

Not “All Natural”: Modernizing Privity to Allow Breach of Contract Claims for Mislabeled Food Products

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ABSTRACT: Unknown to most consumers, the U.S. Food & Drug Administration does not regulate “all natural” food labels. Manufacturers commonly abuse this loophole by placing the “all natural” label on products that are clearly not “all natural.” In doing so, some manufacturers intentionally deprive consumers of a free choice regarding what they put into their bodies. This deception leads consumers to ingest artificial chemicals under the guise of “all natural.” In one particular case, consumers allegedly ate a substance derived from woodchips when the manufacturer had labeled the product as “100%” Parmesan cheese. To the benefit of manufacturers, plaintiffs’ available legal remedies have proved to be insufficient and have failed to significantly deter manufacturers from continuing the mislabeling practices. Plaintiffs have tried to bring breach of contract claims against the manufacturers, but courts across the nation have consistently found the claims fail for lack of privity. Privity is an outdated requirement that has been relaxed in other areas of the law. Since privity fails to achieve a fair result, the privity requirement should be relaxed in the food-label litigation context. The privity requirement should either be extended between the consumer and manufacturer or abandoned entirely. Modernizing the privity requirement to fit the realities of modern society will produce the fairest result by providing an adequate remedy for consumers and preventing future mislabeling practices.

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* J.D. Candidate, The University of Iowa College of Law, 2018; B.A., Saint Francis University, 2015. Thank you to Adam and my parents for their love, support, and patience as I rambled about food labels and privity; to Professor Christopher Drahozal for providing guidance and thoughtful feedback as I navigated the complexities of contract law; and to the *Iowa Law Review* Editorial Board for its unwavering commitment to the student writer experience, especially Tessa Register, Logan Eliassen, and Brandon Pakkebier.

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I. INTRODUCTION

More than half of Americans purchase foods with “all natural” food labels,¹ yet the FDA has no definition of “all natural” foods. In fact, manufacturers are free to place the label on any of their products, even when the food is anything but “all natural.” Although the FDA has opened the question of an “all natural” definition up to the public, a regulation seems far away.² In the meantime, consumers are limited to breach of warranty claims against manufacturers who falsely label foods “all natural.” However, the fact that consumers can bring breach of warranty claims has not deterred manufacturers from falsely labeling foods. This is likely due to the fact that so far, consumers’ attempts to sue for breach of contract have failed because courts consistently hold that there is no privity between the parties.

With more Americans focusing on nutritional habits, manufacturers need to be held accountable for the accuracy of the labels they place on products. Without regulation of “all natural” labels, consumers are at a disadvantage. At a minimum, consumers could accidentally ingest unhealthy doses of artificial sugar when they think they are consuming 100% natural ingredients.³ In more drastic scenarios, consumers believe they are eating “all natural” food, when what they are ingesting is not food at all. This allegedly happened to consumers who purchased a certain type of Parmesan cheese,

1. This Note focuses on products bearing an “all natural” label. There are several variations of this label that manufacturers use. A reference to “all natural” can be used interchangeably with any of these variations, including “natural,” “all natural ingredients,” and “100% natural.”

2. See *infra* note 14.

3. Carina Storrs, ‘Natural’ and Other Food Labels that Sound Legitimate but May Not Be, CNN (May 18, 2015, 2:16 PM), <http://www.cnn.com/2015/05/18/health/natural-food-labels> (discussing the possible inaccuracy of the “100% juice” labels on Juicy Juice products).

which the manufacturer had labeled as “100%” Parmesan cheese; in reality, the suit alleged that it contained cellulose, a substance derived from wood pulp.⁴

This Note argues that consumers should be able to sue manufacturers for breach of contract claims when manufacturers falsely promote their products as “all natural.”⁵ At the moment, courts do not even reach the question of whether purchasing a food product forms a contract because all claims would fail for lack of privity even if a contract were formed. Privity is the “[l]egal connection or relationship between two parties” and traditionally was required to ensure that the parties shared an interest in a transaction.⁶ However, privity should be extended to the consumer when the consumer purchases the product from a middleman (such as the grocery store) or, alternatively, the outdated privity requirement should fall away, like the privity requirements in other areas of the law have. The result of privity falling away will be contract formation because each party in the distribution chain agrees to buy and/or sell the packaged food.

To understand the pitfalls of the current claim options available to consumers, Part II of this Note details the history of food label litigation arising in the absence of regulation by the U.S. Food & Drug Administration. Part III explains the privity requirement in traditional contract law and the subsequent fall of privity in certain areas of the law. Part IV argues that the privity requirement should be extended through the chain of contracts from manufacturers to consumers. In the alternative, if the court is unwilling to extend the reach of privity, then the privity requirement should be abandoned in food-label litigation. Also, legislatures could enact consumer protection acts to extend or eliminate privity. Finally, Part V demonstrates how all elements of a contract have been satisfied in this food label litigation context. Once a contract has been formed between the consumer and manufacturer, the food label becomes a term of the contract. The injured consumers can then sue the manufacturers for a breach of contract.

II. FOOD LABEL LITIGATION HISTORY

To better understand the failure of current claims available to consumers, Part II tracks the history of food-label litigation combined with the absence of regulation by the U.S. Food & Drug Administration. The “all natural” label entices more than half of consumers to select those foods,⁷ yet

4. Complaint at ¶ 2, *Sims v. Albertsons, LLC*, 1:16-cv-06169 (N.D. Ill. Mar. 21, 2016) (emphasis omitted).

5. While the focus of this Note is on the “all natural” label, the privity and contract concepts could extend to all mislabeling scenarios.

6. *Privity*, BOUVIER LAW DICTIONARY (2012). The privity requirement is discussed in depth *infra* Part III.

7. Andrea Rock, *Peeling Back the ‘Natural’ Food Label*, CONSUMER REP. (Jan. 29, 2016), <http://www.consumerreports.org/food-safety/peeling-back-the-natural-food-label> (citing CONSUMER

the FDA does not formally regulate this type of labeling practice.⁸ As a result, this loophole has permitted manufacturers to deceptively label products as “all natural” when they in fact are not “all natural.” In 2014, 87% of Americans reported that they were “making an effort to eat healthy.”⁹ Mislabeling foods as “all natural” deprives consumers of free and informed choices about what they put into their bodies: Consumers think they have chosen a healthier option but actually have not.¹⁰

Unfortunately, only half of consumers realize that the “all natural” label is not verified.¹¹ Those consumers who have realized that “all natural” labels are not regulated have urged the FDA to define or ban “all natural” labels.¹² As a result of these efforts, the FDA opened the question of an “all natural” definition up to the public for comment.¹³ Despite opening up the question for comment and receiving 7,690 responses, the FDA declined to create a

REPORTS NAT'L RESEARCH CTR., NATURAL FOOD LABELS SURVEY 2 (2015), http://www.consumerreports.org/content/dam/cro/magazine-articles/2016/March/Consumer_Reports_Natural_Food_Labels_Survey_2015.pdf). The survey was conducted with a sample of 1,005 randomly selected adults within the United States. CONSUMER REPORTS NAT'L RESEARCH CTR., *supra*. For more information on the increase in consumer practices to purchase “all natural” food products and the confusing marketplace that false labels create, see Hadley Malcolm, *More Shoppers Buying 'Natural' Food, yet Most Don't Know What It Means*, USA TODAY (Jan. 27, 2016, 3:01 PM), <http://www.usatoday.com/story/money/2016/01/27/most-shoppers-dont-understand-natural-food-labels/79346088>.

8. “Natural” on Food Labeling, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm> (last updated Sept. 14, 2016).

9. *Majority of US Households Have Someone with Diet Restrictions*, FOOD MANUFACTURING (June 10, 2014, 9:19 AM), <http://www.foodmanufacturing.com/news/2014/06/majority-us-households-have-someone-diet-restrictions>. In fact, six out of ten Americans do not consume at least one nutritional component. *Id.* Common examples of dietary restrictions include dairy, meat, gluten, sugar, and salt. *Id.*

10. Not all labels are inaccurate. In fact, some of the labels mentioned in this Note are only *alleged* to be incorrect. Additionally, even if these products are inaccurately labeled, it is possible that their manufacturers mislabeled the products by accident or negligence rather than intentionally. At the very least, regulations and accountability need to be increased so that consumers can consistently trust food labels.

11. CONSUMER REPORTS NAT'L RESEARCH CTR., *supra* note 7, at 2, 8. Approximately 60% of those surveyed thought that the “all natural” label meant the food did not contain pesticides, artificial materials and ingredients, or GMOs. *Id.* at 6.

12. Rock, *supra* note 7.

13. “Natural” on Food Labeling, *supra* note 8 (explaining that the FDA opened the issue for public comment “in part because it received three Citizen Petitions asking that the agency define . . . and one Citizen Petition asking that the agency prohibit the term ‘natural’ on food labels”). The FDA has opened the question for comment twice. Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period, 80 Fed. Reg. 80,718, 80,718–19 (Dec. 28, 2015).

regulated definition.¹⁴ Currently, the FDA only regulates the definition of natural versus artificial flavors.¹⁵

Occasionally, the FDA confronts food manufacturers for what it believes are misleading labels. For instance, the FDA sent a letter to Nestle, when it owned Juicy Juice, because its Juicy Juice products were labeled as “all natural” and “100% juice,” even though, according to the FDA, that was inaccurate.¹⁶ Specifically, the letter stated that the “products are misbranded . . . because their labels are misleading. The label of the [juice] product is designed to imply that the product is 100% [fruit] juice”¹⁷ The letter focused on the containers’ “bold lettering outlined in black” and the “close proximity” between the labels and the word “juice” because the labels “may lead consumers to believe that the products are 100% . . . juice when, in fact, they are not.”¹⁸ However, the regulatory recourse of sending warning letters is not sufficient because the FDA’s warning letters carry little weight, and companies are not forced to change their labels or ingredients.¹⁹ Besides sending warning letters, the FDA has not taken any steps to hold manufacturers accountable for misleading “all natural” labeling practices.²⁰

In the absence of FDA food label requirements, consumers have sought recourse in the legal system, most commonly by bringing class action suits

14. *Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period*, REGULATIONS.GOV (Dec. 21, 2015), <https://www.regulations.gov/document?D=FDA-2014-N-1207-1827> [hereinafter *Extension of Comment Period*]; *Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments*, REGULATIONS.GOV (Nov. 6, 2015), <https://www.regulations.gov/document?D=FDA-2014-N-1207-0001> [hereinafter *Request for Information and Comments*]. The second comment period closed on May 10, 2016. *Extension of Comment Period*, *supra*.

