

2012

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### Recommended Citation

Franklin Smith *Where Have We Seen This Before?: Comparing the "Natural" Caloric-Sweetened Beverage Trend to the Claims of Light Cigarettes*, 24 Loy. Consumer L. Rev. 389 (2012).

Available at: <http://lawcommons.luc.edu/lclr/vol24/iss3/4>

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# WHERE HAVE WE SEEN THIS BEFORE?: COMPARING THE “NATURAL” CALORIC- SWEETENED BEVERAGE TREND TO THE CLAIMS OF “LIGHT” CIGARETTES

*Franklin Smith* \*

## INTRODUCTION

The relative success of efforts by consumer groups and government to inform consumers of the dangers of tobacco products and discourage consumption suggests that the lessons of these tobacco-control efforts may be successfully applied to other products. Just as tobacco-related illness has been a dominant health issue in the past century, obesity remains a pressing concern for consumers in the United States.<sup>1</sup> In particular, the analogy is frequently drawn between soft drinks and tobacco products.<sup>2</sup> This note will address a more targeted issue, namely, how do the claims of so called “natural” caloric-sweetened beverages compare to the marketing tactics of light cigarettes? Because of the challenges presented by the growing rate of obesity, it is critically important that consumers make smart choices relating to their diet. This note will consider the role that sweetened beverages play in contributing to the obesity crisis, and will further examine the manner in which natural labels mislead consumers into believing that they are making healthier decisions when in fact, these natural alternatives often fail to offer superior nutritional content.

Part I of this note examines the obesity crisis and the distinct

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<sup>1</sup> *Overweight and Obesity – U.S. Obesity Trends*, CDC, <http://www.cdc.gov/obesity/data/trends.html> (last updated July 21, 2011).

<sup>2</sup> Mark Bittman, *Soda: A Sin We Sip Instead of Smoke?*, N.Y. TIMES, Feb. 14, 2010, at WK1, available at <http://www.nytimes.com/2010/02/14/weekinreview/14bittman.html?pagewanted=all>.

role that caloric-sweetened beverages such as soda<sup>3</sup> play in exacerbating the problem. For the purposes of this note, caloric-sweetened beverages are defined as mass-produced and commercially available beverages which contain significant added calories and sugar.<sup>4</sup> Part II will address the advent of natural products in the marketplace. Part III will critically examine specific examples of caloric-sweetened beverages that are marketed as natural, and compare them to 'regular' alternatives. Part IV of this note will briefly recount the manner in which tobacco companies utilized "light" cigarettes to ease consumer concerns about their products, while Part V will compare these tactics to those used to promote natural caloric-sweetened beverages.

This note will conclude by considering both the specific strategies which have been or may be implemented to address the concerns raised by the natural beverage claims and the difficulties presented by each strategy. While natural beverages present a different challenge than tobacco in that they are only a contributing factor to the larger obesity problem, they nonetheless may harm consumers by encouraging consumption habits that presume that "naturally" sweetened beverages are in fact a healthier option.

## I. THE UNIQUE ROLE OF BEVERAGES IN THE OBESITY CRISIS

The extremely troubling rise in obesity in the United States has prompted health advocates and other groups to search for the causes of this alarming trend. The responses have ranged from efforts to restrict food stamp recipients from purchasing unhealthy food<sup>5</sup> to commentary about the importance of individual responsibility.<sup>6</sup> The fact remains, however, that currently over one-third of American adults, and seventeen percent of American children are obese.<sup>7</sup> In this context, one class of product appears to have a unique role in the

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<sup>3</sup> Lenny R. Vartanian et al., *Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-Analysis*, 97 AM. J. OF PUB. HEALTH 667, 673 (2007).

<sup>4</sup> George A. Bray, *Fructose: Pure, White, and Deadly? Fructose, by Any Other Name, Is a Health Hazard*, 4 J. DIABETES SCI. & TECH. 1003, 1004 (2010).

<sup>5</sup> *Feds Shoot Down NYC Plan to Ban Food Stamp Use For Sugary Drinks*, CBSNEWYORK.COM (Aug. 20, 2011, 12:17 AM), <http://newyork.cbslocal.com/2011/08/20/feds-shoot-down-nyc-plan-to-ban-food-stamp-use-for-sugary-drinks/>.

<sup>6</sup> William Saletan, *Fat Lies: Obesity, Laxity and Political Correctness*, SLATE (July 26, 2007, 5:21 PM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2007/07/fat\\_lies.html](http://www.slate.com/articles/health_and_science/human_nature/2007/07/fat_lies.html).

<sup>7</sup> CDC, *supra* note 1.

changing landscape of the American diet: caloric-sweetened beverages.<sup>8</sup> As early as 1942, the American Medical Association warned that proactive measures should be taken to limit the consumption of empty calories, particularly in the form of "sweetened carbonated beverages."<sup>9</sup> Nevertheless, between 1999 and 2001, sugary soft drinks accounted for seven percent of all calories consumed by Americans – an increase from 2.8 percent between 1978 and 1979.<sup>10</sup> In fact, if a consumer drinks one can of soda per day, they add the equivalent of fifty pounds of sugar to their diet per year.<sup>11</sup> Soda, however, is not the only culprit. From a nutritional standpoint, sweetened, non-carbonated beverages such as bottled teas or fruit drinks are largely equivalent to soda.<sup>12</sup>

The problem with sweetened drinks, then, is the outsized impact their consumption has upon the amount of calories in the modern diet. For instance, numerous studies have indicated that aside from the additional calories contained in sodas and similar drinks, persistent consumption of sweetened beverages may actually change individuals' diets.<sup>13</sup> That is, that consumption of sugary beverages is associated with a general increase in caloric intake, over and above the calories that sugary drinks themselves contain.<sup>14</sup> One study which tracked the Body Mass Index<sup>15</sup> of 548 children and their intake of sugary drinks found that for every additional daily serving of soda, the risk of childhood obesity increased by fifty percent.<sup>16</sup>

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<sup>8</sup> See generally Jason P. Block et al., *Point-of-Purchase Price and Education Intervention to Reduce Consumption of Sugary Soft Drinks*, 100 AM. J. OF PUB. HEALTH 1427, 1427 (2010).

<sup>9</sup> MICHAEL F. JACOBSON, *LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICAN'S HEALTH*, 2 (2d ed. 2005).

<sup>10</sup> Block et al., *supra* note 8.

<sup>11</sup> *1 Soda A Day Equals 50 Pounds of Sugar A Year, Says NYC Health Department*, CBSNEWYORK.COM, (Oct. 25, 2011 10:04 AM), <http://newyork.cbslocal.com/2011/10/25/1-soda-a-day-equals-50-pounds-of-sugar-a-year-says-nyc-health-department/>.

<sup>12</sup> Jacobson, *supra* note 9, at 2.

<sup>13</sup> Vartanian et al., *supra* note 3, at 668.

<sup>14</sup> *Id.*

<sup>15</sup> Body Mass Index is a measure generated by comparing an individual's height and weight according to a formula. This measure is a reliable indicator of the amount of fat on an individual's body. For more information, see *About BMI for Adults*, CDC.gov, [http://www.cdc.gov/healthyweight/assessing/bmi/adult\\_bmi/index.html](http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html) (last updated Sep. 13, 2011).

