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THE FIRST AMENDMENT AND FOOD-MARKETING LITIGATION: RESTORING THE LEGAL BALANCE

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THE FIRST AMENDMENT AND FOOD-MARKETING LITIGATION: RESTORING THE LEGAL BALANCE

INTRODUCTION

The last decade has brought a flood of consumer-deception claims against food manufacturers, with most focusing on the product labels. In many such cases raising these claims, courts have asked whether a reasonable jury could find that the label could deceive a reasonable consumer. If the answer is yes, the claim proceeds. This analytical approach is so common that it goes largely unquestioned. But when it allows claims to proceed against label statements that enjoy legitimate scientific support, it is profoundly contrary to First Amendment free-speech protections.

The First Amendment, to put it simply, makes it easy to speak and hard for the government to punish or suppress speech. When the government attempts to regulate core political or expressive speech based on the position the speaker takes, the law considers that viewpoint discrimination and applies the very highest constitutional scrutiny. Even when commercial speech is at issue, government regulators may ban a viewpoint (or claim) only if no legitimate science supports it. This is a high standard that allows commercial speakers to convey all messages that enjoy legitimate scientific support. Another standard—also high but not quite *as* high—allows the government to require messages to be qualified when they cannot be banned outright.

Current deceptive-practices law, in contrast, often makes it hard to speak and easy for speech to be punished. Some courts have held that a deceptive-practices claim may proceed to trial even if legitimate science supports the view the food company expressed. Indeed, some courts have said the claim may proceed even if the company expressed the *majority* scientific position. If a jury could be convinced of the plaintiff's view of the science, those courts hold, the company's view may be punished with damages. As construed, the law thus allows the government to suppress speech on topics that are the subject of legitimate scientific debate.

This is a *profound* disconnect. Why should the government be allowed to suppress speech through broad laws enforced by plaintiffs' lawyers and juries, when it could not suppress the same speech through specific restrictions applied by government regulators? Ordinarily, broad laws are of greater concern than narrow ones. Likewise, inconsistent application of a law (like juries may produce) is of greater concern than regulatory consistency. The balance of the law requires a reset so that deceptive-practices claims are held to the same First Amendment scrutiny as other government action addressing the same subjects.

I. BASIC FIRST AMENDMENT PRINCIPLES

The First Amendment to the U.S. Constitution provides that "Congress shall make no law … abridging the freedom of speech, or of the press." Although "the First Amendment is phrased as a restriction on Congress' legislative authority," it "binds the government as a whole" and "applies to the States." *Valley Forge Christian Coll.*

v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 511 (1982); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996). Thus, the First Amendment constrains federal and state courts applying state law in civil suits.

A. Expressive Speech Enjoys the Highest Protection

For **expressive speech**, government regulation is typically limited to content-neutral regulations regarding the time, place, and manner of the speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). If the government attempts to regulate based on the *content* of the speech, strict scrutiny applies, and the restriction is "presumptively unconstitutional" unless the government can prove it is "narrowly tailored to serve compelling state interests." *Na'tl Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). And if a regulation engages in *viewpoint* discrimination—banning speech based not just on the content it addresses but also "on the specific … opinion or perspective of the speaker"—the courts will almost always invalidate it as "a more blatant and egregious form of content discrimination." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015).

B. Commercial Speech Is Also Protected, but Currently at a Lower Level

For speech addressing the sale of goods or services—so-called **commercial speech**—the First Amendment standards have evolved and continue to evolve. Early on, the Supreme Court warned that "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942). But in 1976, the Supreme Court changed its view and held

that the First Amendment does indeed constrain government regulation of commercial speech:

> Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas, and from truth, science, morality, and arts in general … that it lacks all protection. Our answer is that it is not.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, (1976).

Under current law, it is easier for the government to regulate commercial speech than expressive speech, though still difficult. The logic is that "commercial speech" receives only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). According to the Supreme Court, "[t]wo features of commercial speech" justify giving it less protection: (1) "commercial speakers have extensive knowledge of both the market and their products" and so can be required to speak accurately; and (2) "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed.'" *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 n.6 (1980).