15. 21 C.F.R. § 101.22(a)(1) (2017); 21 C.F.R. § 101.22(a)(3) (2017).

16. Storrs, *supra* note 3 (citing Warning Letter from Roberta F. Wagner, Dir., Office of Compliance, Ctr. For Food Safety & Applied Nutrition, to Brad Alford, Chairman & CEO, Nestle U.S.A. (Dec. 4, 2009), <https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm194122.htm> [<http://wayback.archive-it.org/7993/20161023102530/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2009/ucm194122.htm>]).

17. Warning Letter from Roberta F. Wagner to Brad Alford, *supra* note 16.

18. *Id.*

19. The Note’s author was unable to find any information about Juicy Juice changing its juice’s formula. Eight years after the warning letter, the labels appear to be similar. *See It’s Sweet to Be Purple: Grape*, JUICY JUICE, <http://juicyjuice.com/products/juicy-juice-fruit-juice/grape#Ingredients> (last visited Oct. 25, 2017) (displaying photographs of the Juicy Juice products with their labels). Hopefully, the decision to keep similar labels is because the company changed the juice’s ingredients to 100% juice. In fact, after the warning letter, a spokesperson for Nestle commented, “We are intending to fully cooperate with the FDA in bringing this matter to a conclusion.” *Nestlé “Juicy Juice” Slammed by FDA for Misleading Consumers*, FOODUCATE (Dec. 27, 2009), <http://www.fooducate.com/app#!page=post&id=57A3294F-E264-4370-4ABB-B2BAD98C17B7>. Additionally, Harvest Hill acquired the Juicy Juice brand from Nestle in 2014. HARVEST HILL, <http://harvesthill.com> (last visited Oct. 26, 2017).

20. Tove Danovich, *What Do Those ‘Healthy’ Food Labels Really Mean?*, EATER (Apr. 29, 2015, 1:50 PM), <http://www.eater.com/2015/4/29/8504677/nutrition-claims-labels-processed-food-nutrition-facts>.

against food manufacturers.²¹ Despite the FDA's affirmative decision to not define "natural"—or, perhaps, because of the agency's silence—courts consistently refuse to dismiss claims on a preemption theory; in other words, courts have decided that the FDA has not preempted the food label field.²²

Initially, the rise of food labeling suits centered on false advertising theories.²³ This was a leap from the former primary focus on product defects or actual health and safety risks.²⁴ For instance, earlier suits against foods containing GMOs²⁵ would no longer be viable under an actual harm theory because the overwhelming majority of the scientific community has concluded that GMO foods do not pose a safety risk.²⁶ Now, the typical consumer suit would allege that the absence of a GMO label harmed the consumer who would not have otherwise purchased the product.²⁷

21. For a comprehensive list with summaries of food-label class action suits up to 2014, see generally ASHLEY HARRISON ET AL., RECENT DEVELOPMENTS AND CASE UPDATES IN FOOD LABELING CLASS ACTIONS AND ADVERTISING LITIGATION (2015), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-joint-cle/written_materials/01_food_labeling_case_updates.authcheckdam.pdf. The number of federal class action lawsuits against food and beverage companies increased dramatically in the past decade—from 19 in 2008 to 102 in 2012. Charles Bowen, *Legal Liability for Lying on Labels*, BOWEN L. GROUP (July 9, 2013), <http://www.thebowenlawgroup.com/blog/2013/07/legal-liability-for-lying-on-labels>.

22. Paul Chan, *Liabe Labels: Consumer Groups and Regulators Are Continuing to Test New Theories Against Manufacturers over Food Labels*, L.A. LAW., Feb. 2015, at 25. The preemption theory may rest on the Nutrition Labeling and Education Act of 1990 ("NLEA"). *Id.* at 28. The NLEA "provides FDA with specific authority to require nutrition labeling of most foods regulated by the Agency [] and to require that all nutrient content claims . . . and health claims be consistent with agency regulations." *Nutritional Labeling and Education Act (NLEA) Requirements (8/94 - 2/95)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/Inspections/InspectionGuides/ucmo74948.htm> (last updated Nov. 25, 2014). Alternatively, manufacturers may attempt to use a preemption defense when the FDA has undertaken rulemaking on a certain label requirement. Chan, *supra*, at 28 at 25.

23. Chan, *supra* note 22, at 25–26.

24. *Id.*

25. GMO is an acronym for Genetically Modified Organism. *GMO Defined*, GMO AWARENESS, <https://gmo-awareness.com/all-about-gmos/gmo-defined> (last visited Oct. 25, 2017). Also referred to as genetic engineering, "[g]enetic modification is the process of forcing genes from one species into another *entirely unrelated species*." *Id.*

26. Chan, *supra* note 22, at 26.

27. *Id.* The idea that a purchaser would not otherwise have purchased the product lends itself also to the shift in damage awards. See generally Chad Hemenway, *Label Liability: Food Makers Targeted for Marketing in Bad Taste*, PROPERTYCASUALTY360.COM (Sept. 10, 2012), <http://www.propertycasualty360.com/2012/09/10/label-liability-food-makers-targeted-for-marketing> (discussing the beginning of the movement of class action suits to seek big damage awards). Earlier food litigation suits fought mostly for injunctions; in other words, the main focus was to stop manufacturers from continuing the mislabeling rather than receiving huge sums in damage awards. *Id.* This Note does not focus on remedies—other than as proof that the current legal framework does not discourage manufacturers from mislabeling food. For more information on the challenges of determining damages when the food product contains the inaccurate "all natural" label, see Galen D. Bellamy & Cedric D. Logan, *A Look at the Latest Damages Model in Food Litigation*, LAW360 (Mar. 19, 2015, 12:00 PM), <http://www.law360.com/articles/633048/a-look-at-the-latest-damages-model-in-food-litigation> (discussing the absence of a universal definition for "all natural" and difficulties in determining how much more money the product was worth to consumers because of the "all natural" label).

The increase in class action suits for false advertising resulted in a minor victory for consumers.²⁸ First, several companies removed the “all natural” label from products that contained unnatural ingredients.²⁹ Second, manufacturers less frequently add “all natural” labels to new food products.³⁰ In their place, foods more commonly bear “‘simple,’ ‘wholesome,’ ‘pure,’ ‘fresh,’ or ‘minimally processed’ labels.”³¹ Although an improvement, these labels could still be inaccurate and misleading because they are equally unregulated as “all natural” labels. In fact, this relabeling may cause more confusion because these new labels may imply the same “all natural” message while avoiding the FDA’s admonitions.

Eventually, food-label litigation added breach of warranty claims to lawsuits with mixed results.³² A typical breach of warranty complaint alleges that the food product’s labels warranted certain features of the product.³³ For example, consider the Parmesan cheese case. Essential Everyday was sued for representing via a food label that its product was “100% Grated Parmesan Cheese.”³⁴ Despite this labeling, studies showed that at least 8.8% of the “cheese” was not cheese at all.³⁵ In fact, according to the complaint, citing a Bloomberg News study, 8.8% was “cellulose, an anti-clumping agent derived from *wood pulp*.”³⁶ In general, breach of warranty claims survive the motion to dismiss stage, but in some jurisdictions, courts have dismissed breach of warranty claims mainly because courts expect consumers to read the whole package, including other food labels such as the ingredient panel.³⁷

28. Lauren E. Handel, *A Practitioner’s Guide to Defending “Natural” Food Labeling Litigation*, 7 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 255, 255–56 (2014–2015).

29. *Id.*

30. *Id.* (“Perhaps because of the litigation risk, the percentage of new food products introduced in the US making ‘natural’ claims decreased from thirty-three percent in 2007 to twenty-two percent as of July 2014.”).

31. *Id.* at 256.

32. *Id.* at 272–73.

33. See, e.g., Complaint, *supra* note 4, at ¶¶ 1–2.

34. *Id.* ¶ 1. The product was manufactured by Albertsons, LLC and Super-Valu, Inc. *Id.*

35. *Id.* ¶ 2.

36. *Id.* ¶ 11. For information on the study, see Lydia Mulvany, *The Parmesan Cheese You Sprinkle on Your Penne Could Be Wood*, BLOOMBERG (Feb. 17, 2016, 1:40 PM), <http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood>. Many companies use cellulose in their cheese products because it prevents the cheese from clumping. Virginia Chamlee, *The Real Problem with Wood Pulp in Cheese*, EATER (Jan. 23, 2017, 4:19 PM), <https://www.eater.com/2016/3/3/11153876/cheese-wood-pulp-cellulose-lawsuits>. Although cellulose is a legal, common food additive, companies are required to list each ingredient in Parmesan cheese. *Id.* Cellulose is also cheaper than cheese, which is part of the reason many consumers want to know if they are not paying for 100% cheese. *Id.*

37. Handel, *supra* note 28, at 272 (referencing *Chin v. General Mills, Inc.*, No. 12-2150, 2013 WL 2420455, at *7 (D. Minn. June 3, 2013)). California consistently did not dismiss similar claims brought under its consumer protection laws because “the fact that a product’s ingredients were disclosed on the package does not preclude a finding that the plaintiffs relied on allegedly deceptive ‘natural’ claims.” *Id.* On the other hand, California courts have dismissed cases in which

Across the country, the most recent addition to food label suits is the breach of contract claim. Unfortunately, courts so far have uniformly decided that such breach of contract claims fail for lack of privity.³⁸ In other words, without privity, no valid contract existed between the manufacturer and consumer.³⁹ Breach of warranty claims can proceed while breach of contract claims cannot because the warranty claims fail under certain privity exceptions that do not—yet—apply to the contract claims.⁴⁰ This issue is universal in American jurisdictions, but it is helpful to focus on one particular state, which is representative of other jurisdictions.

In *Whitaker v. Herr Foods, Inc.*, the United States District Court for the Eastern District of Pennsylvania declined to decide whether an “all natural” label created a contract that would permit a breach of contract claim because it decided that the contract claim failed for lack of privity.⁴¹ This is the typical

reliance on labels is “implausible.” *Id.* at 272–73. “For example, courts found that no reasonable consumer could be misled to believe that ‘Froot Loops’ and ‘Cap’n Crunch’s Crunch Berries’ cereals contained real fruit.” *Id.* at 273. Likewise, a claim could be dismissed based on the location of the “all natural” label, specifically if it were placed directly above the ingredient panel. *Id.* (citing *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d. 973, 980 (C.D. Cal. 2013)). For information on why placing emphasis on the entire package rather than the “all natural” label is inappropriate, see *infra* Part III.C. Additionally, the FDA’s position does not seem to be that another label can immunize the manufacturer from liability. See Warning Letter from Roberta F. Wagner to Brad Alford, *supra* note 16 (noting the placement of the food labels on Juicy Juice placement). For instance, in a warning letter to Nestle regarding potential mislabeling of Juicy Juice labels, the FDA said:

The separate statement at the base of the respective principal display panels, “Flavored juice blend from concentrate with other natural flavors & added ingredients,” appears in a smaller font and white print on a colored background. The manner in which the latter statement is presented makes it less conspicuous and prominent than the other label statements and vignettes and therefore less likely to be read or understood by consumers at the time of purchase.