<sup>16</sup> Allison C. Morrill & Christopher D. Chinn, *The Obesity Epidemic in the United States*, 25 J. PUB. HEALTH POL'Y 353, 360 (2004).

These findings, as well as others, have prompted various levels of government to address the role that sweetened drinks play in the obesity crisis.<sup>17</sup> At the national level, the Obama administration has worked to restrict the availability of sugary drinks in schools.<sup>18</sup> Such bans, however, tend not to limit overall caloric-sweetened beverage consumption significantly, as soda and other sugary drinks are still widely available outside of schools.<sup>19</sup> Additional efforts have been made by the Federal Government to encourage the marketing and availability of healthy options in supermarkets and restaurants.<sup>20</sup> That said, participation in these programs is largely voluntary and it is not clear that they will have a direct impact on the availability or price of caloric-sweetened drinks.<sup>21</sup>

The fact remains that when it comes to making healthy choices, Americans find themselves confronted with conflicting messages and a wide range of unhealthy options. The Centers for Disease Control, for instance, point out that simply choosing the wrong beverages at different points during the day can add hundreds of calories to one's daily intake.<sup>22</sup> If consumers are relying on labels to make better decisions, yet another set of problems arise, as current labeling schemes often include notice of the putative health benefits of the particular product, but rarely explicitly warn the consumer of potentially negative effects that consumption of that beverage may have.<sup>23</sup> As consumers increasingly seek healthy alternatives, food products, including beverages, are correspondingly being identified

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<sup>17</sup> *Overweight and Obesity - State-Based Programs*, CDC, <http://www.cdc.gov/obesity/stateprograms/index.html> (last updated March 3, 2011).

<sup>18</sup> *Obama Wants School Vending Machine Changes: Administration Will Ask Congress To Rid Machines of Junk Food*, MSNBC HEALTH (Feb. 8, 2010, 4:03 PM), [http://www.msnbc.msn.com/id/35299173/ns/health-diet\\_and\\_nutrition/t/obama-wants-school-vending-machine-changes/#.TxDBYW9beeF](http://www.msnbc.msn.com/id/35299173/ns/health-diet_and_nutrition/t/obama-wants-school-vending-machine-changes/#.TxDBYW9beeF).

<sup>19</sup> Eric Nagourney, *Nutrition: Soda Ban in Schools Has Little Impact*, N.Y. TIMES, Sept. 23, 2008, at F6, available at <http://www.nytimes.com/2008/09/23/health/nutrition/23nutr.html>.

<sup>20</sup> Ari Shapiro, *Checking Up On Michelle Obama's Anti-Obesity Effort*, NPR (Feb. 9, 2011), <http://www.npr.org/2011/02/09/133597487/checking-up-on-michelle-obamas-anti-obesity-effort>.

<sup>21</sup> *Id.*

<sup>22</sup> *Healthy Weight - It's Not a Diet, It's a Lifestyle!*, CDC, [http://www.cdc.gov/healthyweight/healthy\\_eating/drinks.html](http://www.cdc.gov/healthyweight/healthy_eating/drinks.html) (last updated Aug. 17, 2011).

<sup>23</sup> Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J.L. & POL'Y 493, 511 (2009).

as natural in one form or another.<sup>24</sup>

## II. THE WORLD OF 'NATURAL' MARKETING – APPEALING TO NATURE AS A MARKETING STRATEGY

In order to place the natural beverage trend in context, it is necessary to examine the growing trend of natural product claims. Natural products generated sales of eighty-one billion dollars in 2010 alone.<sup>25</sup> Products such as ice cream,<sup>26</sup> cosmetics,<sup>27</sup> pet food,<sup>28</sup> and numerous others are being marketed as “all natural,” “natural,” or free of artificial ingredients.<sup>29</sup> For example, a line of natural cosmetics produced by Tarte Inc. touts the benefits of their trademarked “high-performance naturals” as “good for you” and superior to “unhealthy synthetic formulas.”<sup>30</sup> Also, Kashi Company, a subsidiary of Kellogg Company, offers a wide range of “all-natural” foods, including breakfast cereals, snack bars and even

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<sup>24</sup> See, e.g., Kathleen Doheny, *Top 10 Healthy Trends: Hip May Not Mean Healthy*, WEBMD (Apr. 26, 2011), <http://www.webmd.com/food-recipes/news/20110426/top-10-food-trends-hip-may-not-mean-healthy> (stating that ‘natural’ is a top ten food trend for 2011); Sarah Hills, *Kosher Leads Top Ten Claims for New Products*, FOOD NAVIGATOR-USA (Dec. 11, 2008), <http://www.foodnavigator-usa.com/Business/Kosher-leads-top-ten-claims-for-new-products> (indicating that in 2008, “all natural” was a common food claim); *Top Ten Food Trends for 2011*, FOOD PRODUCT DESIGN (Apr. 25, 2011), <http://www.foodproductdesign.com/news/2011/04/top-10-food-trends-for-2011.aspx> (citing ‘natural’ as a desired food claim).

<sup>25</sup> *Natural and Organic Products Industry Sales Hit \$81 Billion*, PR NEWSWIRE (June 1, 2011), <http://www.prnewswire.com/news-releases/natural-and-organic-products-industry-sales-hit-81-billion-122958763.html>

<sup>26</sup> *Ben & Jerry's Backs Off 'All-Natural' Claims*, GREENBIZ.COM (Sept. 29, 2010), <http://www.greenbiz.com/news/2010/09/29/ben-jerrys-backs-all-natural-claims>

<sup>27</sup> Organic Monitor, *Many Natural & Organic Cosmetic Brands Falling Short of Marketing Claims*, ECO-BUSINESS.COM (Aug. 15, 2011), <http://www.eco-business.com/press-releases/many-natural-organic-cosmetic-brands-falling-short-of-marketing-claims/>.

<sup>28</sup> Debbie Phillips-Donaldson, *'Natural' Marketing Claim Still On Top*, PETFOOD-CONNECTION.COM (July 26, 2011, 11:30 AM), <http://www.petfood-connection.com/profiles/blogs/natural-marketing-claim-still>.

<sup>29</sup> Nicolette R. Hudson et al., *Class Actions Filed Over "Natural Food" Claims-Food Drug & Device Law/Advertising & Marketing Alert*, THE NATIONAL LAW REVIEW (Oct. 4, 2011), <http://www.natlawreview.com/article/class-actions-filed-over-natural-food-claims-food-drug-device-lawadvertising-marketing-alert>.

<sup>30</sup> Maureen Kelly, *Welcome to the Tarte Family!*, TARTE, <http://tartecosmetics.com/welcome-letter.php> (last visited Jan. 18, 2012).

frozen pizzas.<sup>31</sup> Other examples of such claims are commonplace in grocery stores across the country.