The applicable constitutional standard for government regulation of commercial speech depends on what the government is trying to do.

1. *Regulations banning commercial speech are subject to intermediate scrutiny under* Central Hudson

If the government is trying to ***ban*** **commercial speech,** the governing precedent is *Central Hudson*, which states:

- "The government may ban forms of [commercial] communication more likely to deceive the public than to inform" (at 563).
- "In commercial speech cases … a four-part analysis has developed"
    1. The speech "must concern lawful activity and not be misleading." If the speech does not meet this standard, it is unprotected. If it does, it is protected, and to regulate it the government must show that:
    2. The "asserted government interest" is "substantial."
    3. "[T]he regulation" "directly advances the governmental interest asserted."
    4. The regulation must be "narrowly drawn" and "not more extensive than is necessary to serve that interest." (At 566.)

The *Central Hudson* standard has come to be known as "**intermediate scrutiny**." *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2382.

In the *Central Hudson* analysis, much depends on whether the speech is misleading, so the Supreme Court has subdivided that concept into three categories:

- **Inherently misleading**—Speech that "inevitably will be misleading to consumers." *1-800-411-Pain Referral Serv. v. Otto*, 744 F.3d 1045, 1056 (8th Cir. 2014). "Statements of objective fact … are not inherently misleading absent exceptional circumstances." *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238 (11th Cir. 2017).
- **Actually misleading**—Speech that "experience" has shown misleads consumers. *R.M.J.*, 455 U.S. at 191, 200 n.11, 203. This requires "evidence of deception." *Peel v. Atty. Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 106 (1990).
- **Potentially misleading**—Speech that *might* plausibly lead people to infer something false. If the potential to mislead is not "self-evident," it must be proved with evidence. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 653 (1985); *Ibanez v. Fla. Dept. of Bus. & Prof'l Reg., Bd. of Accountancy*, 512 U.S. 136, 146 (1994).

The Supreme Court has made clear that categorizing commercial speech as inherently, actually, or potentially misleading requires robust and searching judicial review. "[W]hether a statement falls "beyond the protection of the First Amendment is a question of law" for the court, *Peel*, 496 U.S. at 108 (plurality), and "[i]t is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Edenfield v. Fane,* 507 U.S. 761, 770 (1993). Moreover, the courts "cannot allow [a state's] rote invocation of the words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real." *Ibanez*, 512 U.S. at 146.

The scope of permitted government action depends on the category the speech falls into. Inherently or actually misleading speech may be banned based on that showing alone. But potentially misleading speech may be banned only if the government further meets the intermediate-scrutiny test of *Central Hudson*. Otherwise, the most the government can do is require it to be accompanied with explanatory disclosures. *In re R.M.J.,* 455 U.S. 191, 203 (1982).

2. Regulations requiring disclosures are held to the Zauderer *standard*

If instead of banning commercial speech, the government seeks only to ***mandate disclosures***, the governing precedent is *Zauderer*, which states:

- "[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." (At 651.)
- This is "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," so an advertiser's "constitutionally

protected interest in *not* providing any particular factual information in his advertising is minimal." (*Id.*)

- So, the First Amendment allows mandatory commercial disclosures if:
  - The disclosure is "purely factual and uncontroversial information about the … services" or product being sold;
  - The requirement is "reasonably related to the State's interest in preventing deception of consumers"; and
  - The required disclosure is not "unjustified or unduly burdensome." (*Id.*)

C. Regulations Banning Food Manufacturers' Commercial Speech Have Been Assessed under *Central Hudson*'s Intermediate-Scrutiny Analysis

In the context of regulations banning specific commercial speech, courts have applied *Central Hudson*'s intermediate-scrutiny analysis, asking first whether the regulated speech was inherently, actually, or only potentially misleading, and then—if the speech was not inherently or actually misleading—whether the regulation directly advanced a substantial government interest and was narrowly drawn to meet it.