Id.

38. See, e.g., *Whitaker v. Herr Foods, Inc.*, 198 F. Supp. 3d. 476, 486–87 (E.D. Pa. 2016); Order at 4, *Garrison v. Whole Foods Mkt. Grp., Inc.*, No. 13-cv-05222-VC (N.D. Cal. Mar. 29, 2016), ECF No. 94; *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1195–96 (N.D. Cal. 2014); *Rhinerson v. Van’s Int’l Foods, Inc.*, No. 13-cv-05923-VC, 2014 U.S. Dist. LEXIS 90471, at *4–5 (N.D. Cal. July 2, 2014). Note that the most frequent jurisdiction is the Northern District of California. This reflects that “[t]he majority of these cases have been filed in the U.S. District Court for the Northern District of California, now referred to as the ‘Food Court.’” NICOLE E. NEGOWETTI, FOOD LABELING LITIGATION: EXPOSING GAPS IN THE FDA’S RESOURCES AND REGULATORY AUTHORITY 1 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf. The requirement of privity is discussed *infra* at Parts III.A–B.

39. See *infra* Part III.A–B.

40. *Rhinerson*, 2014 U.S. Dist. LEXIS 90471, at *5 (“[T]he plaintiffs do not argue that they are, in fact, in privity with [the defendant]. Rather, they contend their claim falls within the exceptions to the privity requirement for assertions on labels and advertisements and for foodstuffs. These exceptions, however, apply to breach of warranty claims, not breach of contract claims.” (citations omitted)).

41. *Whitaker*, 198 F. Supp. 3d at 485–87.

outcome of courts, which decline to reach the contract question because of the privity hurdle.⁴² Under Pennsylvania law, like other jurisdictions, privity must exist for a breach of contract claim to be valid.⁴³ The court in *Whitaker* found that no privity existed because there was no “contractual connection or relationship between the parties.”⁴⁴ The court also emphasized that the plaintiff did not purchase the product directly from the manufacturer.⁴⁵ It is important to note that *Whitaker* is an order in response to the Defendant’s motion to dismiss all of the Plaintiff’s claims, except for a breach of express warranty claim.⁴⁶ The court granted the Defendant’s motion and dismissed all of the claims under consideration.⁴⁷ *Whitaker* did not appeal the motion to dismiss,⁴⁸ so the appellate courts will not consider the issue of whether there was a breach of contract to potentially relax the privity requirement. In fact, the plaintiff later voluntarily dismissed all claims with prejudice.⁴⁹ Ultimately, consumers need a better remedy, which the courts can grant by removing the unnecessary privity requirement in breach of contract claims.

III. THE UNNECESSARY PRIVACY OBSTACLE

The food marketing industry has a long history replete with labeling practices that consistently mislead consumers.⁵⁰ The FDA has started the process of defining “natural,”⁵¹ but it is unlikely to enact a regulation any time soon.⁵² Until and unless the FDA steps in with formal “all natural” label requirements or the courts change the privity requirement, consumers will

42. See *supra* note 38 and accompanying text.

43. *Whitaker*, 198 F. Supp. 3d at 486 (“Pennsylvania law requires privity for a breach of contract claim.”). “It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract.” *Electron Energy Corp. v. Short*, 597 A.2d 175, 177 (Pa. Super. Ct. 1991).

44. *Whitaker*, 198 F. Supp. 3d at 486.

45. *Id.* at 486–87.

46. *Id.* at 481, 483.

47. *Id.* at 498.

48. See *Whitaker v. Herr Foods, Inc.*, No. 2:16-cv-02017 (E.D. Pa. dismissed Jan. 9, 2017).

49. Stipulation of Dismissal with Prejudice, *Whitaker v. Herr Foods, Inc.*, No. 2:16-cv-02017 (E.D. Pa. Jan. 9, 2017), ECF No. 43.

50. See Danovich, *supra* note 20 (detailing common practices of manufacturers abusing loopholes in the FDA’s regulation requirements when labeling food products).

51. “*Natural*” on Food Labeling, *supra* note 8.

52. Based on past and current conduct, an FDA regulation of “all natural” is unlikely. For instance, in the early 1990s, the FDA contemplated regulating “all natural” labels. Despite opening up the question for comment, the FDA declined to create a regulated definition and noted that “[t]he comments provided a wide range of ideas for the agency to consider.” Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). The FDA concluded that due to “resource limitations and other agency priorities, [the] FDA is not undertaking rulemaking to establish a definition for ‘natural’ at this time.” *Id.* In 2016, the FDA once again opened the question for comment but declined to act. See *supra* note 13 and accompanying text.

continue to be misled by meaningless “all natural” food labels.⁵³ Consumers need a legal recourse that will provide adequate compensation and sufficiently deter manufacturers from continuing the practice of false labeling. The threat of a lawsuit has not served as a sufficient deterrent for food manufacturers,⁵⁴ which is exacerbated by the FDA’s lack of involvement and regulation. Some jurisdictions strictly require privity for breach of warranty claims where the harm is solely economic.⁵⁵ As it stands, courts have repeatedly dismissed breach of contract claims in food label litigation suits for lack of privity, which keeps plaintiffs on a losing playing field.⁵⁶ First, Part III.A of this Note explains the privity requirement. Second, Part III.B details the fall of privity in other areas of the law. Finally, Part III.C connects the reasons why privity has been abandoned in other areas of law to the food-label litigation context. It also demonstrates why the current privity analysis unnecessarily harms consumers.

A. THE PRIVACY REQUIREMENT

In the typical sale of packaged food, there is a distribution chain segmented by a series of contracts.⁵⁷ For instance, there could be contracts between the manufacturer and distributor, between the distributor and retailer, and between the retailer and consumer.⁵⁸ The issue that courts face is whether the contract between the consumer and retailer extends all the way back to the manufacturer. Thus far, courts have found that it does not.⁵⁹ In other words, the consumer is not in privity with the manufacturer to sue for breach of contract.⁶⁰

53. See *Brazil v. Dole Packaged Foods, LLC*, 660 F.App’x 531, 533 (9th Cir. 2016) (finding that the “100% Natural,” “All Natural,” and FDA warning letters “could allow a trier of fact to conclude that [the company’s] description of its products . . . is misleading to a reasonable consumer”).

54. After a minor victory for consumers, food manufacturers have continued their false labeling practices. See *supra* Part II.

55. See *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290 (S.D.N.Y. 2014) (“Plaintiffs have pleaded solely economic injury, and therefore privity is required to assert a breach of warranty claim.”). Plaintiffs have also failed to bring their actions in torts rather than contracts. See *Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss, In re Safeway Tuna Cases*, No. 3:15-cv-05078-EMC (N.D. Cal. July 13, 2016), ECF No. 66 (dismissing plaintiff’s negligent misrepresentation claim because it was barred by the economic loss doctrine).

56. See *supra* note 38 and accompanying text (listing cases that have decided breach of contract claims fail for lack of privity).

57. *How to Start a Wholesale Distribution Business*, ENTREPRENEUR, <https://www.entrepreneur.com/article/190460> (last visited Oct. 25, 2017).

58. *Id.*

59. See *supra* note 38 and accompanying text (listing cases that have decided breach of contract claims fail for lack of privity).

60. See *supra* note 38 and accompanying text (listing cases that have decided breach of contract claims fail for lack of privity).

Privity is the “[I]legal connection or relationship between two parties.”⁶¹ The presence of privity means that the parties share an interest in the transaction.⁶² In contract law, a shared interest is ensured “between two parties to the same contract.”⁶³ Privity is not unique to contract law.⁶⁴ For example, in property law, to ensure two parties share an interest in the same piece of land, privity tracks who has transferred the property to whom.⁶⁵ Under traditional contract law, stability was emphasized at the expense of fairness.⁶⁶ This meant that even in situations where justice demanded that an injured person have recourse against the wrongdoer, lack of privity would bar the injured person’s claim.⁶⁷ Fortunately, the strict formalities of privity have relaxed vastly to accommodate the realities of modern times.⁶⁸

B. THE FALL OF PRIVACY

After privity of contract was first established as a requirement, the legal system was unsatisfied with it.⁶⁹ Almost immediately, the courts carved out a number of exceptions to the requirement.⁷⁰ The erosion of the privity requirement started with actions brought against manufacturers for negligently producing defective products.⁷¹ The landmark American decision that helped bring about this change was *MacPherson v. Buick Motor Co.*⁷² In

61. *Privity*, *supra* note 6.

62. *Id.*

63. *Id.*

64. *See id.* (providing examples of privity in different areas of law).

65. *Id.* Another example is privity of possession: “[P]rivacy of possession requires that the second possessor takes the thing possessed from first possessor immediately, with no interval between the possessors.” *Id.* Similarly,

[t]hough less common now than standing doctrines or interest analysis, privity is sometimes required by specific doctrines in the law in order to determine the category of parties interested in some matter, allowing one party to proceed against the other or one to stand for the other in an action against a third party.

Id.

66. STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* 604 (4th ed. 2012).

67. *Id.*

68. *Infra* Part III.B.

69. Gary E. Sullivan & Braxton Thrash, *Purchasers Lacking Privity Overcoming “The Rule” for Express Warranty Claims: Expanding Judicial Application of Common Law Theories and Liberal Interpretation of U.C.C. Section 2-318*, 5 DREXEL L. REV. 49, 56–58 (2012); *see also* Thomas v. Winchester, 6 N.Y. 397, 411 (1852) (establishing privity requirement for negligent product injury suits); R. D. Hursh, Annotation, *Privity of Contract as Essential to Recovery in Negligence Action Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 74 A.L.R.2d 1111, 1127–28 (1960). Before English courts created the privity requirement in the late 17th Century, “third-party beneficiary actions were both common and commonly granted.” Sullivan & Thrash, *supra*, at 55. English courts no longer require privity in negligence suits. 18 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 52:38 (4th ed. 2015).

70. Hursh, *supra* note 69.

71. 18 LORD, *supra* note 69.

72. 18 LORD, *supra* note 69 & n.3.