This new trend has been accompanied by a significant amount of controversy, mainly stemming from the fact that natural is a vague and nebulous term. Currently, the regulatory body with the greatest authority over the labeling and marketing of beverages, the Food and Drug Administration, does not have an official definition for the term natural or a list of requirements that must be satisfied in order for a product to be deemed natural.<sup>32</sup> The lack of an official rule regarding the definition of the term natural has sparked litigation, with a significant number of actions focusing on whether or not beverages sweetened with High Fructose Corn Syrup (“HFCS”) can be considered natural products.<sup>33</sup> HFCS is a liquid caloric-sweetener first utilized in the 1960s which has since seen widespread use in many food products.<sup>34</sup> While the question of whether HFCS is natural is not addressed fully here, the general objection to categorizing HFCS as natural is that it is created through industrial-chemical processes in a way that sugar is not.<sup>35</sup> Specific concerns about HFCS have also been raised about the way the human body metabolizes HFCS as opposed to other sweeteners.<sup>36</sup> These concerns may be unfounded, however, as a number of studies have found no definitive reason for special concern over HFCS.<sup>37</sup> Examining the significance

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<sup>31</sup> *Kashi Company Announces New Line of All-Natural Frozen Entrees*, KELLOGG’S (June 21, 2006), <http://kelloggs.mediaroom.com/index.php?s=43&item=112>; *Our Foods*, KASHI, [http://www.kashi.com/our\\_foods](http://www.kashi.com/our_foods) (last visited Jan. 18, 2012).

<sup>32</sup> April L. Ferris, *The “Natural” ‘natural’ Aversion: The FDA’s Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403, 423 (2010).

<sup>33</sup> *See, e.g.*, *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009), (refusing to dismiss class action alleging that Snapple beverages misled consumers by claiming to be natural when they were sweetened with HFCS); *AriZona Beverage Co. v. Hitt*, 08 CV 809 WQH (POR), 2009 WL 449190, (S.D. Cal. Feb. 4, 2009) (refusing to dismiss claim against beverage manufacturer for misleading labeling of “all natural” when sweetened with HFCS); *Von Koenig v. Snapple Beverage Corp.*, 2:09-CV-00606, 2011 WL 43577 (E.D. Cal. Jan. 6, 2011) (alleging “all natural” label was misleading due to presence of HFCS).

<sup>34</sup> John S. White et al., *High-Fructose Corn Syrup: Controversies and Common Sense*, 4 AM. J. LIFESTYLE MED. 515, 515-17 (2010).

<sup>35</sup> Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle Over Restricting High Fructose Corn Syrup From Food And Beverages Labeled ‘Natural’*, 5 J. FOOD L. & POL’Y 145, 146-48 (2009).

<sup>36</sup> White et al., *supra* note 34.

<sup>37</sup> *Id.* at 517-518.

of natural claims, however, requires a broader focus than their application to particular products.

There are two basic concepts associated with the term natural.<sup>38</sup> On the one hand, nature may refer to the set of qualities that define a thing, such as "human nature."<sup>39</sup> Alternatively, nature can refer to the collective environment in which humans live and interact with other species, an idea especially relevant to marketing claims.<sup>40</sup> Attempting to decide whether a product is natural or not presents philosophical difficulties; notably, at what point does human involvement with something from nature render it unnatural?

In the American tradition, the concept of nature is frequently associated with the positive sentimental notion of a pastoral age, or the era before industrialization.<sup>41</sup> In a larger sense, however, the positive feelings relating to nature or the pastoral, ideal may speak to the sometimes troubling disconnect between the modern consumer and the source of their food.<sup>42</sup> In today's era of industrialized agriculture and supermarkets, associating a food product with nature, as it is understood in the modern mind, may have the effect of rehabilitating an "industrial" food with the positive associations of an idealized concept of "nature" - an approach similar to "green-washing."<sup>43</sup> In reality, however, the natural label may have little to do with the actual benefits of a given product.

The conflation of what is natural with what is preferable is not a new concept. Philosophers refer to it as the logical fallacy of appealing to nature.<sup>44</sup> The fallacy occurs when an idea's proponent states that because a thing or state is from nature, it is superior or meritorious.<sup>45</sup> This fallacy is particularly relevant to the marketing of certain sweetened beverages which appear to make this unjustified appeal.<sup>46</sup> Whether consciously or not, the company that markets their

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<sup>38</sup> Donald B. Thompson, *Natural Food and the Pastoral: A Sentimental Notion?*, 24 J. AGRIC. & ENVTL. ETHICS 165, 167 (2011).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 167-74.

<sup>41</sup> *Id.* at 178-81.

<sup>42</sup> *Id.*, at 181.

<sup>43</sup> *Id.* at 182-83.

<sup>44</sup> *Logical Fallacies and the Art of Debate*, CAL. ST. U. NORTHRIDGE, <http://www.csun.edu/~dgdw61315/fallacies.html#Nature,%20appeal%20to> (last modified Jan. 29, 2001) [hereinafter *Logical Fallacies*]; *Naturalistic Fallacy*, CAL. ST. U. NORTHRIDGE, <http://courses.csusm.edu/fallacies/naturalistic.htm> (last visited Jan. 18, 2012) [hereinafter *Naturalistic Fallacy*].

<sup>45</sup> See *Naturalistic Fallacy*, *supra* note 44; see also *Logical Fallacies*, *supra* note 44.

<sup>46</sup> See *infra*, Part III.



product as natural benefits from this persistent tendency to believe that things which are natural are superior by virtue of their natural qualities.

So, seeking to understand the loaded term natural is not merely an intellectual exercise, as the term is connected with particular associations and implications. A key purpose of marketing, of course, is influencing consumer perceptions of a product.<sup>47</sup> A buzzword like natural implies certain qualities about the product associated with it.<sup>48</sup> Indeed, the term natural rivals “organic” for associations with pure, healthful or superior qualities in a product.<sup>49</sup> A recent survey revealed that thirty-one percent of respondents seeking more healthful or wholesome products view the term “all natural” as a more trustworthy claim than “organic” or similar descriptors.<sup>50</sup> Additionally, a study of meat labeling indicated that, despite some skepticism as to the validity of “all natural” claims, the participants believed that the term indicated that the product was free of detrimental ingredients and that they were more likely to buy a product that was labeled as natural over one which was not.<sup>51</sup> This association is replicated in studies of European consumers as well.<sup>52</sup> Specifically, a study of consumers in France, The United Kingdom, Germany and Spain found that the consumption of natural foods was considered to be inherently superior as part of a healthy diet.<sup>53</sup>

The preference for natural products may explain the previously mentioned controversy surrounding the inclusion of HFCS in products labeled natural. Indeed, the controversy surrounding HFCS has spawned a response from the Corn Refiners Association, a group representing HFCS manufacturers which has petitioned

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<sup>47</sup> Leonard N. Read & Lauranne Buchanan, *A Shopping List Experiment of the Impact of Advertising on Brand Images*, 8 J. ADVERTISING 26, 28 (1979).