Examples of the cases, focusing on decisions involving food or beverage products, include the following:

- *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 637 (6th Cir. 2010). Ohio tried to ban "rbST free" milk labels as deceptive. But the court said that scientifically it was "still very much an open question" whether "'such labels "inform[] consumers of a meaningful distinction" between different kinds of milk, so the First Amendment protected such labels.
- *Alliance for Natural Health US v. Sebelius*, 786 F. Supp. 2d 1, 24 (D.D.C. 2011). "Where the evidence supporting a [label] claim is inconclusive, the First Amendment permits the claim to be made" (considering challenge to FDA's denial of approval for dietary-supplement label).

- *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 10-11 (D.D.C. 2002). A "complete ban of a [dietary-supplement label] claim" is permitted only "when there [is] almost no qualitative evidence in support of the claim."
- *POM Wonderful, LLC v. F.T.C.,* 777 F.3d 478, 502 (D.C. Cir. 2015). The FTC enjoined a juice company from making "claims about the disease-related benefits of [its] product … in the absence of two [randomized controlled trials]" that substantiated the claim. The court held that this was excessive because prohibiting claims supported by *one* reliable study would deprive the market of valuable information.
- *Authentic Beverages Co. v. Texas Alcoholic Beverage Comm'n,* 835 F. Supp. 2d 227, 241 (W.D. Tex. 2011). Based on statutory definitions, Texas argued that it was misleading to refer to "ale" as a kind of "beer." The court upheld a First Amendment challenge: "[arguing that] commercial speech is only protected by the United States Constitution if it parrots Texas state law … reflects a degree of Texas pride that, while laudable under most circumstances, must in this case be considered legally dubious."
- *Lever Bros. Co. v. Maurer*, 712 F. Supp. 645, 652 (S.D. Ohio 1989). "There is nothing inherently misleading about the use of the word 'butter' in margarine advertising."
- *Turtle Island Foods, SPC v. Richardson*, 2019 WL 7546586, at *5 (W.D. Mo. Sept. 30, 2019). A Missouri statute declared "misleading" the use of the word "meat" to describe plant-based or lab-grown products. The court held: "plaintiffs are unlikely to succeed on their First Amendment claim … because the statute only prohibits speech which would be misleading."
- *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr.3d 462 (2005). A winery in Napa County used grapes grown elsewhere and sold the wine under the label "Napa Ridge." California law prohibits this practice, and the Court found it "misleading" under the First Amendment as well.

D. Regulations Requiring Disclosures on Food Labels Have Been Assessed under *Zauderer*'s Standard

Courts have also applied standard First Amendment doctrine to assess the constitutionality of government-mandated disclosures in food labeling or advertising. Here, under the *Zauderer* standard, courts have asked whether the government has shown that the speech is potentially misleading (or another state interest is

implicated) and if so, whether the required disclosure is purely factual, uncontroversial, and not unduly burdensome.

Examples of these cases include the following:

- *Am. Beverage Ass'n v. City & Cty. of San Francisco,* 916 F.3d 749, 757 (9th Cir. 2019) (*en banc*). San Francisco required soda companies to devote 20% of their advertising space to a "Warning" about the health dangers of sugar in the product. CA9 held that, "[o]n this record … the 20% requirement is not justified and is unduly burdensome when balanced against its likely burden on protected speech." The court "d[id] not hold that a warning occupying 10% of product labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than 10% of product labels or advertisements necessarily is invalid."
- *Grocery Mfrs. Ass'n v. Sorrell,* 102 F. Supp. 3d 583, 625 (D. Vt. 2015). "Act 120's GE disclosure requirement mandates disclosure of a fact: the presence or potential presence of GE ingredients. It does not require GE manufacturers and retailers to convey a 'preferred message' about that fact, and it applies regardless of a manufacturer's or retailer's own view of GE and GE foods."
- *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018). "'[U]ncontroversial' refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience."
- *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 643 (6th Cir. 2010). If milk included an "rbST free" label, Ohio required a "contiguous" disclosure of the fact that such milk had no detectable differences from regular milk. The Sixth Circuit suggested that the contiguity requirement was an undue burden because it (1) interfered with the label design and (2) required milk sellers to create special Ohio-only labels. The court allowed the placement of the disclosure elsewhere on the milk label.