MacPherson, a retailer sold a car to the plaintiff, who was subsequently injured by a defective wheel.⁷³ Instead of suing the retailer, the plaintiff brought an action against the manufacturer.⁷⁴ The plaintiff did not have a contractual relationship with the manufacturer and therefore did not satisfy the traditional privity requirement.⁷⁵ The court held that the manufacturer owed a duty of care to the consumer even though the plaintiff was not the immediate purchaser.⁷⁶ The court qualified this holding by limiting it to inherently dangerous products when the nature of the product “is reasonably certain to place life and limb in peril when negligently made.”⁷⁷

Manufacturing an inherently dangerous product became a notable exception to the privity requirement in these negligently manufactured product suits,⁷⁸ and more exceptions to privity followed. In the food context, the courts created an exception for when the negligently manufactured product is “intended for internal consumption,” which includes food, drugs, tobacco, and even containers of food products.⁷⁹ The inherently-dangerous-product exception was also expanded to include “products which were not dangerous by nature but were dangerous if defectively made.”⁸⁰ Common examples of when privity has been abandoned or reduced in importance include “unwholesome food, mice, vermin, or other deleterious objects or substances in soft drinks or milk; foreign substances in beer; [and] exploding bottles.”⁸¹

In tort law, when a purchaser claims that a product caused injury and privity clearly is not present, manufacturers frequently assert that the claim fails for lack of privity.⁸² Certain courts have worked around the privity requirement obstacle by either holding that (1) privity of contract existed between the parties or (2) “the injured person and the defendant . . . bore a

73. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

74. *Id.*

75. *Id.*

76. *Id.* at 1055.

77. *Id.* at 1053.

78. Hursh, *supra* note 69 (“One of the earliest of these [privity] exceptions was . . . the inherently dangerous product exception which viewed the privity requirement as inapplicable where a manufacturer or seller was shown to have been guilty of actionable negligence in connection with an injury-causing product which was dangerous by nature; the inherently dangerous product exception has widespread support and has been held applicable in cases involving product-caused injury to property as well as in cases involving personal injury.” (citation and footnotes omitted)).

79. *Id.*

80. *Id.*

81. 18 LORD, *supra* note 69 (footnotes omitted). Other examples include “a cork forcibly propelled from a champagne bottle; contaminated or unsafe medical products; harmful cosmetics, detergents, and insecticides; flammable clothing; defective shoes; an exploding gas range; disintegrating grinding wheels; defective electrical cable for the transmission of high-voltage current; a poorly manufactured golf cart; and defective power tools.” *Id.* (footnotes omitted).

82. Hursh, *supra* note 69.

personal relationship toward one another which was *the equivalent of privity*.⁸³ Almost every jurisdiction has either adopted this broad-reaching exception or "repudiated the privity rule entirely" for tort suits.⁸⁴ As the requirement of privity has evolved in the realm of tort litigation, "[i]t has frequently been said that the exceptions which have been drawn to the privity rule have, in effect, swallowed up the rule so that it is no longer of any real effect."⁸⁵ In fact, the Restatement of Torts has adopted the view that privity of contract should not be required in tort litigation.⁸⁶

Overall, "[t]he requirement of privity of contract in negligence suits against manufacturers and sellers is . . . gradually vanishing."⁸⁷ The underlying thread in the cases moving away from requiring privity is a combination of public policy and acknowledgement of reality.⁸⁸ In a series of cases involving negligently manufactured automobiles,⁸⁹ the courts abolished the privity requirement because "as a matter of public policy, privity should not be required in cases where the injured party was a reasonably foreseeable occupant of the car."⁹⁰ The court went on to explain that "[i]t would be wholly opposed to reality to say that use [of a car] by [the ultimate purchasers] is not within the anticipation of parties" to the warranty that the car is reasonably suitable for "ordinary highway operation[s]."⁹¹ The public policy, foreseeability, and modern reality aspects together led the court to conclude that the ultimate purchaser "must be considered within the distributive chain."⁹² This holding did not abandon the privity requirement but instead extended privity to include the ultimate purchaser even though the purchaser did not buy directly from the manufacturer.⁹³ Courts have not gone so far as to extend privity to car accident victims that are not the purchasers of the defective product.⁹⁴

83. *Id.* § 3 (emphasis added). For a summary of cases and explanations rejecting the privity requirement in negligently-manufactured products, see *id.* But see *id.* § 4 for courts requiring privity.

84. *Id.* § 2.

85. *Id.*

86. See RESTATEMENT (SECOND) OF TORTS § 531 cmt. e (AM. LAW INST. 1977).

87. Hursh, *supra* note 69, at 1136–38.

88. See generally 18 LORD, *supra* note 69 (tracking the gradual fall of privity).

89. The trilogy of automobile cases includes: *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); and *Gen. Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. Ct. App. 1960).

90. 18 LORD, *supra* note 69. This Note argues that privity should be abolished or extended in the scenario where a consumer tries to sue someone higher on the distribution chain. On the other hand, negligently manufactured product suits can involve situations in which someone who did not purchase a good sues the manufacturer. Despite this difference, the court's rationale to extend privity in negligently manufactured product suits can be applied to extend privity from the consumer to manufacturer in mislabeled food products suits.

91. *Henningsen*, 161 A.2d at 100.

92. *Id.*

93. 18 LORD, *supra* note 69.

94. *Id.*

Tort law is not the only area of law in which privity has declined. In the context of property law, courts created exceptions to evade the privity requirement.⁹⁵ Homeowners, especially in subdivisions, frequently impose covenants on property.⁹⁶ For example, property owners may agree to only build two-story residences on their lots or pay homeowner association dues.⁹⁷ These agreements bind the original parties, but whether they bind subsequent purchasers is often disputed in court.⁹⁸ For a real covenant to be enforceable against subsequent purchasers, there must be horizontal and vertical privity.⁹⁹ However, when privity cannot be proved, the court can reframe the same agreement as an equitable servitude, which is enforceable without privity.¹⁰⁰ Likewise, an easement is legally valid without privity.¹⁰¹ Some scholars assert that requiring privity to enforce real covenants “will assure the ultimate extinction of the real covenant as a viable property interest.”¹⁰² Instead, “[t]he law should respond to the practical realities in [sic] order to avoid manipulation of traditional doctrines.”¹⁰³

Privity has also been relaxed in certain areas of contract law. Even in the narrow context of supermarkets, some courts have overcome the privity obstacle.¹⁰⁴ The traditional view is that a consumer has to check out before a contract is formed, meaning that the consumer is not in privity with the supermarket before that point.¹⁰⁵ However, products are capable of injuring shoppers before checkout (the most common example is exploding soda bottles).¹⁰⁶ Some courts have reframed the contract formation question so that a consumer accepts the supermarket’s offer by placing the product in the

95. 1 JAMES H. BACKMAN & DAVID A. THOMAS, *A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS—EASEMENTS* § 4.05 (2011).

96. Antony Dnes & Dean Lueck, *Asymmetric Information and the Law of Servitudes Governing Land*, 38 J. LEGAL STUD. 89, 97–98 (2009).

97. *See id.* (explaining the definition and legal requirements for an enforceable real covenant).

98. 1 BACKMAN & THOMAS, *supra* note 95.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 1 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 2.7 (Rev. ed. 1993 & Supp. 2017).

105. *Id.*

106. *Id.* The infamous exploding soda bottle scenarios occurred when carbonated beverages exploded in customers’ hands while they were shopping; the issue was whether a customer could sue in contract law without having first purchased the product. *Id.* For examples of exploding bottle cases, see, e.g., *Lasky v. Econ. Grocery Stores*, 65 N.E.2d 305, 307 (Mass. 1946) (finding no breach of warranty when the consumer had not purchased the exploding tonic bottle when she was injured); *Day v. Grand Union Co.*, 113 N.Y.S.2d 436, 439 (N.Y. App. Div. 1952) (Brewster, J., concurring) (finding sufficient evidence of sale when the customer grabbed a beer bottle and intended to pay for it at a self-service store); *Loch v. Confair*, 63 A.2d 24, 25, 27 (Pa. 1949) (finding no contractual relationship when, at a self-service store, a consumer was placing a ginger ale bottle in his shopping cart when it exploded).

shopping cart.¹⁰⁷ As a result, a contract is formed sooner in the transaction time period, and, thus, the parties are in privity sooner. This shift reflects the expectations of the reasonable customer—after all, supermarkets do not refuse to sell the products for the listed price once the customer reaches the checkout line.¹⁰⁸

The third-party beneficiary doctrine is the judicial response to the injustice that arises when an injured person is not technically a party to the contract.¹⁰⁹ For instance, consider a life insurance policy. The insured takes out a life policy from the insurer, who promises to make a payment to a beneficiary once the insured dies.¹¹⁰ Under the traditional privity requirement, the beneficiary would not be a party to the contract and would not be in privity with the insurer.¹¹¹ The third-party beneficiary doctrine recognizes that preventing a beneficiary from suing an insurer who fails to make the promised payment is unfair, so it extends privity to the beneficiary to allow the beneficiary to have recourse against the insurer.¹¹²

As the courts began to relax privity requirements, the Uniform Commercial Code was amended¹¹³ and now provides “alternative rules respecting the persons to whom a seller’s warranty extends” in the context of “Third Party Beneficiaries of Warranties Express or Implied.”¹¹⁴ The U.C.C. provides three alternatives¹¹⁵ to govern when privity should extend to the manufacturer:

Alternative A

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in

107. 1 CORBIN, *supra* note 104. It is important to keep in mind that consumers bringing products liability suits no longer need to prove privity. *See supra* Part III.B. Although this may seemingly render the privity and contract formation question moot, there are numerous reasons why a consumer may prefer to bring a breach of contract claim over a tort claim: “The retailer may have greater resources than the manufacturer with which to satisfy a judgment,” the venue that has jurisdiction over the retailer may be more convenient for the plaintiff, and “the passage of time may have barred a tort claim against the manufacturer, but not a contract claim against the retailer.” 1 CORBIN, *supra* note 104.

108. 1 CORBIN, *supra* note 104.

109. BURTON, *supra* note 66.

110. *Id.*

111. *Id.*

112. *Id.*

113. 18 LORD, *supra* note 69; *see also* U.C.C. § 2-318 (AM. LAW INST. & UNIF. LAW COMM’N 1948 (amended 2010)).

114. 18 LORD, *supra* note 69.

