighties to advance an intellectual justification for their inactivity was to use a cost-benefit analysis. Because they found any inconvenience to industry a major cost and found no benefit to a deception-free marketplace, the cost-benefit battles were over before they began, as far as this breed of economists was concerned. Calfee and Pappalardo's attempt to quantify that which is essentially metaphysical reached its charmingly nutty peak when they put forth the proposition that the best justification for FDA failing to act on illegal health claims was derived from the formula: $EV = P_tB_t - (1-P_t)C_f$, where EV is the expected value of allowing a health claim, P_t is the probability that the claim will turn out to be true, B_t is the estimated net benefit of allowing the claim if it turns out to be true, and C_f is the estimated net cost of allowing the claim if it turns out to be false. *Id.*, at 39-44. Got it?

[38] For good discussions of the evils of preemption, and the lack of legal underpinnings for it, *see* Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L. J. 123 (1990); and Richard L. Cleland, *The Regulation of Food Labeling: An Effective, Uniform National Standard Without More Preemption*, in James E. Tillotson (Ed.), AMERICA'S FOODS: HEALTH MESSAGES AND CLAIMS: SCIENTIFIC, REGULATORY, AND LEGAL ISSUES (1993).

[39] *See, e.g., Kellogg Co. v. Mattox*, 763 F. Supp. 1369 (N.D. Tex. 1991), *aff'd* 5th Cir. 1991. Kellogg sued Texas Attorney General Jim Mattox claiming several constitutional grounds—including the Commerce Clause and the First Amendment—for its right to violate state food labeling laws. The court

denied Kellogg's motion for preliminary injunction, in a strongly-worded opinion.

[40] *FTC's Welcome Return*, Advertising Age, Feb. 6, 1989, at 16, col. 1; Saddler, *FTC, Under Industry Pressure, Shows New Life in Backing Deceptive Ad-Laws*, Wall St. J., Apr. 17. 1989. at B4. col. 3.

[41] This section is based in large part on a legal brief written by the author and Sharon Linden, an attorney with the Center for Science in the Public Interest. The nice thing about being a lawyer is that this sort of thing is called "precedent" rather than "plagiarism." Those readers fortunate *not* to be lawyers are granted permission to skip this section.

[42] *Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979) (citations omitted).

[43] *Board of Trustees v. Fox*, 109 S.Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 69 (1983); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[44] *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1381 (N.D. Tex. 1991). *Accord Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 n.5 (1980) (emphasis added); *Fox*, 109 S.Ct. at 3032; *Bolger*, 463 U.S. at 67-68.

[45] *Board of Trustees v. Fox*, 109 S.Ct. at 3031; *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796 (1988).

[46] *United States v. Edge Broadcasting Co.*, 125 L.Ed. 345 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993); *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989); *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. at 563; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

[47] *Central Hudson*, 447 U.S. at 566; *Friedman v. Rogers*, 440 U.S. at 9-10.

[48] Indeed, one basis for opposition to improved nutrition labeling by food marketers was that the testing was too difficult and expensive even for them to perform.

[49] *See*, *e.g.*, *Kraft, Inc. v. F.T.C.*, 970 F.2d 311 (7th Cir. 1992) (upholding FTC ban on deceptive calcium claims for processed cheese products); *Bristol-Myers Company v. F.T.C.*, 738 F.2d 554, 762 (2d Cir. 1984) (upholding FTC prohibition against certain

advertising claims for analgesics); *United States v. General Nutrition, Inc*., 638 F. Supp. 556, 562 (W.D.N.Y. 1986) (upholding Food and Drug Administration [FDA] prohibition of certain nutritional claims on the product label); *F.T.C. v. Pharmtech Research*, 576 F. Supp. 294, 303 (granting preliminary injunction against deceptive advertisements for dietary supplements); *United States v. Articles of Food, Etc*., 67 F.R.D. 419, 424 (D. Idaho 1975) (rejecting First Amendment defense to forfeiture action because "freedom of speech does not include the freedom to violate the labeling provisions of the Federal Food, Drug, and Cosmetic Act"); *United States v. Articles of Drug*, 32 F.R.D. 32 (S.D. Ill. 1963) (upholding FDA ban on false and misleading medical guidance in pamphlets and other literature sold with supplements); *United States v. 8 Cartons, Etc*., 103 F. Supp 626 (W.D.N.Y. 1951) (upholding FDA ban on unapproved health claims in literature distributed with product).

[50] *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1372 (N.D. Tex. 1991), *aff'd* 5th Cir. 1991.

[51] *Kellogg Co. v. Mattox*, 763 F. Supp. at 1376-1377.

[52] *Kellogg Co. v. Mattox*, 763 F. Supp. at 1381.

[53] *Kellogg Co. v. Mattox*, 763 F. Supp. at 1381.

[54] *American Frozen Food Institute v. Mathews*, 418 F. Supp. 548 (D.D.C. 1976) *aff'd* 555 F.2d 1059 (D.C. Cir. 1977).

[55] *American Frozen Food Institute v. Mathews*, 418 F. Supp. at 551.

[56] *American Frozen Food Institute v. Mathews*, 418 F. Supp. at 555 [emphasis added]. *See also National Nutritional Foods Association and Solgar Company, Inc*., 504 F.2d 761, 808 n. 11 (2d Cir. 1974) (dismissing First Amendment challenge to FDA regulations defining standards of identity and prescribing label statements for foods); *62 Cases, Etc. v. United States*, 340 U.S. 593 (1951) (upholding FDA's authority to require foods bearing a particular name on the label to meet certain standards); and *U.S. v. Dakota Cheese*, 906 F.2d 335 (8th Cir. 1990) (upholding food standard for "mozzarella cheese").

[57] *American Home Products Corp. v. Federal Trade Commission*, 695 F.2d 681, 698 (3rd Cir. 1982),

[58] May 25, 1993 letter from C. Manly Molpus, President and Chief Executive Officer of GMA to Janet D. Steiger, Chairman of the Federal Trade Commission, p. 19.

[59] Despite its recognition of the value of NLEA's restrictions on deceptive labeling, GMA curiously continues to oppose similar regulations for food advertising, which is not covered by the NLEA.

[60] For example, the attorneys general of California, Iowa, New York, and Texas—all of whom were leaders in the fights against deceptive food labeling in the Eighties—have all left office, mostly due to unsuccessful bids for the governorships of their respective states.