II. THE DISCONNECT BETWEEN CURRENT DECEPTIVE-PRACTICES CASE LAW AND FIRST AMENDMENT PRINCIPLES

As shown above, when government restrictions on food labels and advertising take the form of laws or regulations addressing specific topics, essentially all courts apply the controlling First Amendment standards to analyze the free-speech issues.

But when the government restrictions take the form of broad deceptive-practices laws, courts have generally acted as if those controlling First Amendment standards are inapplicable or irrelevant. There is a profound disconnect here that is manifested both in different legal standards being applied and in a different decision maker doing the application.

A. A Different Standard Governs What Is Considered Deceptive

The first substantive difference, and the most important one, is the difference in what is considered deceptive.

As noted above, the constitutional standard allows commercial speech expressing a viewpoint to be banned only if no legitimate science supports it. *See, e.g., Whitaker*, 248 F. Supp. 2d at 11 (requiring there to be "almost no qualitative evidence in support of the claim"). If, on the other hand, there is "still very much an open question," *Boggs*, 622 F.3d at 637, or the "evidence supporting a claim is inconclusive," *Alliance for Natural Health*, 786 F. Supp. 2d at 24, any viewpoint supported by legitimate evidence may be expressed.

This standard, however, is reversed in deceptive-practices law. Some courts have held that government can prohibit commercial speech expressing a particular viewpoint as long as any legitimate science supports a *different* viewpoint. To use language more typical of the cases, a court will deny a defendant's motion to dismiss or motion for summary judgment if a reasonable jury could be convinced by the plaintiff's view of the science. *E.g., Southland Sod Farms v. Stover Seed Co.,* 108 F.3d

1134, 1144 (9th Cir. 1997).

Under this upside-down standard, a deceptive-labeling lawsuit could impose damages or an injunction on a food manufacturer for having expressed a viewpoint that is supported by legitimate science. Indeed, a manufacturer can be punished for expressing a viewpoint that represents the *majority* scientific view. As long as a plaintiff comes forward with a different view that some jury reasonably could believe, the claim can go forward.

B. A Different Standard Governs How Likely the Speech Must Be to Communicate the Deceptive Message

The second substantive difference between the constitutional test and current deceptive-practices law is how likely the speech must be to communicate a deceptive message before it can be prohibited.

Under the constitutional standard, speech can be prohibited only if it will *invariably* be understood to convey the deceptive message or if the government shows that it does convey the deceptive message to its audience. In constitutional parlance, the statement must be shown to be "inherently" or "actually" misleading. *In re R. M. J.,* 455 U.S. 191, 203 (1982).

Under current deceptive-practices law, however, many state laws allow speech to be found deceptive, and thus prohibited, under the much lower standard that it is *likely* to mislead some portion of "reasonable consumers." *E.g., POM Wonderful, LLC*, 777 F.3d at 490 (federal FTC Act asks "whether at least a significant minority of reasonable consumers would likely interpret the ad to assert [a false]

claim"); *Stutman v. Chem. Bank,* 731 N.E.2d 608, 611–12 (N.Y. 2000) ("the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances" but "need not reach the level of common-law fraud"); *Downey v. Pub. Storage, Inc.,* 2020 WL 581821, at *9 (Cal. Ct. App. Feb. 6, 2020) ("the focus [is on] whether the content of the challenged advertisement is likely to deceive th[e] reasonable consumer").

There is thus at least one key difference, and possibly a second, between the constitutional standard and the statutory tests. First, the constitutional standard requires proof of *actual* deception, whereas the statutory tests require only *likely* deception. Second, the constitutional standard seems to require that the speech deceive some significant portion of an audience, whereas under the statutory tests, only a small portion of deceived consumers may be sufficient.

The statutory tests, in short, approximate the constitutional standard for determining that a statement is "potentially misleading." But under the First Amendment, that showing allows the government only to require the potentially misleading statement to be accomplished with disclaimers or explanation, *In re R.M.J.*, 455 U.S. at 203, while under deceptive-practices statutes, that showing allows the statement to be banned.

C. A Different Decisionmaker Decides What Is Allowed

A final key difference between the traditional constitutional standard and current deceptive-practices law is the identity of the decisionmaker.