115. The U.C.C. provision provides in a note that a state should select one of the three alternatives when it enacts the U.C.C. § 2-318 cmt. 3.

person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.¹¹⁶

In others words, the U.C.C. extends privity by constructing a warranty that runs from the manufacturer and the retailer to the consumer, making the latter the third-party beneficiary.¹¹⁷ The majority of states have adopted Alternative A, and several states use Alternatives B or C or a hybrid combination.¹¹⁸ Although personal injury was a motivating factor in the decision of the U.C.C.'s drafters to set forth alternatives, changes to privity have not been limited to personal injury suits in other areas of the law.¹¹⁹

Most relevant to food label litigation, the third-party beneficiary doctrine extends privity between a consumer and a manufacturer for a breach of warranty claim if the food is not wholesome or fit for human consumption.¹²⁰ Courts first granted this extension because of the recognition that although the product was "paid for by one," it was actually intended "for the benefit of another."¹²¹ Modern law recognizes that, despite the intermediary contracts, the manufacturer is "warrant[ing] to the *ultimate consumer* that the article is fit for human consumption."¹²² The law of privity has been molded to fit modern realities:

116. *Id.* § 2-318.

117. *Cf.* BURTON, *supra* note 66, at 603-04 (explaining the creation and nature of third-party beneficiaries).

118. *See* Sullivan & Thrash, *supra* note 69, at 59 & nn.45-46, 89 (describing that several states have enacted statutes that "blur the line between Alternatives B and C"). For a discussion of each alternative, the legal implications, and various states' interpretations, see *id.* at 58-65.

119. This issue is discussed more *infra* Part IV.B.

120. 18 LORD, *supra* note 69, § 37:41.

121. *Id.* (quoting *Glanzer v. Shepard*, 135 N.E. 275, 277 (N.Y. 1922)).

122. *Id.* (emphasis added) (quoting *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F.2d 597, 600 (2d Cir. 1938)).

Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture.¹²³

Today, consumers rarely purchase food directly from the manufacturer. Instead, food products pass through a chain of people—and contracts—before reaching the ultimate consumer. Thus, the trend to relax the privity requirement should be continued to reflect all modern realities.

C. PRIVACY: AN OUTDATED REQUIREMENT

Privity no longer effectively serves its original function in food label litigation situations. Other areas of law have recognized when privity is no longer necessary and have either modified privity requirements or abandoned them altogether.¹²⁴ Underlying the decisions to abolish privity is a general understanding that the requirement is outdated and ineffective. For instance, in the context of negligently-manufactured products, criticism of the privity requirement revolved around "its unworkability in modern times, that is, its inherent inability to assure fundamental justice in contemporary litigation involving product-caused injury."¹²⁵ Aside from the shift to mass production and ubiquitous usage of products in everyday life, the realities of purchasing have changed:

In the days when the so-called "general rule" [requiring privity] was adopted in this country, it was the accepted practice for the ultimate consumer or purchaser to buy goods, wares, and merchandise largely from one dealer, with whom he had special constant contact. Most of the wares and appliances purchased were simple. . . . The

123. *Id.* (quoting *Codling v. Paglia*, 298 N.E.2d 622, 627 (N.Y. 1973)).

The dynamic growth of the law in this area has been a testimonial to the adaptability of our judicial system and its resilient capacity to respond to new developments both of economics and of manufacturing and marketing techniques. A developing and more analytical sense of justice, as regards both the economics and the operational aspects of production and distribution has imposed a heavier and heavier burden of responsibility on the manufacturer

Id. (quoting *Codling*, 298 N.E.2d at 626).

124. *See supra* Part III.B.

125. Hursh, *supra* note 69, at 1133–36.

manufacturing process was simple, compared to the intricacies of modern methods of production and modern products.¹²⁶

Modern realities of purchasing require that the privity requirement be updated because its outdated rigidity does not serve its intended function. Most importantly, as evidenced through the realities of grocery shopping, the requirement of privity is contrary to the modern way in which people eat and obtain food. The first self-service grocery store did not pop up in America until the beginning of the 20th Century.¹²⁷ Grocery stores rapidly transformed from small retailers to consolidated supermarkets.¹²⁸ Fast forward to today, 85% of consumers regularly purchase food from the typical grocery store.¹²⁹ In fact, federal to local governments have attempted to improve access to grocery stores in underserved communities.¹³⁰ The federal government alone spent almost \$500 million in the past five years while local governments offered smaller financial incentives.¹³¹

Not only has the way consumers shop changed,¹³² but where consumers shop and what they buy has changed as well.¹³³ A 12-year study found that there is a trend to buy packaged food from convenience stores, mass merchandisers (stores such as Walmart), and warehouse clubs (like Costco) over grocery stores.¹³⁴ Whether a consumer purchases a packaged food from a grocery store, convenience store, or any other retailer does not change the analysis of whether a contract has been formed or whether privity should be

126. *Id.*

127. *A Quick History of the Supermarket*, GROCETERIA.COM, <http://www.groceteria.com/about/a-quick-history-of-the-supermarket> (last visited Oct. 25, 2017). The first self-service grocery store was the Piggly Wiggly, “established in Memphis in 1916.” *Id.*

128. *Id.* For a more detailed history of the grocery store phenomenon, see *id.*

129. FOOD MKTG. INST., U.S. GROCERY SHOPPING TRENDS 2014: OVERVIEW 6 (2014), <https://www.fmi.org/docs/default-source/research/presentation.pdf>. The average shopper purchases food from three to three different food sources. *Id.* The following figures represent the percentage of consumers who regularly purchase food from certain sources: 85% from regular full-service supermarkets, 46% from supercenters, 29% from conventional discount stores, 26% from warehouse club stores, 16% from low-price grocery stores, 15% from drug stores, 15% from dollar stores, 11% from natural or organic food stores, 5% from convenience stores, 5% from ethnic grocery stores, and 3% from online. *Id.*

130. Diana Yates, *Report: People Buy Most of Their Junk Food at the Supermarket*, ILL. NEWS BUREAU (Aug. 9, 2016, 9:15 AM), <https://news.illinois.edu/blog/view/6367/393433>.

131. *Id.* Although these figures illustrate that people will on average continue to purchase their food mostly from grocery stores, the government funding actually seeks to increase access to healthier foods. *Id.* This decision follows a study conducted in the *European Journal of Clinical Nutrition* which analyzed the food desert hypothesis. *Id.* The hypothesis alleges that people are more likely to suffer from obesity if they do not have access to a grocery store. *Id.*

132. Susan Perry, *Where Americans Are Buying Packaged Foods—and Why It Matters*, MINNPOST (Oct. 14, 2015), <https://www.minnpost.com/second-opinion/2015/10/where-americans-are-buying-packaged-foods-and-why-it-matters> (citing Dalia Stern et al., *The Nutrient Content of U.S. Household Food Purchases by Store Type*, 50 AM. J. PREVENTATIVE MED. 180, 182 (2016)).

133. Malcolm, *supra* note 7.

134. Stern et al., *supra* note 132.

extended or abolished. What is important is that, in modern times, consumers do not often purchase their food directly from the manufacturer. This reality makes it unfair to continue to require privity because it insulates manufacturers from liability, especially since privity originated in a time when people mainly purchased food directly from the farmer or manufacturer. Further, the analysis would not change regardless of how many people purchased food somewhere besides a grocery store. Consumers should have a recourse against whomever mislabels the food product—whether the consumer purchases directly or indirectly from the manufacturer.

Additionally, consumers do not solely consider taste and convenience when choosing which foods to purchase; many consumers make meaningful purchases based on health considerations.¹³⁵ A shift in food culture reveals that “consumers value ‘fresh,’ less processed as a primary marker of quality and wellness.”¹³⁶ Labels allow consumers to “zero in” on the package and make food choices based on the information presented.¹³⁷ Modern food culture has also increased consumers’ expectations of their food.¹³⁸ The label on the front of products is arguably one of the most important parts of the food package.¹³⁹ When people shop, they generally seek out certain words that “correspond[] with underlying interests and values.”¹⁴⁰ During this shopping process, the front of the package grabs the shoppers’ attentions first.¹⁴¹ Almost one-quarter of consumers actively seek a “natural” label; this is not even including words that are similar to “natural,” such as organic or non-GMO.¹⁴²

Additionally, this increased interest in “all natural” foods has created “[a]n opening for food retailers as shoppers seek trusted allies to help them navigate food and wellness.”¹⁴³ This trust, coupled with general unawareness that “all natural” is not regulated, shows the perhaps naïve tendencies of shoppers and unknowing reliance on labels. The intentional inaccuracy of “all

135. Malcolm, *supra* note 7.

136. FOOD MKTG. INST., *supra* note 129, at 15. Specifically, in less than ten years, the percentage of consumers who look for foods that are minimally processed went from 19% to 28%. *Id.*

137. Malcolm, *supra* note 7 (quoting “David Just, a professor of behavioral economics at Cornell University”).

138. FOOD MKTG. INST., *supra* note 129, at 2. The study identified certain trends in the food culture: “Consumers are becoming more engaged and more powerful in the world of food than ever before”; “[c]onsumers will be expecting more from their food, and from the companies providing it”; and “[c]onsumers will increasingly shed the constraints of traditional foods.” *Id.*

139. *See id.* at 5 (describing consumer purchasing habits).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 9 (emphasis omitted). The study discovered that “[f]ood retailers are better positioned than other industry players to win and leverage consumer trust around Health & Wellness.” *Id.* at 19 (emphasis omitted). People interviewed during the study shared thoughts on the retailers’ role, with one saying that “grocery stores should advocate for manufacturers to put things on labels, and for more information.” *Id.*

natural” labels either sheds light on manufacturers’ exploitation of consumer shopping habits or is an exceptional coincidence.

Although the privity requirement is clearly outdated in the food-label litigation context, the issue has yet to be resolved. For one, not all plaintiffs appeal the issue of privity, so privity remains a requirement under mainly district courts’ discretion.¹⁴⁴ This means that appellate courts do not have the opportunities to decide the breach of contract issue and potentially change the law. For example, take *Whitaker*, discussed above.¹⁴⁵ The Plaintiff declined to appeal the order granting the Defendant’s motion to dismiss.¹⁴⁶ As “all natural” food labels continue to gain popularity in American culture, the issue of whether food labels create contracts will likely become an issue that a court will eventually have to address. The FDA is unlikely to intervene soon,¹⁴⁷ so the court is the appropriate place in which to provide recourse to injured consumers, to deter manufacturers, and to protect future purchasers.