<sup>48</sup> *National Survey: Green Is Officially Mainstream-But Consumers Are Confused, Skeptical About Products*, SHELTON GROUP INC. (June 29, 2009), [http://www.sheltongroupinc.com/press/ecopulse/press\\_releases/EcoPulseNewsReleaseNaturalvOrganic.pdf](http://www.sheltongroupinc.com/press/ecopulse/press_releases/EcoPulseNewsReleaseNaturalvOrganic.pdf); Bill Cross, *Blogging: ‘Natural’ Beats “Organic” in Consumer Perception*, *FOODBIZDAILY.COM* (Jan. 19, 2010, 3:43 PM), <http://foodbizdaily.com/articles/95890-natural-beats-organic-in-consumer-perception-by-bslg.aspx>.

<sup>49</sup> Cross, *supra* note 48.

<sup>50</sup> *Id.*

<sup>51</sup> Katie M. Abrams et al., *Naturally Confused: Consumer’s Perceptions of All-Natural and Organic Pork Products*, 27 *AGRIC. HUM. VALUES* 365, 369 (2010).

<sup>52</sup> Van Wezemael et al., *Consumer Perceptions of Beef Healthiness: Results From a Qualitative Study in Four European Countries*, 10 *BMC PUB. HEALTH* 342, 350 (2010).

<sup>53</sup> *Id.*

unsuccessfully to the FDA for permission to market their product as “corn sugar.”<sup>54</sup> This desire can be readily understood in the context of the general preference of consumers for so-called natural products. That said, the focus on HFCS as opposed to cane or beet sugar is a massive red herring when it comes to the roll of sweetened beverages in the obesity crisis.<sup>55</sup>

### III. NATURAL BEVERAGES: A SWEETENED BEVERAGE BY ANY OTHER NAME IS FULL OF CALORIES

The true problem with the marketing of sweetened beverages as natural is that such descriptors may disguise the actual danger they present, which is a large amount of added sugar and empty calories.<sup>56</sup> It is because of this limited nutritional value that many caloric-sweetened beverages have been singled out by health advocates.<sup>57</sup> To illustrate this point, the following table provides the calorie and sweetener content of several sweetened beverages marketed as natural compared to alternative beverages which make no such claim. Those marked with an asterisk indicate that they are marketed as “natural.”

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<sup>54</sup> Marion Nestle, *The Increasingly Absurd Fight Over High Fructose Corn Syrup’s Name*, THE ATLANTIC (Dec. 2, 2011, 4:02 PM), <http://www.theatlantic.com/health/archive/2011/12/the-increasingly-absurd-fight-over-high-fructose-corn-syrups-name/249332/>.

<sup>55</sup> Bray, *supra* note 4.

<sup>56</sup> See CBSLOCAL.COM, *supra* note 5.

<sup>57</sup> Vartanian et al., *supra* note 3, at 671.

## Selected Examples of Calories and Sugars Per Serving

Product Name	Calorie Count Per Serving	Sweetener Per Serving
AriZona Raspberry Iced Tea <sup>58*</sup>	90 per 8 Oz Serving	22 Grams (HFCS) <sup>59</sup>
Coca-Cola <sup>60</sup>	140 per 12 oz. Serving	39 Grams (HFCS)
Snapple Lemon Tea <sup>61*</sup>	80 per 8 Oz serving	18 Grams (Sugar)
Hansen's Natural Original Cola <sup>62*</sup>	160 per 12 Oz serving	41 Grams (Sugar)
Joia Lime Hibiscus and Clove Soda <sup>63*</sup>	120 per 12 Oz serving	28 Grams (Sugar & Erythriol)
Pepsi Cola <sup>64</sup>	150 Per 12 Oz serving	41 Grams (HFCS) <sup>65</sup>

What is immediately apparent from the above table is how similar the calorie counts are between these samples. In the snapshot provided here, the beverage option with the fewest amount of calories only differs by thirty calories per serving from Pepsi Cola, which makes no natural claims. While these products are not marketed explicitly as “low calorie” options, the official descriptions of several

<sup>58</sup> *Raspberry Tea*, ARIZONA BEVERAGE CO., [http://www.drinkarizona.com/index\\_national.html#product\\_raspberry](http://www.drinkarizona.com/index_national.html#product_raspberry), (last visited Jan. 18, 2012) [hereinafter *Raspberry Tea*].

<sup>59</sup> *Nutrition Facts for Arizona Raspberry Iced Tea*, FOODFACTS.COM, <http://www.foodfacts.com/NutritionFacts/Ice-Teas/Arizona-Raspberry-Flavored-Iced-Tea-Drink-20-fl-oz/23511> (last visited Jan. 18, 2012).

<sup>60</sup> *Product Information: Coca-Cola*, COCA-COLACOMPANY, <http://productnutrition.thecoca-colacompany.com/products/coca-cola?packagingId=6971> (last visited Jan. 18, 2012).

<sup>61</sup> *Products: Lemon Tea*, SNAPPLE BEVERAGE CORP., <http://www.snapple.com/#/products/Lemon%20Tea> (last visited Jan. 18, 2012) [hereinafter *Lemon Tea*].

<sup>62</sup> *Hansen's Soda: Original Cola*, HANSEN BEVERAGE CO., <http://www.hansens.com/us/en/products/soda/hansens-soda/original-cola/> (last visited Jan. 18, 2012) [hereinafter *Hansen's Soda*].

<sup>63</sup> *Products: Lime Hibiscus & Clove*, BOUNDARY WATERS BRANDS LLC, <http://www.joialife.com/products/lime-hibiscus-clove/> (last visited Jan. 18, 2012).

<sup>64</sup> *The Facts About Your Favorite Beverages: Pepsi*, PEPSICO INC., [http://www.pepsicobeveragefacts.com/infobyproduct.php?prod\\_type=1026&prod\\_size=20&brand\\_fam\\_id=1051&brand\\_id=1000&product=Pepsi](http://www.pepsicobeveragefacts.com/infobyproduct.php?prod_type=1026&prod_size=20&brand_fam_id=1051&brand_id=1000&product=Pepsi) (last visited Jan. 18, 2012).

<sup>65</sup> *Nutrition Facts Pepsi Cola*, FOODFACTS.COM, <http://www.foodfacts.com/NutritionFacts/Cola/Pepsi-Cola-Soda-20-oz/775> (last visited Jan. 18, 2012).

of the beverages as provided on their company websites illustrate the potentially confusing claims being made.

Snapple describes its “Lemon Tea” product as not only “All Natural” on the label, but as made from the “best stuff on earth.”<sup>66</sup> It also touts the presence of “natural antioxidants” and filtered water.<sup>67</sup> AriZona Beverage Co. makes an even bolder claim by urging visitors to their website to “Move to Arizona. It’s Good for you.”<sup>68</sup> These purported health benefits come from the “all natural difference” of AriZona products which can be the answer for “more and more consumers [who] are looking for products that not only taste good but are good for them.”<sup>69</sup> In terms of caloric content, however, AriZona Raspberry Iced Tea contains only 10 fewer calories than a can of Pepsi.<sup>70</sup>

A 2010 press release for Hansen’s “Natural Cane Sodas” may exemplify the core strategy of the naturally sweetened beverage market. In it, Hansen’s describes their product as the “better-for-you” soda.<sup>71</sup> In the press release Hansen’s, which incidentally is the company originally responsible for Monster Energy Soda,<sup>72</sup> does not explicitly claim that its product is healthy.<sup>73</sup> Rather, the press release simply suggests that its product is *better for you* than other sodas<sup>74</sup> despite the fact that Hansen’s all natural soda has fully twenty more calories per serving than a can of Coca-Cola.<sup>75</sup>

After comparing some examples of the sweetened beverages on the market today, it becomes apparent that natural products are not necessarily better for you from the standpoint of caloric intake. Considering the importance of natural labeling to consumer decision making, the variation between products which can claim this attribute is troubling. Manufacturers such as Hansen’s and AriZona explicitly

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<sup>66</sup> See *Lemon Tea*, *supra* note 61.