Under the constitutional standard, the judge is the decisionmaker. "[W]hether a statement falls "beyond the protection of the First Amendment is a question of law" for the court. *Peel* 496 U.S. at 108 (plurality). The judge determines whether the challenged message is unsupported by legitimate science, and the judge determines whether the speech actually conveys the challenged message. The courts will not allow the government's "rote invocation of the words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real." *Ibanez* 512 U.S. at 146 .

Under deceptive-practices law, in contrast, whether a challenged standard is "misleading" is determined by a jury as a "question of fact." *E.g., Hypertouch, Inc. v. ValueClick, Inc.,* 123 Cal. Rptr. 3d 8, 34 (2011). Under this standard, a claim can proceed to trial if any reasonable jury could find—by a preponderance of the evidence—that the challenged label or advertising would mislead a reasonable consumer. The court reviews the jury's finding with great deference. Relatedly, when an administrative agency has made a finding of deceptiveness during an administrative enforcement action, courts defer to the agency's findings. *See, e.g., Kraft, Inc. v. F.T.C.,* 970 F.2d 311, 320 (7th Cir. 1992) (in challenge to cheese advertising, deferring to the FTC's "common sense and administrative experience" on the issue of deceptiveness); *POM Wonderful, LLC* 777 F.3d at 499 ("Our precedents, however, call for reviewing the [FTC's] factual finding of a deceptive claim under the ordinary (and deferential) substantial-evidence standard, *even in the First*

Amendment context.") (emphasis added).

When juries or government agencies become the decisionmakers, as is the case with deceptive-practices claims, judges currently do not enforce First Amendment protections to the extent that they do when ruling on the constitutionality of direct government regulation of speech, such as speech bans or speech mandates.

* * *

To summarize, because of different substantive standards and a different decisionmaker, speech is being prohibited through deceptive-practices litigation that could not be prohibited under the traditional First Amendment analysis governing commercial speech.

III. NO REASONABLE BASIS FOR PRESERVING THE DISCONNECT

Moving from the descriptive to the normative, the question arises whether the disconnect between how the First Amendment is being applied to broad deceptive-practices statutes and narrower regulations can be justified. Are there distinctions between the two types of government action that would support applying different levels of constitutional scrutiny to them? The answer, we think, is no.

A. Different Entities Deciding What to Suppress

The biggest difference between a specific regulation and a lawsuit applying a broad deceptive-practices law is the identity of the person deciding what speech the government will try to suppress. With a specific regulation, the decisionmaker is

either the legislative branch (*e.g.,* Congress, a state legislature, or a municipality) or the executive branch acting through a regulatory agency (*e.g.,* the FDA). With a broad deceptive-practices law, the decisionmaker is either the executive branch acting in an enforcement capacity (*e.g.,* an Attorney General or the FTC) or a private party, usually a class-action plaintiffs' lawyer or a public-interest group.

There is no apparent reason to allow that second class of decisionmakers to suppress speech more easily than the first. From the standpoint of **democratic legitimacy**, legislatures and regulatory agencies are more accountable to the electorate than government enforcers, private class-action lawyers, and interest groups. On the factor of **expertise**, it is a mixed bag. Regulatory agencies likely have the greatest expertise, with legislative bodies and class-action lawyers occupying a distinctly lower level. From the standpoint of **motivation**, any branch of government may be motivated to suppress political enemies, unpopular opinions, or the speech disfavored by powerful or majority interests. But they may also be motivated to protect the broader public interest. Many private class-action lawyers are motivated primarily by making money, leading them to target large institutions, whereas self-declared public-interest groups are motivated by certain social, political, or other goals. Finally, when one considers **institutional competence**, legislatures and regulatory agencies are arguably *better* situated to address scientific issues than are individual plaintiff's attorneys. Oftentimes, whether a label statement is true will depend on a disputed question of science or medicine. The answer will be the same

for everyone, so one could argue that the question should be assessed by a generalized authority, such as the legislature or a regulatory agency, rather than allowing a patchwork of individual lawyers and public-interest groups to shape the law to match their own idiosyncratic (and likely varying) answers.