144. See generally First Amended Class Action Complaint, *Whitaker v. Herr Foods, Inc.*, No. 2:16-cv-02017 (E.D. Pa. Aug. 18, 2016), ECF No. 22 (declining to appeal district court decision granting motion to dismiss breach of contract claim). Other plaintiffs fail to bring breach of contract claims in the first place, probably due to consistent failure. For instance, a suit has recently been filed against Naked Juice for allegedly misleading consumers. Jonathan Stempel, *PepsiCo Misleads Buyers of Naked Juice: Lawsuit*, REUTERS (Oct. 4, 2016, 12:15 PM), <http://www.reuters.com/article/us-pepsico-naked-lawsuit-idUSKCN1241ZF?il=0>. Rather than claim breach of contract, the plaintiffs allege violations of state consumer protection laws and an unjust enrichment claim. Class Action Complaint at ¶¶ 91–151, *Lipkind v. PepsiCo, Inc.*, No. 1:16-cv-05506 (E.D.N.Y. Oct. 4, 2016), ECF No. 1.

145. *Whitaker v. Herr Foods, Inc.*, 198 F. Supp. 3d 476, 476 (E.D. Pa. 2016).

146. First Amended Class Action Complaint, *supra* note 144, ¶¶ 65–77 (amending complaint to allege misbranding and “quasi-contractual” relationship).

147. This conclusion is based in part on the last time that the FDA opened up the definition of “natural” for public comment but then ultimately declined to regulate “all natural.” Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993); Deena Shanker, *After More Than 30 Years, the US Government May Finally Define “Natural” Food*, QUARTZ (Nov. 10, 2015), <http://qz.com/546118/after-more-than-30-years-the-us-government-may-finally-define-natural-food>. The FDA’s current approach is a case-by-case approach via its warning letters. Shanker, *supra*; see also Letter from Geraldine A. June, Supervisor, Ctr. For Food Safety & Applied Nutrition, to Audrae Erickson, President, Corn Refiners Ass’n (July 3, 2008), <http://corn.org/wp-content/uploads/2008/07/FDAdecision7-7-08.pdf>. Also taken into consideration is the difficulty in defining “all natural.” As Lauren Kotwicki, a spokeswoman for the FDA, said: “From a food-science perspective, it is difficult to define a food product that is ‘natural’ because the food has probably been processed in some way.” Malcolm, *supra* note 7. Removing the privity obstacle is a solution that avoids the messiness of defining “all natural.” If manufacturers were accountable to consumers, they would be less likely to engage in blatant mislabeling practices. Products that are clearly full of processed ingredients and are far from “all natural” would—hopefully—no longer bear the label.

IV. THE PRIVACY REQUIREMENT SHOULD BE MODERNIZED

As the history of privity demonstrates, other areas of the law have recognized the need for change.¹⁴⁸ In response, these other areas have altered the originally rigid privity requirement to best reflect the needs of modern times.¹⁴⁹ In this way, relaxing the privity requirement can fulfill the goals of contract law: protecting the expectations of parties by providing a remedy for reasonable expectations that have been induced by the making of a promise.¹⁵⁰ In the context of food label litigation, manufacturers intentionally mislabel products with “all natural” labels that induce consumers to purchase products. Relaxing the privity requirement will redress the injury caused by the consumers’ reliance on manufacturers’ unfulfilled promises. As the law currently stands, consumers are without an adequate recourse to hold manufacturers accountable for false labeling practices.¹⁵¹

Part IV.A of this Note argues that courts should extend privity from the consumer to the manufacturer so that consumers can successfully bring breach of contract claims. Part IV.B argues that if courts find this extension inappropriate, then privity should be abandoned in food-label litigation situations. Finally, Part IV.C argues that if courts refuse to adapt privity to fit modern times, then the legislature should enact consumer protection acts to statutorily extend or abandon the privity requirement.

A. EXTENDING PRIVACY FROM THE CONSUMER TO THE MANUFACTURER

Extending privity from the consumer to the manufacturer stretches the privity requirement to hold manufacturers accountable without going against the purpose of privity. The privity requirement’s beneficial function is to “limit[] the exposure of a promisor to unforeseeable and sometimes crushing liabilities.”¹⁵² The role of privity is not to immunize intentional wrongdoers from liability. The typical grocery store shopper is not an unforeseen consumer. In fact, the typical shopper is the ultimate consumer, so manufacturers are very aware of who will use the food product. To echo the courts that abolished privity in the case of negligently-manufactured automobiles, it is wholly unrealistic to say that a manufacturer’s product will not be consumed by the ultimate purchaser.¹⁵³ Additionally, liability for intentional mislabeling is not an unfair crushing liability. So far, manufacturers have conducted a cost-benefit analysis and concluded that risking minor settlement suits is worth the benefit of advertising and inducing consumers into buying their products. As explored in Part II.A and Part III.C,

148. See *supra* Part III.B.

149. See *supra* Part III.B.

150. 18 LORD, *supra* note 69, § 1:1; see 1 CORBIN, *supra* note 104, § 1.1.

151. See *supra* Part II.

152. BURTON, *supra* note 66.

153. See *supra* Part III.B.

manufacturers have consistently exploited consumers' shopping desires without any meaningful repercussions. Since privity was designed to protect promisors from unforeseen and unfair liabilities, privity can be extended in the food label context without destroying privity's main purpose.

Further, privity already exists to sue for a breach of contract claim when the consumer purchases directly from the manufacturer.¹⁵⁴ For instance, a district court denied a fast-food restaurant chain's motion to dismiss because the consumer sufficiently alleged a breach of contract claiming the restaurant's fried foods contained more trans fat than advertised.¹⁵⁵ The result should not be different simply because modern society includes middlemen in the typical food distribution chain. Moreover, a consumer suing the grocery store is not an adequate remedy. The grocery store is not the culpable party, and the manufacturer likely deceived the distributor and grocery store along with the consumer. It would be grossly expensive and time-consuming to require the consumer to sue the grocery store, the grocery store to then sue the distributor, and then the distributor sue the manufacturer when the same result can be accomplished by allowing the consumer to sue the manufacturer directly. This practical realization that it is more efficient to sue the manufacturer directly is apparent when one considers litigation trends—consumers generally only sue the grocery store when it is also the manufacturer.¹⁵⁶

The extension of privity in the food label context would mirror the third-party beneficiary doctrine.¹⁵⁷ Thus, privity would extend up the series of contracts from the manufacturer to the consumer. Further, the Uniform Commercial Code's three alternatives to extend warranty to the manufacturer focus on those who can "reasonably be expected to use, consume or be affected by the goods."¹⁵⁸ This is consistent with privity's purpose to prevent unforeseen liabilities. Extending privity prevents the doctrine of privity from being an unnecessary obstacle while still keeping its principle purposes in place.

154. Robin Miller, Annotation, *Liability of Food Manufacturer Based on Statement in Product Labeling or Promotion Relating to, or Inconsistent with Presence of, Trans Fat in Product*, 92 A.L.R.6th 141, 167–68 (discussing *Jernow v. Wendy's Int'l, Inc.*, No. 07-Civ-3971, 2007 WL 4116241 (S.D.N.Y. Nov. 15, 2007)).

155. *Jernow*, 2007 WL 4116241, at *4, *9.

156. For instance, consumers have filed lawsuits against Trader Joe's and Whole Foods for allegedly mislabeling their own products sold in their stores. Joe Satran, *Trader Joe's Lawsuit over 'Evaporated Cane Juice' Part of Firm's Crusade Against Mislabeled Foods*, HUFFINGTON POST (Mar. 31, 2013), http://www.huffingtonpost.com/2013/03/29/trader-joes-lawsuit-evaporated-cane-juice_n_2980706.html (suit alleging that Trader Joe's labeled products as containing "evaporated cane juice" instead of "sugar"); Bowen, *supra* note 21 (alleging that Whole Foods labeled soda as "all natural" when it contained artificial ingredients).

157. See *supra* Part III.B.

158. U.C.C. § 2-318 (AM. LAW INST. & UNIF. LAW COMM'N 1948 (amended 2010)); see also *supra* Part III.B (discussing the Uniform Commercial Code's approach to extending breach of warranty claims).

B. ABANDONING PRIVACY IN FOOD LABEL LITIGATION

If courts are unwilling to extend privity from the consumer to the manufacturer, then courts should abandon the privity requirement in the food-label litigation context. Although mirroring the third party beneficiary doctrine is a practical solution, courts may prefer to follow the law surrounding negligently manufactured products and abandon the privity requirement entirely.¹⁵⁹ The historic shift in defective product suits resulted in carving out exceptions in the privity requirement until privity was no longer a requirement at all.¹⁶⁰ Courts could avoid the intervening carve outs and skip straight to abolishing the privity requirement for mislabeled food products.

In the negligently-manufactured product context, the focus was on public policy concerns that mandated that the foreseeable consumer should be able to hold the manufacturer accountable.¹⁶¹ Likewise, consumers should be able to hold food manufacturers accountable. Consumers place great reliance and trust in food manufacturers. After all, improperly manufactured foods can result in illness or death. People should also have autonomy to decide what substances they put into their bodies. By intentionally mislabeling foods, manufacturers are essentially abusing consumers' trust and reliance on manufacturers' statements about the food in order to make a sale. Thus, public policy supports a legal system that does not allow deceitful manufacturers to win on a privity technicality.

Although the abandonment of privity in negligently manufactured products suits was motivated by personal injury harms to plaintiffs, changes for the privity requirement should not be limited to personal injury cases. A plaintiff should never be prohibited from suing simply because another plaintiff was hurt worse. In fact, a manufacturer who intentionally mislabels a product may be more culpable than a manufacturer who accidentally makes a mistake while manufacturing a product. Additionally, not all jurisdictions require physical injury to sue in negligent manufacturing cases.¹⁶²

Furthermore, courts have moved away from privity to reflect changing times. Shopping trends have changed from the time courts created privity. People rarely purchase directly from manufacturers, especially the large-scale companies that are the main culprits of intentional mislabeling. Privity now acts to insulate manufacturers from contract liability. This change warrants privity to undergo the same reconsideration as it did in tort liability. Similarly, the way in which consumers shop has changed. People rely on the "all natural" label when making purchasing decisions. Moreover, from a public policy perspective, the interests of consumers in being fully informed of the foods they are consuming outweigh the interests of manufacturers in increasing

159. *See supra* Part III.B.

160. *See supra* Part III.B.

161. *See supra* Part III.B.

162. Satran, *supra* note 156.

profits through intentionally mislabeled products. These reasons heavily support the argument that the courts should abandon privity in the food label litigation context.

C. *THE CONSUMER PROTECTION ACT OPTION*

Correcting the privity problem is well within the province of the courts. After all, privity is a common law doctrine. Additionally, courts gradually abandoned privity for tort liability and the third-party beneficiary doctrine is a judicial doctrine. However, if courts are unwilling to correct the privity problem, then the legislature can intervene and enact consumer protection acts. The acts can either statutorily extend or eliminate the privity requirement, or even require manufacturers to label accurately.