<sup>67</sup> *Id.*

<sup>68</sup> *Move to Arizona. It’s Good For You.*, ARIZONA BEVERAGE CO., [http://www.drinkarizona.com/index\\_national.html#health\\_allnaturaldiff](http://www.drinkarizona.com/index_national.html#health_allnaturaldiff) (last visited Jan. 18, 2012) [hereinafter *Move to Arizona*].

<sup>69</sup> *Id.*

<sup>70</sup> See *supra*, Table: “Selected Examples of Calories and Sugars Per Serving”.

<sup>71</sup> *Hansen’s Introduces Original Cola*, PRNEWswire (May 14, 2010), <http://www.prnewswire.com/news-releases/hansens-introduces-original-cola-93794864.html> [hereinafter *Hansen’s Original*].

<sup>72</sup> Christopher Palmeri, *Hansen Natural: Charging at Red Bull With a Brawny Energy Brew*, BLOOMBERG BUSINESSWEEK (June 6, 2005), [http://www.businessweek.com/magazine/content/05\\_23/b3936409.htm](http://www.businessweek.com/magazine/content/05_23/b3936409.htm).

<sup>73</sup> See *Hansen’s Original*, *supra* note 71.

<sup>74</sup> *Id.*

<sup>75</sup> See *supra* Table: “Selected Examples of Calories and Sugars Per Serving”.

equate the natural aspects of their products with healthy choices.<sup>76</sup> However, given the fact that the calorie content of natural and 'non-natural' caloric-sweetened beverages do not necessarily vary greatly, it becomes increasingly clear that natural labeling distracts from the real danger which these kinds of products pose, namely, significant amounts of added calories. In short, natural sweetened beverage manufacturers routinely highlight certain aspects of their products as superior, even though the controversial aspect of the product remains unchanged. This kind of marketing tactic should not appear novel to anyone familiar with the marketing of light cigarettes.

#### IV. WHERE HAVE WE SEEN THIS BEFORE?

The obesity crisis, of course, is not the first nationwide health challenge the United States has faced. Parallels are frequently drawn between the role that caloric-sweetened beverages play in the onset of obesity and the numerous illnesses that are caused by cigarettes.<sup>77</sup> The comparison is not unreasonable as both health crises can trace their origins to the habits of consumers, and both are subjects of national concern and intervention.<sup>78</sup> Of course, the analogy is not perfect and there is no agreement that obesity is traceable to a single cause.<sup>79</sup> That said, an analysis of the tobacco industry's response to the growing awareness of the effects of tobacco reveals parallels to the developing trends in the marketing of sweetened beverages. This section will discuss the development of the 'light cigarette'; including light, low tar, and specialty filter brands.

Tobacco use has been the subject of controversy from the time of its introduction into European communities.<sup>80</sup> Nevertheless, by the late nineteenth century, the use of tobacco products began to expand with the advent of wider availability and innovative marketing techniques.<sup>81</sup> By the 1950s, tobacco use was fairly

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<sup>76</sup> See *Raspberry Tea*, *supra* note 58; *Hansen's Soda*, *supra* note 62.

<sup>77</sup> Bittman, *supra* note 2.

<sup>78</sup> *Learn the Facts, LET'S MOVE!*, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Jan 18, 2012).

<sup>79</sup> See, e.g., *Causes and Consequences*, CDC, <http://www.cdc.gov/obesity/causes/index.html> (last updated May 16, 2011); *What Are Overweight and Obesity?*, NAT'L HEART LUNG & BLOOD INST. (Nov. 1, 2010), <http://www.nhlbi.nih.gov/health/health-topics/topics/obe/>.

<sup>80</sup> Stephen E. Smith, "Counterblasts" to Tobacco: Five Decades of North American Tobacco Litigation, 14 W.R.L.S.I. 1- 3 (2002).

<sup>81</sup> *Id.* at 2.

ubiquitous, and began to draw increased scrutiny.<sup>82</sup> In 1952, for instance, the American Cancer Society began a landmark study which followed nearly two hundred thousand volunteers for three years, and showed that smokers had significantly higher mortality rates.<sup>83</sup> Within a decade, these findings would be built upon, and a consensus within the scientific community would be forged regarding the deleterious effects of tobacco use.<sup>84</sup>

As consumers became more knowledgeable regarding the health impact of smoking, the tobacco industry carefully modified its tactics.<sup>85</sup> Cigarette companies responded by developing new brands of cigarettes which sported wonder filters.<sup>86</sup> The industry exploited consumer faith in existing technology, such as charcoal filtration, as a means of making their cigarettes appear safer than “regular” brands.<sup>87</sup> One infamous promotion for “Hi-Fi Filter” Parliament brand cigarettes featured a prominent seal of approval from the official sounding United States Testing Company, which was in fact a private company.<sup>88</sup>

The Surgeon General’s 1964 public statement regarding the health affects of cigarettes soon changed the game, however.<sup>89</sup> Within a decade, significant cigarette marketing restrictions were implemented, and each pack was required by law to have a statement disclosing the associated health risks.<sup>90</sup> Once again, the tobacco industry adapted its tactics, and the light cigarette came to prominence. Brands with names such as “True” or “Merit” began to appear.<sup>91</sup> The main goal of these brands was to dissuade smokers from actually quitting by suggesting that if they smoked light or “low tar” cigarettes they would be able to avoid the documented health

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<sup>82</sup> *History of the Cancer Prevention Studies* AM. CANCER SOC’Y (Apr. 23, 2011, 8:31PM), <http://www.cancer.org/Research/ResearchProgramsFunding/history-of-the-cancer-prevention-studies>.

<sup>83</sup> *Id.*

<sup>84</sup> K. Michael Cummings, Anthony Brown & Richard O’Connor, *The Cigarette Controversy*, 16 *CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION* 1070, 1072-73 (2007).

<sup>85</sup> R.W. Pollay & T. Dewhirst *The Dark Side of Marketing Seemingly “Light” Cigarettes: Successful Images and Failed Fact*, 11 *TOBACCO CONTROL (SUPPL. I)* i18 (2011).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at i18-i19.

<sup>88</sup> *Id.*

<sup>89</sup> NAT’L CANCER INST., *MONOGRAPH NO. 19, THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE*, 301 (2008).

<sup>90</sup> *Id.* at 301-303.