B. Different Degree of Notice to Speakers

A second difference between a specific regulation and a broad deceptive-practices law is the degree of notice given to speakers about what will be permitted and what will be forbidden. It is difficult to see why this difference should affect the constitutional standard. Regardless of how the speech is suppressed, whether through a specific prohibition up front or a general prohibition made specific through litigation, the end result is the same: The speech is suppressed by government force. The First Amendment standard should therefore be the same. If anything, one could argue that the broad ban on "misleading" speech creates greater First-Amendment problems because of the greater chilling effect it has on speech.

C. Different Role of Judges and the Judiciary

A third difference is in the role of the judiciary. With specific, direct regulations, the judiciary plays little role in deciding what speech the government will try to suppress. The legislature or regulatory agency has already decided what to prohibit. All that remains for litigation is for (1) the jury or judge to determine whether the challenged speech falls within the regulation and (2) the judge to determine whether the regulation is permissible under the First Amendment.

By contrast, in a deceptive-practices lawsuit, the judiciary plays a much greater role in determining whether the particular speech at issue should be the target of government suppression because the factfinder (and judge) directly weigh the question of whether the evidence shows (or could reasonably show) that the speech is "deceptive."

This difference in roles should not alter the First Amendment standard judges apply. In fact, when unelected officials or private plaintiffs play a significant part in determining what speech is deceptive, judges should be more vigilant in protecting defendants' commercial-speech rights through vigorous First Amendment review.

D. Risk of Over-constitutionalizing Litigation

One final factor could possibly distinguish broad deceptive-practices lawsuits from specific government bans—the sheer number of deceptive-practices lawsuits filed each year. Perhaps judges are concerned that subjecting such suits to First Amendment scrutiny will turn hundreds of fraud cases into constitutional cases.

Courts should address that concern, however, in a way that doesn't dilute the First Amendment or the prevailing commercial-speech standard. Courts can and should ask the same questions when presiding over a deceptive-practices claim as they would when considering the constitutionality of a direct, specific speech regulation: (1) is the proscribed point of view supported by legitimate science; and (2) if not, does the restricted speech actually convey that point of view?

Consider two examples. First, suppose that a private plaintiff files a deceptive-practices claim against an automobile dealership alleging that it falsely said that a used car it sold had not previously been in an accident, when in fact it had. No First Amendment issue is apparent in this case. There is no question about what the dealership said. And the car was either in an accident or it wasn't—an objective question with a clear answer. Thus, the decisionmaker can decide the truth or falsity of that statement by a preponderance of the evidence without implicating any free-speech problems.

But now, suppose that a claim is brought against breakfast cereal manufacturers alleging that it is deceptive to describe cereals as healthy because, regardless of their fiber and other nutrients, the added sugar they contain is so deadly that that nutrient alone renders the cereal unhealthy. Here, the claim *does* implicate First Amendment issues arising out of nutrition science. If consumer-fraud plaintiffs through litigation under state deception laws are allowed to ban the publication of such labels while the scientific debate is still ongoing, the government would effectively be declaring one side of the debate to be the loser. That would be in enormous tension with First Amendment values.

If the First Amendment questions are limited in the way this publication proposes, many, if not most deceptive-practices claims will *not* implicate First Amendment issues. But in the cases that *do* present legitimate constitutional issues, judicial application of the First Amendment will restore this vital protection to its

proper role of a limit on the use of government force to suppress speech.

CONCLUSION AND NEXT STEPS

Deceptive-practices claims against the food industry tend to follow nutrition fads—whether they involve fat, sugar, high-fructose corn syrup, genetically-modified organisms, or what have you. When labeling and advertising expressing a generally-accepted scientific view is challenged in lawsuits arguing that they are deceptive because they do not cohere with the new fad, the First Amendment should provide an added layer of protection for the challenged speech beyond the protections offered by the substantive requirements of the deceptive-practices law. Courts may struggle initially to become familiar with the First Amendment principles, but the doctrinal basis for applying them is sound, and their application will bring a needed rebalancing to the currently unbalanced law of deceptive practices.