Some states have legislatively eliminated the privity requirement. For instance, a Kansas consumer protection act provides that “no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made.”¹⁶³ An act provides flexibility in the scope of coverage because an act could apply broadly to all consumer claims against manufacturers or narrowly to only those involving mislabeled food products.

Legislatures could also define “all natural” and impose regulations regarding food labels. One example of a food-related consumer protection act is the federal Food Allergen Labeling and Consumer Protection Act.¹⁶⁴ This Act requires foods with any of the eight major food allergens to contain an identifying label.¹⁶⁵ Along those lines, a state or federal act could prohibit mislabeling of “all natural” foods. As the FDA found, a uniform definition of “all natural” is difficult to articulate. (This issue is avoided by eliminating the privity requirement because then wronged plaintiffs can prove to judges and juries on a case-by-case basis that a food product is not “all natural.”) Therefore, legislative action may work best by defining what products labeled “all natural” cannot contain.

In this way, an act could mirror the federal Food Allergen Labeling and Consumer Protection Act:

(1) A food product that purports to be or is represented as “all natural,” “natural,” or is labeled with similar or equivalent terms is mislabeled if it contains or is manufactured using:

(a) artificial flavors, flavoring, or coloring ingredient;

163. KAN. STAT. ANN. § 50-639(b) (2017).

164. Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, 118 Stat. 891, 905-11 (2004) (codified in scattered sections of 21 U.S.C.).

165. 21 U.S.C. § 343(w) (2012); *see also* 21 U.S.C. § 321(qq) (2012) (defining the mentioned eight major food allergens).

- (b) high-fructose corn syrup, artificial sweetener, or other refined sugar;
 - (c) refined carbohydrates, modified starches or refined grains, such as white flour or white rice;
 - (d) juice concentrates; or
 - (e) flavors derived from natural sources that have undergone artificial processing.
- (2) A food product that purports to be or is represented as “100%” of a certain ingredient is mislabeled if it contains anything other than that specified ingredient.¹⁶⁶

An act of this kind would make it illegal for manufacturers to place “all natural” food labels on many products that contain ingredients that are not natural. If the allegations are true, this definition would likely remove the “all natural” labels from many not healthy “health-food” products.¹⁶⁷

Legislatures that do not wish to create a definition for “all natural” could require food manufacturers to self-define “all natural.” In this way, if manufacturers place an “all natural” label on a food product, the same product also must contain a statement giving a reason for the “all natural” label.¹⁶⁸ Although manufacturers could still abuse the grey area of “all natural,” this approach would provide consumers with more information about the “all natural” label and hopefully eliminate any blatant abuse of inaccurate labels. For instance, one would assume that a manufacturer would be unable to label a soda bottle as “all natural” because the manufacturer could not justify that label. Additionally, consumers who do not want to file lawsuits themselves could instead report false labeling practices to a government agency. This agency could be modeled after the Bureau of Consumer Protection, which “stops unfair, deceptive and fraudulent business

166. This sample legislative language mirrors the set-up of 21 U.S.C. § 343(h) (2012) and incorporates part of the USDA’s definition of “natural.” See USDA, FOOD STANDARDS AND LABELING POLICY BOOK (2005), <https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128fo4ae/Labeling-Policy-Book.pdf>. Part (1)(d) of this sample act addresses the potentially misleading “100% juice” labels on some juices that are actually made from juice concentrate. Part (1)(e) addresses numerous misleading labels, including some currently-labeled “natural” granola bars that contain processed sugars and “natural flavors,” which is simply “an umbrella term for flavors derived from natural sources, but which are often processed in a lab like artificial flavors.” Tracy Miller, 7 “100% Natural” Foods That Aren’t, PREVENTION (Aug. 9, 2012), <http://www.prevention.com/food/smart-shopping/what-all-natural-means-food-labels>. The second portion of this sample act would have made it illegal for any company to label its product as “100%” cheese when it contained substances other than cheese.

167. See *supra* Part II; HARRISON ET AL., *supra* note 21.

168. USDA, *supra* note 166 (“All products claiming to be natural or a natural food should be accompanied by a brief statement which explains what is meant by the term natural This statement should appear directly beneath or beside all natural claims or, if elsewhere on the principal display panel; an asterisk should be used to tie the explanation to the claim.”).

practices by collecting complaints . . . conducting investigations, [and] suing companies and people that break the law.”¹⁶⁹ Alternatively, the Bureau of Consumer Protection could expand its scope and pursue these cases.

V. CONTRACT FORMATION AND FOOD LABELS AS A TERM OF THE CONTRACT

Once courts move past the privity obstacle, they will then have to decide whether a contract is formed between the manufacturer and consumer. If the court finds that a contract is formed, it will then be required to determine what constitutes the terms of such a contract. This Part first demonstrates how a contract is formed between a manufacturer and a consumer when the consumer purchases a food product. This Part explains the basic contract requirements before distinguishing contract requirements under the common law from requirements under the Uniform Commercial Code since Article 2 governs food products. Finally, this Part argues that the “all natural” food label becomes a term of the contract.

When a consumer purchases a food product, a contract is formed between the manufacturer and the consumer. Article 2 of the U.C.C. governs transactions involving packaged foods. Applying equally to transactions by merchants and non-merchants,¹⁷⁰ Article 2 of the U.C.C. governs transactions, usually sales, involving goods.¹⁷¹ Goods are defined as “all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action.”¹⁷² The main focus in determining whether an object is a good under Article 2 is its movability¹⁷³ along with the inclusivity of objects frequently sold.¹⁷⁴ Packaged foods are not only movable but also frequently sold, so they are considered goods under the meaning of Article 2.¹⁷⁵ Therefore, this Note

169. *Bureau of Consumer Protection*, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> (last visited Oct. 25, 2017).

170. U.C.C. § 2-104 cmt. 2 (AM. LAW. INST. & UNIF. LAW COMM’N 1948) (amended 2010). Article 2 expressly sets out which special provisions apply to only merchants (defined as one “who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction”). *Id.* § 2-104(1); *id.* § 2-104 cmts. 1 & 2. For the purposes of this Note, all relevant provisions apply to merchants and non-merchants.

171. *Id.* § 2-102 (detailing the scope of Article 2 as “appl[y]ing to transactions in goods”).

172. *Id.* § 2-105(1).

173. *Id.* § 2-105 cmt. 1.

174. *Id.* Also, the U.C.C. would undoubtedly consider packaged food to be a good, even though it does not expressly say so. After all, the commentary expressly states that “growing crops” are considered “goods since they are frequently intended for sale,” so other foods are included as well. *Id.*

175. See Steven O. Weise, *Le Menu: The UCC and Food*, 18 BUS. L. TODAY, May/June 2009, at 10 (“Article 2 [of the U.C.C.] often applies to food. A seller of food, whether a grocery store or a restaurant, can breach the article 2 warranties if the food is defective.”); Richard Goldfarb, *The Uniform Commercial Code and Food Recalls*, FOOD LIABILITY L. (Mar. 24, 2009), <http://www.foodliabilitylaw.com/2009/>

will analyze the contract question surrounding labels on packaged food products under Article 2 of the U.C.C. with the common law filling in the gaps.¹⁷⁶

Under the U.C.C., “[a] contract for sale of goods may be made in any manner sufficient to show agreement.”¹⁷⁷ The common-law definitions fill in the gaps of the U.C.C., but under a lens that is favorable to forming a contract. A contract is a legally enforceable promise.¹⁷⁸ “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”¹⁷⁹ The primary goal of contract law is “to protect the expectations of the contracting parties.”¹⁸⁰ In other words, contract law attempts to provide a stable and uniform judicial remedy to “realiz[e the] reasonable expectations that have been induced by the making of a promise.”¹⁸¹

Regardless of whether a contract is express or implied, the legal effect is the same.¹⁸² Rather, the difference between the two is in the manner of assent.¹⁸³ There are three requirements to form a contract:¹⁸⁴ offer,¹⁸⁵

03/articles/crisis-management/the-uniform-commercial-code-and-food-recalls (analyzing food recall liability under the U.C.C.).

176. When the common law and the U.C.C. conflict, the U.C.C. presides. BURTON, *supra* note 66, at 67 (“Since a statute supplants the common law when they conflict, it is important to consider in any contracts case whether the problem involves a ‘transaction in goods’ within the meaning of [Article 2]. If it does, the U.C.C. is the applicable law and governs the transaction as a matter of priority.”).

177. U.C.C. § 2-204(1) (AM. LAW INST. & UNIF. LAW COMM’N 1948 (amended 2010)).

178. 1 LORD, *supra* note 69, § 1:1 (“The traditional definition of the term ‘contract’ is ‘a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.’ The heart of ‘contract’ is thus found both in its promissory nature and in its enforceability.” (footnote omitted)); *id.* § 1:2 (“Although in common parlance the word ‘promise’ includes an assurance or other pledge which has no legally binding effect, because a contract is defined at its most basic level as a promise the law will enforce, the legal meaning of the word ‘promise,’ when it is used in this sense, is synonymous with contract.”). Also note the terminology used in this context: A promisor makes a promise to a promisee. *Id.* § 1:2. These same terms are also used when referring to a promisor who owes a legal duty to a promisee. *Id.*

179. *Id.*

180. *Id.* § 1:1.

181. 1 CORBIN, *supra* note 104, § 1.1. Recent discussion of contract law’s function has centered around to what degree the law should “redress[] the injury caused by a promisee’s conduct in reliance on an unfilled promise.” *Id.*

182. 1 LORD, § 1:1.

183. *Id.*

184. *Id.*

185. “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another [objectively reasonable] person in understanding that his assent to that bargain is invited and will conclude it.” RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981). Put another way, if the other party’s affirmative “yes” answer will form a contract, then an offer was made. *See id.* In deciding whether an offer was made, courts look at several factors: (1) the audience, *id.* § 29; (2) strong language of commitment, *id.* § 32 & cmt. b; and (3) whether there were sufficiently definite terms, *id.* § 33. Regarding the audience, advertising generally to the

acceptance,¹⁸⁶ and consideration.¹⁸⁷ In the typical food product transaction, a series of contracts exists between the manufacturer and distributor, distributor and retailer, and so on. Once privity is extended or abolished, a consumer can become a party to that chain of contracts by accepting the offer to purchase the product. Although courts are divided on whether a consumer accepts an offer by placing the product in his or her shopping cart,¹⁸⁸ a consumer definitely accepts the contract by purchasing the product. This

public is not an offer. *Id.* § 26 cmt. b. However, using language such as “first come, first serve” as part as an advertisement is an offer. *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 690–91 (Minn. 1957).