<sup>91</sup> *Id.* at 76.

consequences associated with smoking.<sup>92</sup> One particularly telling advertisement for “True Cigarettes” featured an attractive woman sporting athletic gear at a tennis court.<sup>93</sup> The tag-line on the advertisement explained that her doctor told her to either quit or smoke True.<sup>94</sup> Not surprisingly, she chose True.<sup>95</sup>

Other, more subtle changes were made to advertisements and packaging. Advertisements, such as the “True” ad, began to regularly feature images associated with vitality and pleasant experiences.<sup>96</sup> Many of the brands that claimed to be “light” included bright packaging or images of raw tobacco leaves to imply a connection to nature.<sup>97</sup> Additionally, advertisements began to emphasize reduced levels of particular ingredients in cigarettes.<sup>98</sup>

These “ultra-filter” and “low tar” brands acted as a corollary to the “light” and “filtered” cigarettes.<sup>99</sup> While such brands remained subject to the obligatory surgeon general’s warning on advertisements and packages, they were permitted to identify the product as “low tar” if they met certain regulatory standards.<sup>100</sup> Unfortunately, the low-tar and light cigarette brands were far less safe than advertised.<sup>101</sup> The Federal Trade Commission test that determined which cigarettes could be marketed as “low tar” consisted of a machine that drew air through a cigarette at a constant pressure, and measured the residue that accumulated.<sup>102</sup> The problem with this methodology is that, unlike the FTC machine, the smoker inhaling from a low-tar or filtered cigarette would simply compensate by drawing more heavily on the cigarette in order to achieve the same level of nicotine delivery.<sup>103</sup> The tobacco companies were not only

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<sup>92</sup> R.W. Pollay & T. Dewhirst *The Dark Side of Marketing Seemingly “Light” Cigarettes: Successful Images and Failed Fact*, 11 TOBACCO CONTROL (Suppl I) i18, i28-i29 (2002).

<sup>93</sup> See MONOGRAPH NO. 19, *supra* note 89, at 146.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 148.

<sup>97</sup> *Id.* at 166.

<sup>98</sup> Pollay & Dewhirst, *supra* note 85, at i22.

<sup>99</sup> *Id.*

<sup>100</sup> Letter from Stephanie Foster, Senior Vice President, Government Affairs, American Legacy Foundation, to Chairman Kovacic, Federal Trade Commission, (September 5, 2008), available at <http://www.ftc.gov/os/comments/cigarettestesting/536798-00019.pdf>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Pollay & Dewhirst, *supra* note 85, at i21.

aware of this fact, but relied on it in order to sustain cigarette sales.<sup>104</sup> This was achieved by altering nicotine levels in their products to maintain consumer dependence.<sup>105</sup>

A brief review of the tactics of the tobacco industry in response to growing consumer concerns indicated a basic overall strategy. Initially, the industry responded through the use of misinformation and propaganda.<sup>106</sup> Once unequivocal denial of the health hazards of tobacco products became impractical, cigarette companies began to address the problem by changing the marketing and appearance of their product, with an emphasis on creating the impression of safety or at least relative safety.<sup>107</sup> In so doing, the industry was able to present the prospective consumer with an apparently safer cigarette without any substantive changes to the product.<sup>108</sup>

## V. RELATED CLAIMS

Having very briefly reviewed the broad themes of “light cigarettes” and some pertinent examples of natural caloric-sweetened beverages, it is now possible to compare the developments in the marketing of these two products. Cigarettes and sweetened beverages are, of course, vastly different products. That said, the strategy behind their marketing is similar. To begin, both products are presented as alternatives to other brands or sub-brands within a particular class of product.

Light or low tar cigarettes were frequently described as superior to ‘regular’ cigarettes, whether because of a proprietary filter, a particular blend of tobacco, or other distinguishing feature.<sup>109</sup> Similarly, AriZona Brewing Company’s website suggests that consumers move to Arizona as, among other things, AriZona’s products are “naturally heat pasteurized” and are unlike “many of [AriZona’s] competitors [who] are passing off chemically preserved and potentially hazardous drinks as ‘Healthy.’”<sup>110</sup> Additionally, cigarette companies have also frequently employed pastoral themes in the promotion of cigarettes. For example, an ad for “Real” brand cigarettes, advertised as low-tar, presented two packages displayed in

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<sup>104</sup> *Id.* at i25-i26.

<sup>105</sup> *Id.*

<sup>106</sup> Cummings, Brown & O’Connor, *supra* note 84, at 1072-73.

<sup>107</sup> *Id.*

<sup>108</sup> Foster, *supra* note 100.

<sup>109</sup> See MONOGRAPH NO. 19, *supra* note 89, at 77.

<sup>110</sup> See *Raspberry Tea*, *supra* note 58; *Move to Arizona*, *supra* note 68.



a rustic setting, lying on tobacco leaves.<sup>111</sup> The tag-line accompanying the cigarettes implores the reader to “Taste Real [Brand]. †. †. smoke Natural” and explains that Real has “discovered the way to keep natural taste in, artificial out.”<sup>112</sup>

In comparison, a visitor to the Hansen’s Natural Soda website is immediately presented with a text box which asks whether they would like to go on a picnic to the beach or a grassy hillside.<sup>113</sup> Upon making a selection, the website backgrounds shifts to either a beach or to a hillside, where cans of soda sit as butterflies and ladybugs land on the cans.<sup>114</sup> When a visitor selects the tab titled “natural ingredients,” text accompanied by images of fruits and spices appears which extols Hansen’s ingredients as “Real fruit. Real spice. Real good.”<sup>115</sup>

Both examples highlight the alleged virtue of the product’s “naturalness,” while ignoring or minimizing the components of the product that have the greatest impact on consumers. In the case of tobacco products, even “additive free” cigarettes still have all the attendant health risks of other brands.<sup>116</sup> Similarly, as indicated in the table above in Part II, Hansen’s Natural Cola still has 160 calories per serving and forty-one grams of sugar. It is irrelevant from a nutritional standpoint that this amount of calories is delivered by natural sugar as opposed to synthesized HFCS.<sup>117</sup> The role of sweetened beverages in the obesity crisis does not stem from additives but from calories.<sup>118</sup>

Beyond the specific natural marketing trend, comparing some examples of the general responses of the tobacco and beverage industries to controversy surrounding their products is illuminating. When the concern over cigarettes began to impact public perception,

<sup>111</sup> Patricia A McDaniel & Ruth E Malone, “I always thought they were all pure tobacco”: *American Smoker’s Perceptions of Natural Cigarettes and Tobacco Industry Advertising Strategies*, 16 *TOBACCO CONTROL* e7 (RESEARCH PAPER), 5 (2007).

<sup>112</sup> *Id.*

<sup>113</sup> *Hansen’s Natural Cane Soda*, HANSEN BEVERAGE CO., <http://hansensnaturalsoda.com/> (last visited Jan. 18, 2012).

<sup>114</sup> *Id.*

<sup>115</sup> *Natural Ingredients*, Hansen Beverage Co., [http://hansensnaturalsoda.com/#/Natural\\_Ingredients](http://hansensnaturalsoda.com/#/Natural_Ingredients) (last visited Jan. 18, 2012).