186. Acceptance, as the manifestation of assent, RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981), is typically made in the manner requested by the offeror or, if none, in a manner that is reasonable. *Id.* § 30. It must be communicated, and, thus, silence is generally not acceptance. *Id.* § 69; *see also* 18 LORD, *supra* note 69, § 6:50. There are exceptions to the general rule that silence does not constitute an offer. 18 LORD, *supra* note 69, § 6:50. Acceptance can be communicated by formal acceptance or acts amounting to an acceptance. RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. LAW INST. 1981). For a common silence exception, consider *Cole-McIntyre-Norfleet Co. v. Holloway*, 214 S.W. 817, 818 (Tenn. 1919), in which silence constituted acceptance when the party did not act in a reasonable time and had plenty of opportunities to notify the other party that he did not accept the offer. Offer and acceptance are usually referred to collectively as assent. RESTATEMENT (SECOND) OF CONTRACTS § 22 (AM. LAW INST. 1981).

187. Consideration is a bargained-for exchange. *Id.* § 71(1)–(2). This exchange can be for performance or a return promise. *Id.* §§ 71(2), 72, 75. The best way to understand consideration is with several examples of what constitutes consideration and what does not. The following are not sufficient to constitute consideration: (1) a promise to make a gift, *id.* § 71 illus. 3; (2) past action, *id.* § 86 cmt. a; (3) sham performance or nominal consideration, *id.* § 71 cmt. b; (4) an illusory promise, which is the promise-equivalent of a peppercorn, *id.* § 77; (5) unsolicited action, 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 112 (1920) (Williston’s tramp hypothetical); or (6) a pre-existing duty, *Levine v. Blumenthal*, 186 A. 457, 459 (N.J. 1936); RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981). Even though a contract may exist, the court recognizes various reasons why a contract should not be enforced. These reasons, or defenses to enforcement, include lack of capacity, RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. LAW INST. 1981); misrepresentation, *id.* § 163–64; mistake, *id.* § 152; unfairness and unconscionability, *McKinnon v. Benedict*, 157 N.W.2d 665, 671 (Wis. 1968) (“We find that the inadequacy of consideration is so gross as to be unconscionable and a bar to the plaintiffs’ invocation of the extraordinary equitable powers of the court.”); 8 LORD, *supra* note 69, §18:1; and duress, RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981). In the context of false labeling, the two relevant defenses to enforcement are misrepresentation and mistake. Misrepresentation is a proper defense when the seller creates a condition that “materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care.” *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 676 (N.Y. App. Div. 1991). In *Stambovsky*, the plaintiff learned that the house he had purchased was “haunted.” *Id.* at 674–75. The defendant misrepresented the condition of the house and took “unfair advantage of the buyer’s ignorance.” *Id.* at 677. The court found for the plaintiff in equity and allowed the contract to be rescinded. *Id.* This defense is not available to manufacturers because the person who misrepresented the good cannot benefit from the misrepresentation defense to undo the contract. On the other hand, the defense may be available to the consumer on the theory that the manufacturer misrepresented the food products. However, the consumer would want to argue that a contract had been formed (i.e., the consumer does not want the contract to be rescinded), so defenses to enforceability will not be discussed any further in this Note.

188. *See supra* notes 106–08 and accompanying text.

coincides with the U.C.C.’s approach to construing acceptance “in any manner . . . reasonable in the circumstances.”¹⁸⁹

The U.C.C. is the Uniform Law Commission and American Law Institute’s joint effort to provide a set of uniform laws to govern business and commercial transactions:

The U.C.C. is an unusual statute in that it begins with a statutory command concerning its interpretation: It “must be liberally construed and applied to promote its underlying purposes and policies.” The underlying purposes (i.e., principles) and policies of the act are to simplify, clarify, and modernize the law governing commercial transactions; to permit continued expansion of commercial practices through custom, usage, and agreement of the parties; and to make uniform the law among the various jurisdictions. The U.C.C. implements these goals through “articles” containing legal rules and standards.¹⁹⁰

In keeping with its liberal application, the U.C.C. distinguishes contracts from agreements by defining “contract” as “the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.”¹⁹¹ In contrast, an “agreement” is “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade.”¹⁹²

Under Article 2, a “[c]ontract for sale’ includes both a present sale of goods and a contract to sell goods at a future time” and a “sale” is defined as “the passing of title from the seller to the buyer for a price.”¹⁹³ The formation of a contract under this Article is less constrained than at common law.¹⁹⁴ In fact, “[a] contract for sale of goods may be made in any manner sufficient to show agreement.”¹⁹⁵ Further, “an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”¹⁹⁶ Accordingly, the U.C.C. does not define “offer.”¹⁹⁷ Although the common law definition steps in when the statute is silent, it is

189. U.C.C. § 2-206(1)(a) (AM. LAW INST. & UNIF. LAW COMM’N 1948) (amended 2010).

190. BURTON, *supra* note 66, at 67 (citations omitted) (quoting U.C.C. § 1-103(a)); *see also* *Uniform Commercial Code*, USLEGAL, <http://uniformcommercialcode.uslegal.com> (last visited Oct. 25, 2017) (explaining the Uniform Commercial Code).

191. U.C.C. § 1-201(b)(12).

192. *Id.* § 1-201(b)(3).

193. *Id.* § 2-106(1) (citation omitted).

194. *See id.* § 2-204.

195. *Id.* § 2-204(1).

196. *Id.* § 2-206(1)(a).

197. *See id.* § 2-103.

important to remember the U.C.C.'s favorability toward finding a contract and the statute's objective influence on the way an offer will be interpreted.¹⁹⁸

Once the consumer can reach the manufacturer through the chain of contracts, the consumer can sue for breach of contract if the manufacturer does not fulfill the terms of the contract. By placing the "all natural" label on the food product, the manufacturer warrants to the consumer that the product is "all natural." Article 2 covers express warranties made by sellers.¹⁹⁹ Specifically, an express warranty can be created in three ways:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.²⁰⁰

Here, it is important to note that sellers do not have to use specific words to create an express warranty, and sellers can create express warranties without intending to do so.²⁰¹

The first two ways express warranties can be created under the U.C.C. ("a" and "b") are relevant to packaged foods. First, the "all natural" label is an affirmation of fact or promise. Second, the label is a description of the food product that becomes part of the basis of the bargain. "[A]ll of the statements

198. *Id.* §§ 2-204, 2-206. Further, under the U.C.C., no consideration is needed to modify a contract. *Id.* § 2-209(1).

199. *Id.* § 2-313.

200. *Id.* § 2-313(1). As used in the above provisions, "conform" refers to when "[g]oods or conduct . . . are in accordance with the obligations under the contract." *Id.* § 2-106(2).

201. *Id.* § 2-313(2). On the other hand, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* As with the common law, the U.C.C. addresses defenses to enforceability. *Id.* § 2-302. The U.C.C. explains that a contract is unenforceable if there is an absence of meaningful choice together with unreasonably favorable terms. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965); U.C.C. § 2-302. The question of meaningful choice considers the equality of bargaining power and understanding of the terms. *Walker-Thomas Furniture Co.*, 350 F.2d at 450. In other words, "the court may refuse to enforce the contract" if the contract was "unconscionable at the time it was made." U.C.C. § 2-302(1). The commentary elaborates that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." *Id.* § 2-302 cmt. 1. The U.C.C. is primarily concerned with eliminating surprise and preventing the superior bargaining party's advantage in allocating risks. *Id.* As discussed above, this Note's focus is not defenses to enforceability.

of the seller [become part of the basis of the bargain] unless good reason is shown to the contrary.”²⁰² No contrary reasoning is present to exclude the label as part of the contract.

Manufacturers may assert that there is an assumption that consumers will read all of the ingredients and labels on a food product. However, this does not reflect actual consumer practices. As explored in Part III.C, consumers routinely seek out certain words on food packages and associate those words with underlying principles. Moreover, manufacturers are aware of consumer habits and use the “all natural” label as a marketing scheme to encourage purchases. Excluding the “all natural” label as a term of the contract based on inaccurate assumptions will only allow manufacturers to continue to exploit unwary customers. Furthermore, “a contract is normally a contract for a sale of something describable and described,”²⁰³ and the labels on a package are part of the food product’s description.

Additionally, although consumers certainly rely on “all natural” labels when making purchasing decisions, reliance is not necessary to “weave them into the fabric of the agreement” because it is “part of the description of those goods.”²⁰⁴ Manufacturers do not need to intend to warrant that the goods were “all natural” to create a warranty.²⁰⁵ Reasonable consumer expectations, plus market practices to exploit consumers’ increased desires for “all natural” products, lend support to including “all natural” as an express warranty. Therefore, the manufacturer warrants to the consumer that the food product is “all natural” by placing the label on the product.²⁰⁶ Ultimately, once the privity obstacle is removed, consumers will be able to bring a breach of contract claim against manufacturers for placing inaccurate “all natural” labels on food products.

VI. CONCLUSION

The prevalence of manufacturers mislabeling food products and consumers relying on false “all natural” food labels demonstrates the need for a fair recourse against manufacturers. Maintaining the outdated privity requirement has placed an unnecessary obstacle in the way of wronged plaintiffs and their courses of action. In the food-label litigation context, the

202. *Id.* § 2-313 cmt. 8.

203. *Id.* cmt. 4.

204. *Id.* cmt. 3.

205. *Id.* § 2-313(2) (articulating that sellers do not have to use specific words to create an express warranty and sellers can create express warranties without intending to do so).

206. This Note by no means sets forth the perfect standard for what constitutes an “all natural” product. That decision is best left to the FDA and nutrition experts. Instead, this Note focuses on contract formation and removing the privity obstacle. Each court will still have the duty of deciding whether a product is “all natural” or not. Courts (or juries) could consider common sense or evidence of a manufacturer’s knowledge that the product was not “all natural,” such as an FDA warning letter and subsequent failure to alter the label or ingredients.

privity requirement should either be extended from consumers to manufacturers or abandoned. In the meantime, the legislature is welcome to enact consumer protection acts to achieve the same results. Once the privity obstacle is removed, plaintiffs will be able to pursue breach of contract claims against manufacturers and the “all natural” food label will be a term of the contract. This result is consistent with the desire to allow consumers to make informed choices and the increasing trend in consumer preferences for “all natural” products. Manufacturers should not be permitted to exploit consumer preferences by intentionally mislabeling their products and escaping any real ramifications.