<sup>116</sup> Wendy Koch, *Eco-Friendly Cigarettes Ads Make Tobacco Foes Fume*, USA TODAY (July 26, 2011 10:48 PM), [http://www.usatoday.com/money/advertising/2011-07-26-green-cigarette-ads\\_n.htm](http://www.usatoday.com/money/advertising/2011-07-26-green-cigarette-ads_n.htm).

<sup>117</sup> Bray *supra*, note 4.

<sup>118</sup> *Id.*

cigarette manufactures engaged in concerted misinformation campaigns to shed doubt on the findings of health and tobacco control advocates.<sup>119</sup> Similarly, a recent report found that while the majority of available scientific studies suggest that caloric-sweetened beverage consumption is consistently associated with increased calorie intake-which would contribute to any existing weight problem-the conclusions of studies funded by the beverage industry were disproportionately likely to report more favorable findings relating to sweetened beverage consumption.<sup>120</sup> This fact is disturbing when taken with industry responses to various attempts at limiting caloric-sweetened beverage consumption. An effort to levy a penny per ounce tax on sweetened beverages in New York State was stricken from the state revenue bill largely because of a concerted and sophisticated \$9.4 million lobbying effort on the behalf of the American Beverage Association.<sup>121</sup>

It is not necessary to draw a perfect comparison between the impact of caloric-sweetened beverages on the current obesity crisis and the multitude of illnesses that are attributed to tobacco use, or even between the products themselves. The comparable strategies and responses observed in these industries are significant. Like tobacco products, sweetened beverages have been singled out as having negative – albeit less hazardous – consequences to health. Moreover, similar to tobacco companies, in the face of growing controversy, producers such as Snapple and AriZona highlight certain qualities of the beverages they produce as meritorious, without making substantive changes to the controversial aspect of the product.

In other words, the contribution of sweetened beverages to obesity rates does not stem from the natural or unnatural origins of the ingredients, but from the excessive amount of calories they add to the American diet. In the same way that 'light' cigarettes encouraged consumers to switch to a supposedly healthier cigarette rather than quit smoking, naturally sweetened beverages suggest to the consumer that if they are seeking a healthy alternative to other caloric-sweetened beverages, they should choose the natural product.<sup>122</sup> The fact that these products can point to claims of natural versus manufactured ingredients has an alarming potential to mislead consumers seeking healthy alternatives. Naturally sweetened

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<sup>119</sup> Cummings, Brown & O'Connor, *supra* note 84.

<sup>120</sup> Vartanian et al., *supra* note 3.

<sup>121</sup> Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Anti-Tax Message*, N.Y. TIMES, July 2, 2010, at A14.

<sup>122</sup> Hansen's Soda, *supra* note 62.

beverages and light cigarettes present the same potential for confusion and misunderstanding as the marketing claims of light cigarettes and additional steps should be taken to protect and inform consumers.

## VI. SOLUTIONS

### A. Defining 'Natural'

One potential solution to the problems raised by natural claims would be for the FDA to implement rules that create a clear legal definition of the term "natural." Similar solutions have been proposed on several occasions, but the FDA, to date, has refused to offer definite parameters regarding natural foods.<sup>123</sup> The FDA's decision appears to stem from the potential difficulties in determining at what stage of the industrial food process a product stops being "natural."<sup>124</sup> That said, similar difficulties did not prevent the United States Department of Agriculture, from issuing guidelines relating to the use of the similarly vague "healthy" claim.<sup>125</sup> If the FDA were to use its own regulatory authority in a similar fashion, one option would be to determine whether individual ingredients are natural or not, and then restrict the natural term to those products which contain only natural ingredients.<sup>126</sup>

As previously noted, however, with regards to sugary beverages, it is not clear that natural is inherently better.<sup>127</sup> Restricting the use of the term natural may indeed be a beneficial policy, but it would not necessarily mitigate the danger of confusing "natural" with "healthy." The USDA-defined term "organic," for instance, has been found to equate with "healthy" in the minds of consumers.<sup>128</sup> As noted, Hansen's Natural Original Cola, the "better for you soda" still contains 160 calories per 12oz can and 41 grams of

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<sup>123</sup> BRUCE SILVERGLADE & ILENE R. HELLER, *FOOD LABELING CHAOS: THE CASE FOR REFORM PART X-6 & X-7* (2010).

<sup>124</sup> *What is the Meaning of 'Natural' on the label of Food?*, FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm> (last visited Jan. 18, 2012).

<sup>125</sup> April L. Farris, *The "Natural" Aversion: The FDA's Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 *FOOD & DRUG L.J.* 403, 422-423 (2010).

<sup>126</sup> *Id.*

<sup>127</sup> See Part III *supra*.

<sup>128</sup> Katie M. Abrams et al., *Naturally Confused: Consumer's Perceptions of All-Natural and Organic Pork Products*, 27 *AGRIC. HUM. VALUES* 365, 369 (2010).

sugar per serving.<sup>129</sup>

The fight over "light" tobacco also illustrates the way in which a regulatory definition may not be sufficient to combat consumer misperceptions. The FTC strictly limited the use of "low tar" in relation to describing cigarettes.<sup>130</sup> Even if the methodology of the testing had not been flawed, as the Surgeon general's warning made clear, the concept of a safer cigarette is an oxymoron. Consequently, the focus on "low tar" or "ultra light" distracted consumers from the considerable health risks of cigarettes.<sup>131</sup> In short, a definition of the term natural would not ameliorate the potential for misinformation absent other changes to the labeling of naturally sweetened beverages.

### *B. Labeling Changes*

A revision of the way in which nutrition facts are presented, possibly in conjunction with other educational measures, might be one path forward.<sup>132</sup> The United Kingdom currently employs a "stop sign" system, which includes not only relevant nutritional facts, but also a color graded system of labels which correspond to the levels of fat or sodium in a product.<sup>133</sup> "Green Light" products feature a small amount of sodium, while products with high levels of sodium are labeled with a red light.<sup>134</sup> If this system were applied to sugar content it might go a long way to both inform the consumer of important nutritional information and dispel the healthy or active images which are employed in the marketing of sweetened beverages.

In addition to modifications to nutritional labels, one alternative might be to prohibit the use of natural as a descriptor. Such a step may be theoretically possible, as the recent prohibition by the FDA of the use of the terms "light, low, mild or similar descriptors" may indicate that for certain products, the use of certain marketing slogans and schemes may be prohibited.<sup>135</sup> This analogy, however, is not perfect. Unlike tobacco, sweetened beverage

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<sup>129</sup> *Hansen's Soda*, *supra* note 62.

<sup>130</sup> *Foster*, *supra* note 100.

<sup>131</sup> *Id.*

<sup>132</sup> Margaret S. McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 *J.L. & POL'Y* 493, 507-512 (2009).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Duff Wilson, *Coded To Obey Law, Lights Become Marlboro Gold*, *N.Y. TIMES*, Feb. 18, 2010, at B1.

consumption only contributes to a larger existing problem, as opposed to the host of scientifically proven dangers directly traceable to cigarettes.<sup>136</sup><sup>137</sup> Additionally, the aforementioned lobbying efforts of the beverage industry may indicate that a strict ban on the use of natural as a marketing term may not be a reasonably obtainable goal.

### C. Litigation

It does not appear that civil suits will be particularly effective means of counteracting the potential for misinformation presented by naturally sweetened beverages. Recent litigation over natural sugary beverages has centered on the theory that the product is not what it purports to be, rather than objecting to the use of the term natural.”<sup>138</sup> Manufacturers, such as Snapple, have been able to avoid liability in these suits, although Snapple now utilizes sugar-as opposed to HFCS-as its caloric sweetener of choice in its non-diet line.<sup>139</sup>

Even if consumer advocates were able to successfully pursue a claim against a beverage manufacturer for false advertising on the basis of a beverage containing synthetic or “non-natural” ingredients, it is not clear that this would address the basic issue of misinformed consumers. After all, even drinks sweetened with natural sugar may contain a substantial amount of added calories.<sup>140</sup> Consequently, even if the recent suits over HFCS achieved all of their goals, the problem of rehabilitating high calorie drinks as natural will not be addressed.

### D. Education

Aside from label modifications, other methods of consumer education may prove effective in combating consumer misconceptions. As previously discussed, much of the danger associated with natural marketing campaigns stems from a basic misunderstanding of what a natural product is and consumers’

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<sup>136</sup> See generally, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, QV 137 H847 2010, HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE: A REPORT OF THE SURGEON GENERAL (2010).

<sup>137</sup> Alfredo Morabia & Michael C. Costanza, *Sodas, High Fructose Corn Syrup and Obesity: Let's Focus on the Right Target*, 51 PREVENTIVE MEDICINE 1, 1 (2010).

<sup>138</sup> See cases cited *supra* note 33.

<sup>139</sup> Adam Klasfeld, *Federal Judge Boots Snapple Class Action*, COURTHOUSE NEWS SERVICE (Jan. 31, 2011), <http://www.courthousenews.com/2011/01/31/33741.htm>.

<sup>140</sup> See Part III, *supra*.

general tendency to associate natural with "healthful." The efforts of the Obama Administration, and particularly those of First Lady Michelle Obama, to encourage America to be active have addressed obesity broadly, and the role that caloric-sweetened beverages have in childhood obesity rates.<sup>141</sup>

That said, obesity intervention programs generally produce mixed results.<sup>142</sup> What is encouraging, however, is that intervention programs that target specific behaviors, such as poor eating habits, have potential for success.<sup>143</sup> Nevertheless, media campaigns alone do not appear to have a significant effect on behaviors if consumers do not achieve a threshold level of exposure, meaning campaigns must be persistent and widespread enough to achieve maximum benefits.<sup>144</sup>

### *E. Taxation*

Taxation may offer the most plausible solution to the problematic effect of natural marketing insofar as it may tend to reduce consumption of all affected caloric-sweetened beverages. A study by the USDA determined that a tax raising the price of caloric-sweetened beverages by twenty percent in retail locations and restaurants could produce a daily drop in caloric intake of 38.8 calories for adults and 48.8 calories for children.<sup>145</sup> If that were to occur, over time, the prevalence of obesity in children could be reduced by 4.5 percent and in adults by three percent.<sup>146</sup>

While there is currently no Federal excise tax on caloric-sweetened beverages, in 2010, various state legislatures attempted to implement some form of tax on soft drinks, though these were not successful.<sup>147</sup> At the municipal level, the City of Chicago is considering imposing a tax on sugary beverages, either at a fixed rate

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<sup>141</sup> See *Learn the Facts*, *supra* note 78.

<sup>142</sup> Eric Stice, Heather Shaw & C. Nathan Marti, *A Meta-Analytic Review of Obesity Prevention Programs for Children and Adolescents: The Skinny on Interventions That Work*, 132 *PSYCHOL. BULL.* 667, 688 (2006).

<sup>143</sup> *Id.*

<sup>144</sup> Sherry L. Emery et al., *Public Health Obesity-Related TV Advertising: Lessons Learned from Tobacco*, 33 *AM. J. PREV. MED.* S257, S261 (2007).

<sup>145</sup> TRAVIS A. SMITH, BIING-HWAN LIN & JONQ-YING LEE, *TAXING CALORIC SWEETENED BEVERAGES: POTENTIAL EFFECTS ON BEVERAGE CONSUMPTION, CALORIE INTAKE, AND OBESITY*, 10 (2010).

<sup>146</sup> *Id.* at 12.

<sup>147</sup> *Spread of Soda Taxes Fizzles*, *JOPLIN GLOBE* (Feb. 14, 2012), <http://www.joplinglobe.com/dailybusiness/x1704539864/Spread-of-soda-taxes-fizzles>.

or per ounce.<sup>148</sup> It remains to be these state and local efforts at taxing sweetened beverages will be successful. If experiences with cigarette taxation are any indication, an excise tax should be effective at discouraging consumption.<sup>149</sup> Furthermore, implementing a general tax on caloric-sweetened beverages may have the added virtue of drawing attention to the unique roll that these products have in contributing to obesity. For the present, however, a general excise tax on caloric-sweetened beverages appears unlikely.

## VII. CONCLUSION

The marketing of so-called natural caloric-sweetened beverages today has many parallels to the promotion of light and low-tar cigarettes. On its face, the marketing of caloric-sweetened beverages appears to be of little consequence. A Pepsi habit by itself will most likely not have the dire consequences that result from a tobacco habit. That said, in the particularly challenging fight against American obesity, the cumulative effect of caloric-sweetened beverage consumption has a considerable impact on the health of the nation.<sup>150</sup>

In this context, marketing strategies that obscure the fact that American consumers have an unhealthy relationship with caloric-sweetened beverages must be critically scrutinized. The application of the term natural and its derivatives to high-calorie beverages may have this effect. Some beverage producers explicitly suggest that their products, which have no significant difference in caloric content from 'regular' brands are "better for you" by virtue of their natural ingredients. Whether intentionally or not, natural beverage companies have adopted a similar strategy to that of "light" cigarette manufacturers. By highlighting incidental aspects of their product both industries are able to redirect consumer attention from the negative aspects of the products.

To counteract consumer misperceptions, the best path forward may be persistent media interventions and education campaigns, along with an updated labeling scheme which could reduce the misleading qualities of 'natural' labeling. As the challenges

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<sup>148</sup> Frank Spielman, *Sugar-Drink Tax to Get Chicagoans, Budget in Shape?*, CHI. SUN-TIMES (Feb. 16, 2012, 10:28PM), <http://www.suntimes.com/news/politics/10691227-418/sugar-drink-tax-to-get-chicagoans-budget-in-shape.html>.

<sup>149</sup> Rajeev K. Geol & Michael A. Nelson, *The Effectiveness of Anti-Smoking Legislation: A Review*. 20 J. ECON. SURV. 325, 345 (2006).

<sup>150</sup> Smith, Lin & Lee, *supra* note 145.

of increased obesity rates persist, and increasing scrutiny is placed on the American diet, it seems probable that beverage manufacturers will continue to promote natural products as a means of drawing the attention of health-conscious consumers. Consumer groups and health advocates should direct their attention away from fights over whether a twelve ounce can of flavored sugar water is or is not natural and reinforce the message that there is no such thing as a healthier sugary drink.